

MANDATE

AFFIRMED

PROCEEDINGS OF APRIL 17, 2019

COURT OF APPEALS CASE NO. CR-18-775

TONY L. HENDERSON

APPELLANT

V. APPEAL FROM GARLAND COUNTY CIRCUIT COURT
(26CR-17-187)

STATE OF ARKANSAS

APPELLEE

THIS CRIMINAL APPEAL WAS SUBMITTED TO THE ARKANSAS COURT OF APPEALS ON THE RECORD OF THE GARLAND COUNTY CIRCUIT COURT AND BRIEFS OF THE RESPECTIVE PARTIES. AFTER DUE CONSIDERATION, IT IS THE DECISION OF THE COURT THAT THE JUDGMENT OF THE CIRCUIT COURT IS AFFIRMED.

VIRDEN, J., AUTHORED THE DECISION OF THE COURT, IN WHICH GRUBER, C.J., AND ABRAMSON, J., AGREE.

IT IS ALSO ORDERED THAT, IF THE APPELLANT IS FREE PURSUANT TO AN APPEAL BOND, THE APPELLANT SHALL IMMEDIATELY SURRENDER TO THE SHERIFF OF GARLAND COUNTY. IF THE SURRENDER IS NOT IMMEDIATE, HIS BOND IS DECLARED FORFEITED AND A WARRANT SHALL ISSUE FOR APPELLANT'S ARREST.

IN TESTIMONY, THAT THE ABOVE IS A TRUE AND CORRECT COPY OF THE JUDGMENT OF THE ARKANSAS COURT OF APPEALS, I, STACEY PECTOL, CLERK, SET MY HAND AND AFFIX MY OFFICIAL SEAL, ON THIS 19TH DAY OF SEPTEMBER, 2019.


STACEY PECTOL, CLERK

OFFICE OF THE CLERK
ARKANSAS SUPREME COURT
625 MARSHALL STREET
LITTLE ROCK, AR 72201

SEPTEMBER 19, 2019

RE: SUPREME COURT CASE NO. CR-18-775
TONY L. HENDERSON V. STATE OF ARKANSAS

THE ARKANSAS SUPREME COURT ISSUED THE FOLLOWING ORDER TODAY IN THE
ABOVE STYLED CASE:

"APPELLANT'S PETITION FOR REVIEW IS DENIED. HART, J., WOULD GRANT."

SINCERELY,

A handwritten signature in cursive script, appearing to read "Stacey Pectol".

STACEY PECTOL, CLERK

CC: DAVID A. HODGES
VADA BERGER, SENIOR ASSISTANT ATTORNEY GENERAL
GARLAND COUNTY CIRCUIT COURT
(CASE NO. 26CR-17-187)

OFFICE OF THE CLERK
ARKANSAS COURT OF APPEALS
625 MARSHALL STREET
LITTLE ROCK, AR 72201

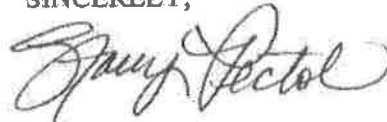
JUNE 5, 2019

RE: COURT OF APPEALS CASE NO. CR-18-775
TONY L. HENDERSON V. STATE OF ARKANSAS

THE ARKANSAS COURT OF APPEALS ISSUED THE FOLLOWING ORDER TODAY IN
THE ABOVE STYLED CASE:

"APPELLANT'S PETITION FOR REHEARING IS DENIED."

SINCERELY,

A handwritten signature in cursive script, appearing to read "Stacey Pectol", written in dark ink.

STACEY PECTOL, CLERK

CC: T. CLAY JANSKE
DAVID A. HODGES
BROOKE GASAWAY, ASSISTANT ATTORNEY GENERAL
GARLAND COUNTY CIRCUIT COURT
(26CR-17-187)

2019 Ark. App. 220
Court of Appeals of Arkansas,
DIVISION II.
Tony L. HENDERSON, Appellant
v.
STATE of Arkansas, Appellee
No. CR-18-775

Opinion Delivered: April 17, 2019

Rehearing Denied June 5, 2019

APPEAL FROM THE GARLAND COUNTY CIRCUIT COURT [NO. 26CR-17-187], HONORABLE MARCIA HEARNSBERGER, JUDGE

Attorneys and Law Firms
T. Clay Janske, Garland County Deputy Public Defender, for appellant.
Leslie Rutledge, Att’y Gen., by: Brooke Jackson Gasaway, Ass’t Att’y Gen., for appellee.

