

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	No. 115589
	:	
v.	:	
	:	
EARL DEJOURNETT,	:	
	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: REVERSED AND REMANDED
RELEASED AND JOURNALIZED: October 22, 2026

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-25-699980-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, Mallory Parker, and Lucas Kirkland, Assistant Prosecuting Attorneys, *for appellee*.

Cullen Sweeney, Cuyahoga County Public Defender, and Aaron T. Baker, Assistant Public Defender, *for appellant*.

ANITA LASTER MAYS, J.:

{¶ 1} Defendant-appellant Earl Dejournett (“Dejournett”) appeals his conviction, following a jury trial, for operating a vehicle under the influence of alcohol, a drug of abuse, or a combination of them in violation of

R.C. 4511.19(A)(1)(a), a felony of the fourth degree. He contends that the State exercised a peremptory challenge against a prospective juror on the basis of race in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986), and that his trial counsel rendered ineffective assistance by withdrawing a motion to suppress. For the reasons that follow, we sustain the first assignment of error, reverse the judgment of the trial court, and remand the cause for a new trial. The second assignment of error is moot.

I. Factual and Procedural History

{¶ 2} On March 13, 2025, the Cuyahoga County Grand Jury returned a two-count indictment against Dejournett. Count 1 charged operating a vehicle under the influence in violation of R.C. 4511.19(A)(1)(a) and Count 2 charged a violation of R.C. 4511.19(A)(2)(a); each count carried a specification alleging that Dejournett had been convicted of or pleaded guilty to three prior violations within ten years, elevating each offense to a felony of the fourth degree. Dejournett was subsequently arraigned and pleaded not guilty.

{¶ 3} After arraignment, trial counsel filed a combined motion to suppress and motion in limine directed at, among other things, the evidence obtained from the traffic stop and the results of field sobriety testing. The motion was withdrawn before any hearing was held. When the trial court raised the motion on the morning of trial, defense counsel confirmed that it had been withdrawn: “Your Honor, that motion was withdrawn. It’s on the docket. It was withdrawn. I did an oral motion to withdraw it.” (Tr. 4.)

{¶ 4} The matter proceeded to a jury trial on July 21, 2025. During its preliminary remarks to the venire, the trial court asked: “Now, if chosen, will you agree to follow the law as the Court will provide to you and not substitute your own idea of what you think the law should be. Can you do that?” (Tr. 13.) The transcript reflects that the venire collectively answered, “Yes,” and that the court responded, “I see nods. Is there anyone who cannot do that?” (Tr. 14.) No prospective juror indicated an inability to do so. Because the State intended to call a single witness, the court dispensed with its usual practice of providing juror notebooks and permitting juror questions (tr. 6, 14) and described the anticipated length of service to the venire in terms of “the next few hours.” (Tr. 52.)

{¶ 5} Juror No. 5 stated during the court’s questioning that she was employed as an aide caring for veterans, that she had retired after working for the county as a home health aide for 27 years, and that she was divorced and her former spouse had worked as a machinist. (Tr. 21-22.) When defense counsel asked about her hobbies, Juror No. 5 answered that she liked “to play the games on the phone”; asked to name a favorite, she responded, “Oh, man. A whole bunch of them,” and, after counsel offered examples, identified “Jeopardy.” (Tr. 66-67.) She stated that she was most proud of her daughters and her approximately 17 grandchildren. (Tr. 67-68.) Two other prospective jurors, Juror Nos. 7 and 10, also identified video games among their hobbies. (Tr. 69, 75-76.) Juror No. 7 remained on the panel. The State exercised a later peremptory challenge against Juror No. 10. (Tr. 99.)

{¶ 6} At the close of voir dire, Juror No. 2 was excused for cause by agreement of the parties after disclosing that a family member had been victimized by a drunk driver. (Tr. 51, 94-95.) The State exercised its first peremptory challenge against Juror No. 8, and the defense exercised its first against Juror No. 1. (Tr. 97.) The State then exercised a peremptory challenge against Juror No. 5, and the following exchange occurred:

ASSISTANT PROSECUTING ATTORNEY: Juror number 5, your Honor.

