STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JIMMY ERIC GREEN,

Defendant-Appellant.

UNPUBLISHED
June 25, 1999

No. 202259
Washtenaw Circuit Court
LC No. 95-003684 FC

Before: Griffin, P.J., and McDonald and White, JJ.

GRIFFIN, P.J. (*concurring*).

In *People v Miller*, 411 Mich 321; 307 NW2d 335 (1981), our Supreme Court held that the "struck jury method"[1] employed by the trial court did not comply with the court rule then in effect, GCR 511.6.[2] Regarding the effect of such noncompliance, the Court, in a 4-3 decision, held that *any* deviation from the standard court rule practice necessitates automatic reversal:

> Although the defendants' claims of confusion in the jury selection process are not implausible, we 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. . . . 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.* The "struck jury method" or any system patterned thereafter is disapproved and may not be used in the future. [*Miller, supra* at 326, (emphasis added).]

More recently, in *People v Colon,* 233 Mich App 295; 591 NW2d 692 (1998),[3] this Court was faced with a preserved challenge to a modified jury selection procedure. The procedure was described by the trial court therein as follows:

> Before we pick the jury, I told you I was going to try something different. I should try it in a few more civil cases rather than changing it on a criminal case. We're going to seat 13 jurors. . . .[A]nd then we're going to seat six jurors on the bench over there, and we'll have voir dire of all 19 jurors. I will seat 13 jurors. After jury voir dire, we'll have challenge for cause. You'll challenge any juror from 1 to 19 that you want for cause.
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> When we have peremptory challenges, you will only challenge 1 through 13 as a peremptory challenge. If a juror is removed for cause or peremptory, the next juror on the bench will take that juror's seat, and we'll continue going until we have 12 jurors remaining.
>
> Then I'll call out seven more jurors. We'll have a voir dire of only those seven jurors, not of the other 12 that were there before.
>
> * * *
>
> When we call up a new juror, we're not reopening voir dire. It's voir dire for that juror. [*Id.* at 299.]

In a 2-1 decision, the *Colon* majority invoked *Miller* and held that even in the absence of actual prejudice, the trial court's failure to follow the procedure described in MCR 2.511(F)[4] required reversal:

> Our Supreme Court [in *People v Miller*, 411 Mich 321; 307 NW2d 335 (1981)] stated that GCR 1963, 511.6, the predecessor of the similarly worded MCR 2.511(F), "contemplates the seating and examination of a panel of potential jurors equal in size to the jury that will hear the case. As a juror is challenged, either peremptorily or for cause, another will be seated before further challenges are exercised." *Miller, supra* at 325-326. The Court further noted that "[a] defendant is entitled to have the jury selected as provided by the rule" and where "a selection procedure is challenged before the process begins, the failure to follow the procedure prescribed in the rule requires reversal." *Id*. at 326.
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> The jury selection procedure utilized in this case is clearly not the procedure described in and contemplated by MCR 2.511(F). The panel of potential jurors seated and examined was not equal in size to the jury that heard the case, and once a prospective juror was dismissed, a new prospective juror was not selected and examined before further challenges were made. The trial court's procedure examined nineteen prospective jurors at once, and when, after a total of seven challenges were exercised and twelve potential jurors remained, *then* the trial court selected and examined seven new prospective jurors. *Although there is no indication that defendant suffered actual prejudice as a result of this procedure, because of the fundamental nature of the right to trial by an impartial jury and the difficulty in*

examining such claims, prejudice need not be shown. Miller, supra. Thus, we are compelled to reverse and remand for a new trial. [*Colon, supra* at 303, emphasis in original (emphasis added.).]

Judge (now Justice) Corrigan dissented, noting that while errors affecting peremptory challenges require reversal because it is virtually impossible to demonstrate prejudice from errors surrounding the selection of jurors, *Miller, supra* at 326, *People v Schmitz*, 231 Mich App 521; 586 NW2d 766 (1998), rules of automatic reversal are no longer favored. *People v Graves*, 458 Mich 476, 481; 581 NW2d 229 (1998); *People v Belanger*, 454 Mich 571, 575; 563 NW2d 665 (1997). Applying these principles, she reasoned, *Colon, supra* at 308, 310-312, that

