[Cite as *State v. Prieto*, 2016-Ohio-8480.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	CASE NO. 15 MA 0200
	)	
PLAINTIFF-APPELLEE,	)	
	)	
VS.	)	OPINION
	)	
JEVON PRIETO,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from the Court of Common Pleas of Mahoning County, Ohio Case No. 2013 CR 60
JUDGMENT:	Affirmed in part, Vacated in part, Remanded for resentencing.
APPEARANCES:	
For Plaintiff-Appellee:	Atty. Paul J. Gains Mahoning County Prosecutor Atty. Ralph M. Rivera Assistant Prosecuting Attorney 21 West Boardman St., 6th Floor Youngstown, Ohio 44503
For Defendant-Appellant:	Atty. David Betras Atty Frank Cassese Betras, Kopp & Harshman, LLC 6630 Seville Drive Canfield, Ohio 44406
JUDGES:	
Hon. Carol Ann Robb Hon. Gene Donofrio Hon. Cheryl L. Waite	
	Dated: December 16, 2016

[Cite as *State v. Prieto*, 2016-Ohio-8480.]
ROBB, J.

{¶1} Defendant-Appellant Jevon Prieto appeals the judgment entered in the Mahoning County Common Pleas Court upon his conviction of tampering with evidence and illegal conveyance of a drug of abuse onto the grounds of a specified government facility. As to the elements of illegal conveyance, Appellant argues an inmate cannot convey drugs onto the grounds of a prison if he never left the grounds. As to voir dire, Appellant contends the state failed to provide a race-neutral reason for excluding a prospective juror. These arguments are overruled.

{¶2} Appellant and the state agree the trial court's sentencing entry lacks the statutorily-required consecutive sentence findings. Additionally, the court improperly imposed a sentence on a merged offense. In accordance, Appellant's conviction is affirmed, but the sentencing entry is vacated. The case is remanded for the trial court to make consecutive sentence findings and eliminate the sentence on one of the illegal conveyance counts in the sentencing entry.

STATEMENT OF THE CASE

{¶3} This case arose while Appellant was a minimum security inmate at the Ohio State Penitentiary ("OSP") in Youngstown, Ohio. The main building at the OSP houses maximum security offenders and is called a "supermax" prison as it houses the state's worst offenders. (Tr. 27-28). The minimum security facility is a 220-bed dormitory-style detention facility with rows of bunks and open common areas surrounded by a fence. (Tr. 28). The minimum security inmates are permitted contact visitation. (Tr. 32). Visitation occurs by appointment only. (Tr. 29). It does not take place at the minimum security facility.

{¶4} To meet their visitors, the inmates are strip-searched at the minimum security prison and then escorted to the sally port at the supermax prison, which is surrounded by a fence with concertina wire. (Tr. 29, 39, 154). A different escort leads the inmates to a visiting room on the fourth floor of the supermax prison. (Tr. 31). On returning to the minimum security prison, the inmates wait in a room while being monitored by a correctional officer until it is their turn to be strip-searched again. (Tr. 33-34). The "strip-out" room has a table separating the correctional

officer from the inmate; the inmate removes his clothes and places them on the table for the officer. (Tr. 34-35).

{¶5} On January 20, 2011, Appellant was visited by his girlfriend. Thereafter, Appellant was escorted back to the minimum security facility. Correctional Officers Newell and Tanner were in the "strip-out" room, while Correctional Officer Walker watched the inmates waiting to be strip-searched to make sure they did not pass items amongst themselves. (Tr. 145). Officer Newell conducted Appellant's strip-search while Officer Tanner conducted a search of another inmate. (Tr. 64). While Officer Newell was inspecting the inside of one of Appellant's boots, he felt something hard under the insole. (Tr. 65-66, 95). He discovered pills in a twisted bag. (Tr. 65, 67). He noticed three different colors of pills (blue, red, and white) and thought some were shaped like states. (Tr. 66, 97). His report estimated there were between seven and ten pills. (Tr. 85-86).

{¶6} Officer Newell showed the pills to Officer Tanner who took them from him. Both officers asked, "What are these?" Moving closer, Appellant replied, "I don't know. What are they?" Officer Newell testified Appellant grabbed the pills from Officer Tanner and threw them in his mouth. (Tr. 68). Officer Tanner testified he lunged over the table at Appellant as the pills moved toward his mouth. The table flipped over. He wrestled him to the floor in an attempt to retrieve the pills. (Tr. 126). Appellant swallowed some pills. (Tr. 68-69).

