**[Cite as *State v. Draughon*, 2003-Ohio-2727.]**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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| State of Ohio, | : | |
| Plaintiff-Appellee, | : | No. 02AP-895<br>(C.P.C. No. 00CR-03-1543) |
| v. | : | (REGULAR CALENDAR) |
| Reginald Draughon, | : | |
| Defendant-Appellant. | : | |

O P I N I O N

Rendered on May 29, 2003

*Ron O'Brien*, Prosecuting Attorney, and *Heather R. Saling*, for appellee.

*Samuel H. Shamansky Co., L.P.A.*, *Samuel H. Sahamansky* and *Lisa M. Tome*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

PETREE, P.J.

**{¶1}** This matter is before this court upon the appeal of Reginald Draughon, appellant, from the judgment of the Franklin County Court of Common Pleas, which found him guilty of one count of gross sexual imposition, in violation of R.C. 2907.05, one count of felonious sexual penetration, in violation of R.C. 2907.02, and three counts of rape, in violation of R.C. 2907.05. Appellant had been found not guilty of five counts, and the trial court had previously dismissed three counts. Following a pre-sentence investigation and

a finding that appellant was not a sexual predator, the trial court sentenced appellant accordingly.

**{¶2}** Appellant asserts one assignment of error on appeal:

**{¶3}** "The trial court erred in polling the jury on incorrect verdicts, thereby depriving Appellant of his right to a fair trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and comparable provisions of the Ohio Constitution."

**{¶4}** Appellant does not challenge the sufficiency of the evidence, nor does he challenge the manifest weight of the evidence. Instead, appellant's only allegation of error concerns the events surrounding the polling of the jury. For reasons that follow, appellant's sole assignment of error is overruled.

**{¶5}** Following the presentation of all of the evidence and the closing arguments, the trial court instructed the jury properly. Specifically, with regard to the instructions for the charges of rape in counts two, seven and eight, the court instructed the jury as follows:

**{¶6}** "Count 2 alleges rape, vaginal intercourse, that happened between October 1, 1993 to November 30, 1993.

**{¶7}** "* * *

**{¶8}** "Count 7 alleges rape, cunnilingus, that happened between December 31, 1993 to January 31, 1994.

**{¶9}** "Count 8 alleges rape, vaginal intercourse, that happened between December 31, 1993 to January 31, 1994.

**{¶10}** "* * *

**{¶11}** "If you find the defendant guilty of any count of rape, you must go on to consider an additional factual question. You must determine whether the defendant purposely compelled Kieauna Fuqua to submit by force or threat of force.

**{¶12}** " 'Force' means any violence, compulsion or constraint physically exerted by any means upon or against a person or thing." (May 13-17 Tr. 261-262.)

**{¶13}** Next, the trial court explained the verdict forms to the jury, in relevant part, as follows:

**{¶14}** "Now, the form is pretty much the same on all of the verdict forms. Some of them have questions that have to be answered, and they will be a little bit different. But basically there will be a statement, and below that a signature line for 12 signatures.

**{¶15}** "* * *

**{¶16}** "* * * We, the jury, in this case find the defendant, Reginald Draughon, not guilty of rape as he stands charged in Count 2 of the indictment.

**{¶17}** "Or we, the jury, in this case find the defendant, Reginald Draughon, guilty of rape as he stands charged in Count 2 of the indictment.

**{¶18}** "Then it goes on. We, the jury, further find the defendant did/did not, purposely compel Kieauna Fuqua to submit by force or threat of force. And we, the jury, further find that Kieauna Fuqua was or was not less than 13 years of age.

**{¶19}** "* * *

**{¶20}** "Next: We, the jury, in this case find the defendant, Reginald Draughon, not guilty of rape as he stands charged in Count 7 of the indictment.

**{¶21}** "Or we, the jury, in this case find the defendant, Reginald Draughon, guilty of rape as he stands charged in Count 7 of the indictment.

**{¶22}** "We, the jury, further find the defendant did/did not purposely compel Kieauna Fuqua to submit by force or threat of force.

**{¶23}** "We, the jury, further find that Kieauna Fuqua was/was not less than 13 years of age.

**{¶24}** "Next: We, the jury in this case find the defendant, Reginald Draughon, not guilty of rape as he stands charged in Count 8 of the indictment.

