IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-160321 TRIAL NO. B-1503614(C)
Plaintiff-Appellee,	:	*O P I N I O N.*
vs.	:	
MORDECIA BLACK,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: June 23, 2017

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Scott M. Heenan*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Roger W. Kirk for Defendant-Appellant.

MOCK, Presiding Judge.

{¶1} During the course of a series of fights and civil disturbances on and around Fountain Square on July 4, 2015, defendant-appellant Mordecia Black was approached by Christopher McKnight and the two engaged in a momentary exchange. According to video evidence and witness testimony, Black began attacking McKnight, and others around Black joined in beating him. Police were eventually able to enter the area and extract McKnight and get him to the hospital for treatment of significant, serious injuries. Black was arrested and charged with felonious assault and aggravated riot. After a jury trial, Black was found guilty and sentenced to maximum prison terms to be served consecutively. Raising five assignments of error, Black now appeals.

The *Batson* Challenge

{¶2} In his first assignment of error, Black—who is African-American—claims that the trial court erred when it permitted the prosecuting attorney to use a peremptory challenge to dismiss a prospective African-American juror. During the course of the voir dire, the state sought to use its third preemptory challenge against a potential juror, an African-American woman. Counsel for Black objected, noting that it would be the third African-American jury candidate struck by the state. In response, the state argued that:

> I am troubled by her answer about the place where she lives that she says it's not a high-crime area and she doesn't know anybody - - friends, relatives, anybody - - that's been convicted or charged with a crime. That's just not true. Winton Place is probably the worst or second-worst crime neighborhood in the city, and I cannot imagine that she knows nothing about any of this or has an opinion that [it] is

> not an unsafe area. Also, I'm not too thrilled with her not having any interests, activities; doesn't watch the news, doesn't pay attention to anything. She seemed very reluctant in her answers, too, kind of one-word, no explanation, not willing to give any information.

The trial court then made its own observations while denying the challenge:

> This juror definitely presented to the Court as a very unusual individual. Her responses and demeanor about - - she seemed very unwilling to participate in the give-and-take, as the state pointed out. I agree that this is the third or fourth African-American excused. Frankly, one-third of the original seated jury was African-American. So I don't believe that it's risen to the level of a *Batson* challenge.

{¶3} In *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the United States Supreme Court held that the Equal Protection Clause of the United States Constitution precludes purposeful discrimination by the state in the exercise of peremptory challenges so as to exclude members of minority groups from petit juries. *See State v. O'Neal*, 87 Ohio St.3d 402, 402, 721 N.E.2d 73 (2000).

{¶4} *Batson* established a three-step procedure for evaluating claims of racial discrimination in the use of peremptory challenges. *State v. White*, 85 Ohio St.3d 433, 435, 709 N.E.2d 140 (1999); *State v. Thomas*, 1st Dist. Hamilton No. C-120561, 2013-Ohio-5386, ¶ 14. First, the opponent of a peremptory strike must make a prima facie showing of discrimination. Second, the proponent of the strike must give a race-neutral explanation for the strike. Third, the trial court must determine whether, under all the circumstances, the opponent has proven purposeful discrimination. *State v. Herring*, 94 Ohio St.3d 246, 255-256, 762 N.E.2d 940 (2002); *Thomas* at ¶ 14-15.

{¶5} The burden of persuasion always stays with the opponent of the strike. A reviewing court will defer to the trial court's finding that no discriminatory intent existed, since it turns largely on an evaluation of credibility. *Herring* at 256; *Thomas* at ¶ 16. The reviewing court may only reverse a trial court's finding if that finding is "clearly erroneous." *Hernandez v. New York*, 500 U.S. 352, 369, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991); *Thomas* at ¶ 16. The state's reason is deemed to be race-neutral unless discriminatory intent is inherent in the explanation. *Thomas* at ¶ 15.