{¶7} Officer Walker testified he entered the room upon hearing the commotion. He recovered two pills from the floor; one was white, and one was pink. (Tr. 147, 150). The pills were tested by a criminalist at the Ohio State Highway Patrol (OSHP) crime lab. The white pill appeared to be Percocet, which contains oxycodone and acetaminophen. (Tr. 107). Testing confirmed the pill contained oxycodone, which is a Schedule II controlled substance that is considered a drug of abuse. (Tr. 108). The pink pill was stamped "USA" and shaped like the continental United States. (Tr. 113). Testing confirmed it contained benzylpiperazine or BZP, which is a Schedule I stimulant compound and is considered a drug of abuse. (Tr. 110-112).

{¶8} Appellant said the boots were not his. (Tr. 91-92). He was transported to the medical unit in the supermax prison. Prior to being placed in administrative segregation, Appellant told a lieutenant the boots were not his, but he then asked the lieutenant to place the boots in the "pack-up" with the rest of his possessions during his time in segregation. (Tr. 172, 174). An investigator with the OSHP, who was assigned to the prison, was unable to make contact with Appellant's girlfriend and could not verify her involvement. (Tr. 209-210). Appellant was released from prison in March 2011, and the testing of the pills was completed in November 2011.

{¶9} Appellant was indicted on two counts of illegal conveyance of a drug of abuse onto the grounds of a specified government facility (one for each pill) and one count of tampering with evidence, all third-degree felonies. The case was tried to a jury. The state presented the testimony of the three correctional officers, the lieutenant, a prison investigator, the OSHP investigator, and the OSHP criminalist.

{¶10} At the close of the state's case, the defense moved for an acquittal, focusing on the illegal conveyance counts. Defense counsel argued it was legally impossible for an inmate to be guilty of conveying drugs onto the grounds if he never left the grounds of the facility. (Tr. 246). The prosecution responded that the one who receives the drugs from a visitor can be liable for conveyance under a principal/accomplice theory, noting the state does not have to indict on complicity. (Tr. 247). The trial court overruled the motion for acquittal. The jury found Appellant guilty as charged.

{¶11} The court sentenced Appellant to 30 months on count one, 30 months on count two, and 30 months on count three. The court's October 13, 2015 sentencing order said: "Counts One and Two merge to each other for purposes of sentencing however run consecutively to Count Three for a TOTAL PRISON TERM OF SIXTY (60) MONTHS."

ASSIGNMENT OF ERROR ONE: SENTENCING

{¶12} Appellant's first assignment of error provides:

"Appellant's sentence is both contrary to law and an abuse of discretion as the trial court failed to make any of the findings required by R.C. 2929.14(C)(4) prior to imposing consecutive sentences."

{¶13} Initially, we note the text of Appellant's assignment of error mentions the abuse of discretion standard. The Ohio Supreme Court recently ruled the plain language of R.C. 2953.08(G)(2) prohibits the application of the abuse of discretion standard to sentencing issues. *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 10, 16. "[A]n appellate court may vacate or modify a felony sentence on appeal only if it determines by clear and convincing evidence that the record does not support the trial court's findings under relevant statutes or that the sentence is otherwise contrary to law." *Id.* at ¶ 1, applying R.C. 2953.08(G)(2).

{¶14} In any event, Appellant employs only the standard under R.C. 2953.08(G)(2) in constructing his argument. He points out the court ran the sentence on the tampering with evidence count consecutive to the illegal conveyance counts but failed to make any consecutive findings in the sentencing entry. The consecutive sentence findings are contained in R.C. 2929.14(C)(4), which provides:

> If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:
>
> (a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.
>
> (b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single

> prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.
>
> (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶15} The trial court must make these consecutive sentence findings at the sentencing hearing and incorporate those findings into the sentencing entry. *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 37, syllabus. Appellant only takes issue with the lack of findings in the sentencing entry. He does not contest the findings at the sentencing hearing and did not seek to have the hearing transcribed. Appellant cites a case issued by this court where the defendant conceded the findings were made at the hearing but assigned the lack of findings in the entry as error; this court remanded with instructions for the trial court to issue a proper sentencing entry. *State v. Ashby*, 7th Dist. No. 14 MA 80, 2015-Ohio-1899, ¶ 28-30, citing *Bonnell*, 140 Ohio St.3d 209. The state agrees the trial court failed to make any statutorily-required consecutive sentence findings in the sentencing entry and points to the availability of a nunc pro tunc entry, citing to *Bonnell*.

