

IN THE SUPREME COURT OF OHIO

ORIGINAL

12-0830

STATE OF OHIO,

Appellee,

vs.

TYRAN DAVIS,

Appellant.

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CASE NO.

On Appeal from the Summit County
Court of Appeals, Ninth Appellate
District

Court of Appeals Case No. 25826

MEMORANDUM IN SUPPORT OF JURISDICTION
OF
APPELLANT TYRAN DAVIS

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WHY THIS COURT SHOULD ACCEPT THIS CASE.

In the present case, the appellant Tyran Davis, is raising the issues that the trial court erred in refusing to instruct the jury on the inferior offense of voluntary manslaughter and committed reversible error and abused its discretion by denying the **Batson** challenge.

The appellant presented both issues to the Ninth District Court of Appeals explaining that it is up to the jury, not the judge, as to whether there is reasonable sufficient evidence to incite a person into using deadly force, as this is the question of fact for the jury to decide. It is not the court who decides this ultimate question, the trial court decides only if there is evidence of reasonably sufficient provocation occasioned by the victim and then such provocation caused the appellant to be under the influence of a "sudden passion or under a sudden fit of rage." R.C.2903.03.

The Majority decided that the appellant was entitled to an instruction on voluntary manslaughter if the evidence supported the mitigating factor of reasonably sufficient provocation. (Appx. Opinion at ¶22). But they went on to hold that since appellant was acquitted of purposely killing the victim, the trial court's error was harmless. Id.

This decision and opinion by the majority was disagreed to by Justice J. Carr, (Appx. Opinion at ¶28-32). In Justice Carr's dissent, he expressed that "an offense cannot be looked at in a vacuum when multiple offenses for the same conduct are charged." Id. ¶28. Justice Carr explains that even if the appellant's trial counsel would have requested every instruction the majority suggests, they still would have been thwarted by two insurmountable obstacles because of the trial court had already decided-erroneously that appellant could not meet the provocation requirement.

Id., at ¶30.

The appellant prays that this court accepts jurisdiction of this case because it is no longer in dispute the appellant should or should not have had a jury instruction on the lesser offense of voluntary manslaughter, the dispute presented now is whether the trial courts error in not giving the requested instruction harmless error.

"It is ironic that the fact that the defendant was correct in his argument to the trial court that he was not criminally liable for purposeful murder is now used against him on appeal to decide that the trial court's error was harmless." (Appx. Opinion, Justice Carr's dissent at ¶29).

The appellant's Batson v. Kentucky (1989), 476 U.S. 79 challenge was clear abuse of discretion of the trial court, this will be demistrated through the record that this erroneous decision prejudiced the appellant from having his constitutional protected right to a fair trial.

The trial court clearly abused its discretion and by doing so committed reversible error all to the prejudiced of the appellant because the juror stated that he can be fair and impartial and understood that the judge would give him the definitions of law to fallow.

Futhermore, in failing to give the manslaughter instuction, the trial court was not fair to appellant, the majority of the Ninth Appellate District has already ruled that this was error, but harmless. Appellant is now asking this court to accept jurisdiction over his appeal and conclude that the error was not harmless because "the striking of [appellant's] pregnant girlfriend was sufficient provocation to meet the objective prong and remand the matter for a new trial." (Appx. Opinion Justice Carr's dissent at ¶32).

STATEMENT OF THE CASE AND FACTS

On October 8, 2010 at about 9:30 PM, Tierra Shellman,(sister of appellant), drove with others to the Wilbeth Homes an Arlington Street in Akron, Ohio, Known also as "The Wilbeth". Serina,(driver of the car and friend), Denika,(sister of appellant), Tyiesha,(sister of appellant), and Terrika,(cousin of appellant), and they all were going to the home of Shaneka to visit her children, Tierra's niece and nephew. (Tr.P. 258)

As they went into the house, Steve Myers,(the victim), subsequently came in.(Tr. P. 260).

After the visit the young women left the house and returned to the vehicle. Steve tried to get in the car and Denika told him to not get into the car because no one knew him.(Tr.P. 261). Thereafter, Steve threw liquor in Denika's face(Tr.P. 262), and told her that he would "cancel her".(Tr.P. 261). Shortly thereafter, Steve's girlfriend, Shereene, came to the scene.(Tr.P. 262). Tierra testified that Steve was telling her to fight Denika.(Tr.P. 263). The two women then started fighting, this being the first fight.(Tr.P. 264). After this first fight was over, the women in the car went to a different area around the corner called The Rosemary. (Tr.P. 264). After being at The Rosemary they then went back to The Wilbeth because Denika's intention to go back and again fight Shereene. (Tr.P. 265).

