No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

KEAON WILSON, PETITIONER

VS.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO

THE THIRD CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

QUESTION: IS IT STRUCTURAL ERROR IN VIOLATION OF THE SIXTH AMENDMENT FOR A JUROR TO SIT ON A JURY WHEN THAT JUROR WAS NOT ACTUALLY SELECTED TO BE ON THE JURY DUE TO A MIX-UP WITH JUROR NUMBERS DURING JURY SELECTION ?

LIST OF PARTIES

All parties appear on the caption of the case on the cover page.

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IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION BELOW

The opinion of the Third Circuit Court of Appeals appears in the Appendix. United States v. Wilson, 2022 WL 216975 (3rd Cir. 2022) (18-2727). The case was not formally reported.

JURISDICTION

The Third Court of Appeals decided this case on January 25, 2022 so therefore this petition is timely.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment

Due Process Clause

STATEMENT OF THE CASE

The petitioner, Keaon Wilson, was convicted of conspiracy for committing and conspiring to commit Hobbs Act robbery of a jewelry store in St. Thomas, U.S. Virgin Islands, as well as brandishing a firearm during that robbery.

The petitioner was tried in the District Court of the Virgin Islands. As noted by the Third Circuit:

> Wilson contends that he is entitled to a new trial because of a mix-up during jury selection. This mix-up switched the numbers held by venireperson 22 and 35, so that venire person 22 held the number 35, and venireperson 35 held the number 22. The District Court, becoming aware of the error after the jury found the defendants of all charges, conducted a status conference the next day to explain the error. The Court explained that both venirepersons had been subjected to voir dire and neither received peremptory challenges.

United States v. Wilson, 2022 WL 216975 (3rd Cir. 2022).

The Third Circuit cited Gray v. Mississippi, 481 U.S. 648 (1987), Ross v. Oklahoma, 487 U.S. 81 (1988), and United States v. Martinez-Salazar, 528 U.S. 304 (2000), and declared that these cases are on point "even if this case presents different facts." Id.

"Those cases are instructive because they establish that the critical inquiry is whether the jury that returned the guilty verdicts was impartial. Here, during jury selection, counsel neither challenged venirepersons 22 or 35 for cause, nor asked any questions of these venirepersons that elicited responses suggestive of bias or partiality. Nor has Wilson identified anything in the record that would establish that the seating of Juror 35 (actually venireperson 22), resulted in a jury that was not impartial." Id. (footnote omitted).

The Third Circuit held that "without some basis to conclude juror 35 was biased or impartial, we see no reason to disturb the District Court's judgment." Id. In so holding, the Third Circuit explicitly rejected the Petitioner's argument that this was a structural error. The Third Circuit held:

> Because errors that affect jury composition do not "always result[] in fundamental unfairness" and the effect of the error can be ascertained by determining if there was an impartial jury, there is no basis for categorizing this as a structural error. See Weaver v. Massachusetts, 137 S.Ct. 1899, 1908 (2017).

Wilson at fn 5.

The petitioner now files the instant petition.

REASONS FOR GRANTING THE PETITION

QUESTION: IS IT STRUCTURAL ERROR IN VIOLATION OF THE SIXTH AMENDMENT FOR A JUROR TO SIT ON A JURY WHEN THAT JUROR WAS NOT ACTUALLY SELECTED TO BE ON THE JURY DUE TO A MIX-UP WITH JUROR NUMBERS DURING JURY SELECTION ?

The integrity and true meaning of the Sixth Amendment right to a jury trial and the concept of choice in the jury selection process is at issue in this case. A juror that was not selected by the defense sat on this case. This person was therefore a legal stranger to the proceeding. This should have been deemed to be a structural error.

The bedrock of the American system of justice is the right to a jury trial consisting of your peers. This is one of the most important, if not the most important right in guaranteeing that a criminal defendant attains a fair trial under the United States Constitution. The Petitioner's Due Process and Sixth Amendment rights were violated in this case because the jury that sat on the case was not the jury that was actually selected by the defendant.

This Court has made clear that some types of trial errors are not amendable to

harmless-error analysis, but instead constitute "structural defects in the constitution of the trial mechanism," which so "affect [ ] the framework within which the trial proceeds" that they require automatic reversal. Arizona v. Fulminante, 499 U.S. 279, 310-11, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991) (Rehnquist, C.J., for Court in part and dissenting in part). See also Starr v. Lockhart, 23 F.3d 1280, 1291 (8th Cir. 1994) ("Certain structural errors, however, can never be deemed harmless").

The cases from this Court that were cited by the Third Circuit to support its holding do not apply to the facts of this case. Those cases were about what happens when a trial court improperly excludes a prospective juror for cause or when the defense is forced to use a peremptory challenge to remove a juror that should have been removed for cause.