Opinion
BART F. VIRDEN, Judge

Tony L. Henderson appeals the Garland County Circuit Court order denying his motion to strike the jury panels called for his trial. We affirm.

I. Relevant Facts

Henderson was arrested on February 2, 2017, and he was charged with first-degree battery and aggravated residential burglary. The criminal information was amended, and Henderson was tried by jury on one charge of aggravated residential burglary and one charge of attempted first-degree murder.

On March 28, 2018, before the trial was held, Henderson brought to the court’s attention that of the forty-three jurors who appeared, none were African American. Henderson, who is African American, objected to the all-white jury panels arguing that they did not constitute a jury of his peers. Henderson argued that different panels should be called because the panels here—panels 1, 7, and 10—were entirely comprised of white jurors. The circuit court stated that “it’s not that [the panels] don’t have any African Americans, it’s that no African Americans showed up” for trial. The State responded that Henderson had the burden of proving that members of his racial group

were systematically excluded. Because the jury venire had been drawn by random selection by computer, and because race was not a factor in determining which panels were chosen, the State argued that Henderson was unable to prove systematic exclusion.

The court agreed that Henderson had not made a prima facie showing of systematic exclusion of African American jurors and denied his motion to strike the panels. Henderson renewed his objection. The jury was sworn, and Henderson's trial proceeded.

Henderson renewed his objection at the close of the State's case. In chambers, the Garland County Circuit Court jury manager and deputy clerk, Tonya Winton, stated that when she previously called panels 1, 7, and 10 for prior trials, she noted that there were no African American potential jurors. Winton explained that race is not indicated on the jury questionnaire; thus, the races of the potential jurors are unknown and not a consideration when forming the panels. Winton clarified that the names of the potential jurors are randomly chosen by computer from driver's-license and Arkansas-ID records as well as voter registration records. Winton explained that she tried to mix up the panels so that the same panels did not always appear together or before the same judge. Winton stated that she typically does not consider the race of a juror, but in the past when she knew that a defendant was African American she had tried to pull panels that she knew had "quite a few [African Americans] on it." Winton stated that she did not do so this time because only twelve potential jurors appeared at orientation, and she had not known that Henderson is African American.

The jury found Henderson guilty of aggravated residential burglary and attempted second-degree murder. Henderson was sentenced to sixty-eight years in the Arkansas Department of Correction on the first charge and forty years on the second charge, to run consecutively. Henderson filed a timely notice of appeal.

II. Standard of Review and Applicable Law

We will reverse a circuit court's denial of a motion to quash a jury panel only when there is a manifest abuse of discretion. *Thompson v. State*, 2015 Ark. App. 275, at 19, 461 S.W.3d 368, 379. Although selecting a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial, nothing requires that the petit jury mirror the community and reflect the various distinctive groups in the population. *Id.* To quash a jury panel based on its racial make-up, the moving party must prove that people of a certain race were systematically excluded from the panel. *See Navarro v. State*, 371 Ark. 179, 264 S.W.3d 530 (2007). To establish a prima facie case of deliberate or systematic exclusion, a defendant must prove that (1) the group alleged to be excluded is a "distinctive" group in the

community; (2) the representation of this group in venires from which the juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) this underrepresentation is due to systematic exclusion of the group in the jury-selection process. *Thomas v. State*, 370 Ark. 70, 257 S.W.3d 92 (2007). The defendant must prove systematic exclusion of members of his or her racial group from the venire; only after making a prima facie case by establishing these three elements does the burden shift to the State to justify its procedure. *Mitchell v. State*, 323 Ark. 116, 913 S.W.2d 264 (1996).

III. Discussion

On appeal, Henderson argues that the circuit court erred by failing to strike the jury panels because no African American jurors presented themselves for jury duty. The State asserts that Henderson argued below that no African American jurors were present that day, which meets the first factor that the defendant prove that the group alleged to be excluded is a distinctive group in the community; however, he failed to offer any proof regarding the second and third factors—namely that representation of this group in the jury pool was not fair and reasonable in relation to the number of such persons in the community or that this underrepresentation was due to systematic exclusion of the group in the jury-selection process. Henderson had the burden of proving that there was not a fair and reasonable representation of the distinctive group across venires from which juries are selected, not just the particular venire summoned at his trial. See *Navarro*, supra. Henderson offered no such evidence, and we cannot ascertain from the record if African American jurors were included in the venire because race information is not included in the jury questionnaire.