When they arrived Steve was Standing outside and told them to move the car from by Shaneka's apartment. (Tr.P. 266). Serina moved the car and Steve started "speaking words" and Shereene came back, started arguing and they started fighting all over again. Tr.P. 266-267). Tyiesha tried to break up the fight and was pushed to the ground by Steve. (Tr.P. 267). Tyiesha got up and walked away.(Tr.P. 268). Tierra testified that Shereene got the better of Denika in this fight.(Tr.P. 268).

Tierra testified that at some point, Jasmine Downing came to the scene.(Tr.P. 270). Jasmine is the pregnant girlfriend of the appellant and he is the father. (Tr.P. 273). She indicated now that a third fight was going on across the street (Tr.P. 271) between Denika and Shereene. She testified that Steve Myers was present and that when Jasmine went by the fight, Steve walked up and punched Jasmine.(Tr.P. 273). Tierra testified that she exclaimed "bro, he just hit your baby's mama"(Tr. P. 273) and that Tryan then came across the street and pulled the trigger.(Tr.P. 273). When asked if she saw him walk across the street Tierra answered "walked, ran, he came across the street. The women then ran from the scene to Chetania's house.(Tr. P.275).

Tierra testified that Jasmine was hit hard by Steve with closed fist.(Tr.P. 276). She opined that Jasmine was still conscious when she was hit, but she was trying to "collect herself". (Tr.P. 276).

On cross-examination Tierra testified that Steve also hit Denika in her face with his closed fist.(Tr.P. 286). She further testified that Tyiesha, Tierra's sister was pregnant and that Tyiesha tried to break up the second fight. She further stated that Steve pushed her to the ground in a hard fashion and she then fell to the ground. (Tr.P. 288).

Tierra testified that between the time she yelled that Jasmine got punched, to when the appellant shot, only seconds passed.(Tr.P. 293).

Lawanda Hubbard testified to her observations, she corroborated Tierra's statement that Steve had taken his shirt off for the last fight.(Tr.P. 315). On cross examination it was quoted that in her 911 call, she said "dude socked--dude socked the girl, and then dude ran up on him"(Tr.P. 315). When asked what she was referring to by that statement she replied that she was "referring that the victim hit a girl and the killer ran up on him and shot him." (Tr.P. 316).

Lawanda added to the description of the punch by Steve to Jasmine. She said that she characterized the punch as a "hard punch", with a closed fist to her face. (Tr.P. 316). Lawanda testified that she saw the shooter actually "physically running" toward the victim. (Tr.P. 316-317).

Various police officers investigated the scene. James Alexander an employee of AMHA responded to a shots fired call at about 11:05pm on October *, 2010. (Tr. P. 189). He secured the crime scene where probably 15 people were milling around. (Tr.P. 200).

Sergeant Michael Rimm of the Akron Police Department testified that he is assigned to the crime scene unit and came on the scene to investigate. He said that the murder occurred in front of 856 Donald Avenue. (Tr.P. 213-215).

Detective John Ross of the Akron Police Department next arrived at the scene. He interviewed Lawanda Hubbard. (Tr.P. 475). He indicated that she told him that she stated there was a large fight across the street and the fight had been going off and on for about an hour. She stated that the fight stopped and then started again, at which time "a male ran across the street, a male in a hoodie, dark pants, ran across the street and fired several shots at another male." (Tr.P. 476). He indicated that Lawanda had video taped through her cell phone part of the activity. This video indicates and demonstrates the number of people in and around the fight and activity. Detective Ross continued to testify about his investigation, interview efforts, and the facts that they developed a suspect as being Tyran Davis. (Tr.P. 486). He indicated that the appellant was picked up and that he talked with him at the police station, and that he had come from the hospital because he had been hit in the face with a bottle while at a bar, and had facial cuts and cuts around his mouth. (Tr.P. 488). He said that the appellant told they had gotten in to a fight and somebody hit him in the face with a bottle. (Tr.P. 491).

Detective Ross also indicated that Ms. Hubbard told him that not more than ten seconds after the victim punched Jasmine, that he was shot.(Tr.P. 504).

The state produced the chief Medical Examiner for the County of Summit, Ohio, Dr. Lisa Kohler. Dr. Kohler testified that the cause of death of Steve Myers was multiple gun shot wounds.(Tr.P. 535). She described that there were 11 different gun shot wounds in the body.(Tr.P.522-531).

On November 8, 2010 the appellant was charged by way of indictment by the Summit County Grand Jury with two counts of Murder and one count of Felonious Assault. In count one it is alleged the appellant did on or about October 8, 2010 commit the crime of Murder in that he did purposely cause the death of Steven Myers, a Special Felony. The claim is that the appellant shot and killed Steven . In Count two it is alleged that on or about October 8, 2010 the appellant did commit the crime of Murder as approximate result of the appellant attempting to commit a felonious assault, a felony of the first or second Degree, a special Felony. In count three it is alleged that the appellant did commit the crime of Felonious Assault in that appellant did knowingly cause serious physical harm to Steven Myers and or did knowingly cause or attempt to cause physical harm by means of a deadly weapon or dangerous ordnance, a felony of the second Degree. A firearm Specification was also charged in Counts one, two and three.

