



**In the Missouri Court of Appeals
Western District**

STATE OF MISSOURI,)
Respondent,) **WD84284**
v.)
KYLE MATTHEWS,) **FILED: March 15, 2022**
Appellant.)

**APPEAL FROM THE CIRCUIT COURT OF BOONE COUNTY
THE HONORABLE KEVIN CRANE, JUDGE**

**BEFORE DIVISION THREE: ANTHONY REX GABBERT, PRESIDING JUDGE,
LISA WHITE HARDWICK, AND THOMAS N. CHAPMAN, JUDGES**

Kyle Matthews appeals his convictions and sentences for child abuse and delivery of a controlled substance. He contends the circuit court's procedure for seating prospective jurors for voir dire failed to comply with statutes and violated his rights to due process and a properly selected jury. For reasons explained herein, we find no error and affirm.

FACTUAL AND PROCEDURAL HISTORY

In February 2017, Matthews lived in Columbia in a home he shared with a female friend and her six-month-old son. On February 21, 2017, Matthews was selling marijuana out of his home and babysitting the child when he called the child's mother and told her that the child had fallen from the couch and "most

likely” hit his head on the coffee table. The child was taken to the hospital, where an ophthalmologist assessed that his eye injuries were consistent with his having been shaken. The State charged Matthews with child abuse and delivery of a controlled substance.

The court set the case for a jury trial to begin on November 17, 2020. A week before trial, Matthews filed a motion for a continuance and an identical motion to stay the proceedings. He argued the Covid-19 pandemic prevented the court from complying with Chapter 494’s jury selection procedures. Specifically, he asserted the pandemic had disproportionately affected the African-American community and, as a result, would prevent him, an African-American man, from having a jury drawn at random from a fair cross-section of the community. Matthews requested the trial be continued until after the pandemic had abated to a point that would allow a jury representing a fair cross-section of the community to be called. During a subsequent pretrial conference, the court heard and overruled both motions. The court also informed the parties that, instead of having the entire venire panel report for voir dire at the same time, one group of potential jurors would arrive at 8:00 a.m. for questioning, and a second group of potential jurors would arrive at 12:30 p.m.

There were 75 total venire panel members for this case. Thirty-seven of them arrived at 8:00 a.m. on the morning of trial. These potential jurors were numbered and seated in the order they arrived at the courthouse. After the court finished its questioning of this group but before the parties began their

questioning, Matthews's counsel argued in chambers that the first group of the venire panel was not a randomized panel:

[MATTHEWS'S COUNSEL]: I just want on the record, the jury panel that is now being submitted to voir dire was accumulated by and numbered by whoever came into the courthouse first. So, the randomized system that had been set up by the jury selection person here has been abandoned, and basically the people who've come in are just whoever got here first. And I – again, I believe that's a randomized – not a randomized panel at all, and I believe it – you know, it's not a fair cross section.

THE COURT: Why do you think the process of randomness has been abandoned?

[MATTHEWS'S COUNSEL]: Well, because it's just based on who came in first. It's not based on –

THE COURT: No, it's not. The panel was called in, and the "who seated first" issue is who arrived first. So, I don't know if Number 1 – Number 1 happened to arrive first, but I didn't know he would. But he's still randomly selected as a juror. So nothing has been abandoned.

[MATTHEWS'S COUNSEL]: Your Honor –

THE COURT: We just didn't use the jury room to number them based on who they are; we used the courtroom, out of an abundance of caution due to COVID. We had them come directly into court and not have them wait around –

[MATTHEWS'S COUNSEL]: I understand.

THE COURT: -- and be together. So nothing's been abandoned. It's totally random. Anything further on that?

[MATTHEWS'S COUNSEL]: No, Your Honor.

After the parties conducted their questioning of the first group, the court heard and ruled on the parties' strikes for cause of those potential jurors. The second group of the venire panel, which consisted of 38 potential jurors, arrived in the afternoon, and the same procedure was followed. Following strikes for cause of the second group, the court determined that, to get 24 qualified jurors from the entire venire panel, it would need to go up to juror number 54. To get four qualified alternates, the court went up to juror number 67. The parties then made their peremptory strikes, and 12 jurors and two alternates were seated. Of the 75-member venire panel, the court noted that only three potential jurors, numbers 68, 73, and 74, were "excess," that is, panel members who were not seated on the jury and who were not disqualified, excused for hardship or by agreement, struck for cause, or peremptorily struck.

Trial was held. The jury found Matthews guilty on both counts. The court sentenced Matthews to consecutive terms of 15 years in prison for child abuse and four years in prison for delivery of a controlled substance. Matthews appeals.

STANDARD OF REVIEW

Whether the circuit court properly interpreted and applied statutes in selecting the jury is an issue of law, which this court reviews *de novo*. See *State v. Storer*, 368 S.W.3d 293, 295 (Mo. App. 2012).