{¶6} Black claims that the reasons given by the state were not race-neutral, but were rather pretext to hide the fact that the state was striking the juror because she was African-American. But the state believed, based on her answers about Winton Place, that the juror was either lying about how she perceived her neighborhood or that she was out of touch with what was going on in her own community. The state was also concerned about the limited way she engaged in the colloquy—a demeanor that the trial court also noted—which further indicated that she was holding something back. Body language and demeanor are permissible race-neutral justifications for exercising a peremptory challenge. *State v. Williams*, 1st Dist. Hamilton No. C-130277, 2014-Ohio-1526, ¶ 40, citing *State v. Brown*, 8th Dist. Cuyahoga No. 84059, 2004-Ohio-6862.

{¶7} On this record, the decision of the trial court was not clearly erroneous. We overrule Black's first assignment of error.

Juror Sees Black Led From Courtroom

{¶8} In his second assignment or error, Black claims that he was prejudiced when a juror had seen him being led from the courtroom in handcuffs. Prior to resuming trial on the third day, it came to the court's attention that one of

the jurors had seen Black being escorted out of the courtroom. The juror was brought before the court and asked if seeing "him with a police officer affect[ed] you in that way as far as your ability to continue to be on the jury and be fair and impartial to the defendant?" The juror said she could continue. Neither attorney asked further questions of the juror, and she was allowed to return to the jury room. Black then asked for a mistrial, which the trial court denied.

{¶9} Nothing in the record indicates that the juror had actually seen Black in handcuffs, just that he had been escorted from the courtroom by deputies. This court has previously held that a trial court may deny a request for a mistrial when a juror sees a defendant in custody during the course of the trial, but maintains that he or she is still able to perform his or her function. *See State v. Crawford*, 1st Dist. Hamilton No. C-070816, 2008-Ohio-5764, ¶ 50. Black has presented no reason for this court to depart from this rule, and we overrule his second assignment of error.

Sentencing

{¶10} In his third assignment of error, Black claims that the trial court improperly imposed maximum, consecutive sentences for his convictions. Applying R.C. 2953.08(G)(2), this court will only modify or vacate a sentence if it clearly and convincingly finds that either the record does not support the mandatory sentencing findings or the sentence is otherwise contrary to law. *State v. Martin*, 1st Dist. Hamilton No. C-150054, 2016-Ohio-802, ¶ 35, citing *State v. White*, 2013-Ohio-4225, 997 N.E.2d 629, ¶ 11 (1st Dist.); *see State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, paragraph one of the syllabus.

{¶11} Although the court must consider the overriding principles of felony sentencing, including R.C. 2929.12, the court need not make specific findings on the record, and we can presume that the court considered the factors, absent an

affirmative demonstration in the record showing otherwise. *State v. Hamberg*, 1st Dist. Hamilton No. C-140536, 2015-Ohio-5074, ¶ 17, citing *State v. Alexander*, 1st Dist. Hamilton Nos. C-110828 and C-110829, 2012-Ohio-3349, ¶ 24.

{¶12} As to the findings required for imposing consecutive sentences, Black concedes that the trial court did make findings, but argues that they are not supported by the record. The court found that consecutive sentences were "necessary to protect the public and punish the defendant and [were] not disproportionate to the seriousness of the defendant's conduct and the danger the defendant poses to the public," and that the defendant "caused such serious harm on these multiple offenses and the harm was so great and unusual that no single prison term for any of the offenses committed as part of his activity would reflect the seriousness of his conduct." The court noted his criminal history, which included a weapons-under-disability conviction in 2012, an aggravated-trafficking conviction in 2012, a drug-possession conviction in 2012, a drug-trafficking conviction in 2006, a drug-possession conviction in 2006, a falsification conviction, an obstruction-of-official-business conviction, and a failure-to-comply conviction. The court summed up by saying that Black's adult and juvenile records were "replete with instances of complete disregard for our public authority, what is legal, what is acceptable, and what is violent in our community. Consecutive sentences are supported by all these facts."

{¶13} Since the record supports the findings made by the trial court, it did not err in sentencing Black to maximum, consecutive sentences. We overrule Black's third assignment of error.

