

[Cite as *State v. Williams*, 2009-Ohio-6303.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92351

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

LARRY WILLIAMS

DEFENDANT-APPELLANT

**JUDGMENT:
FINDING OF GUILT AFFIRMED; SENTENCE
VACATED; REMANDED FOR RESENTENCING**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-512695

BEFORE: McMonagle, J., Gallagher, P.J., and Jones, J.

RELEASED: December 3, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

CHRISTINE T. McMONAGLE, J.:

{¶ 1} After a jury trial, defendant-appellant Larry Williams was acquitted of rape and kidnapping, but found guilty of gross sexual imposition.

The trial court sentenced him to 12 months in prison and five years of postrelease control. Williams now appeals. We affirm the finding of guilt, but vacate the sentence and remand for resentencing.

1. Manifest Weight of the Evidence

{¶ 2} In his first assignment of error, Williams argues that his conviction for gross sexual imposition was against the manifest weight of the evidence.

{¶ 3} When considering a manifest weight challenge, a reviewing court examines the entire record, weighs the evidence, and considers the credibility of the witnesses. *State v. Thomas* (1982), 70 Ohio St.2d 79, 80. The court may reverse the judgment of conviction if it appears that 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. Thompkins* (1997), 78 Ohio St.3d 380, 387. A court should reverse a conviction as against the manifest weight of the evidence only in the most “exceptional case in which the evidence weighs heavily against the conviction.” *Id.*

{¶ 4} Williams was charged with rape in violation of R.C. 2907.02(A)(1)(a) and 2907.02(A)(2). These statutes prohibit sexual conduct (i.e., intercourse) with another when the offender substantially impairs the other person's judgment or control by administering a drug or intoxicant, or when the offender purposely compels the other person to submit by force or threat of force. He was also charged with gross sexual imposition in violation of R.C. 2907.05(A)(1), which prohibits sexual contact (i.e., the touching of erogenous zones) with another when the offender purposely compels the other person to submit by force or threat of force. Williams admitted to sexual intercourse with the alleged victim but contended it was consensual.

{¶ 5} Williams contends that the jury lost its way because it found him guilty of gross sexual imposition but not guilty of rape. He argues that the jury must have concluded that the intercourse was not compelled by force, as it found him not guilty of rape, so it was inconsistent for the jury to then find him guilty of gross sexual imposition, i.e., sexual contact compelled by force. He contends that to find him not guilty of rape but guilty of gross sexual imposition, the jury would have had to have concluded that the foreplay between the parties was not consensual but the intercourse was, an illogical result that can only indicate that the jury lost its way.

{¶ 6} Williams's argument fails, because each count of a multi-count indictment is independent of all other counts. Thus, inconsistent verdicts on different counts of a multi-count indictment are not a reason for overturning a guilty verdict. *State v. Lovejoy*, 79 Ohio St.3d 440, 1997-Ohio-371, paragraph one of the syllabus; *State v. Adams* (1978), 53 Ohio St.2d 223, 230, vacated in part on other grounds, 439 U.S. 811; *State v. Taylor*, Cuyahoga App. No. 89629, 2008-Ohio-1626, ¶10. The rationale for upholding such verdicts was addressed by the United States Supreme Court in *United States v. Powell* (1984), 469 U.S. 57, 68, 105 S.Ct. 471, 83 L.Ed.2d 461, where the Court explained that juries may reach inconsistent verdicts for any number of reasons, including mistake, compromise, and leniency. The Court reasoned that it would be incongruous for a defendant to accept the benefits of an inconsistent verdict without also being required to accept the burden of such verdicts.

{¶ 7} The alleged victim in this case testified at trial that she awoke to find Williams pulling down her pants and pulling up her shirt. She said that she told him to stop and tried to hit his chest, but then did nothing else to resist because of her stuporous condition. On this evidence, the jury did not lose its way in finding Williams guilty of gross sexual imposition. Any attempt to determine why the jury found him not guilty of rape would involve pure speculation, which we decline to do. See *Lovejoy*, 79 Ohio St.3d at 444

(sanctity of the jury verdict should be upheld and not subject to speculation to resolve inconsistencies). Williams's first assignment of error is therefore overruled.

2. *Batson* Challenge

{¶ 8} Williams's second assignment of error asserts that the court committed reversible error because it did not engage in the proper constitutional analysis in determining that the State was not racially motivated in excluding an African-American male from the jury.

{¶ 9} In *Batson v. Kentucky* (1986), 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69, the United States Supreme Court held that purposeful discrimination in the use of peremptory challenges to exclude members of a minority group violates the Equal Protection Clause of the United States Constitution. The Court established a three-step procedure for evaluating claims of racial discrimination in peremptory challenges.

