[Cite as *State v. Campbell*, 2010-Ohio-2573.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO	C. A. No. 24668
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
PERCY L. CAMPBELL	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. CR 08 09 3195

DECISION AND JOURNAL ENTRY

Dated: June 9, 2010

MOORE, Judge.

{¶1} Appellant, Percy Campbell, appeals from the decision of the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} Percy Campbell was arrested on September 10, 2008, stemming from an incident that occurred in the home of the victim, Shanikka Duckworth. Duckworth testified that she knew Campbell. Campbell knocked on her door in the late evening hours of September 10, 2008, and she let him in. Shortly after she allowed him into her home, he asked her for sexual favors. She declined, and stated that she felt uncomfortable so she asked him to leave. Campbell again demanded sexual favors, and proceeded to fight with Duckworth. Duckworth screamed for her daughter. Her daughter came downstairs and observed Campbell attempting to strangle Duckworth. Duckworth screamed to her daughter to go next door to get help. As her daughter

was leaving, Campbell threw a fan at Duckworth. Duckworth testified that Campbell punched her. Campbell then ran from the home.

{¶3} Duckworth followed Campbell out of the home where she met her next-door neighbor, Bernadine Salter. Salter, Duckworth, and Duckworth's daughter watched Campbell leave. Campbell threatened to return. Duckworth called 911 and the police responded.

{¶4} As a result of this incident, on October 17, 2008, Campbell was indicted on one count of attempted rape, in violation of R.C. 2907.02(A)(2)/2923.02, one count of disrupting public services, in violation of R.C. 2909.04(A)(1), and one count of aggravated menacing, in violation of R.C. 2903.21. On November 17, 2008, a supplemental indictment was filed, charging Campbell with one count of aggravated burglary, in violation of R.C. 2911.11(A)(1). The supplemental indictment further contained a sexually violent predator specification to the count of rape as stated in the original indictment. Campbell pled not guilty to the charges, and on January 12, 2009, the matter proceeded to a jury trial.

{¶5} On January 15, 2009, the jury found Campbell not guilty of the charges of attempted rape and disrupting public services. The jury found him guilty of aggravated burglary and aggravated menacing. The trial court dismissed the sexually violent predator specification. Campbell was sentenced to sixth months of incarceration on the aggravated menacing conviction, and five years of incarceration on the aggravated burglary conviction, to run concurrently. Campbell timely appealed this decision, and has raised four assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

"[CAMPBELL'S] CONVICTIONS FOR COUNTS OF AGGRAVATED MENACING, [R.C. 2903.21], AND AGGRAVATED BURGLARY, [R.C.

> 2911.11], WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND MUST BE OVERTURNED."

{¶6} In his first assignment of error, Campbell contends that his convictions for aggravating menacing and aggravated burglary were against the manifest weight of the evidence. We do not agree.

{¶7} We must first address the State's argument that Campbell's appeal regarding his misdemeanor conviction of aggravated menacing is moot as he has already served his sentence. We agree.

{¶8} The Ohio Supreme Court has held that:

> "where a criminal defendant, convicted of a *misdemeanor*, voluntarily satisfied the judgment imposed upon him or her for that offense, an appeal from the conviction is moot unless the defendant has offered evidence from which an inference can be drawn that he or she will suffer some collateral legal disability or loss of civil rights stemming from that conviction." *State v. Golston* (1994), 71 Ohio St.3d 224, 226, citing *State v. Wilson* (1975), 41 Ohio St.2d 236, and *State v. Berndt* (1987), 29 Ohio St.3d 3.

{¶9} Campbell was sentenced on February 10, 2009 to six months of incarceration for the crime of aggravated menacing, a first-degree misdemeanor. He was further sentenced to five years of incarceration for the crime of aggravated burglary, a first-degree felony. The trial court ordered the sentences to be served concurrently. The State notes that Campbell received credit for 154 days for time served. We do not, however, consider Campbell's time served for purposes of the mootness doctrine.

> "Where a defendant is sentenced only to time involuntarily served prior to conviction, the mootness doctrine does not apply. *State v. Benson* (1986), 29 Ohio App.3d 109, 110 []. If the rule were otherwise, 'a defendant who receives credit for time served prior to trial that is equal to his sentence *** could be effectively blocked from ever appealing his conviction.' Id.; see also *Sibron v. New York* (1968), 392 U.S. 40, 51-53, [] (recognizing that mootness does not apply where it is impossible for a defendant to pursue an appeal before expiration of his sentence). *State v. Byrd*, 185 Ohio App.3d 30, 2009-Ohio-5606, at ¶12.

