IN THE COURT OF APPEALS OF IOWA

No. 2-153 / 91-464

FILED
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CLERK SUPREME COURT

STATE OF IOWA,

Plaintiff-Appellee,

vs.

NYLEETA ELAINE HUFFAKER,

Defendant-Appellant.

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STATE OF IOWA,

Plaintiff-Appellee,

vs.

MELINDA RENEE FLETCHER,

Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, George W. Bergeson, Judge.

Defendant appeals her conviction, following a jury trial, of robbery in the first degree. **REVERSED AND REMANDED FOR NEW TRIAL.**

Linda Del Gallo, State Appellate Defender, and Andi S. Lipman, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Bruce L. Kempkes, Assistant Attorney General, John P. Sarcone, County Attorney, and James W. Ramey, Assistant County Attorney, for appellee.

Heard by Schlegel, P.J., and Sackett and Habhab, JJ., but decided en banc.

SACKETT, J.

We address a nonwhite defendant's constitutional and statutory challenges to the makeup of a Polk County jury panel. We find the defendant has shown that white citizens were disproportionately represented and nonwhite citizens comprising a distinctive group in Polk County were systematically excluded from the Polk County jury panel. We reverse the defendant's conviction and order she be granted a new trial.

Defendant-appellant Nyleeta Elaine Huffaker was charged and convicted of first degree robbery in violation of Iowa Code section 711.1 and 711.2 (1989), following a jury trial.

On appeal, the defendant contends she was denied a jury panel that represented a cross section of the community in violation of the sixth and fourteenth amendments of the United States Constitution and article I, section 10 of the Iowa Constitution. Defendant also contends the jury panel was not selected according to Iowa Code section 607A.

The State acknowledges error was preserved on the sixth amendment challenge, but contends error was not preserved on the challenge under 607A.22 of the Iowa Constitution.

Defendant was charged with another black woman following a robbery at Best Western Bavarian Inn. The cases of the two nonwhite women were consolidated for

trial. Prior to jury selection, the defendant objected to the jury panel. Defendant contended the jury panel did not represent a fair cross-section of the community. Defendant claimed the failure of the jury to represent a fair cross-section of the community denied her right to the impartial jury she is guaranteed under the state and federal constitutions. A hearing was held. At the onset it was recognized defendant was black and none of the 36 jurors impaneled were black. The Polk County jury clerk testified 180 people were serving on the jury panel for Polk County that month, and only three of these people were black. It was established, according to 1984 census figures, that while the nonwhite population of Polk County was 7.16 percent, less than 1.67 percent of the jurors on the panel that month were black. A trial consultant testified this disparity was statistically significant and was not likely to occur by chance.

A jury clerk also testified a new jury wheel made up of one-eighth of the population of Polk County is randomly selected by computer every two years. A jury clerk testified she mailed 750 notices for jury duty that month, but about 200 notices were not deliverable, 100 persons asked to serve in a different month, and she excused 320 people.

A jury clerk and a programming supervisor related only two lists are used to make up the jury wheel; these are

driver's license and voter registration lists. A jury clerk testified she believed the percentage of black people registering to vote is smaller than the percentage of white people registering to vote. A programming supervisor testified representation of the population on the jury wheel could be improved by using additional lists in making the jury wheel. A programming supervisor noted information regarding race was not used in the jury selection process but could be used.

A trial consultant and research director with Starr & Associates testified a 1987 study of jury selection in Polk County revealed black individuals were significantly underrepresented on Polk County juries and that the underrepresentation was not a result of chance, but rather caused by some intervening factor.

Following the evidence, the trial court ruled:

> I think that by far the more credible evidence that we have had here today that the jury selection process is a quite good one that we have and that this jury was, in fact, picked impartially, which is the requirement, not representative of -- the requirement doesn't require that there be -- the Sixth Amendment doesn't require that it be a representative jury, only an impartial jury, and I don't know what else the State could do to pick a fairer jury than the way they're doing it.
>
> Motion's overruled.