On November 24, 2010 the appellant pled not guilty to all charges.

At trial, the appellant requested the court to give a charge of voluntary manslaughter but the court denied his request over objection of defense counsel.

At trial, after Voir Dire and during peremptory challenges, the state asked to excuse prospective juror number 10. (Tr.P. 141). The defense objected in that number 10 was african american and so defense asked a race neutral reason why the state was dismissing him. The defense made a "Batson" challenge which was overruled.

On January 24, 2011 the appellant was found not guilty of Murder, but found Guilty of Felony Murder, with a firearm specification. The appellant was also found guilty of Felonious Assault, with a firearm specification.

The court sentenced the appellant to three years mandatory for the firearm spec. to be served prior to and consecutively with the sentence for murder 15 years to life, for a total of 18 years to life imprisonment, with a mandatory three years.

The appellant timely appealed his conviction to the Ninth District court of Appeals.

On March 30, 2012 in a 2 to 1 decision, the Ninth District court of Appeals overruled both appellants assignments of error, but reversed and remanded for resentencing because "the trial court's imposition of sentences on both counts is plain error." (Appx. Opinion at ¶26).

The appellant now timely files his Notice of Appeal and Memorandum in Support of Jurisdiction raising the following two Propositions of law for this courts review.

ARGUMENTS IN SUPPORT OF THE PROPOSITIONS OF LAW

Proposition of law I: the trial court erred in refusing to instruct the jury on the inferior offense of voluntary manslaughter which prejudiced the appellant and denied him his constitutional right to a fair trial.

After request by defense and argument, the trial court refused to give an instruction on the inferior offense of voluntary manslaughter. Certainly, if one truly examines the total circumstances in this case, and not just focus on solely one punch, it can reasonably be concluded that a jury could find sufficient provocation occasioned by the victim pursuant to law enabling this instruction.

The trial court failed to acknowledge that it considered the following:

- 1). Steve's behavior was clearly aggressive throughout the evening. First, it began by trying to shove himself into a car of young women, strangers to him. Next, there is the throwing of a class of liquor on Denika.
- 2). Steve commenced the aggression by soliciting his girlfriend Shereene,

who was not even initially involved, to beat up Denika.

- 3). Testimony of all fact witnesses consistently demonstrated that Steve was aggressive to all of the girls, either pushing them. Steve pushed Tyiesha, Tyran's pregnant sister. Steve hit Denika, he was yelling to Shereene to "beat her ass". He hit Tierra and Serina. Steve Punched Jasmein, knocking her out.
- 4). Steve had fighting words and appellant was walking away.
- 5). Steve went to the middle of the street and took his shirt off to fight.
- 6). Steve then went and punched out appellants pregnant girlfriend.

§ By failing to consider the above, the court was unreasonable in its decision, and thus abused its discretion in not giving the requested jury instructions.

In State v. Shane (1992), 63 Ohio St.3d, 630 this court analyzed the standard of review in giving a jury instruction on voluntary manslaughter in a murder case. This court in its syllabus stated that the trial judge must determine whether evidence of reasonable sufficient provocation occasioned by the victim has been presented to warrant such an instruction. In syllabus two it said words alone would not constitute reasonably sufficient provocation to incite the use of deadly force in most situations.

Voluntary manslaughter is an inferior degree of murder, for its elements are ***contained within the indicted offense, except for one or more additional mitigating elements*** "State v. Tyler (1990), 50 Ohio St.3d 24 at 36. quoting State v. Deem (1988), 40 Ohio St.3d 205 at 209. See State v Rhodes 63 Ohio St.3d at 617. The mitigating offense is provocation by the victim causing one to have a sudden fit of rage. A jury could easily determined that after the nights backdrop, when someone punches out your girlfriend, that could put you in a rage. Obviously this did so to the appellant, he became very upset, as any of us would and he just went off. A jury could find this, especially if it acquits on the offense of murder, which it did here.

Even though voluntary manslaughter is not a lesser included offense of murder, the test for whether a judge should give a jury an instruction on voluntary manslaughter when a defendant is charged with murder is the same test to be applied as when an instruction on a lesser included offense sought. **Tyler**, supra, at 592.

Thus, a defendant charged with murder is entitled to an instruction on voluntary manslaughter when the evidence presented at trial would reasonably support both an acquittal on the charged crime of murder and a conviction for voluntary manslaughter. **Tyler**, supra, at 37, **Deem**, supra, at 211. When the evidence presented at trial going to a lesser included offense meets this test, the trial judge must instruct the jury on the lesser offense. **State v. Loudermill** (1965), 2 Ohio St.2d 79.

