**[Cite as *State v. Robinson*, 2009-Ohio-5917.]**

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

CLARENCE ROBINSON

Defendant-Appellant

JUDGES:
Hon. Sheila G. Farmer, P. J.
Hon. William B. Hoffman, J.
Hon. John W. Wise, J.

Case No. 09 CAA 03 0029

O P I N I O N

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| CHARACTER OF PROCEEDING: | Criminal Appeal from the Court of Common Pleas, Case No. 08 CR I 06 0315 |
| JUDGMENT: | Affirmed |
| DATE OF JUDGMENT ENTRY: | November 9, 2009 |

APPEARANCES:

For Plaintiff-Appellee

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*Wise, J.*

**{¶1}** Defendant-Appellant Clarence Robinson appeals his sentence and conviction on two counts of sexual battery entered in the Delaware County Court of Common Pleas following a trial by jury.

**{¶2}** Plaintiff-Appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

**{¶3}** The relevant facts are as follows:

**{¶4}** On or about July 4, 2007, Defendant-Appellant Clarence Robinson was working as a Juvenile Corrections Officer at the Scioto Village juvenile detention facility in Delaware County, Ohio. Defendant-Appellant was working third shift duty and supervised many female inmates including J.V., the victim of this case.

**{¶5}** J.V. reported to authorities that she was involved in a sexual relationship with Defendant-Appellant. (T. at 111). On November 8, 2007, Trooper Franklin received the report of sexual misconduct. Trooper Franklin first interviewed the victim, J.V., and then Appellant.

**{¶6}** J.V. stated that on numerous occasions, Defendant-Appellant would enter her room and start touching her vagina and awaken her and/or allow her out of her private room to go into the laundry room to do laundry, where she stated Defendant-Appellant would also touch her vagina. (T. at 116). When Defendant-Appellant came into her office, Trooper Franklin read him his Miranda rights, having Defendant-Appellant initial line by line to show his understanding. (T. at 190). Defendant-Appellant then agreed to talk. During this first meeting, Defendant-Appellant admitted that he

"grabbed it and squeezed it", referring to the victim's vagina. (T. at 197). He initialed all of his answers, indicating these were true and accurate statements.

**{¶7}** After this first interview, Defendant-Appellant spoke with his Union Representative and resigned. (T. at 200). Defendant-Appellant then had a second interview with Trooper Franklin where he admitted to penetrating the victim's vaginal area twice with his fingers or hand. (T. at 203).

**{¶8}** As a result of the above, Defendant-Appellant Clarence Robinson was indicted by a Delaware County Grand Jury on two counts of Sexual Battery, in violation of R.C. §2907.03(A), both felonies of the Third Degree.

**{¶9}** Prior to the trial in this matter, Appellee State of Ohio filed a Motion to Suppress a conversation between the Department of Youth Services representatives which occurred at his place of employment. At the suppression hearing on the matter of the conversation with DYS representatives, the trial court found no *Garrity*[1] violation and further found no evidence that Defendant was encouraged to speak with Trooper Franklin in exchange for leniency. The trial court granted Appellee's Motion to Suppress the conversation between Defendant-Appellant and his employers.

**{¶10}** At trial, the jury heard the testimony of several witnesses including J.V. and Trooper Franklin. They also saw several surveillance videos. Two of the surveillance videos depicted Defendant-Appellant getting J.V. out of her cell at 1:30 a.m. and escorting her into the laundry room. (T. at 133). Another video depicted Defendant-Appellant and J.V. watching television in the common area and then showed Defendant-Appellant standing at J.V.'s cell door for over two minutes. (T. at 142).

[1] *Garrity v. New Jersey* (1967), 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562.

**{¶11}** Defendant-Appellant also testified at trial. During his testimony he told the jury that the only time he touched/penetrated J.V.'s vagina was during an incident where he had to subdue her using a special technique that he learned in Europe. (T. at 259-261). Defendant-Appellant further testified that his prior statements to Trooper Franklin were either a mistake or misinterpreted by Trooper Franklin.

**{¶12}** At the conclusion of evidence, the trial court granted defense counsel's Crim.R. 29 motion as to Count One Sexual Battery, instead instructing the jury as to Attempted Sexual Battery Count One and both Sexual Battery and Attempted Sexual Battery on Count Two.

