[Cite as *State v. Hicks*, 2004-Ohio-2780.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio — Court of Appeals No. WD-02-44

Appellee — Trial Court No. 01-CR-334

v.

Tarrell Hicks — **DECISION AND JUDGMENT ENTRY**

Appellant — Decided: May 28, 2004

* * * * *

Raymond C. Fischer, Wood County Prosecuting Attorney, Gary D. Bishop, Assistant Prosecuting Attorney, and Jacqueline M. Kirian, Assistant Prosecuting Attorney, for appellee

Jeffrey M. Gamso, for appellant

* * * * *

HANDWORK, P. J.

{¶1} This is an appeal from a judgment of the Wood County Court of Common Pleas which, following a jury trial, sentenced appellant, Tarrell Hicks, to a term of imprisonment. For the reasons stated herein, this court affirms the judgment of the trial court.

{¶2} The following facts are relevant to this appeal. On November 8, 2001, appellant was indicted on three counts of robbery in violation of R.C. 2911.02(A)(2). Appellant entered a plea of not guilty. Appellant's trial began on May 15, 2002, and

concluded on May 16, 2002. At trial, three young men testified as did the mother of one young man and two police officers.

{¶3} The jury found appellant guilty on all counts. On July 29, 2002, the trial court imposed consecutive sentences of three years on each count, to be served concurrently with sentences imposed for related Lucas County offenses. Appellant filed a timely notice of appeal and sets forth the following three assignments of error:

{¶4} "ASSIGNMENT OF ERROR NO. 1: MR. HICKS WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BY TRIAL COUNSEL WHO ACKNOWLEDGED ON THE RECORD THAT HE DID NOT UNDERSTAND *BATSON V. KENTUCKY* (1986), 476 U.S. 79, AND ITS PROGENY.

{¶5} "ASSIGNMENT OF ERROR NO. 2: THE STATE IMPROPERLY EXERCISED A PREEMPTORY CHALLENGE IN A RACIALLY DISCRIMINATORY FASHION IN VIOLATION OF *BATSON V. KENTUCKY* (1986), 476 U.S. 79, AND ITS PROGENY.

{¶6} "ASSIGNMENT OF ERROR NO. 3: APPELLANT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶7} As appellant's first and second assignments of error are related, we will address them together. These assignments of error focus upon the prosecutor's peremptory challenge which appellant argues violated *Batson v. Kentucky* (1986), 476 U.S. 79, and its progeny. Appellant also argues that he received ineffective assistance of counsel in regard to this peremptory challenge. This court finds no merit in either of these assignments of error.

{¶8} In regard to appellant's *Batson* argument, when the state exercised its third peremptory challenge, the following occurred:

{¶9} "Prosecuting Attorney: Judge, I'm going to ask to excuse Jamal Owens seat number 24 Juror number 28. I think under Bateson [sic] is appropriate [sic] for me to state my reason for that.

{¶10} "The Court: I'm going to ask—

{¶11} "Prosecuting attorney: I'm—the primary reason is he's indicated he's been the subject of racial profiling, in fact he said he has been many times.[1]

{¶12} "The Court: All right. I'll make a finding then you're exercising your challenge of him as not racially itself motivated so. Let's see who did that push up?

{¶13} "The Bailiff: Juror seated number 13.

{¶14} "Defense attorney: Judge, I'm guess with a dilemma here [sic] because I've never understood Bateson [sic], been involved in elimination of a black juror and I don't know if it is appropriate for me to object. Just for purpose of the record without any argument just to preserve it I think I need to do that.

{¶15} "The Court: I want you to.

{¶16} "Defense attorney: I think I do for the Record object with no argument then and I'm ready to proceed."

{¶17} Appellant advances two arguments in regard to the peremptory challenge. Appellant argues that the *Batson* analysis was done incorrectly, asserting that the trial

[1]During voir dire, the prosecuting attorney had asked Juror number 28 if he was African American and if he felt he had been the subject of racial profiling by the police. Juror number 28 responded that he had been the subject of racial profiling by the police and had been pulled over "lots of times" for no other reason than being black.

court erred in not giving him the opportunity to demonstrate that the proffered reason for the challenge was pretextual. Appellant also asserts that the proffered reason for the challenge was pretextual. This court does not agree.

{¶18} In *State v. White* (1999), 85 Ohio St.3d 433, 437, the Ohio Supreme Court stated:

{¶19} "*** The only issue in step two of the *Batson* analysis is whether the proponent gave a *race-neutral* explanation for his peremptory challenge. The 'explanation need not rise to the level of justifying exercise of a challenge for cause.' (Citations omitted.) While a prospective juror's answers may be sufficient to survive a challenge for cause, both prosecutors and defense attorneys must remain free to challenge on a peremptory basis jurors whose answers create overall concerns on the subject at issue. (Emphasis in original.)"