ANALYSIS

In his sole point on appeal, Matthews contends the circuit court erred in overruling his objection to the procedure for seating jurors for voir dire because

the jurors were not seated at random as Chapter 494¹ requires. He asserts the court's "substantial failure to comply" with the jury selection statutes violated his right to due process and entitles him to relief even though he cannot demonstrate actual prejudice.

"Missouri's jury selection statutes are drafted to ensure that juries are comprised of a random sample of eligible jurors drawn from a fair cross-section of the population." *State ex rel. Sitton v. Norman*, 406 S.W.3d 915, 917 (Mo. banc 2013). Specifically, Section 494.400 states, in pertinent part, "All persons qualified for grand or petit jury service shall be citizens of the state and *shall be selected at random* from a fair cross section of the citizens of the county." (Emphasis added). Section 494.415.1 provides, in pertinent part, "From time to time and in a manner prescribed by the board of jury commissioners there *shall be drawn at random* from the master jury list the names or identifying numbers of as many prospective jurors as the court may require." (Emphasis added.) Lastly, Section 494.420.2 provides, "Whenever a judge of the circuit court shall require a panel of jurors for jury service, he shall designate the number of jurors required. *This number of jurors shall be randomly selected* in a manner specified by the board of jury commissioners from the qualified jury list." (Emphasis added.)

The "exclusive means" by which a party can challenge a jury on the basis that it was not selected in conformity with Chapter 494's provisions is contained in

¹ All statutory references are to the Revised Statutes of Missouri 2016.

Section 494.465. § 494.465.3. Section 494.465.1 provides that, whenever there has been a “substantial failure to comply” with the jury selection statutes, “[a] party may move to stay the proceedings or for other appropriate relief including, in a criminal case, to quash the indictment.” § 494.465.1. A “substantial failure to comply” with jury selection statutes “is one that either rises to the level of a constitutional violation, and/or that actually prejudices a defendant.” *Sitton*, 406 S.W.3d at 918 (quoting *State v. Anderson*, 79 S.W.3d 420, 431 (Mo. banc 2002)).

Matthews admits that “no prejudice can be shown [from] seating people in order of their arrival.” Furthermore, he acknowledges that, through strikes for cause, peremptory strikes, hardships, and the choosing of alternates, “most of the jury panel was used.” Because he cannot show actual prejudice, Matthews relies on the Supreme Court’s recognition that there may be “rare cases” in which “certain violations of the statutory jury selection requirements may be so fundamental or systemic in nature as to amount to a ‘substantial’ failure to comply with the statutes, thereby entitling a defendant to relief, even in the absence of a clear showing of actual prejudice or of a constitutional violation.” *Sitton*, 406 S.W.3d at 918 (quoting *Anderson*, 79 S.W.3d at 431 n.4). Examples of these “rare cases” include *State v. Sardeson*, 174 S.W.3d 598, 601 (Mo. App. 2005), and *Hudson v. State*, 248 S.W.3d 56, 60 (Mo. App. 2008), two cases in which a computer error caused prospective jurors to be seated for voir dire in chronological order according to their ages. *Sitton*, 406 S.W.3d at 919. Although neither of the defendants in *Sardeson* and *Hudson* were able to show actual

prejudice, a substantial failure to comply with the jury selection statutes occurred because “the procedural irregularity substantially interfere[d] with the goal of randomly selecting a jury from a representative cross-section of the community.” *Sitton*, 406 S.W.3d at 919.


Matthews argues his case is “almost directly on point” with *Sardeson*. We disagree. Seating potential jurors for voir dire in the order they arrived at the courthouse is not at all similar to seating potential jurors for voir dire in chronological order of their ages. No one could have possibly predicted the order in which the randomly-selected potential jurors would arrive at the courthouse.² See *State v. Boston*, 910 S.W.2d 306, 312-13 (Mo. App. 1995). The randomness of the jury selection process remained completely intact and undisturbed.

While Matthews asserts that a better procedure would have been to pre-assign numbers to the potential jurors in each group and have them sit in assigned seats in the courtroom based on those numbers, we fail to see how seating the potential jurors in the order they arrived at the courthouse was in any way *less* random than his proposed procedure. Matthews has failed to demonstrate that the court committed a violation so fundamental or systemic in nature that it constituted a substantial failure to comply with the jury selection statutes. Point denied.

² Matthews does not allege error in the court’s decision to divide the venire panel into two groups of potential jurors who reported for voir dire at two different times of the day. Rather, his claim of error concerns only the court’s decision to seat the potential jurors in each of the groups in the order they arrived at the courthouse.

CONCLUSION

The judgment is affirmed.



Lisa White Hardwick, Judge

All Concur.