ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NO. 2008 2408 10 - 1603

STATE OF OHIO,	}	
	}	
Plaintiff-Appellant,	}	On Appeal from the Cuyahoga County Court of Appeals, 8th Judicial District
	}	
v.	}	
	}	Court of Appeals
MICHAEL MOSELEY,	}	Case No. 92110
	}	
Defendant-Appellee.	}	

NOTICE OF APPEAL

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SUPREME COURT OF OHIO

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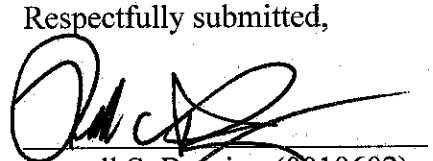
FILED
SEP 13 2010
CLERK OF COURT
SUPREME COURT OF OHIO

Now comes the Appellant, MICHAEL MOSELY, by and through Counsel, and hereby gives notice of appeal from the judgment and final order of the Cuyahoga County Court of Appeals, Eighth Judicial District, journalized in Court of Appeals Case No. CA 92110, journalized July 29, 2010.

This case is a felony, raises a substantial constitutional question, and is one of public or great general interest.

Respectfully submitted,



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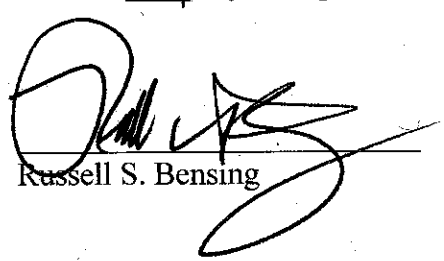
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Notice of Appeal was hand-delivered to Offices of the Attorney for Appellant, Kerri Sowul, Assistant Cuyahoga County Prosecutor, 1200 Ontario Street, Cleveland, Ohio 44113 this 10th day of September, 2010.



Russell S. Bensing

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92110

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MICHAEL MOSELEY

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-504238

BEFORE: Boyle, J., Rocco, P.J., and Sweeney, J.

RELEASED AND JOURNALIZED: July 29, 2010

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FILED AND JOURNALIZED
PER APP.R. 22(C)

JUL 29 2010

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

MARY J. BOYLE, J.:

Defendant-appellant, Michael Moseley, appeals his convictions, raising the following four assignments of error:

"[I.] The jury's verdict was not supported by sufficient evidence, and was against the manifest weight of the evidence, in violation of defendant's right to due process of law, as guaranteed by the 14th Amendment to the United States Constitution.

"[II.] The trial court erred in permitting the state, over objection by the defendant, to peremptorily excuse two African-American jurors from the jury panel, in violation of Defendant's right to trial by jury of his peers, as guaranteed by the 6th Amendment and 14th Amendment to the United States Constitution.

"[III.] The trial court abused its discretion in imposing a 25-minute time limit on defendant's closing argument, while granting the state 40 minutes for closing, in violation of defendant's right to present a defense and right to effective counsel, as protected by the 6th and 14th Amendments to the United States Constitution.

"[IV.] The trial court erred in admitting evidence regarding defendant's prior conviction."

Finding no merit, we affirm.

Procedural History and Facts

In December 2007, the grand jury indicted Moseley on 11 counts, arising out of a series of offenses spanning over a month's time. He was charged with three counts of rape, three counts of kidnapping, and two counts of felonious assault, all occurring between October 6 and November 14, 2007 and involving a single victim, Angela Tambourella. He was further charged with single counts of drug trafficking, drug possession, and possession of criminal tools, arising out of the drugs and other related instruments found at the time of Moseley's arrest in the hotel room where he was staying. Moseley pled not guilty to all the charges, and the matter proceeded to a jury trial where the following evidence was presented.

Jury Trial

The state's case primarily relied on the testimony of Tambourella, the victim, who testified for four days, stating the following:

In the fall of 2007, Tambourella was residing with her children's paternal grandfather while her four children were in the temporary custody of the Cuyahoga County Department of Children and Family Services ("CCDCFS"). At the time, Tambourella was working on a reunification plan through CCDCFS, which involved, among other things, receiving counseling, obtaining a job and stable residence, and remaining sober and drug-free. Tambourella was an

alcoholic and had a history of cocaine use. By October 2007, however, she had been in recovery for two months.