THE COURT: Juror number 5 will be excused.

DEFENSE COUNSEL I: Your Honor, we would like to make a *Batson* challenge.

DEFENSE COUNSEL II: Race neutral reason.

ASSISTANT PROSECUTING ATTORNEY: Your Honor, she was not — can I?

THE COURT: Yes.

ASSISTANT PROSECUTING ATTORNEY: Your Honor, she was not engaged very much, and we felt that she had a short attention span. She couldn't tell the defense why she — what game she was playing. Also the phone games generally do lead to shorter attention spans. Also, when you asked if she could be fair and impartial, I noted that she did not answer in the affirmative. She did not shake her head yes.

DEFENSE COUNSEL I: Your Honor, I would object for the record. I don't believe there was any verbal response from her. She never indicated she could not remain fair and impartial. She is one of two African-American jurors in the box as well as outside of the box. And I just want to note for the record everybody else except for one female minority is of Caucasian descent. Everybody else remains to be white. Our client is an African-American male. And furthermore, I don't think playing games would make anybody short sighted or unable to assess or review evidence as a juror.

THE COURT: Overruled. It's struck.

(Tr. 97-99.)

{¶ 7} Defense counsel stated on the record that Juror No. 5 was one of two African American members of the venire, that the remainder of the venire with one exception was white, and that appellant is an African American man. The State did not dispute these representations, and the trial court did not address them. We rely on defense counsel's undisputed factual representations as part of the totality of the circumstances. (Tr. 98-99.) The court thereafter seated Juror No. 17 in the fifth chair, the parties exercised their remaining challenges, and the jury was impaneled and sworn. (Tr. 99-101.)

{¶ 8} After the jury was impaneled, the State moved to dismiss Count 2; the trial court noted that, a jury having been impaneled, the dismissal was with prejudice, and the matter proceeded to trial on Count 1 alone. (Tr. 115-116.)

{¶ 9} The State's sole witness was Officer Jessica Harmon of the Broadview Heights Police Department. Officer Harmon testified that at approximately 11:50 p.m. on March 1, 2025, she clocked a rented Jeep Grand Cherokee traveling 84 m.p.h. in a 60-m.p.h. zone on I-77 southbound and initiated a traffic stop. (Tr. 126-128.) After the vehicle stopped, she observed "two figures crossing seat to seat from driver to passenger" and radioed for a second unit. (Tr. 128-129.) She found Dejournett seated in the front passenger seat and a female occupant in the driver's seat. (Tr. 130-131.) Officer Harmon testified that Dejournett's speech was

slow and mumbled and that his eyes were glassy and bloodshot; she determined that he was under an administrative license suspension and placed him under arrest. (Tr. 132-133.) An inventory of the vehicle produced an empty bottle of rum, although Officer Harmon acknowledged that she did not know whether, when, or by whom its contents had been consumed. (Tr. 133-136.) Because of the cold, Officer Harmon administered field sobriety tests at the police station: she testified that Dejournett exhibited six of six clues on the horizontal gaze nystagmus test, three of eight clues on the walk-and-turn test, and two clues on the one-leg-stand test, and that he refused a breath test. (Tr. 136, 140-146.)

{¶ 10} The jury found Dejournett guilty of Count 1 and made further findings that he had been convicted of three prior qualifying offenses within ten years. (Tr. 223-225.) On August 21, 2025, the trial court sentenced Dejournett to 60 days in the county jail followed by two years of community-control supervision with conditions including substance-abuse treatment, imposed a mandatory fine of \$1,540 and court costs, and imposed a 15-year driver's license suspension with restricted plates and an ignition-interlock requirement. (Tr. 230-238.) This appeal followed.