Iowa Code section 607A establishes procedures for the selection of juries. Section 607A.1 declares it to be "the policy of this state that all persons be selected at random

from a fair cross-section of the population of the area served by the court . . . ." Iowa Code section 607A.2 further provides that:

> A person shall not be excluded from jury service or from consideration for jury service in this state on account of age if the person is eighteen years of age or older, race, creed, color, sex, national origin, religion, economic status, physical disability, or occupation.

Iowa Code section 607A.22 unambiguously provides the names of prospective jurors will be selected as follows:

> The appointed jury commission or the jury manager shall use all of the following source lists, in preparing grand and petit jury lists:
> 1. The current voter registration list.
> 2. The current motor vehicle operation's list.
> 3. Any other current comprehensive lists of persons residing in the county, including but not limited to the lists of public utility customers, which the appointive jury commission or jury manager determines are usable for the purpose of a juror source list.
>
> * * *

Section 607A.22 provides for the use of other current comprehensive lists where voter registration and driver's licenses fail to include minority representation in the pool, unless the other lists would further dilute minority representation in the pool. See State v. Johnson, 476 N.W.2d 330, 333 n.1 (Iowa 1991).

Polk County did not utilize the three lists provided for in the statute, has shown no valid reason for its failure to include other comprehensive lists, and has not shown the other comprehensive lists would further dilute the pool.

The legislature intends to require a more accurate cross-section of the community than motor vehicle and voter registration lists provide. While many persons of every age, creed, religion, and socio-economic status -- to name only a few potentially "distinctive" groups -- use electricity, telephones, and other public utilities, not all may have exercised their privilege to vote or are fortunate enough to own a motor vehicle. The statutory requirements thus provide the requisite "leeway in application." Taylor v. Louisiana, 419 U.S. 522, 538, 95 S. Ct. 692, 701-02, 42 L. Ed. 2d 690, 702 (1975).

The State contends error on this issue was not preserved because defendant failed to cite section 607A when objecting to the composition of the jury panel. We find the defendant clearly directed the trial court to the problem. Polk County did not use the three lists provided for in the statute. We consider this in addressing the defendant's next challenge that the composition of the jury panel violated her sixth amendment rights.

The sixth amendment to the United States Constitution states: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." The Iowa Constitution contains a virtually identical provision in article I, section 10. Both the United States Supreme Court and the Iowa Supreme

recognized that this "entitles a litigant to a jury panel designed to represent a fair cross-section of the community. See State v. Watkins, 463 N.W.2d 411, 414 (Iowa 1990) (citations omitted).

The United States Supreme Court has stated:

> [A] defendant does have the right to be tried by a jury whose members are selected pursuant to non-discriminatory criteria . . . . The Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race, . . . or on the false assumption that members of his race as a group are not qualified to serve as jurors. . . . .

Batson v. Kentucky, 476 U.S. 79, 85-86, 106 S. Ct. 1712, 1717, 90 L. Ed. 2d 69, 80 (1986) (citations omitted). But, likewise, it has cautioned:

> Defendants are not entitled to a jury of any particular composition, but the jury wheels, pools of names, panels, or venires from which the juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.

Taylor, 419 U.S. at 538, 95 S. Ct. at 702, 42 L. Ed. 2d at 703.

The Iowa Supreme Court has noted "exclusive reliance on voter registrations, although not the best solution, does not alone offend the Sixth Amendment," State v. Lohr, 266 N.W.2d 1, 6 (Iowa 1978), such reliance since the enactment of section 607A.22 in 1986 is offensive to the statutory framework. Because the Polk County jury which heard defendant's case was not drawn from the lists provided for in the statute, we must carefully scrutinize the jury panel

to assess whether it reflects the composition of the population in Polk County. Blacks are a distinctive group in Polk County for purposes of a cross section analysis. See Watkins, 463 N.W.2d at 414; see also Batson, 476 U.S. at 85, 106 S. Ct. at 1712, 90 L. Ed. 2d at 80.