Henderson also failed to prove that African Americans were systematically excluded from the jury-selection process. Winton testified that the jury selection was done in compliance with the relevant statute, which generally provides for a random-selection process. *See* Ark. Code Ann. § 16-32-301(a) (Supp. 2013) (“The pool of names from which prospective jurors are chosen may be expanded from the list of registered voters to include the list of licensed drivers and persons issued an identification card under § 27-16-805.”).

Henderson has failed to provide any evidence of a prima facie case of racial discrimination, and we find no abuse of discretion by the circuit court.

Affirmed.

Gruber, C.J., and Abramson, J., agree.

JURY TRIAL HELD ON MARCH 28 & 29, 2018 (R. 217-661)

(IN CHAMBERS)

THE COURT: All right, the record should reflect that we're back in chambers in State of Arkansas vs. Tony Henderson. Mr. Henderson is here with his attorney and the State is here and my understanding is you have another motion you liked to make. **R.227**

MR. JANSKE: I do, Your Honor. Your Honor, we just sat in there and watched for the calling of the prospective jurors. Forty-three were announced from Panels 1, 7 and 10, I think.

THE COURT: Oh, what was it – 1, 7, 9 or 1, 7, 10, whichever.

MR. JANSKE: And there were – out of the forty-three that appeared, not any of them were African American. As a matter of fact, I don't know if I saw any minorities at all. We're going to object to the entire jury as not being a jury of his peers. **R. 227** I would also like to point out that the clerk of the court was asked a question about that jury and they called that exact same panel before and no African Americans showed up for that particular panel on a previous occasion. **R 228.** We believe that this panel is not a reflection of Mr. Henderson's peers and we would ask for it to be stricken as a panel as a whole.

MR. GRAHAM: Your Honor, pursuant to *Duren v. Missouri*, which is 439 U.S. 357, the Defendant has the burden to prove the systematic

exclusion of members of his racial group from the venire. To make that prima facie showing of systematic exclusion the Defendant has to establish the group excluded was a distinctive group in the community, and that the under-representation was due to systematic exclusion. **R. 228.** Only when he's made that prima facie case does the burden shift to the State to justify the procedure. And when the jury venire is drawn by random selection, the mere showing it's not representative of the racial composition of the population does not establish that prima facie case pursuant to Arkansas cases, *Walker v. State*, 314 Ark. 628 and *Biggers v. State*, 317 Ark. 414. **R. 229.** And the Court's well aware of the selection process for our jury panels. It's completely non-discriminatory, drawn from drivers' licenses, voter registrations and ID cards issued by the Department of Finance and Administration.

THE COURT: It's actually a computer random selection is my understanding. **R. 229**

MR. JANSKE: I guess the issue - what I take issue with is that this exact same set of them - and we have ten panels - so the randomness of it can be a whole lot different - I mean it could be 1, 5, you know, - and this particular set was called on two occasions and not a single African American showed up either time. Knowing that we have an African American on trial, it seems that we should've called different panels and then maybe opened up the idea

THE COURT: Right. So, you know, I don't see that you've met your prima facie case.

MR. JANSKE: I just want to establish a record.

THE COURT: Right. All right, well that objection is denied. All right, we'll get started. **R 230**

(WHEREUPON, THESE IN CHAMBERS PROCEEDINGS WE ADJOURNED)

(THEREAFTER, THE COURT AND ALL PARTIES RECONVENED IN OPEN COURT WHERE THE FOLLOWING PROCEEDINGS WE HAD, TO-WIT)

[PORTION OF TRIAL TRANSCRIPT HAS BEEN OMITTED FOR LACK OF RELEVANCY ON APPEAL.]

THE COURT: Is the jury satisfactory for both sides?

MS. PETRO: Good for the State.

MR. JANSKE: Your Honor, other than our previous objection that was made in chambers. **R. 304**

THE COURT: All right, would you all please stand and raise your right hands to take the oath to sit as a juror in this case.

(Jury sworn and seated at 11:30 a.m.) R. 304

**THURSDAY, MARCH 29, 2018, 8:57 A.M. JURY TRIAL
CONTINUES
IN CHAMBERS**

(THE STATE RESTED ITS CASE IN CHIEF AT 10:38 A.M.) R. 538

MR. JANSKE: We would also renew all of our previous objections, specifically to the pretrial 404(b) motion and also renew our objections to the pictures being introduced that related to the 404(b) motion to Ms. Henderson's previously being shot and as it relates to that and not necessarily **(R 538)** to this particular case. **R. 539**

THE COURT: That's denied.

MR. JANSKE: Okay. I would also like to renew – and I have Tonya – you still go by Winton?

TONYA WINTON: Yes, Winton.

