[Cite as *State v. Parnell*, 2011-Ohio-6564.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 11AP-257
v.	:	(C.P.C. No. 10CR-03-1306)
David Parnell,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 20, 2011

Ron O'Brien, Prosecuting Attorney, and *Susan M. Suriano*, for appellee.

Yeura R. Venters, Public Defender, and *John W. Keeling*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Defendant-appellant, David Parnell, appeals from the judgment of the Franklin County Court of Common Pleas convicting him of one count of felonious assault with a repeat violent offender specification. For the following reasons, we affirm the judgment of the trial court.

{¶2} Appellant's conviction arises out of the stabbing of Randy Sealy that occurred on February 19, 2010. On this date, appellant was living with Prince Ann Parker and her daughters at 1500 Miller Avenue in Columbus, Ohio. On the evening of February 19, 2010, Sealy and his nephew, Bernard Bias, went to Parker's residence to play cards. In addition to appellant and Parker, Kathy Brown, Carol Bondurant, and her son were also at the house. Everyone was consuming alcohol, and during the evening, Sealy, Bias, and appellant left to get more alcohol. After the three returned, an argument ensued between appellant and Parker about the volume of the radio. Eventually, Bias got involved, and Sealy testified that appellant "got pissed off and kept on cussing and stuff." (Tr. 164.) According to Sealy, he got tired of appellant and Bias "going at it back and forth" and decided to leave. (Tr. 185.)

{¶3} Sealy testified that he told Bias, "Let's go," and then proceeded out the back door. (Tr. 186.) According to Sealy, he was on the sidewalk headed to his truck when he turned to see if Bias was also walking out. Instead of seeing Bias, Sealy testified that he saw appellant coming at him with a knife. Sealy testified that appellant stabbed him in the stomach twice and that the knife blade "broke off" during the second stabbing. (Tr. 170.) Sealy also testified that he eventually sat down in the snow and waited for medics to arrive. Sealy was transferred to the hospital for medical attention where he underwent surgery and remained hospitalized for four to five days.

{¶4} Bias also testified during the state's case-in-chief. Bias appeared in jail attire and explained to the jury that he was incarcerated on a "drunk driving" charge. (Tr. 253.) Bias gave a similar account of events that occurred on February 19, 2010, except that Bias testified he walked out of the house in front of Sealy. According to Bias, he

turned around and saw appellant with his hands up against Sealy's stomach, and then appellant went into the house. Bias testified appellant came back out of the house and ran down the alley while Sealy was still walking around. Bias explained to the jury that Sealy walked around towards the front of the house where he eventually sat down in the snow and waited for medics.

{¶5} Police and medics were dispatched to Parker's residence just after 11:00 p.m. on February 19, 2010. After medics and police arrived, Bias gave a statement to police. Appellant was apprehended about three-fourths of a mile from the scene, and Bias was taken to that location to identify appellant. According to Bias, though appellant was wearing a different shirt, he was still wearing the same stocking cap. Police found a kitchen knife blade in the snow, and a black kitchen knife handle on the counter in Parker's kitchen.

{¶6} After the state rested, the defense called Parker's sister, Kathy Brown, as a witness. Brown testified that she has known appellant for 30 years and that on February 19, 2010, appellant was living with Parker. Brown testified in a manner similar to that of Sealy and Bias in that she also testified that during the evening of February 19, people were socializing and playing cards. However, Brown's testimony differs in how the events occurred once people started to leave. According to Brown, after Parker put the alcohol away and told everyone the party was over, Sealy got "agitated." (Tr. 337.) Brown testified that Bias kept turning the radio's volume up while Parker and appellant wanted it turned down, which prompted Parker to ask Bias to leave. According to Brown, Sealy walked out the door and appellant "went upstairs for approximately 15 minutes, came back downstairs, grabbed a knife," and went outside. (Tr. 347.) Once appellant

went outside, Brown testified that she looked out a window and saw Bias grab appellant from behind and Sealy run towards appellant and try to hit him. Brown went on to describe that at this time Sealy grabbed his stomach and then she ran outside and called 9-1-1. Brown stated that the 9-1-1 dispatcher advised her to have Sealy lay in the snow. When he refused, Brown testified she threw Sealy in the snow and waited for medics to arrive. Brown also testified that out of fear of Sealy, she did not tell any of this to the police, but, instead, first relayed this information to appellant's counsel in the fall of 2010.