Tambourella first met Moseley on October 6, 2007. On this evening, Tambourella had arranged to meet Angela Sears, an old high school friend whom she had not seen in years. Sears arrived to pick up Tambourella with Moseley, who was driving. Sears introduced Moseley as her boyfriend and then all three left together in Moseley's car. The three ended up at a house located near Lorain Road and West Boulevard because Moseley needed to make a quick stop.

While Moseley was in the living room making telephone calls, Sears and Tambourella were watching television and talking in a downstairs bedroom. At some point, Sears asked Tambourella if she wanted to have sex with Moseley. Shocked, Tambourella responded "no." Shortly thereafter, Sears left the room and Moseley entered.

According to Tambourella, Moseley entered the room, slapped her, and continued to hit her, telling her that "he does all of his white bitches like this and [she's] going to learn to listen to him and do as he says." While Tambourella was squirming and crying, Moseley raped her vaginally, first inserting his finger and then his penis. He then ordered her to clean herself and get dressed.

Moseley then escorted both women into his vehicle. He proceeded to drive around, stopping four times so that Sears could get out and prostitute herself.

During this time, Moseley told Tambourella that he expected her to be one of his prostitutes eventually, once she learned what she was doing, and that she better not get an "attitude" or he would kill her. Sears never returned after the fourth customer.

As to what transpired from this point on, Tambourella testified in graphic detail, describing horrifying events that took place for the next 39 days. According to her testimony, she was basically a prisoner to Moseley and his world of drugs and prostitution. She was forced to reside at various cheap motels, along with other women, teenage girls, and men, and spend her days primarily driving around with Moseley while he sold drugs. From Tambourella's perspective, Moseley controlled everything and everyone that he associated with, including the teenage girls that associated with them during this time. Moseley bought all the food, drugs, and alcohol, provided clothing and makeup for the girls, and passed out cell phones for everyone to use. Tambourella further described a brutal assault that occurred between October 6 and October 10 where Moseley choked her with a belt and dragged her across the floor.

According to Tambourella, after this incident, Moseley generally became less physically abusive but more verbally abusive; he told her that she was a terrible mother, "was no type of woman," and constantly threatened her. Tambourella further testified that she learned to mask her feelings while in

Moseley's presence and that she "acted" a certain way, keeping quiet and not showing her true feelings. She also testified that she did exactly what Moseley told her to do, especially when interacting with other people. Otherwise, if she was to leave or tell anyone what he was doing, she believed that "he would find my children and hunt me down and kill me." According to Tambourella, this was especially the case when he took her to her supervised visitations with her children and her counseling appointments. He waited in the parking lot, watching her, making it clear that she better not "snitch" on him.

She further testified that the physical abuse ultimately resumed with Moseley anally raping her on November 12, 2007, which she stated was the "final straw" for her. Two days later, while at a scheduled visitation with her children, she passed the social worker a note, stating that she was being held against her will, relating the hotel she was staying in, the room number, and the make and model of Moseley's vehicle, and asking her to call the police.

Later that afternoon, the North Olmsted police arrived at the hotel room. They pretended to take Tambourella in custody on the basis of an outstanding warrant and removed her from the room. They obtained her consent to search the room where they ultimately seized a box of rubber gloves, a box of razor blades, a single razor blade with residue, and rolling papers. They discovered marijuana on one of the teenage girls in the room. Once outside of Moseley's

presence, Tambourella handed over the crack cocaine that she stated Moseley had told her to conceal.

Tambourella went to Fairview Hospital on November 17, 2007, where she was treated for sexual assault. A rape kit, however, was not performed because too much time had elapsed since the incident. The nurse who treated Tambourella testified that "she did have some bruising," and when she attempted to do the speculum exam, "it was too uncomfortable for her so we stopped." The nurse further stated that there was also some bruising documented to Tambourella's arm and thigh that appeared to be older bruises.

The defense presented several witnesses, all of whom testified that they had met Tambourella through Moseley and that she never appeared distressed or scared. A few of the witnesses testified that Moseley and Tambourella were a couple. For example, Jackie Pierson, who was one of the teenage girls found at the hotel when Moseley was arrested, testified that she would often leave the room to give Moseley and Tambourella privacy. Pierson also denied being held against her will and indicated that she hung out with Moseley during this time period for approximately three weeks because it was "fun." She acknowledged that Moseley would buy her food and clothes but indicated that she did not know how he obtained his money.