{¶16} Pursuant to *Bonnell*, "A trial court's inadvertent failure to incorporate the statutory findings in the sentencing entry after properly making those findings at the sentencing hearing does not render the sentence contrary to law; rather, such a clerical mistake may be corrected by the court through a nunc pro tunc entry to reflect what actually occurred in open court." *Bonnell*, 140 Ohio St.3d 209 at ¶ 30, citing *State v. Qualls*, 131 Ohio St.3d 499, 2012-Ohio-1111, 967 N.E.2d 718, ¶ 15 (the inadvertent failure to incorporate post-release control into the sentencing entry may be corrected by a nunc pro tunc entry without a new sentencing hearing).

{¶17} The trial court's sentencing entry imposes consecutive sentences but contains no consecutive sentence findings. Accordingly, the matter is remanded with instructions to file a proper sentencing entry.

Sentencing error recognized sua sponte

{¶18} As aforestated, the trial court separately entered a sentence of 30 months on each of the three counts; however, the court stated the two illegal conveyance counts merged for purposes of sentencing. As the court merged counts one and two, the court was not permitted to enter a sentence on both of these counts; merger occurs prior to imposition of sentence. Although the matter is not raised on appeal, the error plainly reveals itself in our recitation of the particular sentence imposed in the statement of the case, supra. To not address the issue may leave the reader with the impression that this court had no issue with the trial court's imposition of concurrent sentences on merged offenses.

{¶19} It is well-established that when two offenses are merged, the trial court cannot enter a sentence on each offense. *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, ¶ 17-18 (a defendant may be indicted and tried for two allied offenses of similar import, but the court can only sentence him on one of the allied offenses). "Sentencing concurrently on merged counts does not satisfy the merger doctrine as no sentence at all should be entered on one of the two merged counts." *State v. Gardner*, 7th Dist. No. 10 MA 52, 2011-Ohio-2644, ¶ 24.

{¶20} We have previously advised the trial court: when a court merges offenses, only one of the merged offenses remains for sentencing. *State v. Smith*, 7th Dist. No. 11 MA 120, 2013-Ohio-756, ¶ 73, citing *Whitfield*, 124 Ohio St.3d 319 at ¶ 17. "As this court and the Ohio Supreme Court have stated multiple times, two merged counts cannot both receive sentences, even concurrent sentences." *Smith*, 7th Dist. No. 11 MA 120 at ¶ 74. As observed by the Supreme Court: "It is argued that the court's sentencing on each count had no practical or prejudicial effect on Underwood. After all, two years is two years. However, even when the sentences are to be served concurrently, a defendant is prejudiced by having more convictions than are authorized by law." *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶ 31.

{¶21} Imposition of a sentence for multiple convictions on offenses that should be merged can constitute plain error, even where the sentences are run

concurrent. *Id.* (even where a sentence was jointly recommended). We have previously raised this type of plain error sua sponte. *See, e.g., Smith*, 7th Dist. No. 11 MA 120 at ¶ 73-74; *State v. Tapscott*, 7th Dist. No. 11 MA 26, 2012-Ohio-4213, 978 N.E.2d 210, ¶ 47.

{¶22} The standard remedy is to remand for resentencing so the prosecution can elect which merged offense will remain for sentencing. *See Whitfield*, 124 Ohio St.3d 319 at ¶ 20–22, 26 (finding appellate court impermissibly intruded on the state's right to elect by ordering which sentence to vacate). *See also Maumee v. Geiger*, 45 Ohio St.2d 238, 244, 344 N.E.2d 133 (1976). Even where the choice is between a greater crime and a lesser offense, we do not presume the state will choose the greater offense. The election is discretionary with the state. *See State v. Wilson*, 129 Ohio St.3d 214, 217, 2011-Ohio-2669, 951 N.E.2d 381, ¶ 13 (2011) ("Since the remedy for an allied-offenses sentencing error requires that the state exercise its discretion, *Whitfield* held, a reviewing court may not unilaterally correct the error by modifying the sentence.").

