

[Cite as *State v. Hammad*, 2015-Ohio-622.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

STATE OF OHIO

Plaintiff-Appellee

v.

MAJDI HAMMAD

Defendant-Appellant

:
: Appellate Case No. 26110
:
: Trial Court Case No. 13-CR-3338
:
: (Criminal Appeal from
: Common Pleas Court)
:
:
:

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OPINION

Rendered on the 20th day of February, 2015.

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MATHIAS H. HECK, JR., by MICHELE D. PHIPPS, Atty. Reg. No. 0069829, Montgomery County Prosecutor's Office, Appellate Division, Montgomery County Courts Building, P.O. Box 972, 301 West Third Street, Dayton, Ohio 45402
Attorneys for Plaintiff-Appellee

ENRIQUE G. RIVERA-CEREZO, 61 North Dixie Drive, Suite B, Vandalia, Ohio 453477
Attorney for Defendant-Appellant

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FAIN, J.

{¶ 1} Defendant-appellant Majdi Hammad appeals his conviction of harassment by an inmate (bodily substances), a fifth-degree felony, in violation of R.C. 2921.38(A). Hammad was sentenced to serve twelve months in prison, to be served consecutively with a sentence imposed in another criminal case, 13-CR-1625, that was affirmed by this court in *State v. Hammad*, 2d Dist. Montgomery No. 26057, 2014-Ohio-3638.

{¶ 2} Hammad contends that the court erred by allowing the State to exercise peremptory challenges to exclude two African-American jurors from the jury pool. Hammad contends that the State failed to prove the element of mens rea, because intent could not be established without consideration of the defendant's cultural perspective. Hammad contends that the conviction is against the manifest weight of the evidence, and that the court erred by ordering him to serve his sentence consecutively to a sentence imposed in a separate criminal conviction.

{¶ 3} We conclude that the evidence in the record permitted the jury to reasonably find that while incarcerated, Hammad spit on a corrections officer, with the intent to annoy, harass, or insult the officer. This finding is not against the manifest weight of the evidence. We conclude that the State presented racially neutral explanations for its peremptory challenges, and therefore the jury array was not tainted by racial discrimination. We conclude that the record presents sufficient evidence to support consecutive sentences, although the sentencing entry must be corrected to include the statutory findings made on the record at the sentencing hearing.

{¶ 4} Accordingly, the judgment of the trial court is Affirmed. However, this cause is Remanded, to allow the trial court to issue a nunc pro tunc order and entry with

imposition of sentence that incorporates the statutory findings it made in ordering Hammad to serve consecutive sentences.

I. Facts & Course of Proceedings

{¶ 5} Hammad was incarcerated in the Montgomery County Jail, awaiting trial on a different case, at the time of the offense that is the subject of this appeal. Hammad is an Israeli citizen, who immigrated to the United States in 2000. On or about May 30, 2013, Hammad was arrested and detained in the Montgomery County Jail based on a charge of felonious assault. On October 26, 2013, three officers responded to a report of a problem with Hammad, who was upset and throwing things out of his cell. Although Hammad initially responded to the officer's demand to hand him items through the cell bars, Hammad continued to yell, curse and threaten the officers in an angry tone. All three officers heard Hammad make a noise like he was gathering phlegm or saliva in his mouth, then one officer felt spit hit his face, neck and right shoulder. The other officers did not see the spit land, but were able to observe the officer flinch in reaction to being hit by the spit. Hammad was charged with harassment by an inmate (bodily substances), a fifth-degree felony, in violation of R.C. 2921.38(A).

{¶ 6} The case was tried before a jury on February 19, 2014. During voir dire, the State exercised two peremptory challenges to excuse Juror No. 11 and Juror No. 12. Defense counsel raised an objection to these two peremptory challenges solely because these two potential jurors were African-American. A record was made to establish the state's racially neutral reasons for exercising the peremptory challenges, and the court noted that both jurors were African-American. The State believed that Juror No. 11 might

harbor some bias based on the juror's expressed concern over how his brother was treated when his brother was incarcerated in the same jail. The State believed that Juror No. 12 might also harbor some bias based on two relatives who had recently been in the same jail, and noted that Juror No. 12 had his eyes closed during jury selection. The court specifically accepted, on the record, that the State's reasons were race-neutral, and then asked defense counsel if he had anything further on the issue, who responded in the negative, without noting his objection for the record or proposing any additional evidence to support that the peremptory challenges were based on race. The record reveals the following exchange regarding the *Batson* challenge:

MR. THOMPSON: Your honor, I'm going to object. I sense a trend developing. The first, number 11 was an African-American, number 12's an African-American.