The appellant was undoubtedly under these facts, "under the influence of sudden passion of in a sudden fit of rage" having been provoked by Steve. It is up to the jury, not the judge, as to whether it is reasonably sufficient to incite the person into using the deadly force. It is not the court who decides this ultimate question; the court decides only if there is evidence of reasonably sufficient provocation.

Proposition of law II: the trial court committed reversible error and abused its discretion by denying the Batson Challenge submitted by trial Counsel.

The state asked to excuse prospective juror number 10. The defense objected in that number 10 was an african American and so defense asked a race neutral reason why the state was dismissing him. See Tr.P. 141-143.

The court addressed and ruled that the state has to the Court's satisfaction set forth several race neutral reasons for their peremptory challenge and so it did allow him to be excused. (Tr.P. 144-146).

In Batson v. Kentucky (1986), 476 U.S. 79 at 89 the United States Supreme Court concluded the "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race[.]" This court has since explained that: A court adjudicates a Batson claim in three steps. First, the opponent of the peremptory challenge must make a prima facie case of racial discrimination. Second, if the trial court finds this requirement fulfilled, the proponent of the challenge must provide a racially neutral explanation for the challenge for cause. Finally, the trial court must decide based on all the circumstances, whether the opponent has proved purposeful racial discrimination. State v. Bryan, 101 Ohio St.3d 433 at 444-445. A trial court's finding that there was a lack of any discriminatory intent on behalf of the State will not be reversed on appeal unless it was clearly erroneous. State v. Were 118 Ohio St.3d 448 at ¶61.

In the within matter, the state sought to excuse juror number 10, a black male. Defense objected stating because he is african american, the state excused him not for any other reason. So defense asked for a race neutral reason.

The reasons the state advanced for race neutral reason is not supported in the record. There is no dialogue that indicates that number 10 was "confused" about the burden of proof. In the discussion, he said he can be fair and impartial and understood that the judge would give the definition for beyond a reasonable doubt. No other questions were asked by the state which demonstrates confusion on number 10's part.

In regards to hitting a woman, number 10 said he was brought up to not hit women. This has nothing at all to do with the fact that Steve hit women. Indeed, the following question was whether if he saw a man hit a woman, if it is appropriate amount of response to strike the man, number 10 said, no, not me.

The allowance by the court in the peremptory dismissal of number 10 was clearly an erroneous ruling by the court. As such, the appellant's rights of equal protection

were violated to his prejudice.

In that the trial court committed reversible error by denying the Batson challenge, the conviction of the appellant must be reversed.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest and a substantial constitutional question. The appellant requests that this court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,

Tyran Davis

Tyran Davis

#A594-982

Mansfield Correctional Inst.

P.O. Box 788

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CERTIFICATE OF SERVICE

I certify that a true copy of this MEMORANDUM IN SUPPORT OF JURISDICTION was sent by ordinary U.S. mail to counsel for appellee, Sherri Bevan Walsh, Summit County Prosecutor, at Summit County Safety Building, 53 University Ave., 6th Floor, on this 7 day of May, 2012.

Tyran Davis

Tyran Davis

STATE OF OHIO)
COUNTY OF SUMMIT)

COURT OF APPEALS
DANIEL M. HORRIGAN

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT
)ss: 2012 MAR 30 AM 11:30

STATE OF OHIO

SUMMIT COUNTY
CLERK OF COURTS

A. No. 25826

Appellee

v.

TYRAN L. DAVIS

Appellant

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 10 10 2961 (A)

DECISION AND JOURNAL ENTRY

Dated: March 30, 2012

DICKINSON, Judge.

INTRODUCTION

{¶1} Tyran Davis shot Steven Myers at least ten times, killing him. A jury acquitted Mr. Davis of murder, but convicted him of felony murder and felonious assault with a firearm specification. The trial court sentenced him to eighteen years to life in prison. He has appealed. This Court affirms his convictions because he was not entitled to a voluntary manslaughter jury instruction in relation to the felony murder via felonious assault charge, he was not prejudiced by the court's failure to give the instruction in relation to the purposeful murder charge, and the trial court correctly overruled his Batson challenge. We reverse in part and remand the matter for resentencing due to plain error in the imposition of multiple sentences for counts all parties agreed should have been merged for sentencing purposes.

BACKGROUND

{¶2} On the evening of October 8, 2010, Mr. Davis's sister, Denika Davis, went with two other sisters, a cousin, and a friend to the Wilbeth-Arlington Homes to visit Shaneka McBride-Wilson and her children. As they were leaving, Mr. Myers tried to get in their car. Ms. Davis refused to allow it as nobody in the car knew him. Mr. Myers threatened to "cancel" her and threw a drink in her face. Just then, Mr. Myers's girlfriend, Shereene Ford, arrived. Mr. Myers convinced Ms. Ford to physically fight Ms. Davis. After several minutes, the fight ended, and Ms. Davis and her companions left the Wilbeth-Arlington Homes.