{¶23} *However, both offenses here were of the same name and degree, with the same elements*. Although the indictment specified a Schedule I drug for count one and a Schedule II drug for count two, the offense is not defined by the particular type of drug. The appellate court in *Underwood* eliminated offenses of the same name rather than remanding; the Supreme Court affirmed (although the Court was addressing a certified question which did not involve the remedy).[1] In accordance, we remand for a new sentencing entry with instructions for the trial court to eliminate the sentence on one of the illegal conveyance counts from its sentencing entry.

ASSIGNMENT OF ERROR TWO: CONVEY ONTO GROUNDS

{¶24} Appellant's second assignment of error alleges:

[1] In addition, we do not have the sentencing transcript. When a court's sentence is proper at the hearing, the remedy is a nunc pro tunc entry. As to the consecutive sentence findings, we presume they were made at the hearing as Appellant only argued the issue with the entry and the state agreed a nunc pro tunc was available. Since Appellant chose not to submit the transcript, we presume the same on this topic.

"The trial court denied Appellant his constitutional rights to due process and a fair trial, under the Fourteenth Amendment to the Constitution of the United States, by denying Appellant's motion for judgment of acquittal when the evidence was insufficient to prove 'conveyance onto the grounds,' an essential element of the offense of Illegal Conveyance of Weapons or Prohibited Items charged in count one and two of the indictment."

{¶25} Sufficiency of the evidence is a question of law dealing with the legal adequacy of the evidence. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). In viewing a sufficiency of the evidence argument, the evidence and all rational inferences to be drawn from the evidence are evaluated in the light most favorable to the prosecution. *State v. Goff*, 82 Ohio St.3d 123, 138, 694 N.E.2d 916 (1998). A conviction cannot be reversed on grounds of sufficiency unless the reviewing court determines that no rational juror could have found the elements of the offense proven beyond a reasonable doubt. *Id.* at 138.

{¶26} This is the legal standard used to determine whether the case may go to the jury and whether the evidence was legally sufficient as a matter of law to support the verdict. *State v. Smith*, 80 Ohio St.3d 89, 113, 684 N.E.2d 668 (1997). A Crim.R. 29 motion for acquittal is based upon the sufficiency standards. *See, e.g., State v. Carter*, 72 Ohio St.3d 545, 553, 651 N.E.2d 965 (1995). In Appellant's Crim.R. 29 motion for acquittal, he argued it was legally impossible for an inmate, who receives drugs from a visitor, to convey the drugs onto the grounds when it is undisputed the inmate never left the grounds. (Tr. 247).

{¶27} On counts one and two, Appellant was convicted of "illegal conveyance of drugs of abuse onto the grounds of a specified governmental facility." *See* R.C. 2921.36(G)(2) (naming the offense and labeling it a third-degree felony). The elements of this offense are as follows:

> No person shall knowingly convey, or attempt to convey, onto the grounds of a detention facility or of an institution, office building, or other place that is under the control of the department of mental health and addiction services, the department of developmental disabilities,

> the department of youth services, or the department of rehabilitation and correction any of the following items: * * * Any drug of abuse, as defined in section 3719.011 of the Revised Code;"

R.C. 2921.36(A)(2) (other subdivisions name weapons or intoxicating liquor).

{¶28} Appellant states the plain language of this statute requires the person charged to have conveyed the drugs from outside of the entire grounds surrounding the facility. He says he never left the grounds of the Ohio State Penitentiary, making it impossible for him to convey anything onto the grounds. Appellant reviews *Snead* and *Germani* out of the Fifth District and states they are distinguishable. The state disagrees with Appellant's construction of these cases.

{¶29} In *Snead*, the defendant was an inmate working as a porter in the prison visiting room. At the request of another inmate, the defendant retrieved a package from the women's restroom in the prison visiting area. After the defendant returned to the visiting room, an officer discovered he was carrying over 10 grams of marijuana. The defendant argued there was insufficient evidence to support his conviction as he retrieved a package from the women's restroom, located inside the facility, and did not convey the package into the facility. The Fifth District held: "We find the state did satisfy the elements of R.C. 2921.36(A)(2) because the state established that appellant conveyed the package from the women's restroom, open to the public that visited the institution, into the area where the inmates are confined. We find this act by appellant to constitute 'conveyance' within the meaning of R.C. 2921.36(A)(2)." *State v. Snead*, 5th Dist. No. 96 CA 37 (Mar. 6, 1997).