Prosecutorial Misconduct

{¶14} In his fourth assignment of error, Black claims that his due-process rights were violated by prosecutorial misconduct during the trial. Prosecutorial misconduct will only serve as grounds for error if it deprived the defendant of a fair trial. *State v. Smith*, 130 Ohio App.3d 360, 366, 720 N.E.2d 149 (1st Dist.1998). Accordingly, the remarks must have been improper and have prejudicially affected the defendant's substantial rights. *State v. Bailey*, 1st Dist. Hamilton No. C-140129, 2015-Ohio-2997, ¶ 42, quoting *State v. Jones*, 135 Ohio St.3d 10, 2012-Ohio-5677, 984 N.E.2d 948, ¶ 200.

{¶15} Black first argues that the prosecutor improperly questioned witnesses, citing several instances. But in most of the instances cited by Black, he failed to object, so his challenges to the prosecutor's conduct are reviewed for plain error. *See Smith* at 366. In the one instance where counsel objected to a leading question, the trial court sustained the objection and struck the response. The trial court later instructed the jury to disregard any statements or answers that the trial court had ordered stricken. The jury is presumed to have followed this instruction. *See State v. Stallings*, 89 Ohio St.3d 280, 286, 731 N.E.2d 159 (2000). And the remaining instances of similar conduct do not rise to the level of plain error.

{¶16} Black next argues that the state improperly attempted to refresh the recollection of a witness, and in doing so characterized Black as the "instigator" of the fight. But counsel objected, and the trial court sustained the objection, struck the answer, and instructed the jury to disregard it. And we presume that the jury followed that instruction.

{¶17} Black next claims that the prosecutor improperly indicated that he did not believe Black's version of events when cross-examining him. While questioning

Black, the state began a line of questioning with "let's just say what you said is even true, just assuming it's true - - which I don't believe you, but let's assume it's true for a minute." Again, counsel failed to object, and we do not find that the comment rose to the level of plain error.

{¶18} As it relates to closing arguments, Black claims that the state made a number of comments on how the video evidence contradicted Black's testimony. And there were also comments indicating that Black had lied. Again, we are faced with statements to which counsel failed to object. The comments about the evidence contradicting Black's testimony were a fair comment on the state of the evidence. As to the accusation that Black was a "liar," Black himself had admitted that he had lied to the police when he told them that the victim had stabbed him prior to the fight. And again, the statements do not rise to the level of plain error.

{¶19} We overrule Black's fourth assignment of error.

Sufficiency and Weight of the Evidence

{¶20} In his fifth assignment of error, Black claims that his convictions were based upon insufficient evidence and were against the manifest weight of the evidence. In a challenge to the sufficiency of the evidence, the question is whether after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. In regard to the weight of the evidence, we review the entire record, weigh the evidence, consider the credibility of the witnesses, and determine whether the trier of fact clearly lost its way and created a manifest miscarriage of justice. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997).

{¶21} Black was convicted of felonious assault and aggravated riot. Under R.C. 2903.11(A)(1), a person is guilty of felonious assault when they knowingly cause serious harm to another person. A person commits the offense of aggravated riot when they participate with four or more others in a course of disorderly conduct with the purpose to facilitate the commission of any offense of violence. *See* R.C. 2917.02(A)(2).

{¶22} At trial, McKnight testified that he had finished watching the fireworks and was trying to get home. The next thing he remembered was being on the ground attended to by a female police officer. A person riding a Metro bus through downtown testified that he saw a group of people pushing and shoving. He then saw a fight break out between a white male and an African-American man. From inside the bus, he began filming the fight. The fight progressed from a one-on-one encounter to several individuals attacking the white male. Black was identified as the African-American male involved in the fight. Another individual testified that she saw an initial fight between the white male and the group, she then saw the white male temporarily get away before being attacked again. She identified Black from a photo as the man who started the fight. Police then obtained a video from a bus that showed McKnight walking down the street and Black yanking McKnight around and attacking him. It then showed Black and several others attack McKnight. According to all sources, only a few seconds passed between the initial encounter and the beginning of the fight.