The disparity between the percent of black jurors on the panel and black persons in the population pool is lower than the percent some federal courts have required in other jurisdictions to prove the prima facie elements of a fair cross-section claim. See United States v. Sanchez-Lopez, 879 F.2d 541, 547-49 (9th Cir. 1989); United States v. Pepe, 747 F.2d 632, 649 (11th Cir. 1984). However, precedent from jurisdictions having a larger nonwhite population than Iowa are minimally instructive. The smaller the percentage of a minority population in a jurisdiction, the greater the possibility becomes that a disparity between the percentage of nonminorities in the population and those on the jury panel will result, as here, in a jury composed of only members of the majority race. See United States v. Butler, 611 F.2d 1066, 1069-70 (5th Cir. reh'g denied 615 F.2d 685, 686 (1980) (suggests other statistical methods may be necessary when there is a small absolute disparity shown and minority less than ten percent of population).

The method of selecting juries in Polk County has not provided black jurors in a number equal to their percentage

of the population. The defendant has met her burden of showing the selection process has systematically excluded blacks because:

(1) There were no blacks in defendant's pool;
(2) There was a disparity of twenty-five percent to fifty percent between the percentage of blacks in the population and the percentage of blacks in the jury pools;
(3) There is no valid data to support a finding the system is systematically fair; and
(4) Polk County failed to follow the dictates of section 607A.22(3).

The jury manager does not have accurate data on the number of minority persons the current selection system in Polk County generates. The only data on race is collected from voluntary answers to a questionnaire. Absent any data showing the method of selection produces a fair result, we can only look to the end result which is blacks are not being called in a ratio representing their presence in the population.

It is imperative to the credibility of our system of justice that our system treats members of all races fairly and without prejudices. A member of a minority race in this state should not have to have his or her fate decided by a jury that may harbor or exercise racially discriminatory prejudices toward him or her. See Wright-Bey v. State, 444 N.W.2d 772, 776 (Iowa App. 1989). The chances any such prejudices may be overt is significantly lessened when the jury panel represents diverse backgrounds. Id. at 776.

We must be aggressive in seeing that our system is fair and perceived as being fair.

REVERSED AND REMANDED FOR NEW TRIAL.

All judges concur except Donielson and Habhab,JJ., who dissent.

DONIELSON, J. (dissenting)

I respectfully dissent. Because the defendant has failed to prove her case, I would affirm.

The sixth and fourteenth amendments guarantee a defendant a jury panel drawn from a fair cross-section of the community, Taylor v. Louisiana, 419 U.S. 522, 530, 95 S. Ct. 692, 697, 42 L. Ed. 2d 690, 702 (1975), but the Constitution does not require the defendant's jury duplicate precisely the community's statistical composition; some deviation is expected. Hoyt v. Florida, 368 U.S. 57, 69, 82 S. Ct. 159, 166-67, 7 L. Ed. 2d 118, 126 (1961); United States v. Kleifgen, 557 F.2d 1293, 1296 (9th Cir. 1977). Nevertheless, a systematic exclusion of "distinct" segments of the community violates this guarantee. Duren v. Missouri, 439 U.S. 357, 364, 99 S. Ct. 664, 668, 58 L. Ed. 2d 579, 586-87 (1979); Taylor, 419 U.S. at 533, 95 S. Ct. at 699, 42 L. Ed. 2d at 699.

"A defendant challenging the composition of a jury panel must first establish a prima facie violation of the sixth amendment's fair cross-section requirement." State v Watkins, 463 N.W.2d 411, 414 (Iowa 1990)(citing Duren, 439 U.S. at 364, 99 S. Ct. at 668, 58 L. Ed. 2d at 586-87)). To establish a prima facie violation, a defendant must prove:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the

> community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Id.

There is no question but that the group claimed by Huffaker to be unfairly represented in Polk County venires--blacks--is a distinctive group in the community for the purposes of a sixth amendment analysis. See Batson v. Kentucky, 476 U.S. 79, 94, 106 S. Ct. 1712, 1721-22, 90 L. Ed. 2d 69, 86 (1986); Watkins, 463 N.W.2d at 414. However, the defendant has wholly failed in her attempt to satisfy the last two prongs of the test, and she has, therefore, not established a prima facie violation.