{¶30} In *Germani*, the defendant was a deputy sheriff working at a jail. An inmate's girlfriend went to the front desk window, gave the defendant $1,000, and said she had a package to deliver to an inmate. The defendant gave her a key to the women's restroom and told her to leave the package there. The defendant retrieved the package, which contained cocaine and paraphernalia, and delivered it to the inmate's cell. The defendant argued the state failed to prove he conveyed the items onto the grounds of the jail. *State v. Germani*, 5th Dist. No. 04CA000015, 2005-Ohio-1757, ¶ 20. He said the "grounds" includes the land surrounding the jail and it

was the inmate's girlfriend who actually brought the drugs onto the grounds, not him. *Id.* at ¶ 30. The Fifth District found the case factually similar to its *Snead* case, recited the prior holding, and concluded: "The State produced evidence that the Appellant conveyed the cocaine from the women's restroom to inmate Tate who was confined in his detention cell." *Id.* at ¶ 31-32.

{¶31} Appellant believes these two Fifth District cases are distinguishable as those defendants had access to areas the inmates did not and those defendants brought contraband from areas accessible to the general public to areas where inmates were confined. As the state points out, "R.C. 2921.36 applies uniformly to all persons" whether they are officers, employees, visitors, or inmates. *See State v. Cargile*, 123 Ohio St.3d 343, 346, 2009-Ohio-4939, 916 N.E.2d 775, ¶ 17, 19 (and upholding conviction where inmate had undiscovered contraband on him at the time of his arrest, which was conveyed to the facility along with him, as this was a voluntary act). The statute contains a blanket prohibition: "No person shall knowingly convey * * *." *Id.* at ¶ 19, quoting R.C. 2931.36. There is no distinction based on the special position of access occupied by the defendant.

{¶32} As to the other part of his argument, the cases are not distinguishable in Appellant's favor; Appellant was in an area open to visitors when he acquired the drugs, and he conveyed them to an area not accessible to the visiting public where inmates were confined. Even more, he brought the drugs from a visiting room at one prison, through the hallway and elevator of the supermax prison, out of the sally port, across the yard, and into the minimum security prison where he was housed.

{¶33} The state also espouses the theory of complicity. The complicity statute provides that a person with the culpability required for the commission of the offense shall not solicit or procure another to commit the offense or aid or abet another in committing an offense. R.C. 2923.02(A)(1)-(2). It is no defense that the person with whom the accused was in complicity has not been convicted as a principal offender. R.C. 2923.02(B). "Whoever violates this section is guilty of complicity in the commission of an offense, and shall be prosecuted and punished as if he were a principal offender. A charge of complicity may be stated in terms of this

section, or in terms of the principal offense." R.C. 2923.03(F). In accordance, an inmate can be convicted of illegal conveyance via complicity without being specifically charged with complicity. *See, generally, State v. Hand*, 107 Ohio St.3d 378, 2006-Ohio-18, 840 N.E.2d 151, ¶ 181 (complicity need not be charged in indictment).

{¶34} Circumstantial evidence and direct evidence inherently possess the same probative value, and intent is typically established by circumstantial evidence. *See, e.g., In re Washington*, 81 Ohio St.3d 337, 340, 691 N.E.2d 285 (1998); *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph one of the syllabus. An inmate who received a book containing marijuana through the mail was convicted of illegal conveyance by way of the complicity doctrine. *State v. Turner*, 5th Dist. No. 2010-CA-0016, 2010-Ohio-5420, ¶ 80 (evidence of suspicious phone calls about sending books). *See also State v. Garrett*, 5th Dist. No. 03-CA-49, 2004-Ohio-2231, ¶ 47 (finding sufficient evidence the defendant committed conveyance offense where his girlfriend, who was caught attempting to enter prison with drugs, testified that she brought the marijuana to the prison at the request and for the benefit of the defendant). The Fifth District also found sufficient evidence of an inmate's complicity in illegal conveyance onto the grounds of a prison where the inmate's girlfriend brought balloons containing marijuana to the visitation, she placed them on his food tray, the inmate covered the balloons with a napkin, and he then appeared to retrieve one (at which point guards interfered). *State v. Miller*, 5th Dist. No. 2009-CA-0113, 2010-Ohio-3488, ¶ 35-36.