THE COURT: Right. And, any race neutral reason for the excuse - -

MS. WOODRUFF: Yes, Your Honor, the race neutral reason for juror number 11 - -

THE COURT: I'm sorry, - - go ahead with both.

MS. WOODRUFF: Was that he indicated that - - The State believes that the juror number 11 would be biased because he indicated that he had some feelings with how his brother was treated when his brother was incarcerated at the Montgomery County Jail, and that he specifically has some feelings towards how the deputies handled his brother's medical care. The State feels that he would be biased with that.

The State feels that [Juror No. 12] may have some - - harbor some -

- harbor some concerns - - or excuse me, the State has some concern with regard to [Juror No. 12] for two reasons. The first is that at several points in time, [Juror No. 12] had his eyes closed during the jury selection. And, at other points in time - - or excuse me, at another point in time, he indicated that both his brother had been in jail and that his cousin had been incarcerated.

THE COURT: For the record, both of those jurors, 11 and 12 are African-American. They're not on the video. So, they wouldn't be seen on that part of the record. Those are - - I'm going to find that that is what they both said. [Juror No. 11] much more clearly indicated that he had concerns about the way his brother was treated in the Montgomery County Jail. He did even say words to the effect that "I'm not sure that I can be fair."

And, [Juror No. 12] did indicate that he had two family members that had been in the Montgomery County Jail relatively recently.

I will find that those are race neutral reasons for the peremptory challenges. Anything further, Mr. Thompson, on that issue?

MR. THOMPSON: No, your honor.

Transcript pgs. 90-91.

{¶ 7} At trial, three officers who were present at the time of the offense testified: Officers Reed, Perkins and Cooper. Hammad testified in his own defense. Although Officer Reed did not actually see Hammad spit, he explained what he heard as follows:

Q: Well, I have asked you to describe it for me.

A: It was a - - it was more of a gathering of saliva or phlegm within his

throat that is commonly heard prior to somebody expelling spit from their mouth.

Transcript at pg. 134.

{¶ 8} Officer Perkins's description of the event was consistent with Officer Reed's:

Q: Okay. And how close to the door of the cell was Mr. Hammad standing?

A: Right in front.

Q: Was it a matter of inches?

A: Yes.

Q: And how close were you, Officer Cooper and Sergeant Reed standing?

A: Maybe a foot away.

Q: Okay. Now at some point, did Mr. Hammad escalate his behavior?

A: Yes. Toward the end, I mean the threats just kept getting worse. I mean you could tell he was very agitated.

Q. And let me stop you there for a minute. As he's talking to you and making these threats and cussing at you, is spit flying out of his mouth?

A: No.

Q: Okay. And at some point or excuse me, what happens next?

A: Just as he hands out the last item, I hear him gathering saliva in his mouth and then I saw him turn towards Officer Cooper who was

standing against the wall over here and I heard the spitting sounds, I guess that's how you would put it but.

Q: What do you mean by when you say the spitting sound?

A: The - - (indicating) - - that sort of noise.

Q: Okay. And, for the record, are you describing like a sound of expelling spit from one's mouth?

A: Yes.

Q: Okay. What happened after you heard that sound?

A: Out of the corner of my eye, I saw Officer Cooper's reaction. I mean he flinched and I mean he went like this (demonstrating). I did not see the saliva come out but by his reaction, I knew that's what happened, so.

Transcript pgs. 148-149.

{¶ 9} Officer Cooper described the incident in his testimony, as follows:

Q: Okay. And, at some point, the Defendant becomes more hostile toward you and actually acts on that hostility. Can you describe that?

A: As the last article was relinquished from his cell, as he passed out the last piece of contraband, I could hear him physically gather saliva, drawing up, from what I assume is his throat, and then an intentional "thwa" (ph). I could hear him expel the saliva. And, at that point, I was looking down at the items that we had removed from the cell, and I felt saliva strike my face, my right shoulder and my neck area.

Q: Okay. Now were you alarmed, or what was your reaction to your
- - to this sensation?