{¶7} On March 1, 2010, appellant was indicted by a Franklin County Grand Jury for one count of felonious assault, in violation of R.C. 2903.11. The charge included a repeat violent offender ("RVO") specification. A jury trial commenced on March 7, 2011, and, two days later, the jury returned a verdict of guilty on the felonious assault charge. The trial court found appellant guilty of the RVO specification based on the parties' stipulation that appellant had a previous first-degree felony conviction for involuntary manslaughter arising out of the stabbing death of his wife. Appellant was subsequently sentenced to an eight-year term of incarceration and awarded 383 days of jail-time credit.

{¶8} This appeal followed and appellant brings the following three assignments of error for our review:

> [1.] THE TRIAL COURT COMMITTED PLAIN ERROR BY FAILING TO INSTRUCT THE JURY ON THE LAW OF SELF-DEFENSE AND COMMITTED FURTHER ERROR WHEN IT REFUSED THE DEFENDANT'S REQUEST TO INSTRUCT THE JURY ON AGGRAVATED ASSAULT, WHICH SHOULD ALMOST ALWAYS BE GIVEN IN CASES OF IMPERFECT SELF-DEFENSE.
>
> [2.] THE TRIAL COURT ERRED WHEN IT ALLOWED THE STATE, OVER THE DEFENDANT'S OBJECTION, TO INTRODUCE OTHER BAD ACT EVIDENCE IN AN

> ATTEMPT TO PORTRAY THE DEFENDANT AS A BAD PERSON, PARTICULARLY WHEN THE EVIDENCE WAS INHERENTLY UNTRUSTWORTHY.
>
> [3.] THE TRIAL COURT ERRED WHEN IT OVERRULED THE DEFENDANT'S BATSON CHALLENGES TO THE STATE'S REMOVAL OF AFRICAN-AMERICAN FROM THE JURY IN THIS CASE.

{¶9} Appellant's first contention under his first assignment of error is that the trial court erred in failing to give the jury an instruction on self-defense. It is undisputed that appellant did not request a self-defense instruction, and, therefore, he has waived all but plain error. *State v. Johnson*, 10th Dist. No. 08AP-652, 2009-Ohio-3383, ¶37, citing *State v. Hartman*, 93 Ohio St.3d 274, 289, 2001-Ohio-1580 (as a general rule, the failure to request a specific jury instruction waives all but plain error).

{¶10} Under Crim.R. 52(B), plain errors affecting substantial rights may be noticed by an appellate court even though they were not brought to the attention of the trial court. To constitute plain error, there must be: (1) an error, i.e., a deviation from a legal rule, (2) that is plain or obvious, and (3) that affected substantial rights. *Johnson* at ¶19, citing *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68. Even if an error satisfies these prongs, appellate courts are not required to correct the error. Appellate courts retain discretion to correct plain errors. Id.; *State v. Litreal*, 170 Ohio App.3d 670, 2006-Ohio-5416, ¶12. Courts are to notice plain error under Crim.R. 52(B) "with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Barnes*, quoting *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of the syllabus.

{¶11} In Ohio, self-defense is an affirmative defense that must be proven by the accused by a preponderance of the evidence. See R.C. 2901.05(A). See also *State v.*

Darby, 10th Dist. No. 10AP-416, 2011-Ohio-3816; *State v. Smith*, 10th Dist. No. 04AP-189, 2004-Ohio-6608, ¶16. To establish self-defense through the use of deadly force, " 'a defendant must prove the following elements: (1) that the defendant was not at fault in creating the situation giving rise to the affray; (2) that the defendant had a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of such force; and (3) that the defendant did not violate any duty to retreat or avoid the danger.' " *Darby* at ¶32, quoting *Barnes* at 24, citing *State v. Robbins* (1979), 58 Ohio St.2d 74. "[T]he elements of self-defense are cumulative. * * * If the defendant fails to prove any one of these elements by a preponderance of the evidence he has failed to demonstrate that he acted in self-defense." (Emphasis omitted.) *Darby* at ¶32, quoting *State v. Jackson* (1986), 22 Ohio St.3d 281, 284.

