STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH SMITH,

Defendant-Appellant.

UNPUBLISHED
July 9, 1996

No. 134460
LC No. 90-000548 FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

KENNETH SMITH,

Defendant-Appellee.

No. 175350
LC No. 90-000548 FH

Before: Markey, P.J., and Holbrook, Jr., and M.J. Matuzak,* JJ.

PER CURIAM.

These consolidated appeals arise out of the shooting death of Gary Brown on a secluded section of roadway in Kalamazoo County in apparent retribution for Brown's failure to satisfy a drug debt. As a result of Brown's death, defendant was convicted by jury of first-degree murder, MCL 750.316; MSA 28.48, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to serve two years in prison for the felony-firearm conviction to be served consecutively to a sentence of life imprisonment without parole for the murder conviction. Defendant appeals as of right from the entry of his judgment of sentence. The prosecutor appeals by leave granted from an order granting defendant a new trial. The trial court entered the order

* Circuit judge, sitting on the Court of Appeals by assignment.

following an evidentiary hearing on our remand with respect to defendant's claim that he was denied his right to a jury drawn from a representative cross-section of the community. We affirm the grant of the new trial and remand.

In these appeals we are asked to address the constitutional implications of the system used by Kalamazoo County before July 1992 to allocate prospective jurors from a general source list supplied by the Michigan Secretary of State's Office to the venires for the county's circuit court. We preface our discussion of these implications with the observation that the appeals before us share an evidentiary record created on remand with two additional appeals before us. See *People v Hubbard*, ___ Mich App ___; ___ NW2d ___ (Docket Nos. 145054, 175352, released _/__/96). We also observe that the arguments advanced by the prosecutor in opposition to the trial court's grant of a new trial are virtually identical to those arguments advanced by the prosecutor in *Hubbard*. We look to our decision in *Hubbard*, therefore, for guidance in resolving the claims now before us.

The prosecutor advances several procedural challenges to the trial court's ability on remand to have reached the substantive merits of defendant's challenge to the juror allocation system. For the reasons set forth in our opinion in *Hubbard*, we reject these procedural challenges. Defendant made his initial challenge to the allocation system in a timely manner. *Hubbard, supra*. Having rejected the prosecutor's procedural challenges, we now address the constitutional question posed by these appeals.

The prosecutor contends that the trial court erroneously determined that the juror allocation system in question violated defendant's Sixth Amendment right to a jury drawn from a fair cross-section of the community and, therefore, abused its discretion when it granted defendant's motion for a new trial. We disagree.

The Sixth Amendment guarantees the opportunity for a representative jury by requiring that jury wheels, pools of names, panels or venires from which juries are drawn must not systematically exclude distinctive groups present in the community and thereby fail to be reasonably representative thereof. *Taylor v Louisiana*, 419 US 522, 538; 95 S Ct 692; 42 L Ed 2d 690 (1975); *United States v Jackman*, 46 F3d 1240, 1244 (CA 2, 1995). In order to establish a prima facie violation of the Sixth Amendment fair-cross-section requirement, a criminal defendant must demonstrate (1) that the group alleged to be excluded is a distinctive group in he community; (2) that the representation of this group in venires from which juries are chosen is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to the systematic exclusion of the group in the jury-selection process. *Duren v Missouri*, 439 KUS 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979).

As we concluded in *Hubbard*, African-Americans are considered a constitutionally-cognizable group for Sixth Amendment fair cross-section purposes. *Hubbard, supra*; see also *United States v Ashley*, 54 F3d 311, 313 (CA 7, 1995); *Jackman*, *supra* at 1246; *Ramseur v Beyer*, 983 F2d 1215, 1230 (CA 3, 1992). As we also concluded in *Hubbard*, an absolute disparity[1] of between 3.4% and 4.1% is sufficient to establish a constitutionally significant level of underrepresentation of African-

Americans where the underrepresentation resulted from a non-benign circumstance, and not from random chance. *Hubbard, supra*; see also *United States v Osorio*, 801 F Supp 966, 977 (D. Conn, 1992). Here, as in *Hubbard*, the 3.4% to 4.1% disparity was not the result of random chance, but instead was the result of a juror allocation system that essentially excluded Kalamazoo city residents, and thereby excluded the largest African-American population in the county, from the circuit court venires. Finally, as we concluded in *Hubbard*, the underrepresentation of African-Americans in the venires resulted from a circumstance inherent in the juror allocation process. This circumstance existed for a constitutionally significant duration. *Hubbard, supra*. Accordingly, we conclude here, as we did in *Hubbard*, that defendant was denied his Sixth Amendment right to a jury drawn from a representative cross-section of the community and, therefore, that the trial court did not abuse its discretion when it ordered a new trial.

We need not consider the issues raised by defendant because those issues either were not preserved for appellate review or were unique to trial.

Defendant's conviction is vacated and this matter is remanded for a new trial. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Donald E. Holbrook, Jr.
/s/ Michael J. Matuzak

[1] The absolute disparity test measures the representativeness by the difference between the percentage of a certain population group eligible for jury duty and the percentage of that group who actually appear in the venire. *Ramseur, supra* at 1231; *People v Sanders*, 51 Cal 3d 471; 273 Cal Rptr 537; 797 P2d 561, 570, n 5 (1990). Absolute disparity is obtained by subtracting the jury representation percentage from the community percentage. *Ashley, supra* at 314; *Ramseur, supra* at 1231 & n 18;*United States v Tuttle*, 729 F2d 1325, 1327 (CA 11, 1994). The absolute disparity in this case is 3.4% to 4.1% (7.4% [percentage of adult African-Americans residing in Kalamazoo County] minus 4% [percentage of African-Americans appearing in the jury venires] and 7.4% minus 3.3%).