The jury acquitted Moseley on the first two counts of the indictment, rape and kidnapping, alleged to have occurred on October 6, 2007. The jury found him guilty of Count 3, kidnapping, relating to the entire period; convicted him of Count 4 and Count 6, the rape and kidnapping pertaining to the anal rape, but found him not guilty of the lesser included offense of assault on Count 5, pertaining to the same incident; found him guilty of Count 8, the kidnapping pertaining to the belt incident, but not guilty of Count 7, felonious assault for that incident; and convicted him of the drug charges and possession of criminal tools.

The trial court separately held a hearing on the sexually violent predator ("SVP") and repeat violent offender ("RVO") specifications that were attached to several of the counts of the indictment. The court found him not guilty on the SVP specifications but guilty as to the RVO specifications. The court sentenced Moseley to a total of 18 years in prison on all of the convictions. The trial court, however, incorrectly stated in its journal entry that Moseley was found guilty of the sexual violent predator specifications.

Sufficiency and Manifest Weight of the Evidence

In his first assignment of error, Moseley argues that his conviction was not supported by sufficient evidence and was against the manifest weight of the evidence.

An appellate court's function in 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. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus. "In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, 678 N.E.2d 541. 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. *Jenks* at 273.

While the test for sufficiency requires a determination of whether the state has met its burden of production at trial, a manifest weight challenge questions whether the state has met its burden of persuasion. *Thompkins*, supra, at 390. When a defendant asserts that a conviction is against the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the fact finder clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. Id. at 387.

Under his sufficiency challenge, Moseley contends that "no rational fact finder could have accepted [Tambourella's] testimony, and that it does not provide sufficient evidence for a conviction." He therefore does not make any argument that the state failed to present evidence as to each element of the offenses; instead, he simply argues that the testimony offered, namely, Tambourella's, was totally "incredible" and therefore insufficient to support the rape, kidnapping, and assault convictions.[1] We disagree. We do not conclude that Tambourella's testimony was so incredible that any rational juror would have completely disregarded it. Construing the evidence in a light most favorable to the state, we find that any rational trier of fact could have found Moseley guilty beyond a reasonable doubt on the charges.

We now turn to the manifest weight of the evidence challenge. Here, the state's case in support of the rape, kidnapping, and assault convictions primarily relied on Tambourella's testimony. Moseley claims that Tambourella's allegations are totally unbelievable because, if they were true, she would have fled or alerted the authorities much earlier than the 39th day of her alleged captivity. But the state answered this question at trial and presented

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[1]Although Moseley broadly states that he is challenging the jury's verdict, his entire argument focuses on those counts involving Tambourella, i.e., the rape, kidnapping, and assault charges. He raises no argument as to the drug possession, drug trafficking, or possession of criminal tools counts; therefore, we need not address them under this assignment of error. We do, however, generally discuss the evidence supporting these counts in the disposition of the third assignment of error. See fn. 3.

compelling evidence to support it: Tambourella was afraid of Moseley — afraid of what he would do to her and afraid of what he would do to the people near to her.

We further cannot say that those factors that make Tambourella less credible, i.e., her substance abuse history, render her testimony wholly unreliable. Nor can we say that contradictory statements made by her require a reversal of the jury's verdict. As this court has previously recognized, a defendant is not entitled to a reversal on manifest-weight grounds merely because inconsistent evidence was presented at trial. *State v. Gaughan*, 8th Dist. No. 90523, 2009-Ohio-955, ¶32, citing *State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958, at ¶21.

As for Moseley's other arguments attacking the credibility of Tambourella, namely, (1) the lack of any physical evidence to corroborate her claims, (2) her failure to timely appear at the hospital so that a rape kit could have been done, and (3) the testimony of the defense witnesses belying her testimony, we note that the jury heard all of these same arguments and nonetheless chose to believe Tambourella's testimony. And after a thorough review of the record, we cannot say that the jury clearly lost its way simply because it chose to believe Tambourella over the defense witnesses. Indeed, the determination of weight and credibility of the evidence is for the trier of fact. *State v. DeHass* (1967), 10

Ohio St.2d 230, 227 N.E.2d 212. "The rationale is that the trier of fact is in the best position to take into account inconsistencies, along with the witnesses' manner and demeanor, and determine whether the witnesses' testimony is credible." *State v. Chandler*, 10th Dist. No. 05AP-415, 2006-Ohio-2070, ¶9. Further, the trier of fact is free to believe or disbelieve all or any of a witness's testimony. Id. Although an appellate court must act as a "thirteenth juror" when considering whether the manifest weight of the evidence requires reversal, it must give great deference to the fact finder's determination of the witnesses' credibility. Id.