{¶12} To be entitled to a jury instruction on an affirmative defense such as self-defense, a defendant must introduce sufficient evidence that, if believed, would raise a question in the minds of reasonable jurors as to the existence of such an issue. *State v. DiFrancesca*, 10th Dist. No. 10AP-340, 2011-Ohio-3087, ¶34, citing *State v. Melchior* (1978), 56 Ohio St.2d 15, paragraph one of the syllabus. A trial court does not err in refusing to instruct on an affirmative defense where the evidence is insufficient to support the instruction. *State v. Daniels*, 10th Dist. No. 09AP-976, 2010-Ohio-3745, ¶22.

{¶13} After review of the evidence, we conclude that a jury instruction on self-defense was not warranted because the evidence was not sufficient to satisfy the elements of self-defense. The testimony provided by Sealy and Bias provides that they both had exited Parker's house and were proceeding to their truck when appellant came

out of the house with a knife. Both Sealy and Bias denied touching appellant in any manner that evening and further denied addressing him verbally once he exited the house. Accordingly, this evidence is insufficient to warrant a jury instruction on self-defense.

{¶14} Appellant did not testify and, therefore, gave no testimony regarding his account of the situation, his belief that he was in imminent danger or his belief that the use of force was his only means to escape that danger. Instead, appellant relies on Brown's testimony to support his assertion that the trial court committed plain error in not giving the jury an instruction on self-defense. Brown testified that while inside the house, Bias and appellant were engaged in a verbal argument primarily concerning the volume of the radio and she heard Bias verbally threaten appellant. Brown also testified that appellant went upstairs for approximately 15 minutes and that Sealy and Bias exited the house. According to Brown, appellant came back downstairs, grabbed a knife, and went outside after Sealy and Bias. Brown testified she was looking out the window and just before Sealy was stabbed, she saw Bias grab appellant around the neck from behind and Sealy run towards appellant as if to try to hit him.

{¶15} This evidence, however, fails to establish that appellant was not at fault in creating the situation giving rise to the affray or that he had a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from that danger was the use of force. Instead, Brown's testimony generates mere speculation about what occurred outside of the house that night. In other words, while appellant could have exited the house and been attacked by Bias and Sealy completely unprovoked, it is equally plausible that appellant exited the house and threatened Bias and Sealy with the

knife as he did so thereby causing the affray. " 'If the evidence generates only a mere speculation or possible doubt, such evidence is insufficient to raise the affirmative defense, and submission of the issue to the jury will be unwarranted.' " *State v. Brooks*, 2d Dist. No. 23784, 2010-Ohio-5886, ¶30, quoting *State v. McGhee*, 2d Dist. No. 23226, 2010-Ohio-977, ¶42. Moreover, the record is devoid of any evidence that appellant held a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from that danger was the use of deadly force. See also *State v. Puckett*, 10th Dist. No. 06AP-330, 2006-Ohio-5696, ¶23-25; *State v. Koss* (1990), 49 Ohio St.3d 213, 215 ("Self-defense incorporates a 'subjective test in determining whether a particular defendant properly acted in self-defense. The defendant's state of mind is crucial to this defense.' ").

{¶16} Upon review of the record, we conclude the trial court did not commit plain error by not providing the jury with an instruction on self-defense.

{¶17} Appellant also contends under his first assignment of error that the trial court erred in refusing to give the jury instruction he requested on aggravated assault.

{¶18} At the time relevant to this appeal, R.C. 2903.11 defined felonious assault and provided in pertinent part:

> (A) No person shall knowingly do either of the following:
>
> (1) Cause serious physical harm to another or to another's unborn;
>
> (2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance.

{¶19} As effective at the time, R.C. 2903.12 defined aggravated assault and provided:

> (A) No person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, shall knowingly:
>
> (1) Cause serious physical harm to another or to another's unborn;
>
> (2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance, as defined in section 2923.11 of the Revised Code.