{¶10} Thus, the State's argument utilizing Campbell's time served prior to sentencing as a mechanism to render moot his current appeal is without merit. However, a review of the record reveals that Campbell's appeal on this issue is in fact, moot.

{¶11} Although we recognize that Campbell has not yet completed his five-year term of incarceration, we conclude that Campbell completed his sentence for aggravated menacing on or about August 5, 2009. A review of the record reveals that he did not request the trial court to stay his sentence pending appeal. In *State v. Payne*, 9th Dist. No. 21178, 2003-Ohio-1140, this Court found that the appellant would not suffer any collateral disability or loss of civil rights where the sentence ran concurrently with a longer felony sentence and the six month misdemeanor assault sentence had been fully served. Id. Campbell does not present this Court with an argument that his sentence for aggravating menacing was not moot for some other collateral disability or loss of civil rights. Accordingly, he has failed to satisfy his burden on appeal, and we conclude that his appeal on this particular issue is moot. *In re B.G.*, 9th Dist. No. 24428, 2009-Ohio-1493, at ¶13, citing, *State v. Amell*, 9th Dist. No. 23943, 2008-Ohio-3770, at ¶12; *State v. Solomon*, 9th Dist. No. 23545, 2008-Ohio-553, at ¶39.

{¶12} We turn to Campbell's argument that his conviction for aggravated burglary was against the manifest weight of the evidence.

{¶13} "While the test for sufficiency requires a determination of whether the state has met its burden of production at trial, a manifest weight challenge questions whether the state has met its burden of persuasion." *State v. Gulley* (Mar. 15, 2000), 9th Dist. No. CA19600, at *1, citing *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390 (Cook, J., concurring).

{¶14} A determination of whether a conviction is against the manifest weight of the evidence does not permit this Court to view the evidence in the light most favorable to the State

to determine whether the State has met its burden of persuasion. *State v. Love*, 9th Dist. No. 21654, 2004-Ohio-1422, at ¶11. Rather,

> "an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Otten* (1986), 33 Ohio App.3d 339, 340.

{¶15} Campbell was convicted of aggravated burglary in violation of R.C. 2911.11. This section states:

> "(A) No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if any of the following apply:
>
> "(1) The offender inflicts, or attempts or threatens to inflict physical harm on another[.]"

{¶16} Notably, Campbell contends that the facts elicited at trial do not support a conclusion that "Campbell wrongfully obtained entry into Ms. Duckworth's home or that he caused her any physical harm or attempted to inflict physical harm upon her." Campbell points to Duckworth's testimony in which she testified that she voluntarily allowed Campbell into her home.

{¶17} Duckworth testified that although she allowed Campbell into her home, she became uncomfortable when he asked her for sexual favors in return for drugs he had provided her in the past. She said no, and asked him repeatedly to leave her apartment. She testified that Campbell informed her that she would have to make a police report. He asked her again for sexual favors, which she rejected, and, as a result, Campbell threatened her. He then tried to pull off her dress, ripping the strap. At this point, Campbell and Duckworth were on the couch, and

Campbell attempted to pry apart her legs and fumbled with his pants. Duckworth testified that she yelled at Campbell to get off her and that he started choking her. Once he let go of her neck, he punched her in the jaw. He then picked up a fan and threw it at her.

{¶18} Campbell contends that this testimony reveals that because Duckworth initially voluntarily allowed him in her home, he was not trespassing on the property. "R.C. 2911.21(A), defining criminal trespass, provides:

> 'No person, without privilege to do so, shall do any of the following:
>
> '(1) Knowingly enter or *remain* on the land or premises of another ***.' (Emphasis added.)" (Internal citations and quotations omitted.) *State v. Morton*, 147 Ohio App.3d 43, 2002-Ohio-813, at ¶47-49.

{¶19} It is clear that Duckworth repeatedly asked Campbell to leave her home. Thus, Duckworth revoked her permission to remain in her home. Id. at ¶51. Further, Duckworth contended that in response to her request for Campbell to leave her home, Campbell made threats concerning oral sex and also tried to make her feel sorry for him, thus allowing him to stay, by stating that "nobody loved him and everybody had gave up on him[.]" Upon her denial of oral sex and her requests for him to leave, Campbell attacked Duckworth. It was reasonable for a juror to conclude that Campbell knew that Duckworth did not want him to remain in her apartment. Thus, Duckworth's testimony presented credible evidence that Campbell trespassed on her property. Further, it is clear from her testimony that Campbell used force to remain in the apartment, thus providing evidence satisfying the contested elements of aggravated burglary pursuant to R.C. 2911.11(A).