Accordingly, given the deference we must afford the jury who observed Tambourella for four days while she testified and observed all of the defense witnesses, we cannot say that the jury "lost its way" simply because it believed Tambourella. The first assignment of error is overruled.

Batson Challenge

In his second assignment of error, Moseley, who is African-American, argues that his constitutional rights were violated when the trial court allowed the state to peremptorily excuse two black female jurors from the jury panel over his *Batson* objection.

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.

A. Three-Step Procedure for Analyzing a *Batson* Claim

Trial courts are to apply a three-step procedure for evaluating claims of racial discrimination in peremptory challenges. *State v. Frazier*, 115 Ohio St.3d 139, 2007-Ohio-5048, 873 N.E.2d 1263, ¶64. First, the opponent of the peremptory strike must make a prima facie case of racial discrimination. Id. "To make a prima facie case of such purposeful discrimination, an accused must demonstrate: (a) that members of a recognized racial group were peremptorily challenged; and (b) that the facts and any other relevant circumstances raise an inference that the prosecutor used the peremptory challenges to exclude jurors on account of their race." (Internal citations and quotations omitted.) *State v. Hill* (1995), 73 Ohio St.3d 433, 444-445, 653 N.E.2d 271.

Second, if the trial court finds that the opponent has set forth a prima facie case, then the proponent of the strike must come forward with a racially neutral explanation for the strike. *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, 804 N.E.2d 433, ¶106. The explanation need not rise to the level justifying exercise of a challenge for cause. Id.

Third, "if the proponent puts forward a racially neutral explanation, the trial court must decide, on the basis of all the circumstances, whether the

opponent has proved purposeful racial discrimination." *State v. Herring*, 94 Ohio St.3d 246, 256, 2002-Ohio-796, 762 N.E.2d 940. This final step involves evaluating "the persuasiveness of the justification" proffered by the prosecutor, but "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." *Collins v. Rice* (2006), 546 U.S. 333, 338, 126 S.Ct. 969, 163 L.Ed.2d 824, quoting *Purkett v. Elem* (1995), 514 U.S. 765, 768, 115 S.Ct. 1769, 131 L.Ed.2d 834 (per curiam). The trial court, however, may not simply accept a proffered race-neutral reason at face value; it must examine the prosecutor's challenges in context to ensure that the reason is not merely pretextual. *Frazier*, 115 Ohio St.3d at ¶65.

B. Standard of Review

In reviewing a trial court's ruling on a *Batson* challenge, we will not disturb the court's decision unless we find it to be clearly erroneous. See *State v. Were*, 118 Ohio St.3d 448, 2008-Ohio-2762, 890 N.E.2d 263, ¶61. This deferential standard arises from the fact that step three of the *Batson* inquiry turns largely on the evaluation of credibility by the trial court. See *Herring*, 94 Ohio St.3d at 252, citing *Batson*, 476 U.S. at 98.

Moseley challenges the trial court's decision allowing the prosecutor to exercise his second peremptory against Juror B. and his fourth peremptory against Juror H. Focusing on the third step of the *Batson* procedure, he argues

that the trial court failed to engage in an independent examination of the state's reasons for exercising preemptories against them and instead merely "rubber-stamped" the reasons proffered by the state in direct contravention of the United States Supreme Court's recent decision in *Snyder v. Louisiana* (2008), 552 U.S. 472, 128 S.Ct. 1203, 170 L.Ed.2d 175. We disagree.

C. Application of *Snyder*

In *Snyder*, which was a capital murder case, the prosecutor had proffered two race-neutral reasons for the removal of a black juror: (1) "that he looked very nervous * * * throughout the questioning," and (2) that his student-teaching obligation may prompt him to return a guilty verdict of a lesser-included offense of the charge to avoid the penalty phase. The second reason, i.e., the nondemeanor-based explanation, was proven to be refuted by the record. And as for the first reason, the demeanor-based explanation, the court found that the peremptory challenge could not be sustained on this ground because there was no evidence that the trial judge even relied on it. Id. at 485-486.

Synder, however, does not stand for the proposition that a trial judge must specifically explain its analysis on the record before accepting the prosecutor's proffered reason for removal. Nor must a trial court make an independent determination as to a prospective juror's demeanor when such reason is offered as grounds to excuse the juror. Although *Snyder* recognizes that this is clearly

the preferred practice and that a silent record as to the trial judge's own observation of a prospective juror's demeanor *may* be grounds for reversal under certain circumstances, it does not create such a bright-line rule.