{¶35} Here, Appellant's girlfriend made an appointment to visit him in prison; he was strip-searched before his visit; he was walked to the supermax prison; he visited with his girlfriend in an open area where contact was permitted; he was led out of the secured supermax prison into the minimum security prison where he was housed; he was strip-searched after this visit; pills were discovered inside his boot under the insole; the pills formed a noticeable lump in the insole; Appellant had been walking in these boots; he grabbed the pills from the grasp of a correctional officer; and he ate some of the pills recovered from his boot in front of the officers.

{¶36} Appellant does not specify an argument pertaining to the circumstantial evidence or the complicity theory, which was raised by the state in responding to Appellant's motion for acquittal. Rather, he presents a narrow argument that an inmate cannot commit the offense of illegal conveyance onto the grounds of a specified government facility if he never leaves the grounds.

{¶37} In any event, this case has the unique facts involving an inmate's conveyance of drugs from a visiting room at a supermax prison, through the sally port of that prison, across the intermediate grounds, and into a separate minimum security facility with its own fence. This assignment of error is overruled.

ASSIGNMENT OF ERROR THREE: PEREMPTORY CHALLENGE

{¶38} Appellant's third and final assignment of error contends:

"The trial court denied Appellant his constitutional rights, under the Equal Protection Clause of the United States Constitution, by allowing the State of Ohio to use a peremptory challenge on the only African American juror on the jury panel without establishing a race neutral explanation for the excusal of the potential juror."

{¶39} When the state exercised a peremptory challenge on juror number six, defense counsel voiced a *Batson* challenge. He noted this was the only African American on the panel and pointed out Appellant is African American. Counsel said after he rehabilitated juror number six, the juror indicated he would interpret the facts and follow the law the court provided. (Tr. 91).

{¶40} The state responded: "He made it clear to me he would need pretty much 100% proof." The state pointed out when defense counsel tried to rehabilitate the juror on whether he would follow the law, he answered, "yeah but." The state characterized the juror's position as unclear. It was also noted the juror was charged with a crime in 2005 and the charges were dismissed. The prosecutor concluded he did not think the juror could be fair and impartial. (Tr. 92). The court overruled the *Batson* challenge and allowed the state to exercise its peremptory challenge.

{¶41} Upon raising this Equal Protection Clause argument, the defendant has the burden to prove the state racially discriminated in the use of a peremptory challenge. *Batson v. Kentucky*, 476 U.S. 79, 93, 106 S.Ct. 1712, 90 L.E.2d 69

(1986). The court's evaluation of a *Batson* claim involves three components: (1) the defendant sets forth a prima facie case of racial discrimination; (2) the state is then mandated to set forth a race-neutral reason for the exercise of the peremptory challenge; and (3) the trial court must decide whether the prosecutor purposefully discriminated. *See id.* at 97-98.

{¶42} In setting forth a prima facie case of racial discrimination, the defendant must object to the peremptory challenge by pointing to relevant circumstances that raise an inference the prosecutor used the challenge to exclude the prospective juror on account of his race, which could include: the state's use of a prior challenge against the same race; the defendant and the challenged juror are members of the same racially cognizable group; and/or disparate questions were asked in voir dire. *Id.* at 96-97. *See also Powers v. Ohio*, 499 U.S. 400, 416, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991). The preliminary issue of whether the defendant made a prima facie showing becomes moot, however, if the state offers a race-neutral explanation for the peremptory challenge and the trial court rules on the ultimate question of intentional discrimination. *Hernandez v. New York*, 500 U.S. 352, 359, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991); *State v. White*, 85 Ohio St.3d 433, 437, 709 N.E.2d 140 (1999) ("Once the proponent explains the challenge and the trial court rules on the ultimate issue of discrimination, whether or not a prima facie case was established becomes moot."). The state acknowledges this law and proceeds to the Appellant's argument under the second step.

