

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAMON LEE BRYANT,

Defendant-Appellant.

UNPUBLISHED

March 16, 2004

No. 241442

Kent Circuit Court

LC No. 01-008625-FC

Before: Smolenski, P.J., and Sawyer and Borrello, JJ.

BORRELLO, J. (*concurring in part and dissenting in part*).

I dissent because I find that Kent County, when selecting jurors, engaged in the systematic exclusion of African-Americans, thereby denying defendant of his Sixth Amendment right to a fair and impartial jury. While my brother jurists provide an excellent analysis of the case law on the issue of underrepresentation of distinctive groups in jury pools, I respectfully dissent from their decision to allow the trial court to again determine if the defendant was denied his Sixth Amendment right to a fair and impartial jury. The trial court previously made a finding on this issue, and I disagree with the analysis utilized by the trial court. Because I find that the County of Kent systematically excluded African-Americans from their jury pools, in lieu of remand to the trial court on this issue, I would reverse the conviction and remand the matter to the trial court for a new trial.

The majority correctly asserts that the issue of underrepresentation of minorities, and specifically African-Americans, on Kent County juries is a problem that this Court has faced on several occasions. However, because defendants in those prior cases failed to perfect the issue for appeal, this Court has been denied the opportunity to address this issue. It is an issue which this Court must review with the utmost of assiduousness, because at stake in our analysis is an individual's right to a fair and impartial jury.

In this case, the prosecution admits there were "problems" in the selection of juries in Kent County. Those problems arose, according to the prosecution, because:

[I]n essence . . . a computer program used to select potential jurors chose a disproportionately large number of jurors from areas with lower zip codes, which had the unintended effect of selecting fewer jurors from

areas of the county where African-Americans live. The assumption is that this led to an artificial shortfall of African-American jurors, though to what extent has never been determined.

In view of the fact that we have no other evidence before us to suggest any other reason(s) for the underrepresentation of African-Americans on Kent County juries, we must assume the statement of the prosecution to be accurate. I therefore examine the rationale offered by the prosecution to address the issue of underrepresentation of African-Americans on Kent County juries, and their affect on the defendant's Sixth Amendment right.

The record is devoid of any evidence that the computer program which caused the problem was an intentional act of anyone acting on behalf of the Kent County jury selection process. However, this does not excuse the fact that this program error was allowed to go unabated for the years 2001 through 2002. Our record shows that it was a teacher, called to jury duty, who first asked the question of why Kent County jury pools were so lacking in their number of African-Americans. Only after his diligence in searching for an answer to this question was the prosecution's assertion for the basis of the problem brought to light.

I do not accept the proposition that an unabated computer program error cannot lead to a finding of systematic exclusion of African-Americans from jury pools. I find the reverse to be true. In so finding, I reject the prosecution's implied declaration that this problem can be labeled a mechanical defect. Like all things involving computers, they can only do what an individual has programmed the software to do. In this case, an individual programmed the software in such a fashion that it led to the systematic exclusion of zip codes that had higher representations of minority populations. Even if the programmer lacked the intent to cultivate the consequences which arose from this faulty software, the result of the error was to deny a legally adequate representation of African-Americans from serving on Kent County juries. Because case law is devoid of the suggestion that we must find the *intent* to exclude African-Americans from jury pools, the record is clear that Kent County did, albeit with a machine, systemically exclude African-Americans from jury pools. There is no better evidence of systematic exclusion from jury selection then a computer which has been programmed to exclude people who live in zip codes with higher minority populations, while at the same time disproportionately including zip codes where few, if any, minorities reside.

I concur with the majority on all other issues defendant has raised in his appeal.

/s/ Stephen L. Borrello