In *Thaler v. Haynes* (2010), 559 U.S. ___, 130 S.Ct. 1171, ___ L.Ed.2d ___,[2] the United States Supreme Court examined *Batson* and *Snyder*, noting that "neither of these cases held that a demeanor-based challenge must be rejected unless the judge personally observed and recalls the relevant aspect of the prospective juror's demeanor." 130 S.Ct. at 1174. The Court explained:

"The opinion in *Snyder* did note that when the explanation for a peremptory challenge 'invoke[s] a juror's demeanor,' the trial judge's 'first hand observations' are of great importance. Id. at 477, 128 S.Ct. 1203. And in explaining why we could not assume that the trial judge had credited the claim that the juror was nervous, we noted that, because the peremptory challenge was not exercised until some time after the juror was questioned, the trial judge might not have recalled the juror's demeanor. Id. at 479, 128 S.Ct. 1203. These observations do not suggest that, in the absence of a personal recollection of the juror's demeanor, the judge could not have accepted the prosecutor's explanation. Indeed, *Snyder* quoted the observation in *Hernandez v. New York,* 500 U.S. 352, 365, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991) (plurality opinion), that the best

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[2]This is a per curiam decision in a federal habeas corpus case.

evidence of the intent of the attorney exercising a strike is often that attorney's demeanor. See 552 U.S. at 477, 128 S.Ct. 1203." *Thaler* at 1175.

Thus, we conclude that Moseley interprets *Snyder* much broader than the court intended. Contrary to Moseley's assertion, we do not find that *Snyder* mandates that the trial court undertake specific fact-finding exercises prior to rejecting a *Batson* challenge; indeed, such a holding would have overruled the Court's established position to the contrary. See *Miller-El v. Cockrell* (2003), 537 U.S. 322, 347, 123 S.Ct. 1029, 154 L.Ed.2d 931 (reaffirming that the Supreme Court "adhere[s] to the proposition that a state court need not make detailed findings addressing all the evidence before it" in deciding a *Batson* claim). Instead, Snyder holds that a reviewing court should not give deference to a demeanor-based explanation when there is no indication in the record that the court relied on it in overruling the *Batson* challenge and the other reasons offered are proven to be pretext for discrimination. 552 U.S. at 485-486.

With these principles in mind, we now examine the prosecutor's stated reasons for the use of the peremptory challenges and whether the trial court's acceptance of the reasons offered was clearly erroneous.

Removal of Juror B.

The prosecutor provided the following reason in excusing Juror B. from the jury venire:

"Ms. [B.] is a social worker who works for the Department of Children and Family Services. Furthermore, several questions were asked of Ms. [B.] assuming that women will lie to get their children back. Ms. [B.] answered in the affirmative. Rather than attack her for cause, I chose to enter a peremptory challenge for her."

The defense responded by arguing that Juror B. indicated "she could be fair and impartial, * * * that she would consider everybody's credibility, and that she wouldn't use — she would start from ground zero and judge everybody from the witness stand."

The court rejected the *Batson* challenge of Juror B., finding that "she is the proper subject of a peremptory challenge."

Contrary to Moseley's assertion, we find Juror B.'s employment at CCDCFS and her belief that "women would indeed lie to social workers in order to keep their children" were significant and supported a nondiscriminatory basis to excuse her. Here, the state's entire case against Moseley on the rape, kidnapping, and felonious assault counts hinged significantly on the credibility of the alleged victim, Tambourella, whose children were in the temporary custody of the CCDCFS. Conversely, Moseley's defense centered around the claim that the victim lied about Moseley to excuse her failure to strictly comply with her CCDCFS case plan and to avoid losing permanent custody of her

children. Given Juror B.'s acknowledging that a drug-addicted mother (i.e., similar to the victim) will basically say anything to get her kids back, we find the state's reason for excusing Juror B. to be reasonable and nondiscriminatory. We therefore cannot say that the trial court's finding that "she is the proper subject of a preemptory challenge" was clearly erroneous.

Removal of Juror H.

We next examine the prosecutor's use of his fourth peremptory challenge on Juror H.