II. Law and Analysis

A. First Assignment of Error

{¶ 11} In his first assignment of error, Dejournett argues that the State exercised a peremptory challenge against Juror No. 5 because of her race and that the trial court failed to conduct the analysis required under *Batson*. The Equal

Protection Clause of the Fourteenth Amendment prohibits a party from exercising a peremptory challenge to exclude a prospective juror solely on account of the juror's race. *Batson v. Kentucky*, 476 U.S. 79, 89 (1986); *State v. Hernandez*, 63 Ohio St.3d 577, 581 (1992). Adjudication of a *Batson* claim proceeds in three steps: first, the opponent of the strike must make a prima facie showing of racial discrimination; second, if that showing is made, the proponent must articulate a race-neutral explanation for the strike; and third, the trial court must determine, in light of all the circumstances, whether the opponent has proved purposeful racial discrimination. *State v. Strong*, 2015-Ohio-169, ¶ 14 (8th Dist.), citing *Batson* at 96-98. Throughout the inquiry, the ultimate burden of proving purposeful discrimination remains with the opponent of the peremptory challenge. *Id.* A trial court's finding of no discriminatory intent at the third step is a finding of fact turning largely on credibility and will not be reversed unless it is clearly erroneous. *Hernandez v. New York*, 500 U.S. 352, 364-365 (1991); *State v. Gray*, 2023-Ohio-215, ¶ 42 (8th Dist.); *State v. Moseley*, 2010-Ohio-3498, ¶ 35 (8th Dist.).

{¶ 12} The State first argues that Dejournett failed at the threshold because trial counsel did not articulate a prima facie case of discrimination before the State volunteered its explanation. The argument is unavailing. Where, as here, the proponent of the strike offers its explanation and the trial court rules on the ultimate question of intentional discrimination, the preliminary issue of whether the opponent made a prima facie showing becomes moot. *Hernandez*, 500 U.S. at 359. The record shows that the State proffered its reasons immediately upon the *Batson*

challenge being raised, before any prima facie determination was made or requested, and the trial court proceeded directly to its ruling. (Tr. 97-99.) The analysis therefore turns on *Batson*'s second and third steps. Nor does the fact that the State struck a single African American juror defeat the claim: the exercise of even one peremptory challenge in a purposefully discriminatory manner violates equal protection, and a pattern of strikes is not a prerequisite to relief. *State v. White*, 85 Ohio St.3d 433, 436 (1999).

{¶ 13} At the second step, the State's proffered reasons that Juror No. 5 "was not engaged very much," that the assistant prosecutor "felt" she had a short attention span, that she "couldn't tell the defense . . . what game she was playing," and that she "did not answer in the affirmative" when asked whether she could be fair and impartial (tr. 98) are facially race neutral. The explanation at this step need not be persuasive or even plausible; unless discriminatory intent is inherent in the explanation, it will be deemed race neutral, and the persuasiveness of the justification is reserved for the third step. *Strong* at ¶ 14-15.

{¶ 14} Although a trial court is not invariably required to make express or detailed findings when ruling on a *Batson* challenge, the reviewing court must be able to determine from the ruling and surrounding record that the trial court completed the third step by evaluating the prosecutor's explanations for credibility and pretext. Where the record supports the trial court's implicit credibility determination, appellate deference is ordinarily warranted. *State v. May*, 2015-Ohio-4275, ¶ 44 (8th Dist.). At the third step, however, the court must assess the

plausibility of the proffered explanations in light of all the evidence bearing on them and determine whether the opponent of the strike proved purposeful discrimination. *Miller-El v. Dretke*, 545 U.S. 231, 252 (2005); *Flowers v. Mississippi*, 588 U.S. 284, 302 (2019); *State v. Frazier*, 2007-Ohio-5048, ¶ 65. Here, the trial court made no inquiry, made no findings, and otherwise gave no indication that it evaluated the State’s explanations. Its entire ruling held, “Overruled. It’s struck.” (Tr. 99.)

{¶ 15} The State’s final and most specific justification — “when you asked if she could be fair and impartial, I noted that she did not answer in the affirmative. She did not shake her head yes” (tr. 98) — rests on a question the trial court never asked. The transcript contains no instance in which the court asked the venire, or Juror No. 5 individually, whether she could be fair and impartial. The related question the court did ask whether the jurors would agree to follow the law as instructed drew a collective verbal answer of “Yes” from the venire, after which the court remarked, “I see nods,” and invited anyone who could not do so to speak. The transcript does not identify which jurors verbally responded or nodded. It also does not indicate that Juror No. 5 failed to respond. (Tr. 13-14.)