> [T]his Court must first ascertain whether the trial court employed the "struck jury method" of jury selection. If so, *Miller* requires reversal. If not, this Court must consider whether the jury selection procedure affected the defendant's right to exercise peremptory challenges. Cf. *id*. An error affecting peremptory challenges requires reversal, whereas other deviations from the court rules may be harmless.
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> * * *
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> Because the trial court did not employ the "struck jury method," this Court must determine whether the trial court's deviation from the court rules affected defendant's right to exercise peremptory challenges. Cf. *id*. The court rules protect a defendant's right to a fair and impartial jury through three procedural mechanisms designed to ensure the effective use of peremptory challenges. First, the court rules contemplate the sitting and examination of a panel of prospective jurors equal to the number of jurors who will hear the case. MCR 6.410(A); MCR 6.411; *Miller, supra* at 325-326. Second, under MCR 2.511(E)(3), the parties alternately exercise peremptory challenges until either they both pass on the jury as it is constituted or they exhaust their challenges. *Schmitz, supra* at 529-530. Third, MCR 2.511(F) requires that the trial court replace an excused prospective juror before considering further challenges. *Miller, supra* at 325-326; [*People v*]*Adkins* [117 Mich App 583; 324 NW2d 88 (1982)] *supra* at 587.
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> On scrutiny, the jury selection method employed in this case violated the court rules in two respects. First, the trial court randomly preselected replacements in groups rather than individually selecting them after it excused a member of the panel. Second, the trial court conducted voir dire of, and considered challenges for cause to, all the original nineteen prospective jurors instead of only the thirteen on the panel. . . . Importantly, neither of these violations concerned the procedural mechanisms designed to ensure the effective use of peremptory challenges.
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> The trial court's failure to comply with the court rules was harmless error because its deviation did not dilute the effectiveness of defense counsel's use of peremptory challenges. . . . That counsel had to keep track of nineteen prospective

> jurors instead of merely the thirteen who constituted the panel was not so confusing as to render the selection process defective. Accordingly, I would hold that the trial court's deviation from the court rules was harmless error. [Footnote omitted.]

I agree with the reasoning of Judge Corrigan and would apply her rationale to the present facts. Where a "struck jury method" or a defendant's right to exercise peremptory challenges are not implicated, a harmless error analysis should be used to evaluate jury selection procedures that do not precisely comport with the court rules. Conversely, I conclude that the *Colon* majority's reliance on *Miller, supra,* is misplaced. Although the *Miller* Court's disapproval of the "struck jury method" remains viable,[5] its sweeping rule of automatic reversal has been superseded by more recent developments in the law and intervening changes in the court rules.

In the years following the *Miller* decision, the courts have turned away from the principle of error per se; our Supreme Court has emphasized and reiterated on several occasions that "[r]ules of automatic reversal are disfavored, for a host of obvious reasons."[6] *People v Mosko*, 441 Mich 496, 502; 495 NW2d 534 (1992). See also, *Graves*, *supra* at 481; *Belanger, supra* at 575.

Moreover, the current court rules adopted in 1985 substantially change the practice that was construed in *Miller, supra*. Specifically, MCR 2.511 provides considerably less detail for the jury selection process and, of particular significance to this appeal, includes a new subsection, MCR 2.511(A)(4), that states: "*Prospective jurors may be selected by any other fair and impartial method directed by the court or agreed to by the parties.*"[7] This subsection indicates that the procedure specified in the court rules need not necessarily be followed so long as the procedure is fair and impartial. As explained in the 3 Dean & Longhofer, Michigan Court Rules Practice (4th ed), § 2.511.2, p 170:

> Once the array of jurors has been formed, the selection process of jurors for a particular action begins. The rule's only restriction on the method used is that it be "fair and impartial." A court may utilize the random draw method set forth in MCR 2.511(A), an alternative method directed by court, or a procedure agreed to by the parties.
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> MCR 2.511(A) contains significantly less detail on the manner of jury selection than did GCR 1963, 511.1. This change was made to give flexibility to the courts to adopt jury selection procedures that best suit the convenience of the parties and the court. The rule was intended to eliminate artificial technicalities found in the old rule, such as the requirement that the names of the prospective jurors be placed on "slips" and then deposited in a "box." Whatever system is used, however, it must be fair and impartial.

Finally, if a violation of the court rules is alleged, MCR 2.511 must be construed in conjunction with the overall court rules of 1985. MCR 1.105 provides: "These rules are to be construed to secure the just, speedy, economical determination of every action and to avoid consequences of error that does not affect the substantial rights of the parties." In addition, MCR 2.613(A) contains a harmless error

rule which provides that no verdict shall be set aside "unless refusal to take this action appears to the court inconsistent with substantial justice."

Based on these considerations, I conclude that allegedly improper jury selection procedures that deviate from the court rules but do not concern "the procedural mechanisms designed to ensure the effective use of peremptory challenges," *Colon, supra* at 311 (Corrigan, J., dissenting), should be analyzed pursuant to the harmless error standard.