The prosecutor stated the following in response to the trial court's request for his reason for excusing Juror H.:

"Judge, number one, Ms. [H.] had some difficulty following some of the questions. When asked directly by Ms. Sowol if the state were to sustain its burden would you be able to sign a guilty verdict. She initially answered no. I think the best she did is got the answer up to I don't know. In addition, I had great concern about the fact that she had a family funeral that she was concentrating on in Dallas. Towards the end of the session in which she was sitting in the box, she appeared to not be paying attention to what was going on in the courtroom. I can only contemplate that maybe she was worrying about the family situation, but at the very least she had eyes closed and head down, I worry about her ability to keep up concentration."

Relying on *Snyder*, Moseley argues that this case is factually identical: the prosecutor's first stated reason is refuted in the record; the trial court made no finding as to the validity of the demeanor-based reason; and another white juror expressed a greater concern than Juror H. over a time constraint but was not removed, thereby evidencing that the prosecutor's stated reasons were merely pretext for discrimination. We disagree.

The instant case is distinguishable from *Snyder* in a very critical way: the defense never disputed the proffered race-neutral reasons for excusing Juror H.[3] In *Snyder*, the defense had disputed both of the proffered reasons, indicating that all of the jurors appeared "nervous" and explaining that the prospective juror's student-teaching concern was alleviated after the trial judge spoke with the dean of his school. We note this distinction because *Batson* places the burden of persuasion on the opponent of the strike. Here, the trial court may have construed Moseley's failure to respond to the government's explanation as an indication that he no longer disputed the strike. See *United States v. Jackson* (C.A.6, 2003), 347 F.3d 598, 605, citing *United States v. Rudas* (C.A.2, 1990), 905 F.2d 38, 41.

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[3]We note that the defense did dispute the explanation provided in support of excusing Juror B.

The record reveals that Juror H. indicated in one of her answers that she was unclear as to what the verdict would be if the state met its burden of proof. She was also equivocal in answering the state's question a second time but ultimately indicated that she clearly understood her role. While we agree that the prosecutor misstated that Juror H. had initially answered no, when in fact she had answered "I don't know," the prosecutor's stated reason in challenging Juror H. was that she had "some difficulty following some of the [state's] questions." Having the benefit of only a cold record, we cannot ascertain whether Juror H. hesitated at great length in answering the state's questions. And given that Moseley did not dispute or rebut the prosecutor's claim, and having identified at least one occasion where Juror H. demonstrated "some difficulty," we cannot say that the state's first stated reason is refuted in the record.

We likewise cannot say that the trial court's failure to comment on Juror H.'s demeanor precludes us from considering this as a valid race-neutral reason. Indeed, as made clear by *Thaler*, even if the trial judge had not observed Juror H. with her head down and eyes closed, his ruling on the *Batson* challenge could

have been validly based on the judge's personal observation of the prosecutor's demeanor during the prosecutor's explanation of his proffered reasons.[4]

Lastly, contrary to Moseley's argument on appeal, we do not find that another similarly-situated white juror remained on the jury, thereby evidencing the prosecutor's discriminatory intent. Although he points to one juror on appeal, who he claims had a work situation that "posed a far greater risk of diverted concentration" than Juror H.'s upcoming funeral, we note that there is no evidence in the record that this juror had her eyes closed and head down during the proceedings.

Accordingly, based on the record before us, we cannot say that the trial court erred in overruling Moseley's *Batson* objection as to Juror H.

The second assignment of error is overruled.

Closing Argument

In his third assignment of error, Moseley argues that the trial court abused its discretion in imposing a 25-minute time limit on his closing

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[4]We also note that we do not have the same particular circumstances in *Snyder*, which contributed to the court's holding that the demeanor-based explanation could not be relied on. In *Snyder*, the peremptory challenge was not exercised until some time after the juror was questioned, and the trial judge might not have recalled the juror's demeanor. Here, Juror H. was called, questioned, and excused all on the same day. Unlike the juror at issue in *Snyder*, who was not challenged until the day after he was questioned, and by that time dozens of other jurors had been questioned, only two jurors had been called after Juror H. and prior to her removal.

argument, which he claims violated his constitutional right to present a defense and constitutional right to effective counsel.

"The trial court in a criminal proceeding may in its discretion limit the duration of closing arguments, as long as such limitation is reasonable under the circumstances." *State v. Ferrette* (1985), 18 Ohio St.3d 106, 110, 480 N.E.2d 399. We therefore review a trial court's decision under an abuse of discretion, recognizing that "no precise rule can be laid down as to the time limit to which the trial court may properly restrict the argument of counsel, since what might be a reasonable limitation in one case would unquestionably be unreasonable in another." (Internal quotations omitted.) *State v. Jenkins* (1984), 15 Ohio St.3d 164, 221, 473 N.E.2d 264.