**{¶25}** "Or we, the jury, in this case find the defendant, Reginald Draughon, guilty of rape as he stands charged in Count 8 of the indictment.

**{¶26}** "We, the jury, further find that the defendant did/did not purposely compel Kieauna Fuqua to submit by force or threat of force.

**{¶27}** "We the jury, further find that Kieauna Fuqua was/was not less than 13 years of age." (Id. at 265-268.)

**{¶28}** Upon actual review of the verdict forms, this court finds that the trial court's description and explanation of the verdict forms is an accurate description and

explanation of those forms. Furthermore, the trial court correctly instructed the jury as to the law and explained how to complete the verdict forms. Thereafter, the jury began its deliberations.

**{¶29}** On May 17, 2002, the same day the trial concluded, the jury asked the court two questions. The jury requested a copy of the victim's testimony and the prosecution's chart of listed events. The trial court instructed the jury that it would have to rely upon its collective memories and that the chart itself was not evidence.

**{¶30}** On Monday, May 20, 2002, the jury informed the trial court that it was unable to reach a unanimous decision based upon the evidence presented. Apparently, the jurors had agreed on three counts, but three of the jurors did not agree with the majority of the other jurors on the remaining seven counts. The trial court reminded the jurors that it was desirable for the case to be decided, that there was no reason to believe that the case would be submitted to a jury that was more capable, impartial or intelligent, that the jurors should not hesitate to re-examine their views, and that they should continue to deliberate. Later that same day, the jury reached a verdict and returned to the courtroom. At that time, the trial court asked the foreperson whether the jury had been able to arrive at a verdict, and the response was, "Yes." (May 20, 2002 Tr. 6.)

**{¶31}** The verdict forms were handed to the bailiff, who handed them to the judge. Thereafter, the trial court read the verdict forms, and the following exchange took place:

**{¶32}** "[THE COURT]: Count One. The verdict is guilty, 'We, the jury, further determine that Kieauna Fuqua was less than 13 years of age.[']

**{¶33}** "On Count Two, the verdict is guilty. 'We, the jury, further find that the defendant did purposely compel Kieauna Fuqua to submit by force or threat of force, and that the victim was less than 13 years of age.'

**{¶34}** "THE DEFENDANT: Why?

**{¶35}** "THE COURT: Count Three, the verdict is not guilty.

**{¶36}** "On Count Five, the verdict is not guilty.

**{¶37}** "On Count Six, the verdict is guilty, and that Kieauna Fuqua was less than 13 years of age.

**{¶38}** "THE DEFENDANT: God, why?

**{¶39}** "THE COURT: Count Seven, the verdict is guilty, with the purpose to compel, and the age of less than 13.

**{¶40}** "THE DEFENDANT: Good Lord.

**{¶41}** "THE COURT: On Count Eight, the verdict is guilty, and again, purpose to compel and under 13.

**{¶42}** "And Count Eleven, the verdict is not guilty.

**{¶43}** "THE DEFENDANT: I did not do it. I didn't do it, Lord.

**{¶44}** "THE COURT: It is not guilty on Count Twelve, and not guilty on Count Thirteen.

**{¶45}** "Ladies and Gentlemen of the jury, is this your – are these your verdicts?

**{¶46}** "JURY PANEL: Yes.

**{¶47}** "THE COURT: Thank you." (Id. at 7-8.)

**{¶48}** Thereafter, defense counsel requested that the trial court poll the jury. In relevant part, the trial court made the following comments before polling the jury, and each juror answered responsively in the affirmative:

**{¶49}** "THE COURT: Okay. Just a moment. And I assume that you want them polled only on the findings of guilty; is that right?

**{¶50}** "[DEFENSE COUNSEL]: Yes, your Honor.

**{¶51}** "THE COURT: Okay.

**{¶52}** "Regarding Count One, finding of guilty, a determination that the victim was less than 13 years of age, ladies and gentlemen of the jury, this is your verdict; is that correct?