{¶3} Later that evening, Ms. Davis and her friends returned to the complex to resume fighting with Ms. Ford. After a second physical altercation between the two women, Ms. Davis and her friends remained in the parking lot. While this was going on, Mr. Davis was on the west side of Akron at a friend's house. Terrika Cornelius and Jasmein Downing, Mr. Davis's pregnant girlfriend, drove from the scene of the fights to pick up Mr. Davis and take him to the Wilbeth-Arlington Homes.

{¶4} Several witnesses testified that some of the women watching the fight had tried to intervene to break it up, but Mr. Myers attacked them, causing them to retreat. According to Ms. Cornelius, Mr. Myers "got to hitting people. . . . He hit everybody except me. . . . I'm the only female that did not get hit." Ms. Cornelius testified that Mr. Myers "punched everybody that was close to the fight. He didn't want anybody there." Ms. Cornelius said that, on the way across town, Ms. Downing told Mr. Davis how the fight had unfolded and specifically mentioned that Mr. Myers had punched Ms. Davis and had pushed Tyiesha Shellman. Ms. Shellman, another of Mr. Davis's sisters, was also pregnant at the time.

{¶5} When Mr. Davis arrived at the housing complex, Ms. Davis, Ms. Ford, and another woman were talking outside of one of the apartments. Meanwhile, across the street, Mr.

Myers apparently began taunting Mr. Davis in an attempt to get him to fight with him in the street, but Mr. Davis was not interested. Soon, another physical fight began between Ms. Davis and Ms. Ford. According to Ms. Cornelius, Ms. Downing headed toward the fight, but before she could get there, Mr. Myers punched her. Most witnesses believed that Ms. Downing was trying to break up the fight, but nobody could say for sure. Ms. Downing did not testify.

{¶6} Several witnesses testified that, ten to thirty seconds before shots rang out, Mr. Myers punched Ms. Downing hard with a closed fist. Ms. Downing fell to the ground and seemed to be unconscious, or at least stunned. Tierra Shellman, another of Mr. Davis's sisters, testified that she yelled, "Bro, he just hit your baby's mama." Witnesses agreed that, prior to the shooting, Mr. Myers was trying to get Mr. Davis to fight him, but had not been successful. At least one witness said that Mr. Davis had denounced the entire situation as "stupid" and was walking away when Ms. Shellman announced that Ms. Downing had been hurt.

{¶7} Witnesses variously described Mr. Davis's behavior immediately after Ms. Shellman yelled that Ms. Downing had been hit. They said that Mr. Davis walked, walked fast, jogged, or ran across the street while shooting at Mr. Myers. Ms. McBride-Wilson testified that she saw Mr. Davis's face as he "jog[ged]" back up the street toward Mr. Myers, just before he started shooting. She said that Mr. Davis "just looked like himself[.]" When asked if he looked enraged or angry, she said that he did not have any expression on his face. Mr. Davis did not testify.

BATSON CHALLENGE

{¶8} Mr. Davis's second assignment of error is that the State peremptorily excused an African-American prospective juror because of his race. *See Batson v. Kentucky*, 476 U.S. 79, 89 (1986). "The Equal Protection Clause of the Fourteenth Amendment strictly prohibits a state

actor from engaging in racial discrimination in exercising peremptory challenges. Such discrimination is grounds to reverse a conviction returned by a jury tainted with such discrimination.” *State v. Murphy*, 91 Ohio St. 3d 516, 528 (2001) (citing *Batson v. Kentucky*, 476 U.S. 79 (1986); *State v. White*, 85 Ohio St. 3d 433, 436-438 (1999)).

{¶9} “A court adjudicates a *Batson* claim in three steps.” *State v. Were*, 118 Ohio St. 3d 448, 2008-Ohio-2762, at ¶ 61 (quoting *State v. Bryan*, 101 Ohio St. 3d 272, 2004-Ohio-971, at ¶ 106). “First, the opponent of the peremptory challenge must make a prima facie case of racial discrimination. Second, if the trial court finds this requirement fulfilled, the proponent of the challenge must provide a racially neutral explanation for the challenge.” *Bryan*, 2004-Ohio-971, at ¶ 106 (citing *Batson v. Kentucky*, 476 U.S. 79, 96-98 (1986)). “However, the explanation need not rise to the level justifying exercise of a challenge for cause.” *Id.* (quoting *Batson*, 476 U.S. at 97). “Finally, the trial court must decide based on all the circumstances, whether the opponent has proved purposeful racial discrimination.” *Id.* (citing *Batson*, 476 U.S. at 98).

{¶10} During the selection of jurors, the prosecutor peremptorily challenged an African-American prospective juror. After the parties exhausted their peremptory challenges, but before any prospective jurors had been released, Mr. Davis objected to the challenge of prospective juror number ten on the basis of *Batson v. Kentucky*, 476 U.S. 79 (1986). The defense asked for a race-neutral reason for the dismissal. Without the trial court deciding whether the defense had met its burden to present a prima facie case of racial discrimination, the prosecutor offered two race-neutral reasons for the strike: the prospective juror’s apparent confusion about the burden of proof and a stated belief that men should not “lay hands on women.” After some discussion, the trial court overruled the *Batson* challenge and agreed to strike prospective juror number ten.