{¶43} Under the second step, the state must provide a racially neutral explanation for the challenge. *Hernandez*, 500 U.S. at 359 (the court "assum[es] the proffered reasons for the peremptory challenges are true"). A race-neutral explanation for a peremptory challenge is simply "an explanation based on something other than the race of the juror." *Id.* at 360. At this stage, the state's explanation need not be "persuasive, or even plausible" as long as the reason is not inherently discriminatory. *Rice v. Collins*, 546 U.S. 333, 338, 126 S.Ct. 969, 163 L.Ed.2d 824 (2006) (where the state exercised a peremptory challenge against an African-American female based on a fear that a young single citizen with no ties to the

community might be too tolerant of the crime at issue). In fact, the state's reason can be silly or superstitious as long as it is not race-related; an evaluation of the persuasiveness of the explanation does not arise until the third step. *Purkett v. Elem*, 514 U.S. 765, 768-769, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995) (long unkempt hair and facial hair is race neutral). "Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Id.* at 768.

{¶44} The state's reason for exercising the disputed peremptory challenge need not rise to the level of a challenge for cause. *Batson*, 476 U.S. at 97. On this topic, we note that a juror can be challenged for cause if "the person discloses by the person's answers that the person cannot be a fair and impartial juror or will not follow the law as given to the person by the court." R.C. 2313.17(B)(9). If the juror's answers fluctuate as to whether they rise to this level or not, the state can still be concerned and express that it is uncertain whether the juror will follow the law.

{¶45} A prospective juror's equivocal answers or expressions of uncertainty about impartiality or matters pertinent to the case are sufficiently race-neutral reasons for exercising a peremptory challenge. *See, e.g., State v. Were*, 118 Ohio St.3d 448, 2008-Ohio-2762, ¶ 65; *White*, 85 Ohio St.3d at 437. The concern that a juror's personal or familial experience with the court system may have provided the juror with preconceived biased notions is considered a race-neutral explanation. *See generally State v. Mitchell*, 7th Dist. No. 14 MA 0119, 2016-Ohio-1439, ¶ 27 (citing cases concerning criminal convictions).

{¶46} If the state provides a race-neutral explanation, the trial court must view all the circumstances and determine whether there was purposeful discrimination, i.e. whether the explanation was merely pretextual. *Batson*, 476 U.S. at 98. Although this step entails evaluating the persuasiveness or genuineness of the state's explanation, the burden of persuasion regarding racial motivation remains on the defendant. *Collins*, 546 U.S. at 338; *State v. Gowdy*, 88 Ohio St.3d 387, 393, 727 N.E.2d 579 (2000) ("The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.").

{¶47} We do not reverse a trial court's decision on intentional discrimination unless the court was clearly erroneous in accepting the state's explanation as genuine (as opposed to pretextual). *See Davis v. Ayala*, __ U.S. __, 135 S.Ct. 2187, 2199, 192 L.Ed.2d 323 (2015). *State v. Frazier*, 115 Ohio St.3d 139, 2007-Ohio-5048, 873 N.E.2d 1263, ¶ 64; *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, 804 N.E.2d 433, ¶ 106. The reviewing court must defer to the trial court's credibility decision. *Bryan*, 101 Ohio St.3d 272 at ¶ 110. The trial court's decision is partially based upon the prosecutor's demeanor in explaining her position; whether the prosecutor's explanation is genuine is a credibility determination subject to great deference. *Ayala*, 135 S.Ct. at 2199, 2201. "Appellate judges cannot on the basis of a cold record easily second-guess a trial judge's decision about likely motivation." *Id.* at 2201, quoting *Collins*, 546 U.S. at 343 (Breyer, J., concurring).

{¶48} Here, the reasons provided by the state were race-neutral: the juror gave the prosecutor the impression he would need 100% proof rather than proof beyond a reasonable doubt; the prosecutor was concerned the juror would not follow the law and would not be fair and impartial; the defense tried to rehabilitate the juror, but the juror was still unclear and equivocal; and the juror's prior experience involving dismissed charges may have biased the juror.

{¶49} Although they need not be, the reasons provided were plausible and persuasive. Read in the context of the entire voir dire transcript, the reasons can readily be adjudged genuine rather than pretextual. We review the highlights of voir dire that support the trial court's decision to allow the peremptory challenge.