In those cases the ultimate choice of the defense was honored and the resulting jury was deemed impartial so there was no error. Here, the choice of the defense was not honored. This is the dispositive difference. Jury selection within the Sixth Amendment includes the right of choice. The Third Circuit completely ignored the concept of choice.

The Petitioner could not intelligently and meaningfully exercise his choice on who to sit on the jury due to the mistake with the juror numbers. The Petitioner has a right of choice to select jurors of his or her liking and he was deprived of this right. A

juror can be chosen based upon a mere hunch or feeling by the defense.

Further, contrary to the Third Circuit, it is not relevant that the defense did not challenge either of the jurors at issue for cause or move to strike them. The defense wanted X to sit on the panel over the choice of Y. This choice was hindered.

In United States v. Chatman, 584 F.2d 1358, 1361 (4th Cir. 1978), the court held that it was *per se* error to allow a thirteenth juror (an alternate who had not been excused), to retire with the regular jurors for the first forty-five minutes of deliberations.

Accordingly, if it is *per se* error to allow an alternate into the jury room then it is most certainly *per se* error to allow in a person who was dismissed from the jury pool. A person who sat on the Petitioner's case was a legal stranger to the proceeding. This error carries a presumption of prejudice.

By analogy, it has been held that in cases where the district court intentionally excludes the public from the courtroom, it violates the defendant's Sixth Amendment right to a public trial and reversal is required. United States v. Gupta, 699 F.3d 682 (2d Cir. 2011). See also Weaver v. Massachusetts, – U.S. – , 137 S.Ct. 1899, 1903, 198 L.Ed.2d 420 (2017) ("a public trial violation counts as structural error").

The Third Circuit erroneously rested its decision on Weaver. The Third Circuit cited Weaver and said that errors that affect jury composition do not always result in

fundamental unfairness. See Wilson at fn5.That may be true, but that does not take into account the Sixth Amendment violation that occurred here.

This Court noted in Weaver, 137 S.Ct. at 1908, that there are three general reasons to declare an error to be structural:

(1) If the right at issue is not designed to protect the defendant from erroneous conviction, but instead protects some other interest. This is true of the defendant's right to conduct his own defense. This right is based on the fundamental legal principle that a defendant must be allowed to make his own ***choices*** about the proper way to protect his own liberty.

= This principle fully applies to the Petitioner because his ***choice*** as to whom to seat on the jury was infringed upon. Also, it protects the "other interest" of having all criminal defendants be judged by a jury of his or her peers to ensure fairness and compliance with the United States Constitution.

(2) An error is deemed structural if the effects of the error are simply too hard to measure. For example, when a defendant is denied the right to ***select*** his or her own attorney. The precise effect of the violation cannot be ascertained.

= This principle fully applies because the Petitioner's right to ***select*** his jury was infringed upon. Further, proving prejudice is impossible. No defendant could

ever prove what the juror who was supposed to be on the jury would have found.

(3) An error is deemed structural if the error always results in fundamental unfairness. For example, if an indigent defendant is denied an attorney or if the judge fails to give a reasonable-doubt instruction, the resulting trial is always a fundamentally unfair one.

= This principle also fully applies to having the wrong person sit on the jury panel because it always results in a fundamentally unfair jury selection process. It logically follows that the resulting trial is fundamentally unfair as well.

Weaver fully supports the Petitioner, contrary to the Third Circuit's analysis in this case.

In sum, the defendant's right to select a jury of his peers under the Sixth Amendment was violated. A person who was not selected for the jury sat on the jury. This affects the framework within which the trial proceeds rather than simply the trial process itself. It is a structural error which requires *per se* reversal. The Third Circuit misinterpreted this Court's case law when it held that the facts of this can be assessed with a harmless error analysis.

CONCLUSION

Due to the fundamental importance of the right to a jury trial and the concept of choice embodied therein, the true meaning of the Sixth Amendment cannot be diluted in such a manner. The defendant did not choose the panel who sat on his trial. He selected another jury panel. This is a structural error.

RESPECTFULLY SUBMITTED this 28th day of January 2022.

By: _____
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APPENDIX

2022 WL 216975
Only the Westlaw citation is currently available.
NOT PRECEDENTIAL
United States Court of Appeals, Third Circuit.