{¶23} On the other hand, Black's version of events was very different and changed over the course of the litigation. He initially told police that he was not involved in the altercation at all, but said that he had been stabbed by an African-American male. When confronted with the video evidence by police, he told

investigators that he had fought with McKnight because it had been McKnight who had stabbed him. He later said that the fight began because McKnight had seen the blood on Black from the stabbing and told him to get away from him. At trial, he claimed that McKnight had randomly asked to buy drugs from him. He then said that McKnight had bumped into him and had said "move the fuck out of the way, nigger." Black then said that McKnight grabbed him by the neck, so he called for help, which resulted in the others involved coming to his aid.

{¶24} The jury found the evidence of the state to be more compelling than the testimony presented by Black. Therefore, his convictions were based neither on insufficient evidence nor were they against the manifest weight of the evidence. We overrule Black's fifth assignment of error.

Instruction on Aggravated Assault

{¶25} In his sixth assignment of error, Black claims that the trial court erred when it refused to instruct the jury on the charge of aggravated assault. During the trial, Black had requested that the jury be instructed on the inferior-degree offense of aggravated assault along with the felonious-assault instruction.

{¶26} The test for giving an instruction on an inferior-degree offense is similar to the test applied when an instruction on a lesser-included offense is sought. Thus, if under any reasonable view of the evidence it is possible for the trier of fact to find the defendant guilty of the inferior-degree offense and to acquit on the greater offense because of the provocation, the instruction on the inferior-degree offense should be given. *See State v. Shane*, 630 Ohio St.3d 630, 632, 590 N.E.2d 272 (1992). But simply having "some evidence" that would support the charge is insufficient. As the Ohio Supreme Court noted:

> [t]o require an instruction to be given to the jury every time "some evidence," however minute, is presented going to a lesser included (or inferior-degree) offense would mean that no trial judge could ever refuse to give an instruction on a lesser included (or inferior-degree) offense. Trial judges are frequently required to decide what lesser included (or inferior-degree) offenses must go to the jury and which must not. The jury would be unduly confused if it had to consider the option of guilty on a lesser included (or inferior-degree) offense when it could not reasonably return such a verdict.

Id. at 633.

{¶27} The elements of aggravated assault are identical to the elements of felonious assault, except for the additional mitigating element of serious provocation. *Compare* R.C. 2903.11 and 2903.12; *see State v. Smith*, 168 Ohio App.3d 141, 2006-Ohio-3720, 858 N.E.2d 1222, ¶ 44 (1st Dist.). Thus, in a trial for felonious assault, a defendant must present sufficient evidence of serious provocation in order to warrant an instruction on the lesser offense of aggravated assault. *State v. Deem*, 40 Ohio St.3d 205, 533 N.E.2d 294 (1988), paragraph four of the syllabus.

{¶28} The only evidence of provocation in this case came from Black's own testimony when he said that the victim "bumped into me. He said, 'Move the fuck out of the way, nigger.' That's when I grabbed him." Provocation, to be serious, must be reasonably sufficient to bring on extreme stress and the provocation must be reasonably sufficient to incite or to arouse the defendant into using deadly force. *See Deem* at paragraph five of the syllabus.

{¶29} In most situations, mere words are insufficient "serious provocation" to meet that element of aggravated assault. *See Smith* at ¶ 48, citing *Shane*, 63 Ohio

St.3d 630, 590 N.E.2d 272, at paragraph two of the syllabus. Even if the trial court believed Black's testimony regarding what occurred prior to the fight, we conclude that the shove and the statement "[m]ove the fuck out of the way, nigger" were not reasonably sufficient to incite or arouse Black into using deadly force. Therefore, the record does not contain sufficient evidence of serious provocation, and the trial court properly refused to instruct the jury on aggravated assault. We overrule Black's sixth assignment of error.

{¶30} Having considered and overruled all of Black's assignments of error, we affirm the judgment of the trial court.

Judgment affirmed.

CUNNINGHAM and **MYERS, JJ.,** concur.

Please note:

The court has recorded its own entry on the date of the release of this opinion.