{¶ 16} A proffered justification that misstates the record is itself evidence of pretext. When the stated reason for a strike does not hold up under examination of the record, “its pretextual significance does not fade” merely because the trial court accepted it. *Flowers* at 315, quoting *Miller-El*, 545 U.S. at 252. The State’s most specific reason was that Juror No. 5 “did not answer in the affirmative” and “did not

shake her head yes” when the court “asked if she could be fair and impartial.” (Tr. 98.) The trial court never asked that question. A prospective juror cannot fail to answer a question that was never asked, and an explanation resting on that purported failure describes an event that did not occur.

{¶ 17} A trial court’s firsthand observation of a juror is entitled to weight precisely because a transcript cannot capture it. *State v. May*, 2015-Ohio-4275, ¶ 44 (8th Dist.); *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008). The State offered one general demeanor observation, that Juror No. 5 “was not engaged very much,” but separately attributed her alleged failure to nod to a specific question from the bench. Because that question was never asked, the latter explanation cannot be sustained merely as an unrecorded demeanor observation. Nothing in the record suggests the trial court recognized nor evaluated that discrepancy.

{¶ 18} The State’s remaining explanations also required examination. Juror No. 5 initially had difficulty recalling the name of a game she played, but she answered each question and ultimately identified “Jeopardy.” (Tr. 66-67.) Nothing in that brief exchange, standing alone, establishes that she was unable to remain attentive during trial. Nor did the State identify any basis for its generalized assertion that playing telephone games leads to a shorter attention span. Although the State claimed that Juror No. 5 appeared disengaged, it asked her no questions concerning her attentiveness or ability to follow the proceedings. Moreover, the trial court did not state that it observed Juror No. 5 appear disengaged or fail to respond, and it made no express credibility determination concerning the prosecutor’s

demeanor-based explanation. The State's entire voir dire occupied approximately three and one-half pages of transcript and included no questions to Juror No. 5 concerning the subjects later offered to justify the strike. (Tr. 52-55.) The failure to engage in meaningful voir dire on a matter asserted as a basis for excluding a juror may support an inference of pretext. *Strong*, 2015-Ohio-169, at ¶ 23 (8th Dist.).

{¶ 19} The State argued on appeal that Juror No. 5's difficulty naming a game distinguished her from Jurors Nos. 7 and 10, both of whom also identified video games among their hobbies. (Tr. 69, 75-76.) The State did not strike Juror No. 7, and it struck Juror No. 10 only later, with a peremptory challenge exercised after the *Batson* challenge had been overruled. (Tr. 99.) In any event, the State did not explain at trial why Juror No. 5's brief difficulty recalling a game demonstrated an inability to remain attentive during the proceedings. This circumstance must be considered together with the inaccurate nonresponse explanation, the absence of meaningful follow-up questioning, and the trial court's failure to evaluate any of the reasons on the record.

{¶ 20} This case is analogous to *Strong* at ¶ 23. There, the State justified its peremptory challenge by asserting that the prospective juror had an "extremely wide-eyed look" resembling a "thousand-yard stare," which caused the prosecutor to question whether the juror could remain attentive. *Id.* at ¶ 16, 23. The State, however, did not question the juror about his attentiveness, and the juror's responses during voir dire did not support the asserted concern. *Id.* at ¶ 23. This court concluded that the State and the trial court failed to develop the record or

appropriately inquire into the concern offered to justify the strike. *Id.* Likewise, the State here did not question Juror No. 5 about her attentiveness or ability to follow the proceedings, her responses did not demonstrate an inability to remain attentive, and the trial court accepted the State's explanations without inquiry. The State's generalized assertion that playing games on a telephone leads to a shorter attention span was unsupported by the record and was not connected to any response or conduct by Juror No. 5. The circumstances here are more compelling because the State's most specific explanation, that Juror No. 5 failed to respond when asked whether she could be fair and impartial, was based on a question the trial court never asked.

{¶ 21} Considering the totality of the circumstances, we determine the State's facially race-neutral explanations were pretextual. The prosecutor's most specific explanation materially misstated the voir dire, the remaining explanations lacked juror-specific support, the prosecutor did not meaningfully question Juror No. 5 about the concerns later offered to justify the strike, and the trial court accepted the explanations without any indication that it evaluated their credibility. On this record, the trial court's implicit determination that appellant failed to prove purposeful discrimination was clearly erroneous.