{¶11} The State has first argued that Mr. Davis's objection was untimely because he did not object until all the peremptory challenges had been exercised. A *Batson* objection that is entered before the jury is sworn is not untimely. *State v. Hunter*, 2d Dist. No. 22201, 2008-Ohio-2887, at ¶ 12. Thus, Mr. Davis's objection was timely.

{¶12} The State has also argued that Mr. Davis failed to make a prima facie case of racial discrimination so that the State had no duty to respond with a race-neutral reason for the strike. "Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot." *State v. Curtis*, 3d Dist. No. 9-02-11, 2002-Ohio-5409, at ¶ 38 (quoting *Hernandez v. New York*, 500 U.S. 352, 359 (1991)). See also *State v. Murphy*, 91 Ohio St. 3d 516, 528 (2001). Therefore, this Court will not consider whether Mr. Davis established a prima facie case of racial discrimination.

{¶13} "The second step of [the *Batson*] process does not demand an explanation that is persuasive, or even plausible." *Purkett v. Elem*, 514 U.S. 765, 767-768 (1995). "[T]he issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Id.* at 768 (quoting *Hernandez v. New York*, 500 U.S. 352, 360 (1991)). At the second step of the analysis, the state's reason for the strike does not need to give the trial court a plausible basis for believing that the prospective juror's ability to perform his or her duties will be affected. *Id.* "It is not until the *third* step that the persuasiveness of the justification becomes relevant—the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination." *Id.* (citing *Batson v. Kentucky*, 476 U.S. 79, 98 (1986)).

The State offered two facially race-neutral reasons for dismissing prospective juror number ten. Neither confusion over the burden of proof nor a belief that men should not hit women are peculiar to any race. Therefore, the trial court properly proceeded to the third step of the analysis.

{¶14} Determining whether Mr. Davis carried his ultimate burden of proving that the prosecutor's removal of prospective juror number ten was the product of discriminatory intent, presented the trial court with a "pure issue of fact." *Hernandez v. New York*, 500 U.S. 352, 364 (1991). "A trial court's findings of no discriminatory intent will not be reversed on appeal unless clearly erroneous." *State v. Watson*, 9th Dist. No. 25229, 2011-Ohio-2882, at ¶ 9 (citing *State v. Bryan*, 101 Ohio St. 3d 272, 2004-Ohio-971, at ¶ 106). *But see State v. Bowden*, 9th Dist. No. 24767, 2010-Ohio-758, at ¶ 30 (Dickinson, P.J., concurring) ("Ohio courts review findings of fact to determine whether they are supported by sufficient evidence and whether they are against the manifest weight of the evidence.") (quoting *State v. Browand*, 9th Dist. No. 06CA009053, 2007-Ohio-4342, at ¶ 29).

{¶15} The prosecutor explained that she was concerned that the prospective juror "thought that the burden of proof may be higher than it legally is. He also said that he was raised not to lay hands on women [and] this case involves an allegation that the victim did, in fact, lay hands on or hit a woman[.]" In regard to the burden of proof, prospective juror number ten said that he thought the burden of proof applicable to this case was something higher than beyond a reasonable doubt. He also said that men should never hit women. The court's determination that the prosecutor was not motivated by discriminatory intent is neither clearly erroneous nor is it against the manifest weight of the evidence. Mr. Davis's second assignment of error is overruled.

VOLUNTARY MANSLAUGHTER JURY INSTRUCTION

{¶16} In his first assignment of error, Mr. Davis has argued that the trial court incorrectly failed to instruct the jury on voluntary manslaughter. The voluntary manslaughter statute provides that, “[n]o person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, shall knowingly cause the death of another” R.C. 2903.03(A).

{¶17} The State charged Mr. Davis with murder, felony murder via felonious assault, and felonious assault. R.C. 2903.02(A), (B); R.C. 2903.11(A). Mr. Davis proposed written jury instructions regarding voluntary manslaughter. Despite extensive discussion on the record, the trial court refused to give the proposed instruction because it determined that the situation failed to meet the objective prong of the two-prong test for sufficient provocation by the victim. Mr. Davis did not testify, but his lawyers proffered a summary of the testimony he would have given if the trial court had been open to the possibility that he could present sufficient evidence of provocation to warrant a voluntary manslaughter instruction. Mr. Davis did not request jury instructions for any other lesser crimes.