**{¶53}** "JURY PANEL: Yes.

**{¶54}** "* * *

**{¶55}** "THE COURT: Referring to Count Two, again, Ms. Sayler, is this your verdict?

**{¶56}** "* * *

**{¶57}** "THE COURT: On Count Seven ladies and gentlemen, is this your verdict?

**{¶58}** "* * *

**{¶59}** "THE COURT: And finally, on Count Eight, Ms. Sayler, is this your verdict?" (Id. at 9-13.)

**{¶60}** Thereafter, on May 23, 2002, the trial court ordered the parties, including all attorneys, appellant, and the jury, back to the courtroom. Prior to the time that the jury returned, the trial judge explained to counsel and the appellant that he believed he may have read one or more of the rape verdict forms incorrectly and that it was the court's position that the jury should be returned so that the trial court could again read the three verdict forms that are at issue and ask if each juror affirmed that particular verdict. Defense counsel moved for a mistrial, which was denied.

**{¶61}** Thereafter, the jury returned, and the trial court informed them, as follows:

**{¶62}** "I became aware of the concerns that the jury had when I went back to talk to them after the case was over which I typically do, not for the purpose of talking about the specific case, but really to ask if they had any suggestions about how we can make the jury life better.

**{¶63}** "It was at that time that it was brought to my attention that they were concerned because they thought I had misread, at least, one of those three verdict forms.

**{¶64}** "I immediately went back and determined that, in fact, I had done that.

**{¶65}** "Now, I did not bring the jury back at that time, but after having given some additional thought and realizing that all or finding all of the jurors were still here, decided it would be better to put it on the record, re-poll the jury as to those three verdicts since I had not done it correctly in the first place.

**{¶66}** "So specifically, I'm referring to Count Two, to Count Seven and to Count Eight. All of the forms for those, all the verdict forms in these three counts are identical except for the fact that each form refers to a different count. Other than that, the wording is exactly the same.

**{¶67}** "So what I intend to do now is to simply read that portion of the verdict form that I may have announced incorrectly which is, reading the first, we, the jury in this case, find the defendant, Reginald Draughon, guilty of rape as he stands charged in Count Two or – and/or Count Seven and/or Count Eight and we further find that the defendant did not purposely compel Kieauna Fuqua to submit by force or threat of force.

**{¶68}** "This is the portion that I may have misread and this is the portion that I will now poll the jury on. *I'm simply going to ask the single question. Is this your signature or did you sign this, these particular jury verdict forms.*" (Emphasis added; May 23, 2002 Tr. at 7-9.)

**{¶69}** Each of the jurors answered in the affirmative.

**{¶70}** Crim.R. 31(D), which deals with the polling of a jury after the receipt of the verdict, provides, as follows:

**{¶71}** "When a verdict is returned and before it is accepted the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberation or may be discharged."

**{¶72}** Additionally, R.C. 2945.77 provides as follows:

**{¶73}** "When the jurors agree upon their verdict, they must be conducted into court by the officer having them in charge.

**{¶74}** "Before the verdict is accepted, the jury may be polled at the request of either the prosecuting attorney or the defendant. If one of the jurors upon being polled declares that said verdict is not his verdict, the jury must further deliberate upon the case."

**{¶75}** Several cases dealing with Crim.R. 31(D) and/or R.C. 2945.77 indicate that the reasons for polling a jury include: to determine whether each of the jurors agree with the verdict; to determine whether further interrogation of the jury is necessary when the jury had initially expressed that it was a stalemate; to give a juror the opportunity to change his or her mind regarding his or her initial vote; and to confirm the written verdict in open court. *State v. Williams* (1995), 73 Ohio St.3d 153; *Cleveland v. Walters* (1994), 98 Ohio App.3d 165; *State v. Green* (1990), 67 Ohio App.3d 72; *Dayton v. Allen* (1959), 27 O.O.2d 179, 200 N.E.2d 356; and *State v. Brown* (1953), 110 Ohio App. 57.