{¶ 22} The erroneous denial of a *Batson* challenge is structural error and is not subject to harmless-error review. *State v. Thompson*, 2014-Ohio-4751, ¶ 53; see *State v. Were*, 2008-Ohio-2762, ¶ 59 (the harm inherent in a discriminatorily chosen jury inures not only to the defendant but to the excluded jurors and to the

integrity of the judicial system). The first assignment of error is sustained. Dejournett's conviction is reversed, and the cause is remanded for a new trial.

B. Second Assignment of Error

{¶ 23} In his second assignment of error, Dejournett argues that trial counsel rendered ineffective assistance by withdrawing the motion to suppress.

{¶ 24} In light of our disposition of the first assignment of error, Dejournett's ineffective-assistance claim concerning trial counsel's withdrawal of the motion to suppress is moot. We therefore decline to address the second assignment of error. App.R. 12(A)(1)(c).

{¶ 25} Judgment reversed and cause remanded to the trial court for a new trial.

It is ordered that appellant recover from appellee 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.

ANITA LASTER MAYS, JUDGE

EILEEN A. GALLAGHER, J., CONCURS;
MARY J. BOYLE, P.J., DISSENTS (WITH SEPARATE OPINION)

MARY J. BOYLE, P.J., DISSENTING:

{¶ 26} I respectfully dissent. I would find that the trial court complied with *Batson*, and based upon my belief that Dejournett’s second assignment of error is unpersuasive, I would affirm his felony operating a vehicle under the influence conviction.

{¶ 27} It is a basic tenet that jury “[s]election procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.” *Batson*, 476 U.S. at 87 (1986), citing *Ballard v. United States*, 329 U.S. 187 (1946); *McCray v. New York*, 461 U.S. 961 (1983). That, however, did not happen in this case, and as a result, I would find that Dejournett is not entitled to a new trial.

{¶ 28} In order to make a successful *Batson* challenge, Dejournett was required first to establish “a prima facie case of purposeful discrimination.” *Id.* at 93-94, citing *Washington v. Davis*, 426 U.S. 229, 239-242 (1976). I would find that he failed to do so. Here, when the State moved to strike Juror No. 5, defense counsel indicated a *Batson* challenge and only stated, “Race neutral reason.” (Tr. 97.) I would find that this rationale was insufficient to establish a prima facie showing of discrimination. *State v. Moore*, 2024-Ohio-1783 (8th Dist.) (finding that “[w]hen a party objecting to a peremptory challenge offers a bare allegation of [racial or] gender discrimination without offering any other relevant facts and circumstances to support an inference of [that] discrimination,’ the moving party has failed to ‘establish a prima facie case of purposeful [racial or] gender

discrimination.” *Id.* at ¶ 20, quoting *State v. Stalder*, 2023-Ohio-2359, ¶ 5.). Moreover, before any voir dire began, the parties and the trial court were able to observe the prospective jury pool and no objections were raised as to the composition of the proposed juror pool or that it consisted of only two African Americans.

{¶ 29} Nonetheless, even if Dejournett’s challenge was proper, I would find that the State provided a race-neutral reason, which the trial court accepted. In reaching this conclusion, I recognize that

[r]eview of a *Batson* claim largely hinges on issues of credibility. Accordingly, we ordinarily defer to the findings of the trial court. Whether a party intended to racially discriminate in challenging potential jurors is a question of fact, and in the absence of clear error, we will not reverse the trial court’s determination. Trial judges, in supervising voir dire, are best equipped to resolve discrimination claims in jury selection, because those issues turn largely on evaluations of credibility.

(Cleaned up.) *Hicks v. Westinghouse Materials Co.*, 78 Ohio St.3d 95, 102 (1997).