A: I would say that I was alarmed. I was kind of panicked. I'd known at that point I was being harassed by an inmate. I knew that there had to be an action to remove him from the housing unit to prevent from later on from happening to anybody else. A state of duress.

Transcript pgs. 166-168.

{¶ 10} In his defense, Hammad testified and admitted that he was very upset over a dispute with another inmate, and he was very mad when ordered to turn over all of his belongings because he believed he would never get them back. Transcript pg. 198. He admitted that he was yelling and cursing at the officers. Transcript pg. 200. However, he denied spitting on the officer, and explained the incident as follows:

Q: Okay, so I guess the question is, did you purposefully spit on CO Cooper?

A: No, sir.

Q: Okay. Do you deny that saliva may have gotten on Officer Cooper?

A: I don't know. Probably when I was talking, like, probably like, you know, like somebody when he talk, like I was talking, fast and laugh, maybe like, you know, like some be coming out, not intentionally, but like, you know, like little stuff be coming out. Ever - -

Q: I think you are saying accidentally?

A: Exactly.

Transcript pg. 202-203.

{¶ 11} Hammad also explained how spitting is perceived in his culture, as follows:

Q: Hammad, in your culture, what does spitting upon someone mean?

A: Like someone you hate, someone like, you ain't respect for.

Q: Okay. So that means - -

A: That's what you do. You spit on them.

Transcript pg. 203.

{¶ 12} After the jury found Hammad guilty of the offense of harassment by an inmate (bodily substances), the court conducted a sentencing hearing. The record reflects that at the hearing, the court made the following findings:

THE COURT: Mr. Hammad, I heard the testimony at trial and really some of your admissions not to the spitting incident but even your own admissions make very clear that you have no respect for the people who work in the jail nor for the danger that you posed in this incident.

After considering, sir, first of all, the purposes and principles of sentencing and the seriousness and recidivism factors and further I'm going to find that you were awaiting sentence, I'm sorry, awaiting trial in another case at the time of this offense and I'm further going to find that consecutive sentences is necessary to protect the public from future crime or to punish you and that consecutive sentences are not disproportionate to the seriousness of this conduct and that you do pose a danger to the public.

And, as I said, I found that you are under, excuse me, awaiting trial in

another case at the time of this offense.

I'm going to sentence you to 12 months at the Correction Reception Center to be served consecutive to 13-CR-1625.

Transcript. Pg. 246.

{¶ 13} The termination entry, Docket #32, filed on February 27, 2014, identifies the jury verdict and the sentencing order, but does not identify any of the factors the court considered in its decision to order the incarceration to be served consecutively to the sentence ordered in a previous felony conviction. From this judgment, Hammad appeals.

II. The Jury's Finding that Hammad Spit on the Officer with an Intent to Annoy, Harass or Insult Is Supported by Sufficient Evidence, and Is Not Against the Manifest Weight of the Evidence

{¶ 14} Hammad's Second Assignment of Error is as follows:

THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT
WHEN IT FOUND THE APPELLANT GUILTY AGAINST THE MANIFEST
WEIGHT OF THE EVIDENCE BECAUSE THERE WAS NO MENS REA TO
SATISFY R.C.2921.38(A)

{¶ 15} Hammad argues that the evidence in the record is insufficient to support the mens rea requirement for a conviction under R.C. 2921.38(A). The statute requires the State to prove that the defendant, while confined in a detention facility, with intent to harass, annoy, threaten or alarm another person, caused the other person to come into contact with blood, semen, urine, feces or another bodily substance by throwing the bodily substance at the other person, by expelling the bodily substance upon the other

person, or in any other manner. The culpable mental state, or mens rea, in the statute is designated as “intentional.” In the context of culpable mental states, “intent” and “purpose” are synonymous. *State v. Miller*, 8th Dist. Cuyahoga No. 93731, 2010-Ohio-4347, ¶ 4, citing *White v. Maxwell*, 174 Ohio St. 186, 188, 187 N.E.2d 878 (1962).

{¶ 16} R.C. 2901.22(A) provides that, “[a] person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature.”