{¶20} Once the proponent of a peremptory strike gives an explanation for the strike, the trial court must determine whether the explanation offered by the prosecution is credible or a pretext for discrimination, the third step of the *Batson* analysis. Id., at 437. Contrary to appellant's argument, there is no requirement in the third step of the *Batson* analysis that the trial court give the objecting party an opportunity to demonstrate that the proffered reason is pretextual. "Unless a discriminatory intent is inherent in the

{¶21} prosecutor's explanation, the reason offered will be deemed race-neutral." *Hernandez v. New York* (1991), 500 U.S. 352, 360. "In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much

evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge." Id. at 365. In this case, the trial court chose to believe that the prosecutor's explanation for striking the prospective juror was race-neutral.

{¶22} Because a trial court's findings in a *Batson* analysis result from an evaluation of credibility, the findings are entitled to great deference. *Batson*, 476 U.S. at 98, fn. 21. Additionally, a trial court's findings in a *Batson* analysis will not be reversed unless clearly erroneous. *White*, 85 Ohio St.3d at 437. Upon our review of the record in this case, this court finds that the trial court's finding, under the totality of the circumstances, was not clearly erroneous.

{¶23} Appellant's second argument is that his trial counsel's lack of understanding of a *Batson* challenge resulted in ineffective assistance of trial counsel. The standard for determining whether a trial attorney was ineffective requires appellant to show: (1) that the trial attorney made errors so egregious that the trial attorney was not functioning as the "counsel" guaranteed appellant under the Sixth Amendment, and (2) that the deficient performance prejudiced appellant's defense. *Strickland v. Washington* (1984), 466 U.S. 668, 686-687. In essence, appellant must show that his trial, due to his attorney's ineffectiveness, was so demonstrably unfair that there is a reasonable probability that the result would have been different absent his attorneys' deficient performance. Id. at 693.

{¶24} Although it would be desirable for a criminal defense attorney to understand *Batson* and its progeny, appellant has not demonstrated "a reasonable

probability that, were it not for counsel's errors, the result of the trial would have been different." *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph three of the syllabus. Furthermore, because this court found that the trial court's finding in regard to the peremptory challenge was not clearly erroneous, appellant cannot demonstrate that but for counsel's alleged error, the results of the proceedings would have been different. Consequently, he has failed to meet his burden to show ineffective assistance of counsel. *Strickland*, 466 U.S. at 687; *State v. Hamblin* (1988), 37 Ohio St.3d 153, 155-156. Therefore, we conclude that appellant's trial counsel's lack of understanding of *Batson* and its progeny did not rise to the level of ineffective assistance of counsel.

{¶25} Accordingly, appellant's first and second assignments of error are found not well-taken.

{¶26} In his third assignment of error, appellant argues that his conviction was against the manifest weight of the evidence. This court finds no merit in this assignment of error.

{¶27} In *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, the Ohio Supreme Court stated that "[t]he legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different." The court also noted:

{¶28} "In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law." Id.

{¶29} In contrast to sufficiency, the court stated the following in regard to weight of the evidence:

{¶30} "*** Weight of the evidence concerns 'the inclination of the *greater amount of credible evidence*, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the *greater amount of credible evidence* sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its *effect in inducing belief*.'" (Citation omitted.)(Emphasis added by Court.) Id. at 387.

{¶31} When a conviction is challenged on appeal as being against the manifest weight of the evidence, we must review the entire record, weigh the evidence and all reasonable inferences, consider witness credibility, and determine whether, in resolving conflicts in the evidence, the trier of fact "'clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" Id. A judgment should be reversed as being against the manifest weight of the evidence "only in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶32} After a careful review of the record, we cannot conclude that the trier of fact lost its way and created a manifest miscarriage of justice when it found appellant guilty of three counts of robbery. Appellant argues that there were crucial differences in the testimony of the three victims in that each victim testified to some details that the other victims did not mention. However, the victims' testimony was consistent in the most important facts. While there were some differences in the witnesses' testimony, we

do not believe that the jury lost its way in concluding that appellant committed the robberies as charged.

{¶33} Accordingly, appellant's third assignment of error is found not well-taken.

{¶34} On consideration whereof, the court finds that the defendant was not prejudiced or prevented from having a fair trial, and the judgment of the Wood County Court of Common Pleas is affirmed. It is ordered that appellant pay court costs for this appeal.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4, amended 1/1/98.

Peter M. Handwork, P.J. _____
JUDGE

Richard W. Knepper, J. _____
JUDGE

Judith Ann Lanzinger, J. _____
CONCUR.
JUDGE