{¶20} The offense of aggravated assault is an inferior degree of felonious assault because its elements are identical to or contained within the offense of felonious assault, coupled with the additional presence of one or both mitigating circumstances of sudden passion or a sudden fit of rage brought on by serious provocation occasioned by the victim. See *State v. Stewart,* 10th Dist. No. 10AP-526, 2011-Ohio-466, ¶7, citing *State v. Logan*, 10th Dist. No. 08AP-881, 2009-Ohio-2899, fn.1, citing *State v. Deem* (1988), 40 Ohio St.3d 205. In other words, aggravated assault is the same conduct as felonious assault but its nature and penalty are mitigated by provocation. *Stewart* at ¶7, citing *State v. Scott* (Mar. 27, 2001), 10th Dist. No. 00AP-868.

{¶21} Although aggravated assault is an inferior offense of felonious assault, rather than a lesser-included offense, the Supreme Court of Ohio held in *Deem* that, in a trial for felonious assault, where the defendant presents sufficient evidence of serious provocation, an instruction on aggravated assault must be given. Id. at 211. The test for whether the trial court should instruct the jury on aggravated assault when the defendant

is charged with felonious assault is the same test applied when an instruction on a lesser-included offense is sought. *Stewart* at ¶8, citing *State v. McClendon*, 2d Dist. No. 23558, 2010-Ohio-4757, ¶18, citing *State v. Shane* (1992), 63 Ohio St.3d 630. The instruction must be given when the evidence presented at trial would reasonably support both an acquittal on the charged crime of felonious assault and a conviction for aggravated assault. *Stewart* at ¶8. Thus, a jury instruction should be given for an inferior offense, if under any reasonable view of the evidence, and when all of the evidence is construed in a light most favorable to the defendant, a reasonable jury could find that the defendant had established by a preponderance of the evidence the existence of one or both of the mitigating circumstances. Id., citing *State v. Rhodes* (1992), 63 Ohio St.3d 613, 617-18.

{¶22} When reviewing a trial court's jury instructions, the proper standard of review for an appellate court is whether the trial court's refusal to give a requested jury instruction constituted an abuse of discretion under the facts and circumstances of the case. *Stewart* at ¶9, citing *State v. Wolons* (1989), 44 Ohio St.3d 64, 68. The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *State v. Clark*, 71 Ohio St.3d 466, 470, 1994-Ohio-43. When a defendant requests an instruction on an inferior degree offense, the burden is on the defendant to persuade the fact finder of the mitigating elements of the offense. *Stewart* at ¶9, citing *State v. Hill* (1996), 108 Ohio App.3d 279, 284; *Rhodes* at syllabus.

{¶23} There are two prongs to an analysis of whether the provocation was reasonably sufficient to prompt sudden passion or a sudden fit of rage: an objective prong and a subjective prong. *Stewart* at ¶10, citing *Shane* at 634. For the objective standard,

the alleged provocation must be reasonably sufficient to bring on a sudden fit of rage. Id. at 634. The subjective standard concerns whether the defendant in the particular case actually was under the influence of sudden passion or in a sudden fit of rage. *Stewart* at ¶10, citing *State v. Mack* (1998), 82 Ohio St.3d 198, 201, citing *Shane* at 634-35. The emotional and mental state of the defendant and the conditions and circumstances that surrounded him at the time are only considered during this subjective stage of the analysis. *Shane* citing *Deem*.

{¶24} In examining whether provocation is reasonably sufficient to bring on a sudden fit of passion or fit of rage, it must be sufficient to arouse the passions of an ordinary person beyond the power of his or her control. *Shane* at 635. While the record contains some evidence that Bias may have made a verbal threat to appellant at some point earlier in the evening, it was Sealy that received the stabbing in this case, and "words alone will not constitute reasonably sufficient provocation to incite the use of deadly force in most situations." *State v. Collier*, 10th Dist. No. 09AP-182, 2010-Ohio-1819, ¶15, citing *Shane* at paragraph two of the syllabus (words and fear alone are insufficient to demonstrate the kind of emotional state necessary to constitute sudden passion or fit of rage).