{¶ 10} First, the opponent of the challenge must establish a prima facie case of discrimination by demonstrating that a member of a cognizable racial group has been peremptorily challenged, and that the facts and any other relevant circumstances raise an inference that the prosecutor has used the challenge to exclude jurors because of their race. *State v. Hill*, 73 Ohio St.3d 433, 444-445, 1995-Ohio-287. If this burden is met, the proponent of the challenge must then provide a race-neutral explanation for the striking of a

particular juror. *State v. Herring*, 94 Ohio St.3d 246, 255-256, 2002-Ohio-796, citing *Batson*, 476 U.S. at 96-98. The explanation need not rise to the level justifying a challenge for cause. *Id.* Third, if the proponent puts forth a racially-neutral explanation, the trial court must decide, on the basis of all the circumstances, whether the opponent has proved purposeful racial discrimination. *Id.* The burden of persuasion is on the opponent of the strike. *Id.*, citing *Purkett v. Elem* (1995), 514 U.S. 765, 768, 115 S.Ct. 1769, 131 L.Ed.2d 834. A trial court's finding of no discriminatory intent will not be reversed on appeal unless the finding was clearly erroneous. *Hill*, 73 Ohio St.3d at 445.

{¶ 11} During jury selection, the State used a peremptory challenge to excuse Juror No. 8, the only African-American male in the jury venire. Defense counsel objected and argued that as Williams is African-American, the State's challenge was racially motivated. The judge then asked the State for its reasons for excusing Juror No. 8, and the prosecutor explained:

{¶ 12} "First, Juror No. 8 has been charged in recent [sic] and sounded like recently convicted of some sort of crime of assault which could make him tend to lean less favorably towards the State of Ohio. Secondly, he has also had a family member convicted of a felony, be it a long time ago. Still, it could be another reason why he could be less lenient towards the State of Ohio. Also, I've noticed that throughout the voir dire process, at certain

points he doesn't seem to be paying attention to what anybody else is saying and doesn't seem to have his whole mind set to this case."

{¶ 13} Defense counsel responded and argued that Juror No. 8 did not seem to "hold a grudge" against the State and that he knew little about the circumstances of his family member's conviction, and that this was not the first time the State had removed a black male from serving as a juror on a case. The judge overruled the objection and stated, "[T]his is the State's first challenge. That hardly establishes a pattern. I don't think a pattern can be established by using dismissals or challenges in other cases. Again, there are—the juror did admit that he was accused of an assault case in his past. He did have a relative who was convicted of a felony. Whatever the State's reservations are with respect to those two facts are certainly within the State's prerogative to dismiss that juror."

{¶ 14} Williams contends that the trial did not engage in the analysis required by *Batson* in concluding that the State was not racially motivated in excluding Juror No. 8 from the jury. We disagree.

{¶ 15} The judge assumed that Williams had set forth a *prima facie* case of discrimination (the first step of *Batson*) because upon defense counsel's objection to the State's use of a peremptory challenge to strike Juror No. 8, the trial court asked the State for its explanation for striking the juror (the second step). The State provided a racially-neutral explanation, i.e., that

Juror No. 8's recent assault conviction and a family member's felony conviction could make him biased against the State. Additionally, the prosecutor noted that Juror No. 8 had not been giving the case his full attention during voir dire.

{¶ 16} At that point, the trial judge proceeded to the third step of the *Batson* analysis—considering whether on the basis of all the circumstances Williams had proved racial discrimination. The trial court concluded that he had not, because there was no pattern of striking jurors that would have demonstrated the State was racially motivated and the State's reservations about Juror No. 8 in light of his and a family member's previous convictions were sufficiently valid to strike him from the panel.

{¶ 17} The record adequately reflects that the trial court engaged in the three-step analysis required by *Batson*. Further, we find nothing demonstrating that its conclusion of no discriminatory intent by the State was clearly erroneous. Accordingly, Williams's second assignment of error is overruled.

3. Sentencing Error

{¶ 18} Lastly, Williams argues that his sentence must be vacated because the trial court did not properly advise him of the consequences of violating post-release control.

{¶ 19} At sentencing, the trial judge sentenced Williams to 12 months in prison and then explained postrelease control as follows:

{¶ 20} “It is a felony sex offense, so it is the court’s understanding that it is a mandatory five years postrelease control at the direction of the Adult Parole Authority. If you do commit a felony while you are on postrelease control, any time imposed for that violation of your postrelease control will be part of the sentence in this case, and will not be credited toward any remaining period on postrelease control.”

{¶ 21} This explanation of the penalties for violating postrelease control was not adequate. Under R.C. 2929.19(B)(3), a trial court must notify a defendant at sentencing that if he violates a condition of postrelease control, the parole board may impose a prison term as part of the sentence of up to one-half of the stated prison term originally imposed upon the defendant. *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, ¶2. As the trial court did not advise Williams that he could be subject to up to six months in prison (one-half of the stated prison term) if he violated postrelease control, his third assignment of error is sustained and we vacate his sentence and remand for resentencing. See, e.g., *State v. Edwards*, Cuyahoga App. No. 92128, 2009-Ohio-1890, ¶19; *State v. White*, Cuyahoga App. No. 92056, 2009-Ohio-4371, ¶4; *State v. Cook*, Cuyahoga App. No. 90487, 2008-Ohio-4246, ¶18.

{¶ 22} Finding of guilt affirmed; sentence vacated and remanded for resentencing.

It is ordered that the parties share costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

CHRISTINE T. McMONAGLE, JUDGE

SEAN C. GALLAGHER, P.J., and
LARRY A. JONES, J., CONCUR