{¶ 17} We have set forth the tests for sufficiency- and weight-of-the-evidence review as follows:

A sufficiency-of-the-evidence argument challenges whether the state has presented adequate evidence on each element of the offense to allow the case to go to the jury or to sustain the verdict as a matter of law. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N .E.2d 541 (1997). The proper test to apply to the inquiry is the one set forth in paragraph two of the syllabus of *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991): “An appellate court’s function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant’s guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential

elements of the crime proven beyond a reasonable doubt.”

When analyzing a challenge to the manifest weight of the evidence, the court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *State v. McKnight*, 107 Ohio St.3d 101, 112, 2005–Ohio–6046, 837 N.E.2d 315. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. *Id.*

Circumstantial evidence and direct evidence inherently possess the same probative value. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph one of the syllabus. It is primarily for the finder of fact to determine what weight to assign to any evidence, but evidence is not to be given less weight merely because it is circumstantial.

State v. Jones, 2d Dist. Miami No. 14-CA-11, 2015-Ohio-196, ¶¶ 28-29, quoting *State v. Henderson*, 2d Dist. Montgomery No. 26018, 2014-Ohio-4601, ¶¶ 22–23.

{¶ 18} The record contains the testimony of three officers on the scene at the time of the incident who all saw that Hammad was very upset by his cursing and yelling, and they all heard Hammad make a sound that was consistent with gathering phlegm or saliva. One officer saw Officer Cooper’s reaction when the saliva hit him in the face, and Officer Cooper described how it felt when the saliva hit him. Hammad also admitted that he was angry at the officers for making him give up his personal belongings, that he did

not expect to get back, and that in his culture spitting was a sign of hatred. From this testimony a rational trier of fact could have found the essential elements of the crime, that Hammad intentionally spit on the officer to annoy or harass him, were proven beyond a reasonable doubt. This finding is not against the weight of the evidence.

{¶ 19} Hammad's Second Assignment of Error is overruled.

III. Racially Neutral Reasons for the Exclusion of Two Potential Jurors Were Established on the Record

{¶ 20} Hammad's First Assignment of Error states as follows:

THE TRIAL COURT ERRED TO THE PREJUDICE OF THE
APPELLANT WHEN IT PERMITTED THE STATE THE USE OF ITS
PEREMPTORY CHALLENGES BY USING RACIAL DISCRIMINATION IN
VIOLATION OF THE APPELLANT'S RIGHTS UNDER THE EQUAL
PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION

{¶ 21} The State exercised two peremptory challenges during voir dire to excuse two jurors from the jury pool. A record of these challenges was made in chambers, after completion of voir dire questioning, and the defendant raised an objection because the two potential jurors were African-American. The court asked the State to provide its explanation for the peremptory challenges, race-neutral explanations were given, the court accepted the explanations as credible, and the defendant did not object or provide any further evidence of a discriminatory intent or pretext for discrimination.

{¶ 22} In *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the United States Supreme Court held that a state denies a Black defendant equal

protection when it puts him on trial before a jury from which members of his race have been purposefully excluded. *Batson* has since been extended to criminal defendants who are not of the same race as the excluded jurors, *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991). The *Batson* court articulated a three-part test for determining if a peremptory challenge is racially motivated. *Batson*, at 96–98. First, the defendant must set forth a prima facie case of racial discrimination. *Id.* at 96. Secondly, the burden then shifts to the State to offer a race neutral-reason for the challenge. *Id.* at 97. Thirdly, the trial court must determine whether the race-neutral reason advanced by the prosecution is credible, or merely a pretext for purposeful racial discrimination. *Id.* at 98.

{¶ 23} We recently reviewed a *Batson* challenge in *State v. Henderson*, 2d Dist. Montgomery No. 26018, 2014-Ohio-4601, and recognized that “[b]ecause the third stage of the analysis rests largely on the trial court’s evaluation of the prosecutor’s credibility, an appellate court is required to give the trial court’s findings great deference.” *Id.* at ¶ 14, citing *Hicks v. Westinghouse Materials Co.*, 78 Ohio St.3d 95, 102, 676 N.E.2d 872 (1997). The record does support that the three-step process was followed, that the court accepted as credible the State’s reasons for excusing the two jurors, and that the reasons were not based on the race of the prospective jurors. We agree with the trial court’s conclusion that the proffered reasons for the peremptory challenges were race-neutral. Exercising appropriate deference to the trial court’s determination that the proffered reasons were, in fact, the real reasons for the peremptory challenges, we find no error in that determination. Accordingly, we conclude that the court did not err in overruling the *Batson* challenge.