Relying on this court's decision in *State v. Kay* (1967), 12 Ohio App.2d 38, 230 N.E.2d 652, the Ohio Supreme Court has noted five factors for a reviewing court to consider in determining whether a particular time limitation on closing argument constitutes an abuse of discretion: "(1) the circumstances of the case, (2) the gravity of the offense, (3) the number of witnesses examined, (4) the volume of the evidence, and (5) the time consumed by the trial." *Jenks* at 221.

Applying these five factors to the instant case, we find the trial court's imposition of 25 minutes for closing argument to be unreasonable. Moseley was indicted on 11 counts: two counts of rape, four counts of kidnapping, two counts

of felonious assault, two drug-related offenses, and possession of criminal tools. These offenses spanned over a month's time. The jury heard six days of testimony involving twelve witnesses, whose testimony consumed 1,218 pages of the transcript. And Moseley faced significant prison time if convicted on all the charges. Moreover, the trial court offered no rationale for its time limitation on closing arguments. We can only guess that it was partly due to the fact that the trial was exceeding everyone's time expectation, which is not a sufficient basis to impose such a time restriction. See *Kay* at 51.

But despite our finding that the trial court's time limitation on closing argument was unreasonable, we cannot say that Moseley was prejudiced to warrant a reversal on this ground. See *Kay* at 52 (after finding that trial court abused its discretion in limiting defendant's closing argument, the court recognized that "[s]tanding alone, such error might not warrant reversal.") Here, we cannot say that the 25-minute time limit impaired Moseley's defense or that a greater time period would have changed the outcome. Thus, we find the trial court's error to be harmless beyond a reasonable doubt. See Crim.R. 52(A);[5] *Chapman v. California* (1967), 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705.

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[5]Crim.R. 52(A) describes a harmless error as one "which does not affect substantial rights [and therefore] shall be disregarded."

Initially, we address Moseley's claim that this court cannot find the trial court's limitation on closing argument to be harmless because there was not overwhelming evidence of Moseley's guilt. According to him, this case was a close call. While we agree that the jury's conviction of Moseley on the rape, kidnapping, and assault charges were a close call, we cannot say the same about the two drug-related offenses and possession of criminal tools offense. Unlike the other offenses, where the state relied primarily on the victim's testimony, the evidence supporting these charges was overwhelming.[6] We point this out only because Moseley's counsel spent hardly any time on these offenses during his closing argument. Therefore, to the extent that the 25-minute time limitation forced his counsel to limit his discussion on these charges, we still find the error to be harmless. No amount of time in closing argument would have changed the outcome on these counts.

Conversely, our review of the record reveals that Moseley's counsel was able to effectively present the defense's theory on the rape, kidnapping, and

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[6]The police found drugs, rubber gloves, a box of razor blades, which had a single blade missing, and a single blade with white residue in the hotel room where they apprehended Moseley. Moseley acknowledged ownership of the items. As for Moseley's claim that he used the razors to shave, there was no evidence corroborating this. Likewise, Moseley's statement that he used the gloves for home healthcare was unsupported by the record. In fact, the defense witnesses who hung out with Moseley during the relevant time period never once mentioned that he did any home healthcare. The police also recovered drugs in the room. Finally, from both the state and defense witnesses' testimony, it was abundantly clear that Moseley sold drugs and relied on such occupation to support himself.

assault charges while poking numerous holes in the state's case, all during the 25-minute time limitation. Indeed, as argued by Moseley, the state's case on these counts hinged primarily on the credibility of the victim. The victim's testimony was the bulk of the state's evidence in support of these charges. During closing argument, Moseley's defense counsel highlighted the significant inconsistent statements made by the victim while emphasizing the victim's inconsistent actions. We recognize, however, the apparent irony in our analysis: had Moseley's defense counsel not been so competent, the outcome of this assignment of error might be different. But because his defense counsel effectively summarized the evidence and conveyed the defense's theory all within the time limitation, we find that Moseley's substantial rights were not violated and that a reversal is not warranted in this case.

We further note that, although Moseley's counsel objected to the state having 15 minutes more than the defense, Moseley's counsel never indicated that he needed more time to effectively present his defense. Nor did the trial court interrupt the defense at any time during the closing argument. Likewise, although we only have a cold record to review and cannot ascertain the exact length of each side's closing argument, the state's entire closing argument comprised of 26 transcript pages and the defense's closing argument comprised

of 19 pages. Thus, we do not find that the more time afforded the state substantially impaired Moseley's rights.