{¶20} Campbell further contends that the jury clearly lost its way when it concluded that Campbell caused Duckworth physical harm, pursuant to R.C. 2911.11(A)(1). Duckworth testified that Campbell strangled her, punched her, and threw a fan at her. She also testified that

he threatened to force her to engage in oral sex. Campbell's daughter stated that she saw Campbell strangle her mother and throw a fan at her. Finally, Detective Jason Kline testified that he observed redness and swelling on Duckworth's neck. Thus, we conclude that the jury did not clearly lose its way and create a manifest miscarriage of justice when it concluded that Campbell "inflict[ed], or attempt[ed] or threaten[ed] to inflict physical harm on another[.]" 2911.11(A)(1). Accordingly, Campbell's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

> "THE TRIAL COURT COMMITTED ERROR BY NOT INSTRUCTING THE JURY UPON THE LESSER INCLUDED OFFENSE OF BURGLARY UNDER [R.C. 2911.12]."

{¶21} In his second assignment of error, Campbell contends that the trial court committed error by not instructing the jury upon the lesser-included offense of burglary pursuant to R.C. 2911.12. We do not agree.

{¶22} Although a crime may constitute a lesser-included offense, it does not follow that a lesser-included offense instruction is mandatory; "[a]n instruction on a lesser-included offense is required only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction on the lesser-included offense." *State v. Carter* (2000), 89 Ohio St.3d 593, 600.

{¶23} Campbell does not present this Court with the proposed jury instruction, nor does he specifically point us to the specific portion of R.C. 2911.12 he felt applied to the instant case. Regardless, we conclude that "[t]he State presented ample evidence that [Campbell] committed aggravated burglary." *State v. Divincenzo*, 9th Dist. No. 05CA0105-M, 2006-Ohio-6330, at ¶36. Campbell argues that "the jury could have reasonably inferred from the testimony that no physical altercation or attack occurred." He concludes that "[e]vidence of physical harm or

threat of physical harm, essential elements required to sustain an aggravated burglary charge, presented by the State was dubious at best[.]" We do not agree.

{¶24} As we stated above, Duckworth testified that Campbell threatened to force her to engage in oral sex, strangled her, punched her, and threw a fan at her. This testimony was corroborated by Duckworth's daughter's testimony, as well as Detective Kline, who testified that he observed redness and swelling on Duckworth's neck. Campbell does not explain why this testimony was "dubious at best[.]" He does not explain why the jury should have ignored this testimony, as would have been necessary to support his contention that the jury could have found against the State on this element of aggravated burglary. App.R. 16(A)(7); App.R. 12(A)(2). As we conclude that the evidence presented at trial would not have reasonably supported an acquittal on aggravated burglary, the trial court did not err when it declined to instruct the jury on a lesser-included offense. Accordingly, Campbell's second assignment of error is overruled.

ASSIGNMENT OF ERROR III

"THE TRIAL COURT ERRED BY ALLOWING THE PROSECUTOR TO ELICIT HEARSAY TESTIMONY FROM DEPUTY COCHRAN."

{¶25} In his third assignment of error, Campbell contends that the trial court erred by allowing the prosecutor to elicit hearsay testimony from Deputy Cochran. We do not agree.

{¶26} A trial court possesses broad discretion with respect to the admission of evidence. *State v. Maurer* (1984), 15 Ohio St.3d 239, 265, certiorari denied (1985), 472 U.S. 1012. An appellate court will not disturb evidentiary rulings absent an abuse of discretion. *State v. Roberts*, 156 Ohio App.3d 352, 2004-Ohio-962, at ¶14.

{¶27} Campbell specifically points to the testimony of Deputy Cochran regarding statements of Duckworth's next-door neighbor, Bernadine Salter. While he mentions statements made by Duckworth and Duckworth's daughter, he does not specifically point to the portions of

the record to support this argument. App.R. 16(A)(7). Further, he does not develop an argument with regard to these statements. Thus, we will limit our discussion to the specific statements made by Salter, as referenced in Campbell's appellate brief. App.R. 12(A)(2).