**{¶13}** At the conclusion of the trial, the jury found Appellant guilty on only Count Two, Sexual Battery. The trial court sentenced Appellant to one (1) year at the Ohio Department of Rehabilitation and Corrections, ordered Appellant to pay court costs and classified him as a Tier III Sex Offender.

**{¶14}** Appellant now raises the following assignments of error on appeal:

ASSIGNMENTS OF ERROR

**{¶15}** "I. THE TRIAL COURT DENIED APPELLANT THE RIGHT TO A FAIR TRIAL BY EXCLUDING EVIDENCE OF HIS CONVERSATION WITH DEPARTMENT OF YOUTH SERVICES REPRESENTATIVES.

**{¶16}** "II. APPELLANT WAS PREJUDICED BY INEFFECTIVE ASSISTANCE OF COUNSEL."

**I.**

**{¶17}** In his first assignment of error, Appellant argues that the trial court's exclusion of evidence denied him a fair trial. We disagree.

**{¶18}** Appellant argues that it was error for the trial court to prohibit him from testifying as to the content of his conversations with the D.Y.S. representatives.

**{¶19}** The admission or exclusion of evidence lies in the trial court's sound discretion. *State v. Sage* (1987), 31 Ohio St.3d 173. In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217.

**{¶20}** At a suppression hearing, the trial court assumes the role of trier of fact and, as such, is in the best position to evaluate the evidence and the credibility of witnesses. See *State v. Carter* (1995), 72 Ohio St.3d 545, 552. When reviewing a ruling on a motion to suppress, deference is given to the trial court's findings of fact so long as they are supported by competent, credible evidence. *Burnside,* 2003-Ohio-5372, at ¶ 8. With respect to the trial court's conclusions of law, however, our standard of review is de novo and we must decide whether the facts satisfy the applicable legal standard. *State v. McNamara* (1997), 124 Ohio App.3d 706, 710.

**{¶21}** Upon review, we do not find that the trial court erred in granting the State of Ohio’s motion to suppress.

**{¶22}** We find that Appellant was not promised anything in exchange for his resignation. At the suppression hearing in this matter, Appellant testified and stated that a representative from the human resources department advised him “that [in] some cases, where if I go ahead and resign, DYS would drop the charges. So I resigned.” (Supp. T. at 55).

**{¶23}** Upon cross-examination, Appellant admitted that nobody offered him a quid pro quo exchange, thereby promising to drop the charges against him if he resigned his position. (Supp. T. at 64). He further testified that his union representative advised him to resign. Id.

**{¶24}** We further find that Appellant's statements to Trooper Franklin, which include details of the sexual abuse, were not coerced and were made voluntarily. Trooper Franklin testified she advised Appellant of his rights prior to the commencement of both interviews, and that she had him initial each line of the statement of his rights indicating his understanding of his rights. (T. at 19-21, 36).

**{¶25}** Accordingly, Appellant's first assignment of error is overruled.

**II.**

**{¶26}** In his second assignment of error, Appellant claims that he was denied the effective assistance of trial counsel. We disagree.

**{¶27}** Specifically, Appellant claims that his trial counsel was ineffective in failing to object to the State of Ohio's use of a peremptory challenge against the only African-American juror and further for failing to object to the trial court's sua sponte instruction on the lesser-included offense of Attempted Sexual Battery.

**{¶28}** Pursuant to *Strickland v. Washington,* to establish ineffective assistance of counsel, Appellant must show (1) a deficient performance by counsel, i.e., a performance falling below an objective standard of reasonable representation, and (2) prejudice, i.e., a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Strickland v. Washington* (1984), 466 U.S. 668, 687-688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d

136, paragraph two of the syllabus. “An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.” *Strickland,* 466 U.S. at 691. When examining counsel's trial strategy, reviewing courts must not use hindsight and must bear in mind that different trial counsel will often defend the same case in different manners. *Strickland,* supra at 689; *State v. Keenan,* 81 Ohio St.3d 133, 152, 1998-Ohio-459. For these reasons, ineffective assistance of counsel claims may not be based upon debatable strategic and tactical decisions. *State v. Phillips,* 74 Ohio St.3d 72, 85, 1995-Ohio-171.