**{¶76}** Appellant contends that he was denied his fundamental right to poll the jury when the trial court polled the jury on verdicts different from those that had been submitted in writing, and appellant cites *Allen*, supra, for the assertion that the written verdict of the jury does not become the true verdict until it is actually affirmed in open

court. In *Allen*, the trial court had refused defense counsel's request that the jury be polled. The court held that a trial court does not have the discretion to grant or refuse the request to poll the jury once the request is made. As such, the court held that the defendant was denied his constitutional rights when the trial court refused his request to have the jury polled. From a historical standpoint, after discussing the 1869 Code of Criminal Procedure and the fact that verdicts of juries in criminal cases were often delivered orally by the foreman, the court noted that the "verdict consists of that expression of the will of the jury announced in open court at the time the oral or written verdict is delivered to the court by the jury" and that "today it is still true that the written verdict executed by the jury only becomes the verdict of the jury if and when it is affirmed or confirmed in open court by the jury as a group upon general inquiry by the Clerk, or by the individual members thereof, if polled, in the presence of the parties to the proceeding, and particularly in the presence of the defendant in a criminal case." Id. at 364.

**{¶77}** Appellant uses the above-cited language to argue that because the jury answered affirmatively to an incorrect statement of their verdict, he has absolutely been denied his constitutional rights and that the verdict forms, as executed by the jurors, and as later attested to by the jurors, do not actually constitute the verdict. Appellant cites *Sargent v. State* (1842), 11 Ohio 472, in support and notes the following language:

**{¶78}** "* * * [I]n no case can the jury after they have retired to consider of their verdict, be permitted to separate and disperse until they have agreed. In criminal cases, although the court direct [sic] the jury to bring in a sealed verdict, the whole jury must be present at the time of its delivery, in the presence of the prisoner, that they may be polled, if the prisoner desires it. * * * After the verdict has been received and the jury discharged, whether it may have been received by a single judge or in open court, the control of the jury and of the court over such verdict is at an end. The court can not alter it, nor can the jury be recalled to alter or amend it. * * *" Id. at 473.

**{¶79}** The present case differs from *Sargent* in a very material way. In *Sargent*, the defendant had been charged in the first count of the indictment with the criminal offense of uttering and publishing a counterfeit bank bill, and in the second count with an attempt to utter and publish said bill. The jury returned the verdict of guilty on the first

count only, and a sealed verdict was opened the morning after the jury was discharged. There was no reference made in the verdict to the second count. The trial court recalled the jury to ascertain whether the jury considered defendant guilty also on the second count and then ordered a general verdict of guilty to be entered on that indictment.

**{¶80}** The Supreme Court of Ohio, in error proceedings, held that, once the jury had been discharged, the court and the jury lost control over the verdict and that thereafter it could not be altered or amended.

**{¶81}** In the present case, the jury fulfilled its duty. After the trial court had correctly instructed the jury, the jury deliberated. Although the jury had some difficulty reaching a unanimous decision as to some of the counts, ultimately the jurors did agree. The jurors completed the verdict forms, and each juror signed his or her name to those forms, attesting that that was their individual and collective verdict. Yet, when the trial judge polled the jury, the trial judge initially read from the verdict forms an incorrect statement, even though the jurors had clearly marked the forms. Unlike the *Sargent* case, where the jurors had not considered or completed any forms, the jurors in this case did complete the forms. As soon as the trial court became aware that it might have made a mistake, all of the jurors were recalled, and the parties and counsel were also recalled. The trial judge did not ask the jurors to reconsider their verdict. Instead, the trial judge only asked one question, and that question was whether or not each of the jurors had, in fact, signed the verdict form that the trial judge then, at that time, correctly read in open court. This is not a situation of a jury being asked to do something which it had not formerly done. In that regard, it differs significantly from the above-cited case law and is readily distinguishable.

**{¶82}** In the present case, appellant was not denied his right to poll the jury. Furthermore, the trial court did not err in refusing to grant a mistrial because the trial court was able to provide a suitable way of addressing what at that time was considered a possible mistake. Again, the jurors were not asked to consider something which they had not previously considered and addressed. Instead, the jurors were only asked individually whether or not they had indeed signed the verdict form, which they clearly had, and whether or not that had been their verdict. Each juror answered in the affirmative in open

court in the presence of the appellant, and any error in the trial court's original reading of the verdict forms constitutes harmless error. As such, appellant's sole assignment of error is not well-taken.

**{¶83}** Based on the foregoing, this court overrules appellant's assignment of error and affirms the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed.*

BROWN and KLATT, JJ., concur.

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