MR. JANSKE: - Winton. I've known her before all that, so I wasn't sure what she went by legally. I would ask to cal her – Tonya Winton – as a witness real fast. Can we swear her in?

THE COURT: Uh-huh. **R. 539**

[PORTION OF TRIAL TRANSCRIPT HAS BEEN OMITTED FOR LACK OF RELEVANCY ON APPEAL.]

TONYA WINTON,

HAVING BEEN FIRST DULY SWORN, WAS CALLED AS A WITNESS ON BEHALF OF THE DEFENSE, AND TESTIFIED AS FOLLOWS, TO-WIT:

DIRECT EXAMINATION

BY MR. JANSKE:

Q. Ms. Winton, would you please give your name and occupation for the record. **R 539**

A. Tonya Winton, Jury Manager and Deputy Clerk for Garland County, Arkansas. **R 539**

Q. Ms. Winton, when we called jury panels 1, 7, and 10 in **(R539)** Mr. Henderson's case – this case at hand – were any African Americans present?

A. No, sir.

Q. Do you have any way, from the information provided by the Clerk's Office, to know whether there are any African Americans on either one of the panels? **R 540**

A. None have appeared yet.

Q. Okay. And when you say none have appeared yet, 1, 7 and 10 were called in a previous trial?

A. Yes, They've appeared twice before.

Q. Twice before. And no African Americans have ever appeared on any of those?

A. Correct.

Q. Okay.

THE COURT: Any questions you want to ask?

CROSS EXAMINATION

BY MR. GRAHAM:

Q. Ms. Winton, you don't obtain such information from jurors when they initially are called or when they send in their questionnaires, is that correct?

A. No, sir. **R540**

Q. The only time you know if there's an African American is when they show up then you will know?

A. Yes.

Q. Now the first – as far as Garland County's (**R540**) procedure goes, how are the jurors obtained for each of the panels? **R 541**

A. We have the expanded list of jurors which chooses names from driver's license and Arkansas ID records as well as voter registration records.

Q. And none of the records of what race a person is comes through when you're selecting those panels, is that correct?

A. Correct.

Q. And they're just randomly selected-

A. Correct.

Q. - through a non-discriminatory process?

A. A computer system, yes.

Q. A computer pulls people?

A. Yes.

Q. Now Garland County has twelve panels per term is that correct?

A. Correct. **R. 541**

Q. Now the first time these panels are called they're called in sequential order one through twelve, depending upon how many panels you're calling at a time, is that correct?

A. Yes.

Q. How do you determine – once you get through that initial calling of the first twelve – which panels you call (**R541**) together for subsequent trials? **R542**

A. I start mixing them up but I try not to have the same panels appear together or before the same judge if I can help it, or for the same type of case if I can help it. But evenly pulling them so that panels don't report more than their fellow panels.

Q. When making that determination do you make any inquiry into if there are African Americans on the panel when you're deciding which panels to call for which trials?

A. Not typically.

Q. Does it ever?

A. There have been times in the past when I have tried to pull panels that I knew had quite a few on it for a black Defendant, but I did not this time because we've only had twelve appear, period, at orientation. Only eleven have appeared so far and one has been excused so far. But none from those panels. **R 542**

Q. But that didn't enter into the equation about which ones were called today –

A. No.

Q. - the fact that there were or were not African Americans on the panels?

A. Because I did not know if there were, and I always **(R542)** hope more appear in the audience, but none did. **R. 543**

THE COURT: And because there's no way to identify on the panel who's African American and who's white?

A. Correct.

THE COURT: Because this is random – is this the program you get from AOC?

A. Yes

THE COURT: So you use the same program that every Court in the State uses?

A. Yes

THE COURT: Ok

MR. JANSKE: Your Honor, real quickly I'd like to make a records that my client is African American.

THE COURT: Right. **R.543**

MR. JANSKE: I don't know if that's ever – even though I've argued it, I don't know necessarily whether it's on paper or not.

THE COURT: Ms. Winton, would you even know that the Defendant was African American?

A. Only if I looked it up. **R 543**

THE COURT: And how would you look it up?

A. In the Court Connect system.

TE COURT: So on his ADR maybe –

A. On the information, it's got it noted.

THE COURT: Okay

A. I did not do that in this case.

MR. GRAHAM: Do you recall if you noted it in this case?

A. I did not do that this time, no.

THE COURT: Is that a regular thing you do?

A. I try to keep track of whether or not it's an African American Defendant to try to, you know, keep up with the panels that might be best because there are more African American present in those panels. I did not do that this time. **R 544.**

THE COURT: Okay, All right, any other questions for Ms. Winton? **R 544**