{¶28} Campbell contends that Deputy Cochran's testimony of what Salter reported to him was hearsay. He testified that she "stated the [Duckworth's daughter] had requested her help back at her apartment, Miss Duckworth's apartment, that she was being attacked. Her mom was yelling for this person to get off of her, and that they needed help." Deputy Cochran further stated that Salter informed him that "she had witnessed, when they were outside after the attack, [Campbell] *** was walking across the street back toward the apartment where we had located him, and had" told Duckworth to call the police because he was going to come back and force her to engage in oral sex.

{¶29} Campbell's counsel objected to these statements, and stated for the record that the testimony resulted in hearsay. The State argued that Salter's statements qualified as excited utterances.

{¶30} Duckworth testified that during the attack, she banged on the shared wall between her apartment and Salter. She further testified that she yelled for her daughter to run next door and tell Salter to call 911 because she was being attacked. Duckworth's daughter testified that she did in fact run next door and pounded on the door for Salter's help. Duckworth testified that Salter was outside with her when Campbell left the apartment and threatened her. Duckworth testified that she called 911 at approximately 1:10 p.m., right after the incident occurred. Deputy Cochran testified that he arrived on the scene approximately eight or nine minutes after receiving the 911 call. Deputy Cochran testified that Salter was "very shaken up, scared. I tried to talk to her a little bit. She was stuttering like she was very shaken up, very scared." He later testified

that "[s]he was very shaken, very nervous, but was able to talk. *** Her voice was cracking. It was a very nervous stuttering. She would repeat herself and apologized for being nervous and shaken up." Pursuant to Evid.R. 803(2), an excited utterance is an exception to hearsay. An excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Evid.R. 803(2). Thus, the trial court did not abuse its discretion when it concluded that Salter's statements related "to a startling event or condition made while [she] was under the stress of the excitement caused by the event or condition." Evid.R. 803(2). To the extent that Salter informed Deputy Cochran what Duckworth's daughter told her, Duckworth's daughter testified at trial, without objection, that she had gone next door to ask for help. See Evid.R. 805. Thus, any error in the admission of these statements would be harmless. Crim.R. 52(A)

{¶31} Lastly, Deputy Cochran's testimony that Salter informed him that she heard Campbell threaten Duckworth was admissible. As we explained above, the excited utterance exception permits Salter's statement to come in under Evid.R. 803(2). To the extent that Salter informed Deputy Cochran what she heard Campbell say, Evid.R. 801(D)(2) defines Campbell's statement as nonhearsay because it is an admission by a party opponent. Accordingly, the trial court did not abuse its discretion when it allowed Deputy Cochran's testimony with regard to Salter's statements. Campbell's third assignment of error is overruled.

ASSIGNMENT OF ERROR IV

> "THE TRIAL COURT DEPRIVED [] CAMPBELL OF HIS CONSTITUTIONAL RIGHT TO EQUAL PROTECTION UNDER THE LAWS WHEN THE COURT DENIED [] CAMPBELL A FAIR AND IMPARTIAL JURY VENIRE."

{¶32} In his fourth assignment of error, Campbell contends that the trial court deprived him of his constitutional right to equal protection when it denied him a fair and impartial jury venire. We do not agree.

{¶33} The Equal Protection Clause of the United States Constitution prohibits deliberate discrimination based on race by a prosecutor in his exercise of peremptory challenges. *Batson v. Kentucky* (1986), 476 U.S. 79, 89. A defendant has a "right to be tried by a jury whose members are selected by nondiscriminatory criteria." *Powers v. Ohio* (1991), 499 U.S. 400, 404. This Court reviews whether a party exercised its peremptory challenges in a discriminatory manner under the clearly erroneous standard. *Hernandez v. New York* (1991), 500 U.S. 352, 364-65; see, also, *State v. Vinson*, 9th Dist. No. 23739, 2007-Ohio-6045, at ¶21, *Akron v. Burns*, 9th Dist. No. 21338, 2003-Ohio-3785, at ¶15.

{¶34} A three-part test is employed to determine whether a peremptory challenge is based on race. *State v. Jones*, 9th Dist. No. 22231, 2005-Ohio-1275, at ¶27. First, the defendant must establish a prima facie case of discriminatory use of peremptory challenges by the prosecution. *Batson*, 476 U.S. at 96-97. To meet the first prong of the test, the defendant "must show that all the facts and circumstances surrounding the State's exercise of peremptory challenges, used to exclude members of a cognizable group, raised an inference that the State exercised challenges based on the excluded jurors' race." *Jones*, supra, at ¶27, citing *State v. Hill* (1995), 73 Ohio St.3d 433, 444-45.