Huffaker's proof fails to establish the representation of blacks in Polk County venires is not fair and reasonable in relation to the number of blacks in the community, because she fails to provide the court with a figure representing the number of blacks in the community. Without a figure for the black population in Polk County, I am unable to examine any relationship existing between that figure and the number of blacks serving on venires. I am, consequently, unable to say the relationship is unfair and unreasonable.

The census figures provided by Huffaker establish only the 1984 population of "black and other" or nonwhite residents of Polk County. This group, according to Huffaker's witness, is comprised of not only blacks but also of other groups such as Chicanos, Native Americans,

and Orientals, for example. I certainly do not believe this figure can be used as a substitute for the figure representing the number of blacks in Polk County.

Notably, nowhere in the majority opinion can a figure be found which purports to represent the percentage of the Polk County population which is black. Nevertheless, despite the glaring lack of record evidence to support Huffaker's argument, the majority concludes, "The disparity between the percent of black jurors on the panel and black persons in the population pool is lower than the percent some federal courts have required in other jurisdictions to prove the prima facie elements of a fair cross-section claim." (Emphasis added.). Ostensibly, the majority arrives at this conclusion by substituting the nonwhite figures (7.16 percent) for the nonexistent black figures, and the white figures (92.84 percent) for the nonexistent nonblack figures. Surely, these figures are not suitable substitutes. Neither do the figures used by the majority appear to represent anything but the whole of the population of each group. Yet, the relevant population would be that portion of each group which is over eighteen years old and, thus, eligible to serve on a jury. I am not sure it is safe to assume the age demographics of the several groups are identical. Accordingly, I would hold Huffaker failed to establish a prima facie violation by not providing the court with sufficiently accurate and reliable

statistical data concerning the relative sizes of the black and nonblack populations of Polk County.

Even assuming Huffaker has shown an unfair and unreasonable disparity between the number of blacks in the community and the number serving on venires, she has failed to show this is the result of any systematic exclusion of blacks in the jury selection process. Huffaker's evidence establishes jury venires are randomly selected in Polk County using the current list of registered voters and the current list of motor vehicle licensees. This practice comports with the applicable Code requirements. See Iowa Code § 607A.22 (1989); State v. Johnson, 476 N.W.2d 330, 333 n.1 (Iowa 1991)(Section 607A.22(3) allows some discretion by jury commissions and managers concerning their use of other lists). Huffaker presents no evidence that the percentage of the Polk County black population which owns a car or is registered to vote is smaller than that of the nonblack population. While this may very well be the case, it is not a self-evident fact, nor is it a fact of which this court should take judicial notice. Iowa R. Evid. 201(b)(judicially noticed fact must be one not subject to reasonable dispute).

Rather than speculate, however, the majority simply deems Huffaker has met her burden of showing the selection process has systematically excluded blacks because the State has failed to show otherwise. As such, the majority has shifted to the State the burden on this necessary

element of defendant's showing of a prima facie violation. This the majority does in direct contravention of the United States Supreme Court and the Iowa Supreme Court decisions which clearly place the burden squarely on the defendant. See Duren, 439 U.S. at 364, 99 S. Ct. at 668, 58 L. Ed. 2d at 586-87; Watkins, 463 N.W.2d at 414. It is not until the defendant succeeds in establishing a prima facie case does the burden shift to the State to show a justifiable reason for the disproportionate representation. See Watkins, 463 N.W.2d at 415 (citing Duren, 439 U.S. at 368, 99 S. Ct. at 670-71, 58 L. Ed. 2d at 589-90; Taylor, 419 U.S. at 533-35, 95 S. Ct. at 699-700, 42 L. Ed. 2d 700-01).

I find Huffaker has failed to establish a prima facie violation of the fair cross-section guarantee, because she was unable to provide this court with adequate statistical support for her claim or, assuming an unfair disparity exists, proof that the method employed by Polk County systematically excludes blacks. I find good reason for the Supreme Court's expression of confidence in the ability of trial judges to identify a prima facie case of racial discrimination. See Watkins, 463 N.W.2d at 415. I would affirm the trial court.

Habhab, J., joins this dissent.