{¶25} Also, " 'past incidents or verbal threats do not satisfy the test for reasonably sufficient provocation when there is sufficient time for cooling off.' " *Collier* at ¶15, quoting *Mack* at 201. Brown, the only witness called by the defense, testified that appellant went upstairs for approximately 15 minutes while Bias and Sealy went outside. Thus, even assuming Sealy and appellant had engaged in a verbal argument, there was a sufficient

cooling off period from any verbal argument that may have occurred inside the house such that an aggravated assault instruction would not be warranted. *Collier* at ¶15.

{¶26} Further, as discussed during our disposition of appellant's arguments pertaining to self-defense, Brown testified that she looked out of a window and saw Bias grab appellant from behind and Sealy run in appellant's direction and try to hit him. Even assuming arguendo that this could satisfy the objective prong of whether the provocation was reasonably sufficient to prompt sudden passion or fit of rage, the record is still devoid of any evidence regarding appellant's emotional and mental state. Appellant's actions may have resulted from fear of Sealy attempting to hit him; however, as this court has said, "fear is different than passion and rage," and evidence that may support the application of self-defense, i.e., that a defendant feared for his own personal safety, does not constitute sudden passion or fit of rage. *Stewart* at ¶13, citing *State v. Tantarelli* (May 23, 1995), 10th Dist. No. 94APA11-1618 (testimony that defendant was dazed, confused, and scared was insufficient to show sudden passion or fit of rage). See also *State v. Adcox* (Apr. 19, 2000), 9th Dist. No. 98CA007049 (trial court did not err in refusing to give instruction on aggravated assault where the defendant contended that he acted in self-defense based on his assertion that he was afraid because the victim was wielding a knife); *State v. Maggard* (June 4, 1999), 2d Dist. No. 17198 (aggravated assault instruction not warranted because subjective component not present where defendant's testimony was simply that he was afraid and therefore he shot in self-defense).

{¶27} Upon review, we find no evidence showing provocation that was reasonably sufficient to bring on a sudden fit of rage or that appellant actually acted with passion or

rage. Therefore, we find the trial court did not abuse its discretion when it refused to instruct the jury on aggravated assault as an inferior offense of felonious assault.

{¶28} Because we find the record contains insufficient evidence to warrant a jury instruction on either self-defense or aggravated assault, we overrule appellant's first assignment of error.

{¶29} In his second assignment of error, appellant contends the trial court erred by admitting evidence that he called Bias a "snitch" while both men were in the inmate holding cells at the courthouse. According to appellant, it was error to allow the introduction of such "bad acts evidence" over his objection because not only was such evidence irrelevant, but, also, its probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury. The testimony with which appellant takes issue occurred during Bias's direct examination when Bias was asked if appellant said anything to him on the day of trial. Over objection, the following exchange occurred:

> [Witness]: He talked in the holding tank –
>
> [The State]: We can't get into where it happened.
>
> [Witness]: -- that, "That's the guy that's about to snitch on me."
>
> * * *
>
> [The State]: And who did he say it to?
>
> [Witness]: His friends, I guess.
>
> * * *

> [The State]: We can't get into what his friend said. I know it seems out of context, but just tell me what the Defendant said.
>
> [Witness]: The Defendant, he had just – I don't know how to explain it.
>
> The Court: Well, how did it make you feel?
>
> The Witness: It made me feel like he was trying to threaten me.

(Tr. 257-58.)

{¶30} Evid.R. 404(B) governs the admissibility of evidence of other acts and provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

{¶31} "Evidence of other acts is admissible if (1) there is substantial proof the alleged other acts were committed by the defendant, and (2) the evidence tends to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *State v. Lowe* (1994), 69 Ohio St.3d 527, 530, citing *State v. Broom* (1988), 40 Ohio St.3d 277, 282-83. "Evidence of other crimes, wrongs or bad acts independent of, and unrelated to, the offenses for which a defendant is on trial is generally inadmissible to show criminal propensity." *State v. Woodard* (1993), 68 Ohio St.3d 70, 73. As with all evidence, other acts evidence is subject to the relevancy and fairness requirements of Evid.R. 403 and is reviewable by an appellate court for an abuse of discretion. *State v. Soke* (1995), 105 Ohio App.3d 226, 249. An abuse of discretion

connotes more than an error of law or judgment; it implies that the court's attitude was unreasonable, arbitrary or unconscionable. *Clark* at 470.