{¶50} After the state discussed its burden, the prosecutor attempted to present an analogy about a jigsaw puzzle with some missing pieces. The prosecutor asked if the puzzle was still a picture of Mount Rushmore even if Washington's chin was missing and Roosevelt's nose was missing. Juror number six responded, "It's an incomplete picture." When asked if he needed 100% of the pieces to tell what it is, the juror added, "If I didn't have the picture of Mount Rushmore to see what it actually supposed to be; and you gave me this puzzle that's partially put together, I

probably wouldn't know what it is." (Tr. 36). The juror added, "It's picture of Mount Rushmore, but not a complete picture." (Tr. 36-37).

{¶51} The prosecutor inquired if he was going to need 100% proof to find the defendant guilty. Juror number six answered, "It's a man's life on the line. His future. So, yes, I would want to be – I would want to be totally sure in order to keep from making a mistake and then later on find out, whoops, we sent an innocent person somewhere where he didn't need to go. *So, yes, I would need to be 100% sure*." (Emphasis added) (Tr. 37). The state then spoke to other jurors about the matter. Juror number six interjected with a story about his personal situation concerning his children and his rights as a father. He suggested the court system held him to a standard requiring 100% proof and complained "because it's not 100%, I couldn't get my legal representation." (Tr. 40-41).

{¶52} Later, the jurors were asked if they had negative feelings toward police officers. Juror number six said his uncle was a police officer. He complained police officers speak down to people and threaten to arrest them for speaking their minds. (Tr. 45). He then voiced that one officer will go along with the other officer's story even if he knows the truth to be different. (Tr. 45-46). He stated he would listen to the testimony and said they would have to convince him, emphasizing he would not be intimidated by the testifying officers just because they had a badge. (Tr. 48). He added: "You have to convince me that that man is guilty; and if I feel he is not, I am not going to agree -- [prosecutor adds, "yes, sir."] -- just because you have a badge on you, *what you say is supposed to be the law*." (Emphasis added) (Tr. 48).

{¶53} Thereafter, in attempting to rehabilitate the juror, defense counsel emphasized, "even if the law was different than what you thought it should be, you would have to commit that you would follow the law as the Judge gives you." He asked juror number six if he could do this, to which the juror responded, "Yeah, I could do it. *Well, I don't know. It all depends because I might have a personal opinion* in that, so I'm trying - - Because, I mean, *the law doesn't always seem correct. It's the law, but the law is manmade. It's not always correct."* (Emphasis added) (Tr. 73).

{¶54} Defense counsel then made statements about credibility determinations, pointing out that jurors can disbelieve witnesses as long as they follow the law. Counsel said if a juror cannot follow the law or is not sure, "you are probably not a good juror for this case, even if you disagree with it." He then specifically asked juror number six (again) if he could follow the law. The juror initially replied that he could follow the law. (Tr. 76). He then continued, "But it's like the evidence * * *" and began opining that the state cannot present him with a gun and claim it belongs to the defendant if the state cannot present him with proof that the defendant's fingerprints are on the gun. (Tr. 76-77). Defense counsel said the situation called for making credibility determinations, and the juror said he could make these credibility determinations. (Tr. 77-78).

{¶55} The trial court was in the best position to evaluate the statements of the prosecutor and also those made by the juror during voir dire. The trial court's decision was based on the prosecutor's credibility, the juror's answers, and the totality of the circumstances. *See, e.g., Batson*, 476 U.S. at 98; *Frazier*, 115 Ohio St.3d 139 at ¶ 64 (based on all the circumstances); *Bryan*, 101 Ohio St.3d 272 at ¶ 110. Under the totality of the circumstances, the prosecutor's concerns could be seen as genuine (and were justified as well). It was not clearly erroneous for the trial court to find the reasons expressed by the prosecution were not pretextual and to conclude the prosecutor's decision was not the result of purposeful discrimination. This assignment of error is overruled.

{¶56} Appellant's conviction is affirmed, but the sentencing entry is vacated. The case is remanded for the issuance of a proper sentencing entry with instructions for the trial court to make consecutive findings and eliminate the sentence on one of the illegal conveyance counts.

Donofrio, P.J., concurs.

Waite, J., concurs.