{¶18} The jury acquitted Mr. Davis of purposeful murder, but convicted him of felonious assault and felony murder via the predicate offense of felonious assault. The parties’ arguments address only whether there was evidence of reasonably sufficient provocation to warrant a voluntary manslaughter instruction. The dispositive issue, however, is whether Mr. Davis was prejudiced by the lack of a voluntary manslaughter instruction.

{¶19} The State charged Mr. Davis with two types of murder: (1) purposeful murder and (2) felony murder. Section 2903.02(A) of the Ohio Revised Code proscribes “purposely

caus[ing] the death of another[.]” Section 2903.02(B) proscribes “caus[ing] the death of another as a proximate result of . . . committing or attempting to commit an offense of violence that is a felony of the first or second degree[.]” Felonious assault, a second degree felony, is defined as “knowingly . . . caus[ing] serious physical harm to another” or “caus[ing] or attempting to cause physical harm to another . . . by means of a deadly weapon[.]” R.C. 2903.11(A); (D)(1)(a). The State charged Mr. Davis under both subsections of the felonious assault statute.

{¶20} “The analysis whether a defendant is entitled to have the jury instructed on an offense for which the defendant has not been indicted begins by first determining whether the requested instruction falls within the statutory definition of a lesser included offense or inferior degree offense.” *State v. Ledbetter*, 2d Dist. No. 93-CA-54, 1994 WL 558996 at *3 (Oct. 14, 1994). The Ohio Supreme Court has explained that, under Rule 31(C) of the Ohio Rules of Criminal Procedure and Section 2945.74 of the Ohio Revised Code, a jury may consider lesser unindicted offenses only if the evidence supports the lesser charge and the lesser charge falls into one of three groups. *State v. Deem*, 40 Ohio St. 3d 205, 208 (1988). A jury may consider lesser unindicted crimes that are (1) a lesser-included offense of the crime charged, (2) an inferior degree of the crime charged, or (3) an attempt to commit the crime charged, if such an attempt is an offense at law. *Id.*

{¶21} Lesser-included offenses are said to be necessarily included within the higher charge because the greater offense can never be committed without the lesser offense being committed, as statutorily defined, and some element of the greater offense is not required to prove commission of the lesser offense. *State v. Deem*, 40 Ohio St. 3d 205, 209 (1988). “[A]n offense is an ‘inferior degree’ of the indicted offense where its elements are *identical* to or contained within the indicted offense, except for one or more additional mitigating elements

which will generally be presented in the defendant's case." *Id.* at 209. The Ohio Supreme Court has also explained that "[a] fourth group of 'lesser' offenses includes those completed offenses of a lesser degree for which the defendant was not indicted and which are neither *necessarily* included within the indicted offense nor identical to the indicted offense save for an additional mitigating element. An instruction on this fourth group of lesser offenses, due to the absence from R.C. 2945.74 and Crim.R. 31(C), may not be given to the jury." *Id.* at 209 n.2.

{¶22} Voluntary manslaughter is an inferior-degree offense to a charge of purposeful murder under Section 2903.02(A) of the Ohio Revised Code because "its elements are . . . contained within the indicted offense, except for one or more additional mitigating elements . . ." *State v. Shane*, 63 Ohio St. 3d 630, 632 (1992) (quoting *State v. Tyler*, 50 Ohio St. 3d 24, 36 (1990)). Thus, in relation to the murder charge, Mr. Davis was entitled to an instruction on voluntary manslaughter if the evidence supported the mitigating factor of reasonably sufficient provocation. Mr. Davis, however, was acquitted of purposely killing Mr. Myers. Therefore, the trial court's failure to give the requested instruction, if error, was harmless in relation to the murder charge.

{¶23} Voluntary manslaughter, the only unindicted crime for which Mr. Davis requested an instruction, is neither a lesser-included nor inferior-degree offense to felony murder via felonious assault. It is not a lesser-included offense because felony murder can be committed without voluntary manslaughter necessarily being committed. That is, one could cause the death of another as a proximate result of committing felonious assault without having been provoked. Voluntary manslaughter is not an inferior-degree offense to felony murder via felonious assault because its elements, except for the mitigating factor of rage provoked by the victim, are neither contained within nor identical to the elements of felony murder via felonious assault. That is,

“knowingly caus[ing] the death of another” is not contained within or identical to proximately causing the death of another by “knowingly . . . caus[ing] serious physical harm” to him or by “caus[ing] or attempting to cause physical harm . . . by means of a deadly weapon[.]” R.C. 2903.02(B); R.C. 2903.03(A); R.C. 2903.11(A). Therefore, Mr. Davis was not entitled to his requested instruction in relation to the felony murder charge because voluntary manslaughter falls into the “fourth group of ‘lesser’ offenses” for which an instruction may not be given to the jury. *State v. Deem*, 40 Ohio St. 3d 205, 209 n.2 (1988).