UNITED STATES OF AMERICA
v.
KEAON WILSON, a/k/
a Keon Wilson, Appellant

No. 18-2727
|
Filed: January 25, 2022

On Appeal from the District Court of the Virgin Islands

District Court No. 3-17-cr-00026-006

District Judge: The Honorable Curtis V. Gomez

Submitted Under Third Circuit L.A.R. 34.1 (a) December 10, 2021

Before: McKEE, RESTREPO, and SMITH Circuit Judges

OPINION*

SMITH, Circuit Judge

Keaon Wilson appeals his conviction for committing and conspiring to commit a Hobbs Act robbery of a jewelry store in St. Thomas, U.S. Virgin Islands, as well as the brandishing of a firearm during that robbery. *See* 18 U.S.C. §§ 1951, 924(c)(1)(A), and 2. We will affirm.[1]

A superseding indictment charged Wilson and six others with the Hobbs Act and firearm offenses. Three of the seven defendants—Wilson, Ron Kuntz, and Shawn McIntosh—went to trial. The jury saw two surveillance videos related to the robbery, the second of which showed the store as it was being robbed. Robert Brown, a cooperating witness, testified to the conspiracy, identified the defendants who appeared in the two surveillance videos, and specifically named Wilson as the man pointing a gun at the store's owner. The jury also heard the testimony of the store's owner, as well as from local law enforcement officers and other witnesses.

At the close of the Government's evidence, Wilson moved for a judgment of acquittal. The Court denied that motion, as well as a renewed motion at the end of the trial. The jury found Wilson, Kuntz, and McIntosh guilty as charged on all three counts. After his sentencing, Wilson appealed.[2]

I.

Wilson contends that he is entitled to a new trial because of a mix-up during jury selection.[3] This mix-up switched the numbers held by venirepersons 22 and 35, so that venireperson 22 held the number 35, and venireperson 35 held the number 22. As a result, the selection of number 35 as a juror, actually seated venireperson 22. The District Court, becoming aware of the error after the jury found defendants guilty of all charges, conducted a status conference the next day to explain the error. The Court explained that both venirepersons had been subjected to voir dire and neither received peremptory challenges. Appeal No. 18-2696, JA531–33. The Court noted that it did not believe there was any prejudice but allowed for briefing on the issue out of an abundance of caution.

The Government advanced that the verdict should stand as "both jurors were able to be impartial, there was no prejudice as a result of this mix up." *Id.* at JA533. Wilson, Kuntz, and McIntosh each filed a motion for a mistrial. Without ruling on these motions, the Court proceeded to sentencing for all three defendants, implicitly denying the motions for a mistrial. *See United States v. Claxton*, 766 F.3d 280, 290, 301 (3d Cir. 2014) ("[T]reating the District Court's failure to issue an explicit ruling as an implicit denial of his ... motion.").

Wilson contends that the jury mix-up violated his constitutional rights. The Sixth Amendment guarantees the right to trial "by an impartial jury." U.S. Const. amend. VI. In *Wainwright v. Witt*, the Supreme Court observed that under the Sixth Amendment "the quest is for jurors who will conscientiously apply the law and find the facts. That is what an 'impartial' jury consists of." 469 U.S. 412, 423 (1985).

Both *Gray v. Mississippi*, 481 U.S. 648 (1987), and *Ross v. Oklahoma*, 487 U.S. 81 (1988), upon which Wilson relies, concerned the Sixth Amendment right to an impartial jury in capital cases. In *Gray*, the trial court improperly excluded a prospective juror for cause. The Court focused on "whether the composition of the *jury panel as a whole* could possibly have been affected by the trial court's erro[neous]" exclusion

of the prospective juror. 481 U.S. at 665 (cleaned up). It concluded that the jury had been affected by the trial court's error and that the error was not harmless.

In *Ross*, the Supreme Court expressly limited the "could possibly have been affected" language it used to describe the jury selection error in *Gray*: "We think the broad language used by the *Gray* Court is too sweeping to be applied literally, and is best understood in the context of the facts there involved." 487 U.S. 87–88; *id.* at 87 n.2 ("[T]he statement that any error which affects the composition of the jury must result in reversal defies literal application."). The Supreme Court explained that, unlike *Gray*, the trial court erred in *Ross* by improperly including jurors who should have been excused for cause, prompting the defendant to use his peremptory challenges. While the *Ross* Court acknowledged that the trial court's error may have affected the composition of the jury, the Court rejected the argument that a new trial was required. It focused on the jury that actually deliberated and returned the guilty verdict, noting that none of the twelve jurors who actually sat had been challenged for cause and that the defendant "never suggested that any of the 12 was not impartial." 487 U.S. at 86. Because peremptory challenges "are not of constitutional dimension," but a "means to achieve the end of an impartial jury," the Court declared that "[s]o long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated." *Id.* at 88. Consistent with this precedent, the Supreme Court subsequently rejected the notion that use of a peremptory challenge to remove a juror who should have been excused for cause violates the Fifth Amendment right to due process. *United States v. Martinez-Salazar*, 528 U.S. 304, 307, 317 (2000).