**{¶29}** A defendant in a criminal trial has the “right to be tried by a jury whose members are selected pursuant to non-discriminatory criteria.” *Batson v. Kentucky* (1986), 476 U.S. 79, 85-86, 106 S.Ct. 1712, 90 L.Ed.2d 69. The use of a peremptory challenge by a prosecutor is subject to analysis under the Equal Protection Clause. *Id.* In *Hernandez v. New York* (1991), 500 U.S. 352, 358-359, 111 S.Ct. 1859, 114 L.Ed.2d 395, the United States Supreme Court followed *Batson,* stating as follows:

**{¶30}** “In *Batson,* we outlined a three-step process for evaluating claims that a prosecutor has used peremptory challenges in a manner violating the Equal Protection Clause.* * * First, the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race.* * *Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question.* * *Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination.” (Citations omitted.)

**{¶31}** As noted by Justice Breyer in his concurrence in *Rice v. Collins* (2006), 546 U.S. 333, 126 S.Ct. 969, 163 L.Ed.2d 824, a decision on excluding a juror via a peremptory challenge is multifaceted. Factors include appearance, demeanor, context, and atmosphere:

**{¶32}** "The trial judge is best placed to consider the factors that underlie credibility: demeanor, context, and atmosphere. And the trial judge is best placed to determine whether, in a borderline case, a prosecutor's hesitation or contradiction reflect (a) deception, or (b) the difficulty of providing a rational reason for an instinctive decision. Appellate judges cannot on the basis of a cold record easily second-guess a trial judge's decision about likely motivation. These circumstances mean that appellate courts will, and must, grant the trial courts considerable leeway in applying *Batson." Rice,* at 343.

**{¶33}** Upon review of the record in the instant case, we find that the State offered a race-neutral explanation for its use of a peremptory challenge for this juror, stating that it had concerns about the juror's age, the juror being only twenty (20) years old, and how his age may affect his thinking in this particular case. (T. at 61).

**{¶34}** We further find that trial counsel discussed this matter with his client and that a decision was made not to challenge such dismissal. (T. at 60-61). In fact, Appellant himself, upon inquiry from the trial court, stated he had no problem with the State removing this juror from the panel even though he was African-American. Id.

**{¶35}** Trial counsel's decisions as to which jurors to excuse and which ones to keep are considered to be a part of trial strategy. See *State v. Goodwin,* 84 Ohio St.3d 331, 341, 703 N.E.2d 1251, 1999-Ohio-356. The strategic choices of trial counsel are

presumed to be sound. *Strickland,* 466 U.S. at 689. Further, during voir dire trial counsel was able to observe the demeanor of this particular juror and was able to assess his responses to questioning. Upon review, we find that trial counsel was not ineffective by failing to object to the dismissal of the juror.

**{¶36}** We further find there is no indication that objecting to the prosecution's use of a preemptory challenge of such juror would have affected the outcome of the trial. Accordingly, the defendant has failed to establish that there is a reasonable probability that, but for trial counsel's failure to object to the challenge of this juror, the result of the trial would have been different.

**{¶37}** As to the trial court's sua sponte instruction on the lesser-included offense of Attempted Sexual Battery in this case, upon review, we find that as Appellant was acquitted of such lesser-included offense as to Count One and was found guilty of the greater offense as to Count Two, Appellant has failed to show any prejudice resulting from the giving of such lesser-included instruction.

**{¶38}** Appellant's second assignment of error is denied.

**{¶39}** For the foregoing reasons, the judgment of the Court of Common Pleas, Delaware County, Ohio, is affirmed.

By: Wise, J.
Farmer, P. J., concurs.
Hoffman, J., concurs separately.

/S/ JOHN W. WISE_____

/S/ SHEILA G. FARMER_____

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JUDGES

JWW/d 1026

*Hoffman, J., concurring*

**{¶40}** I concur in the majority's analysis and disposition of Appellant's second assignment of error.

**{¶41}** I further concur in the majority's disposition of Appellant's first assignment of error. Unlike the majority, I believe the trial court erred in excluding evidence of Appellant's conversation with the Department of Youth Services representatives. However, I find the error to be harmless in light of all the evidence of Appellant's guilt.

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HON. WILLIAM B. HOFFMAN

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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|---|---|---|
| STATE OF OHIO | : | |
| Plaintiff-Appellee | : | |
| -vs- | : | JUDGMENT ENTRY |
| CLARENCE ROBINSON | : | |
| Defendant-Appellant | : | Case No. 09 CAA 03 0029 |

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Delaware County, Ohio, is affirmed.

Costs assessed to Appellant.

/S/ JOHN W. WISE_____

/S/ SHEILA G. FARMER_____

/S/ WILLIAM B. HOFFMAN_____

JUDGES