{¶32} In appellant's view, use of Bias's statements were nothing more than the state's "blatant attempt" to present evidence of another crime or bad act to portray him as a bad person in front of the jury. In response to appellant's challenge to the admission of this evidence, appellee argues that the trial court properly admitted the testimony as consciousness of guilt. We agree with appellee.

{¶33} In *State v. Exum*, 10th Dist. No. 05AP-894, 2007-Ohio-2648, the trial court allowed, over objection, the prosecution to question a witness about an incident in the jail where the defendant yelled to the witness, "You snitching bitch," loud enough for other inmates to hear. Id. at ¶22. In finding no error in the trial court's admission of the evidence, this court stated, "Under Ohio law, 'evidence of threats or intimidation of witnesses reflects a consciousness of guilt and is admissible as admission by conduct.' " Id. at ¶23, quoting *Soke* at 250.

{¶34} Appellant contends, as did the defendant in *Exum*, that such comments, if actually made, were not threats because "[t]o some people snitch and testify are synonyms." (Appellant's brief at 20.) While this may be the view of "some people," the conduct at issue, i.e., "calling a fellow inmate a 'snitch' in front of a number of other inmates, arguably constitutes an attempt to intimidate a witness." Id. at ¶24, citing *United States v. Currie* (C.A.9, 1992), 974 F.2d 1343; *State v. Williams*, 8th Dist. No. 89461, 2008-Ohio-1948, ¶26 (labeling of an individual as a "snitch" is a form of intimidation); *State v. Bonham* (July 21, 1997), 5th Dist. No. 96 CA 121 (testimony by state's witness

that defendant referred to another state's witness as a "snitch" admissible as consciousness of guilt).

{¶35} After review of the challenged testimony, we find such testimony constitutes evidence of a threat or intimidation of a witness that reflects a consciousness of guilt and is admissible by conduct. *Exum* at ¶23. Therefore, we conclude the trial court did not abuse its discretion by admitting such evidence.

{¶36} Accordingly, we overrule appellant's second assignment of error.

{¶37} Appellant's third assignment of error asserts the trial court erred in overruling his objection and allowing the state to exercise a peremptory challenge in violation of *Batson v. Kentucky* (1986), 476 U.S. 79, 106 S.Ct. 1712.

{¶38} Ordinarily, the prosecution may exercise a peremptory challenge "for any reason, or no reason at all." *Hernandez v. New York* (1991), 500 U.S. 352, 374, 111 S.Ct. 1859, 1874 (O'Connor, J., concurring). "Under well-established principles of equal protection jurisprudence, however, a peremptory challenge may not be used purposefully to exclude members of a cognizable racial group from jury service solely on the basis of their race." *State v. Powers* (1993), 92 Ohio App.3d 400, 405, citing *Batson*, 476 U.S. at 84, 106 S.Ct. at 1716.

{¶39} "A court adjudicates a *Batson* claim in three steps." *State v. Murphy*, 91 Ohio St.3d 516, 528, 2001-Ohio-112. "First, the opponent of the peremptory challenge must make a prima facie case of racial discrimination. Second, if the trial court finds this requirement fulfilled, the proponent of the challenge must provide a racially neutral explanation for the challenge." *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, ¶106, citing *Batson*, 476 U.S. at 96-98, 106 S.Ct. at 1723-24. In the third and final step, "the

trial court must decide based on all the circumstances, whether the opponent has proved purposeful racial discrimination." Id. at ¶106, citing *Batson*, 476 U.S. at 98, 106 S.Ct. at 1724.