{¶24} Mr. Davis only asked the trial court for a voluntary manslaughter instruction and has argued on appeal that he was prejudiced by the trial court’s failure to give that instruction. He did not request jury instructions for any other unindicted lesser crimes that may have applied to the felony murder and felonious assault charges, such as involuntary manslaughter and aggravated assault. Thus, regardless of what evidence he could have produced tending to show that he was acting under the influence of a sudden rage provoked by Mr. Myers, Mr. Davis was not prejudiced by the trial court’s refusal to give the requested jury instruction in relation to purposeful murder and the court properly refused to give it, albeit for an incorrect reason, in regard to the other charges. Mr. Davis’s first assignment of error is overruled.

SENTENCING

{¶25} The State has called this Court’s attention to a post-release control error in this case. According to the State, the part of the sentence imposing three years of mandatory post-release control should be vacated because there is no post-release control for murder and the trial court imposed no sentence for felonious assault. In fact, although the trial court wrote that it merged the felonious assault and felony murder charges at sentencing, it imposed a sentence for each charge. In addition to fifteen years to life for felony murder with a consecutive three years

for the firearm specification, the trial court sentenced Mr. Davis to eight years in prison plus three years of mandatory post-release control for felonious assault.

{¶26} When allied offenses are merged at sentencing, the trial court is permitted to impose only one sentence for the conduct. *State v. Underwood*, 124 Ohio St. 3d 365, 2010-Ohio-1, at ¶ 26. The Ohio Supreme Court has held that it is plain error to impose multiple sentences for allied offenses of similar import. *Id.* at ¶ 31. Just before sentencing, the trial court asked the parties whether everyone agreed that felonious assault would merge with the murder charge for the purposes of sentencing. The prosecutor agreed that the counts should merge. As the trial court's imposition of sentences on both counts is plain error, this Court must reverse and remand this matter for resentencing.

CONCLUSION

{¶27} Mr. Davis's second assignment of error is overruled because the trial court's determination that the prosecutor was not motivated by discriminatory intent in striking an African-American from the venire is neither clearly erroneous nor against the manifest weight of the evidence. His first assignment of error is overruled because he was not entitled to a voluntary manslaughter jury instruction in relation to the felony murder via felonious assault charge and he was not prejudiced by the court's failure to give the instruction in relation to the purposeful murder charge. The trial court's imposition of sentences on counts of felonious assault and felony murder, after all parties agreed the counts would merge for purposes of sentencing, was plain error. The judgment of the Summit County Common Pleas Court is affirmed in part, reversed in part, and the cause is remanded for resentencing in accordance with this opinion.

Judgment affirmed in part,
reversed in part,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed equally to both parties.


CLAIR E. DICKINSON
FOR THE COURT

MOORE, P. J.
CONCURS.

CARR, J.
DISSENTING.

{¶28} In theory, the majority's approach makes sense. In the abstract, if a defendant is not convicted of the greater offense, he is not prejudiced by the trial court's failure to give an

instruction on the inferior degree offense. In a practical sense, however, an offense cannot be looked at in a vacuum when multiple offenses for the same conduct are charged.

{¶29} The majority agrees that the trial court erred by failing to give the voluntary manslaughter instruction, but concludes that the error was harmless because the jury acquitted Davis of the higher-degree offense. It is ironic that the fact that the defendant was correct in his argument to the trial court that he was not criminally liable for purposeful murder is now used against him on appeal to decide that the trial court's error was harmless.

{¶30} Trial counsel could have requested every instruction the majority suggests – voluntary manslaughter, aggravated assault, and involuntary manslaughter – and still been thwarted by two insurmountable obstacles. First, the trial court could not instruct on aggravated assault. In *State v. Deem*, 40 Ohio St.3d 205 (1988), which is cited by the majority, the Supreme Court held that if a defendant, on trial for felonious assault, presents evidence of sufficient provocation, the trial court *must* instruct the jury on aggravated assault. *Deem*, paragraph four of the syllabus. Here, the trial court had already decided - erroneously - that Davis could not meet the provocation requirement, so it could not give an instruction on aggravated assault. Without an aggravated assault instruction, there would be no basis to instruct the jury on involuntary manslaughter. Accordingly, the trial court's erroneous conclusion about provocation prevented Davis from receiving an instruction on voluntary manslaughter, involuntary manslaughter, and aggravated assault.

{¶31} Second, if the trial court had instructed on aggravated assault and involuntary manslaughter, but not on voluntary manslaughter, and the jury returned a guilty verdict on felony murder and an acquittal on murder, then the trial court's failure to give the instruction on

voluntary manslaughter would still not be reviewable on appeal under the majority's analysis. Thus, the trial court's error is not harmless.

{¶32} I would conclude that the matter is reviewable, that the striking of Davis's pregnant girlfriend was sufficient provocation to meet the objective prong and remand the matter for a new trial. I would not reach the subjective prong since the trial judge did not reach that issue having felt compelled by case law to reach the conclusion that striking another is not sufficient provocation.

APPEARANCES:

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