Contrary to the arguments pressed here, *Gray, Ross*, and *Martinez-Salazar* are on point, even if this case presents different facts. Those cases are instructive because they establish that the critical inquiry is whether the jury that actually returned guilty verdicts was impartial. Here, during jury selection, counsel neither challenged venirepersons 22 or 35 for cause, nor asked any questions of these venirepersons that elicited responses suggestive of bias or partiality. Nor has Wilson identified anything in the record that would establish that the seating of Juror 35 (actually venireperson 22), resulted in a jury that was not impartial.[4]

Without some basis to conclude that juror 35 was biased or partial, we see no reason to disturb the District Court's judgment.[5]

II.

Wilson claims the evidence at trial was insufficient to establish he was one of the robbers.[6] That claim is meritless. Cooperating witness Robert Brown identified Wilson as the robber pointing a handgun at the owner of the store.

Wilson also argues that the evidence failed to establish that the robbery had an effect upon interstate commerce as required under 18 U.S.C. § 1951. *See United States v. Walker*, 657 F.3d 160, 178–80 (3d Cir. 2011). Yet the evidence suggested the robbery depleted the jewelry store's inventory, and that it was "[m]ainly from the mainland and Italy." Appeal No. 18-2696, JA144. We conclude, therefore, that the effect on interstate commerce was sufficiently established. *See United States v. Haywood*, 363 F.3d 200, 210–11 (3d Cir. 2004).

III.

Wilson raises two legal arguments in an effort to set aside his conviction for brandishing a firearm during a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A). First, he argues that *conspiracy* to commit a Hobbs Act robbery is not a "crime of violence." Second, he argues that a completed Hobbs Act robbery is not a "crime of violence" because it could be completed without violence to person or property—namely by fear to intangible property. *United States v. Walker* forecloses his second argument. 990 F.3d 316, 325 (3d Cir. 2021) (concluding that a completed Hobbs Act robbery is categorically a crime of violence under the elements clause). And because the Court instructed the jury that the completed Hobbs Act robbery was the predicate crime of violence in this case, we need not address whether a Hobbs Act conspiracy constitutes a crime of violence.[7]

Accordingly, we will affirm.

All Citations

Not Reported in Fed. Rptr., 2022 WL 216975

Footnotes

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

1 The District Court exercised jurisdiction under 18 U.S.C. § 3231 and 48 U.S.C. § 1612(a). Appellate jurisdiction exists under 28 U.S.C. § 1291.

2 The Clerk's Office initially consolidated Wilson's appeal with those filed by Kuntz, No. 18-2695, and McIntosh, No. 18-2696. The appendix in McIntosh's appeal contains the trial record upon which we rely. For that reason, we make reference here to appendices filed by both Wilson and McIntosh. The latter citation will reference Appeal No. 18-2696, followed by the relevant page(s) in that appendix.

3 Because this presents a legal question, it is reviewed de novo. *United States v. Tyson*, 947 F.3d 139, 142 (3d Cir. 2020).

4 We have heeded the Supreme Court's instruction, focusing our consideration of whether a challenge to the jury's composition merits relief on the requirement of impartiality. *See United States v. Hodge*, 870 F.3d 184, 202–03 (3d Cir. 2017) (affirming because use of peremptory challenges to remove three prospective jurors, who were not excused for cause, did not result in a partial jury panel); *United States v. Claxton*, 766 F.3d 280, 290, 301 (3d Cir. 2014) (rejecting defendant's assertion that attempted witness tampering and another juror's failure to disclose a previous work relationship with both a government and a defense witness warranted relief where record failed to show any prejudice or bias of the jurors); *United States v. Shiomos*, 864 F.2d 16, 18–19 (3d Cir. 1988) (concluding that the *sua sponte* decision to sequester the jury in light of publicity concerns, which affected the jury composition, did not warrant relief in the absence of some showing of partiality). *See also United States v. Mitchell*, 690 F.3d 137, 150 (3d Cir. 2012) ("The law, we hold, does not categorically impute bias to coworkers of key Government witnesses.").

5 Wilson also argues that what transpired constitutes a structural error. We disagree. Because errors that affect the jury composition do not "always result[ ] in fundamental unfairness" and the effect of the error can be ascertained by determining if there was an impartial jury, there is no basis for categorizing this as a structural error. *See Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908 (2017).

6 We review a sufficiency challenge de novo. *United States v. Pavulak*, 700 F.3d 651, 668 (3d Cir. 2012).

7 Citing Federal Rule of Criminal Procedure 28, Wilson adopts the opening and reply briefs of Kuntz and McIntosh and the issues raised therein "as his own—to the extent they apply to him." Wilson Br. 3. The expectation that we will "identify the issues to be adopted simply results in the abandonment and waiver of the unspecified issues." *United States v. Fattah*, 914 F.3d 112, 146 n.9 (3d Cir. 2019).

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