Finally, as to Moseley's counsel's purported inability to discuss each element of the offenses due to the time constraint, we note that the trial court, over the state's objection, charged the jury on the elements of the offenses immediately prior to the closing arguments. Therefore, the jury had just heard the elements. And, as recognized by Moseley's defense counsel in closing argument, the state's success on proving the elements came down to whether the jury believed the victim. Given that Moseley's counsel was able to present the potential reasons why the jury should not believe the victim within the 25-minute time period, we cannot say that Moseley was prejudiced by such limitation.

Accordingly, Moseley's third assignment of error is overruled.

Admissibility of Evidence

In his final assignment of error, Moseley argues that the trial court erred in allowing testimony regarding Moseley's prior murder conviction.

Moseley first challenges the trial court's admission of Tambourella's testimony regarding Moseley's murder conviction and the details surrounding the murder. Although he concedes that some of her testimony was properly admitted to prove her state of mind, he contends that the court should not have

allowed her to describe such gory detail of the murder or "regale the jury with stories about Moseley bragging incessantly about his murder conviction." He contends that the prejudicial nature of this testimony far outweighed the probative value.

Under Evid.R. 403(A), relevant evidence is not admissible "if its probative value is substantially outweighed by the danger of unfair prejudice[.]" "The admission or exclusion of relevant evidence rests within the sound discretion of the trial court." *State v. Sage* (1987), 31 Ohio St.3d 173, 510 N.E.2d 343, paragraph two of the syllabus. We therefore review a trial court's decision regarding the admission of such evidence under an abuse of discretion standard. Id.

Here, we cannot say that the trial court abused its discretion. The trial court took great lengths to limit the testimony to avoid any prejudice to Moseley. The trial court prevented the state from eliciting any testimony from Tambourella on direct examination related to Moseley's prior conviction. The trial court only allowed the evidence to be admitted after the defense opened the door. And even then, the trial court admonished the prosecutor whenever the questioning became repetitive or excessive and provided several limiting instructions to the jury, reiterating that the evidence should be considered only for the purpose of proving the witness's state of mind. Here, the crux of the

defense's theory was that Tambourella had numerous opportunities to leave or report Moseley during the 39-day period but did not — she only reported him when she thought she may lose her children permanently to CCDCFS. Because the defense repeatedly hammered this point to further reinforce his primary message, namely, Tambourella is not credible, we agree with the trial court that her knowledge of Moseley's prior conviction and the events surrounding the conviction went directly to her state of mind. And in this case, we cannot say that the trial court abused its discretion in finding "the evidence more probative than prejudicial."

Next, Moseley argues that the trial court abused its discretion in allowing the prosecutor to elicit testimony from two defense witnesses, Norzella Sumlin and Jacky Pierson, as to Moseley's character when Moseley never put his character at issue. He contends that such tactic directly contravenes Evid.R. 404(A)(1)[7] and that these witnesses' opinions of Moseley were completely irrelevant and therefore inadmissible under Evid.R. 402.[8]

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[7]Evid.R. 404(A)(1) provides that "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, subject to the following exceptions:

(1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same is admissible; however, in prosecutions for rape, gross sexual imposition, and prostitution, the exceptions provided by statute enacted by the General Assembly are applicable."

[8]Evid.R. 402 provides that "[e]vidence which is not relevant is not admissible."

But our review of the record reveals that Moseley opened the door to these questions on direct examination of these witnesses. For example, defense counsel asked Sumlin on direct examination the very question that Moseley argues as being improperly asked by the state: whether she was afraid of Moseley. Defense counsel further inquired as follows: "Are you afraid if you don't testify appropriately something is going to happen to you?" Similarly, the defense counsel asked Pierson on direct examination, "Did Michael ever say I've killed before, I'll kill again?" We therefore cannot say that the trial court abused its discretion in allowing the state to follow up on many of the same questions that were asked by the defense on direct.

The final assignment of error is overruled. But because of the obvious clerical error in the journal entry, which erroneously states that Moseley was found guilty of the sexually violent predator specifications, the matter is remanded to correct the sentencing entry.

Judgment affirmed and case remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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.

MARY J. BOYLE, JUDGE

KENNETH A. ROCCO, P.J., and
JAMES J. SWEENEY, J., CONCUR