{¶35} After the defendant makes his prima facie case, the burden shifts to the prosecution to provide a race-neutral explanation for the peremptory challenge. Id. at 445. The prosecution does not have to provide "an explanation that is persuasive, or even plausible." *Purkett v. Elem* (1995), 514 U.S. 765, 768. "[T]he issue is the facial validity of the prosecution's

explanation. Unless a discriminatory intent is inherent in the prosecution's explanation, the reason offered will be deemed race-neutral." (Quotations and citation omitted). Id.

{¶36} To meet its burden, "the prosecution must give a clear and reasonably specific explanation of [its] legitimate reasons for exercising the challenge[.]" (Internal citations and quotations omitted.) *Batson*, 476 U.S. at 98, fn. 20. The prosecution must provide an explanation "based on something other than the race of the juror." *Hernandez*, 500 U.S. at 360.

{¶37} After the prosecution has presented its explanation, the trial court must determine whether, under all the relevant circumstances, the defendant has met his burden of proving purposeful racial discrimination. *Batson*, 476 U.S. at 96-97. The trial court must consider the persuasiveness and credibility of the justification offered by the prosecution. *Hicks v. Westinghouse Materials Co*. (1997), 78 Ohio St.3d 95, 99, citing *Purkett*, 514 U.S. at 768. It must determine whether the neutral explanation offered by the prosecution is credible or is instead a pretext for unconstitutional discrimination. *Hernandez*, 500 U.S. at 363. The trial court's finding turns largely on evaluations of credibility and is given great deference. *Batson*, 476 U.S. at 98, fn. 21. As previously stated, this Court will only reverse a trial court's finding of a racially-neutral reason if it is clearly erroneous. *Hernandez*, 500 U.S. 364-65.

{¶38} In the instant case, Campbell objected on the basis of *Batson* when the State dismissed Juror Number 9, Takojia Walters. Campbell notes that as the parties were dismissing jurors, the State declined to make its last preemptory challenge and instead passed to the defense. The defense made its final preemptory challenge, and then the State chose to dismiss Walters, thus utilizing its last preemptory challenge. As part of his objection, Campbell stated the composition of the jury had not changed since the State had passed to the defense; therefore, the only reason to dismiss Walters was because she was an African-American woman. On appeal,

Campbell contends that by passing prior to his final preemptory challenge "the prosecution signified that the State was content with the panel which included Juror Walters." Campbell provides this Court with no authority for the proposition that by passing on a peremptory challenge, the State was in effect ratifying the current panel. App.R. 16(A)(7); App.R. 12(A)(2). Further, nothing in Crim.R. 24, which governs the selection of a jury, supports the argument advanced by Campbell. To the contrary, Crim.R. 24(E) states that "[t]he failure of a party to exercise a peremporty challenge constitutes a waiver of that challenge, but does not constitute a waiver of any subsequent challenge." The State was permitted to challenge four prospective jurors. Crim.R. 24(D). It exercised three peremptory challenges and waived one. Accordingly, this argument is without merit.

{¶39} Assuming Campbell made a prima facie case of discriminatory use of a preemptory challenge, the burden shifted to the State to present a race-neutral reason for dismissing Walters. The State explained that it wanted to seat Juror Number 19, Julie Mate, in Walters' place. Mate stated that she had previously been a juror in a murder trial in which the jury found the defendant guilty of the charge. With regard to our discussion above, the record suggests that the State chose to pass in an effort to determine whether it would have the opportunity to seat a specific juror, Mate. Had Campbell chosen to not challenge another juror, then the State would not have had the opportunity to seat Mate. As this was the State's last peremptory challenge, it had to dismiss a juror to achieve the result it ultimately sought; to seat Mate. The State explained that it struck Walters because she was a teacher and "I usually strike teachers." Walters had previously indicated that she was a substitute teacher who worked with autistic children. Accordingly, the State advanced a race-neutral basis for its peremptory challenge.

{¶40} We do not conclude that the trial court's overruling of Campbell's *Batson* challenge was clearly erroneous in this case. Campbell's fourth assignment of error is overruled.

III.

{¶41} Campbell's assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

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(E). 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 to Appellant.

CARLA MOORE
FOR THE COURT

CARR, J.
BELFANCE, P. J.
CONCUR

APPEARANCES:

BETH A. JUDGE, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.