{¶40} The prosecution's race-neutral explanation need not rise to the level of a challenge for cause. *State v. Cook* (1992), 65 Ohio St.3d 516, 519, citing *Batson*, 476 U.S. at 96-98, 106 S.Ct. at 1723-24. Instead, the issue at the second step is "the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Hernandez v. New York*, 500 U.S. at 360, 111 S.Ct. at 1866 (plurality opinion). An appellate court will not reverse a trial court's ruling that finds no discriminatory intent unless it is clearly erroneous. *Bryan* at ¶106, citing *State v. Hernandez* (1992), 63 Ohio St.3d 577, 583, following *Hernandez v. New York*.

{¶41} On appeal, appellant argues the state's racially motivated use of a peremptory challenge on prospective juror No. 10 violates *Batson*. To meet the first prong of a *Batson* challenge and establish a prima facie case of purposeful discrimination in the prosecution's exercising its peremptory challenges, a defendant must demonstrate: (1) the prosecution peremptorily challenged members of a cognizable racial group; and (2) the facts and any other relevant circumstances raise an inference that the prosecution used the peremptory challenges to exclude jurors on account of their race. *State v. Ford*, 10th Dist. No. 07AP-803, 2008-Ohio-4373, ¶79, citing *State v. Raglin* (1998), 83 Ohio St.3d 253, 265, citing *State v. Hill* (1995), 73 Ohio St.3d 433. When, however, the prosecution offers a race-neutral explanation for the peremptory challenges and the trial court rules on the ultimate question of intentional discrimination, we need not determine

the first question in the three-step *Batson* analysis of whether defendant made a prima facie showing of racial discrimination. In that situation, the threshold issue of whether the defendant has made a prima facie showing becomes moot. *Ford*, citing *Hernandez v. New York*, 500 U.S. at 359, 111 S.Ct. at 1866; *State v. Santiago*, 10th Dist. No. 02AP-1094, 2003-Ohio-2877, ¶8.

{¶42} "[T]he ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." *Purkett v. Elem* (1995), 514 U.S. 765, 768, 115 S.Ct. 1769, 1771. Because the issue of discriminatory intent often turns on the prosecution's credibility, it is "a finding of fact of the sort accorded great deference on appeal." *Hernandez v. New York*, 500 U.S. at 364, 111 S.Ct. at 1868. When a party properly preserves the issue for appeal with a proper objection, an appellate court reviews the trial court's ruling on the issue of discriminatory intent for clear error. Id. Because appellant's counsel objected at trial, appellant's *Batson* claim is subject to clear error review.

{¶43} By way of background, during voir dire, the state questioned the prospective juror about his and his wife's employment. Thereafter, appellant's counsel asked the jurors collectively if they knew who had the burden of proof. The prospective juror volunteered, "[a]t the same time, when you're saying 'burden of proof,' the burden means the weight of the proof, how heavy is that proof, how enforced is that? You can – oh, I can't even any think of a word – and say you did this, but how much does it weigh?" (Tr. 100-01.)

{¶44} When appellant raised a *Batson* objection to the state's peremptory challenge to the prospective juror, the trial court asked the state for an explanation, to

which the state responded, "I didn't think I had a good rapport. Also, the answer to the burden of proof wasn't beneficial to me." (Tr. 133.) In addressing the *Batson* objection, the trial court stated, "[a]nd even the Court thought he was pro-defense." (Tr. 133.) Appellant's counsel noted that *Batson* does not require the existence of a pattern and again noted his objection for the record. The trial court stated, "I think he gave a race-neutral reason" and overruled the *Batson* objection. (Tr. 134.)

{¶45} No inherent discriminatory intent is evidenced in the state's explanation. See *State v. Phelps*, 1st Dist No. C-100096, 2011-Ohio-3144, ¶19, appeal denied, 130 Ohio St.3d 1417, 2011-Ohio-5605 (prosecutor's peremptory challenge because a potential juror's demeanor indicated a lack of rapport with the prosecutor found to be race neutral). The trial court's decision to overrule appellant's *Batson* objection was clearly not erroneous as the stated reasons were "based on something other than the race of the juror," and did not suggest purposeful racial discrimination. *Hernandez v. New York*, 500 U.S. at 360, 111 S.Ct. at 1866.

{¶46} Accordingly, we overrule appellant's third assignment of error.

{¶47} Based on the forgoing, appellant's three assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

KLATT and DORRIAN, JJ., concur.

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