{¶ 30} In this case, the State offered a race-neutral reason to strike Juror No. 5, believing that she did not pay attention during the voir dire and would struggle to pay attention to the proceedings. The State explained that Juror No. 5 “was not engaged very much” and “she had a short attention span. She couldn’t tell the defense . . . what game she was playing. Also the phone games generally do lead to shorter attention spans. Also, when [the trial court] asked if she could be fair and impartial, [the prosecutor] noted that [Juror No. 5] did not answer in the affirmative. She did not shake her head yes.” (Tr. 98.)

{¶ 31} The majority opinion, relying on *Strong*, 2015-Ohio-169, finds that the State's reasoning was pretextual and that the trial court accepted the explanation without any indication that it evaluated the State's credibility. Respectfully, I disagree and would find *Strong* distinguishable in three important respects. First, counsel for the appellant in *Strong* objected to the composition of the jury panel as being nonrepresentative of the community because the panel consisted of 22 people of whom only two were African Americans. The trial court overruled that objection. *Id.* at ¶ 15. Whereas, in this case, defense counsel did not object to the composition of the jury, which also consisted of only two African Americans.

{¶ 32} Next, at the conclusion of voir dire in *Strong* the State moved to exercise a peremptory challenge of one of the two African-American jurors without posing any questions to him. This particular juror, upon questioning by defense counsel, was appropriately responsive and articulate. *Id.* at ¶ 16. In the matter before us, the State did not question Juror No. 5, but when questioned by defense counsel, Juror No. 5 could not think of her favorite game and could only produce an answer after being asked two follow-up questions by defense counsel, one of which was a list of games defense counsel provided. When Juror No. 5's responses are compared to Juror Nos. 7 and 10, who also admitted to playing video games, a difference could be observed because Juror Nos. 7 and 10 could readily name and discuss the games they played on their cell phones with no additional questioning

by counsel. These jurors also discussed additional hobbies and responded with more thorough answers to the follow-up questions.

{¶ 33} Lastly, the trial court and the State in *Strong* failed to sufficiently develop the record or appropriately inquire into the supposed inattentiveness of the juror. The State’s explanation for its peremptory challenge was based solely on the “wide-eyed” look on the juror’s face and “essentially amount[ed] to an expression of displeasure with the physical characteristics of the juror.” *Id.* at ¶ 21. The *Strong* Court based its conclusion on the fact that the trial court admitted it had not observed the conduct complained of by the State, along with the nature of the State’s explanation itself and the fact that both the defense and the trial court previously questioned the juror and he answered questions appropriately. *Id.* at ¶ 28.

{¶ 34} Whereas, in this case, the State explained its legitimate reasoning for striking Juror No. 5 — the concern that Juror No. 5 would not be able to pay attention throughout the proceedings — and the trial court was within its province to believe that the reason was race neutral. When ensuring that the State’s reason is not merely pretextual, the trial court must

“assess the plausibility of” the prosecutor’s reason for striking the juror “in light of all evidence with a bearing on it.” Relevant factors may include “the prosecutor’s demeanor; * * * how reasonable, or how improbable, the explanations are; and * * * whether the proffered rationale has some basis in accepted trial strategy.” “In addition, race-neutral reasons for peremptory challenges often invoke a juror’s demeanor * * *, making the trial court’s firsthand observations of even greater importance.”

(Cleaned up.) *State v. Thompson*, 2014-Ohio-4751, ¶ 52. Furthermore, as the United States Supreme Court stated in *Hernandez*, “[i]n 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.*, 500 U.S. at 365 (1991). “Because the trial judge’s findings in this step “largely turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference.’” *State v. Gowdy*, 88 Ohio St.3d 387, 393-394 (2000), quoting *Hernandez* at 365, quoting *Batson* at 98, fn. 21.

{¶ 35} The majority opinion faults the trial court for accepting the State’s explanation without any indication that it evaluated the State’s credibility. I believe that the trial court in this case acted within its discretion to assess the State’s credibility and accepted that explanation. Indeed, such an explanation would have been proper if defense counsel had expressed it as well. Under these circumstances, I do not believe that we should second guess the trial court’s decision. Therefore, I would overrule Dejournett’s first assignment of error.

Additionally, I would find that defense counsel was not ineffective for withdrawing the motion to suppress. As a result, I would affirm Dejournett’s conviction.