In this case, the jury selection process used by the Washtenaw Circuit Court is not a prohibited "struck jury method"[8] and does not run afoul of MCR 2.511(F). The random assignment of juror numbers and the random selection of the venire from the jury pool by the computer satisfy the requirements of MCR 2.511(A)(2).[9] Where the process deviates from the court rules is in the replacement of excused jurors – jurors' names once selected are placed in numerical order by their randomly selected juror number and replacements are taken in numerical order. Thus, as even the trial court recognized, the parties ostensibly need only look to the next number on the list to know which juror will be called next.

Although the procedure employed by the Washtenaw Circuit Court is flawed by its predictability, this flaw does not constitute error requiring reversal. As the clerk of the circuit court explained, the identity of the next prospective juror is not a certainty under this process. After the preparation of the list, prospective jurors appearing on the list could have their service deferred to a different date or could be excused pursuant to a doctor's note. Any such changes would not be reflected in the list possessed by the attorneys. Accordingly, the clerk opined that it was possible that the next prospective juror appearing on the list would not be the person who would be replacing any prospective juror excused from service. In other words, several juror numbers could be skipped, depending on whether jurors from the pool have been pre-excused from service or have deferred service to the present trial. Indeed, the prosecutor indicated on the record that he was unable to discern with any specificity the identity of any prospective juror to be called to replace an excused venire person. Under these circumstances, because the jury selection procedure "did not dilute the effectiveness of defense counsel's use of peremptory challenges," *id.*, I conclude that the trial court's failure to comply with the court rules was harmless error and did not deprive defendant of a fair trial.

As noted above, I do not agree with the conclusion of the *Colon* majority that alleged error in the jury selection process should be subject to the sweeping error per se rule originally set forth in *Miller, supra*. Were it not for *Colon*, I would hold that the deviation from the court rules in this case was harmless error. In order to remove the element of predictability and insure that the randomness required by the court rules is fulfilled, I would instruct the Washtenaw Circuit Court not to employ this system in the future. However, only because I am compelled by MCR 7.215(H)(1) to follow *Colon*, I concur that defendant's convictions must be reversed and the matter remanded for a new trial. I agree with the majority in regard to the other issues raised by defendant.

/s/ Richard Allen Griffin

[1] The "struck jury method" is a selection process by which a large number of jurors are called and the prosecution and defense alternately "strike" jurors until only the requisite number of jurors remain. *Miller, supra* at 323.

[2] GCR 1963, 511.6 provided:

> After a challenge for cause is sustained or a peremptory challenge exercised, another juror shall be selected and examined before further challenges are made. Such jurors shall be subject to challenge as are other jurors.

[3] On June 2, 1999, an evenly divided Supreme Court, with Justice Corrigan not participating, denied leave to appeal.

[4] MCR 2.511(F) provides:

> After the jurors have been seated in the jurors' box and a challenge for cause is sustained or a peremptory challenge exercised, another juror must be selected and examined before further challenges are made. This juror is subject to challenge as are other jurors.

[5] MCR 2.511(F), virtually identical to 1963 GCR 511.6 relied on by the *Miller* Court, still prohibits the use of a "struck jury method."

[6] These reasons have been explained in *Graves, supra* at 481-482, n 4, quoting *United States v Mechanik*, 475 US 66, 72; 106 S Ct 938; 89 L E 2d 50 (1986) as follows:

> The reversal of a conviction entails substantial social costs: it forces jurors, witnesses, courts, the prosecution, and the defendants to expend further time, energy, and other resources to repeat a trial that has already once taken place; victims may be asked to relive their disturbing experiences. The "[p]assage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible." Thus, while reversal "may, in theory, entitle the defendant only to retrial, in practice it may reward the accused with complete freedom from prosecution," and thereby "cost society the right to punish admitted offenders." [Citations omitted.]

[7] The *Colon* majority curiously only construed MCR 2.511(F) and did not mention MCR 2.511(A)(4).

[8] The method of selecting the jury in this case is diametrically opposed to the "struck jury method." In the present case, the jury panel began with twelve jurors, unlike the strike method, and after a juror was excused for cause or for a peremptory challenge, another juror was selected. In the "struck jury method," another juror is not seated.

[9] MCR 2.511(A)(2) provides that

In an action that is to be tried before a jury, the names or corresponding numbers of the prospective jurors shall be deposited in a container, and the prospective jurors must be selected for examination by a random blind draw from the container.