{¶ 24} The First Assignment of Error is overruled.

IV. The Record Demonstrates Sufficient Grounds for Consecutive Sentences

{¶ 25} Hammad's Third Assignment of Error states as follows:

THE TRIAL COURT ERRED TO THE PREJUDICE OF THE
APPELLANT WHEN IT SENTENCED THE APPELLANT TO THE
STATUTORY MAXIMUM CONSECUTIVE SENTENCES

{¶ 26} Hammad argues that the court should not have considered the act of spitting saliva as an offense serious enough to trigger a maximum and consecutive sentence. The sentence of twelve months was within the statutory range for a felony of the fifth degree. R.C. 2929.14(A)(5) provides that if the court imposes a sentence upon an offender for a felony of the fifth degree, the prison term shall be a minimum of six months and a maximum of twelve months. R.C. 2929.11 explains that "[t]he overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources." Other sentencing considerations are found in R.C. 2929.12, including factors that may indicate that the offender's conduct is more or less serious than normally constituting the offense, and factors indicating that the offender is likely or is not likely to commit future crimes. Hammad argues that spitting saliva is far less serious than expelling other bodily substances, such as feces or urine.

{¶ 27} At the sentencing hearing, the trial court explained that the maximum

sentence was imposed because “your own admissions make very clear that you have no respect for the people who work in the jail nor for the danger that you posed in this incident.” Transcript pg. 246. We find no error in this reasoning.

{¶ 28} R.C. 2929.14(C)(4) allows consecutive sentences when three factors exist: first, when it is “necessary to protect the public from future crime or to punish the offender;” second, “when consecutive sentences are not disproportionate to the seriousness of the offender’s conduct and to the danger the offender poses to the public;” third, one of the factors described in R.C. 2929.14 (a), (b) or (c) must be present, including when one or more of the multiple offenses was committed while the offender was awaiting trial. The court explained that the sentence was to run consecutively with the sentence for his prior felony conviction because this offense was committed while he was awaiting trial in the prior felony case, consecutive sentences were “necessary to protect the public from future crime” because he “did pose a danger to the public”. Transcript pg. 246.

{¶ 29} We have addressed our role in reviewing sentencing orders by recognizing that, we would no longer use an abuse-of-discretion standard in reviewing a felony sentence, but would apply “the standard of review set forth in R.C. 2953.08(G)(2).” *State v. Rodeffer*, 2013-Ohio-5759, 5 N.E.3d 1069, ¶ 29 (2d Dist.) “Under this statute, an appellate court may increase, reduce, or modify a sentence, or it may vacate the sentence and remand for resentencing, only if it ‘clearly and convincingly’ finds either (1) that the record does not support certain specified findings or (2) that the sentence imposed is contrary to law.” *State v. Battle*, 2d Dist Clark No. 2014CA5, 2014-Ohio-4502, ¶ 7. We have acknowledged that this is an “extremely deferential standard of review.” *Rodeffer* at ¶ 31.

{¶ 30} We are unable to find, clearly and convincingly, that the trial court was wrong in its findings for imposing consecutive sentences. The record supports that the statutory factors were considered, and the sentence is not contrary to law. Therefore, Hammad's Third Assignment of Error is overruled.

{¶ 31} Although the trial court did not err in imposing consecutive sentences, the court was obligated to include its consecutive-sentencing findings in the sentencing order. *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 23. As we recently held in *State v. Mayberry*, 2d Dist. Montgomery No. 26025, 2014-Ohio-4706, ¶ 34, it will be necessary for the trial court to correct its sentencing entry to include the three statutory findings in the entry. Therefore, upon remand, the trial court may issue a nunc pro tunc order and entry with imposition of sentence that incorporates the statutory findings it made in ordering consecutive sentences.

V. Conclusion

{¶ 32} All of Hammad's assignments of error having been overruled, the judgment of the trial court is Affirmed. However, the case is Remanded for the sole purpose of correcting the sentencing entry to incorporate the consecutive-sentencing findings the trial court made at the sentencing hearing.

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FROELICH, P.J., and DONOVAN, J., concur.

Copies mailed to:

Mathias H. Heck
Michele D. Phipps
Enrique G. Rivera-Cerezo
Hon. Mary K. Huffman