

[Cite as *State v. Ware*, 2017-Ohio-2643.]

STATE OF OHIO            )  
                                  )ss:  
COUNTY OF SUMMIT    )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No.       28088

Appellee

v.

JACQUELINE E. WARE

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF SUMMIT, OHIO  
CASE No.    CR 14 10 0150

Appellant

DECISION AND JOURNAL ENTRY

Dated: May 3, 2017

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HENSAL, Presiding Judge.

{¶1} Jacqueline Ware appeals a judgment of the Summit County Court of Common Pleas that convicted and sentenced her for felonious assault. For the following reasons, this Court affirms in part and reverses in part.

I.

{¶2} The Grand Jury indicted Ms. Ware for two counts of felonious assault arising out of a fight in which she was involved. Following the presentation of the evidence at trial, the court instructed the jury regarding felonious assault and the lesser-included offense of simple assault. The jury found Ms. Ware guilty of felonious assault, and the trial court sentenced her to five years imprisonment. Ms. Ware has appealed, assigning three errors.

## II.

## ASSIGNMENT OF ERROR I

## THE TRIAL COURT COMMITTED REVERSIBLE AND PLAIN ERROR IN GIVING AN “ACQUITTAL FIRST” JURY INSTRUCTION REGARDING THE LESSER-INCLUDED OFFENSES OF ASSAULT.

{¶3} Ms. Ware argues that the trial court incorrectly instructed the jury that it unanimously had to find that she did not commit the offense of felonious assault before it could consider whether she committed a lesser-included offense. The court told the jury:

If you find that the State has failed to prove beyond a reasonable doubt that the Defendant committed the crime of felonious assault as set forth in either Count 1 or Count 2 or both, you will then consider whether the State has shown beyond a reasonable doubt that the Defendant committed the crime of assault.

Later, when instructing the jury how to fill out the verdict forms, the court told it: “If, and I repeat this, only if you have found that the State failed to prove either Count 1 or Count 2 or both by proof beyond a reasonable doubt, you would then consider whether or not they proved assault[.]” The court also later told the jury that its “verdict must [be] unanimous.”

{¶4} In *State v. Thomas*, 40 Ohio St.3d 213 (1988), the Ohio Supreme Court considered “whether a jury must be instructed that it cannot consider any lesser included offenses on which it has been properly charged unless and until it unanimously agrees that the defendant is not guilty of the indicted greater offense.” *Id.* at 218. The Supreme Court noted that there were advantages and disadvantages to both the State and defendants depending on whether unanimity on the greater offense was required before the jury considered a lesser-included offense. *Id.* at 218-219. It ended up rejecting an “acquittal first” instruction, concluding that “such an instruction encroaches on the province of the jury to decide questions of fact and to arrive at a verdict based on all the evidence before it and all the various offenses on which it has been properly instructed.” It held:

A jury must unanimously agree that the defendant is guilty of a particular criminal offense before returning a verdict of guilty on that offense. If a jury is unable to agree unanimously that a defendant is guilty of a particular offense, it may proceed to consider a lesser included offense upon which evidence has been presented. The jury is not required to determine unanimously that the defendant is not guilty of the crime charged before it may consider a lesser included offense.

*Id.* at paragraph three of the syllabus.

{¶5} After deciding in *Thomas* that a jury is not required to unanimously determine that a defendant is not guilty of the charged offense before considering a lesser-included offense, the Supreme Court examined the instructions that were given regarding aggravated murder in that case. The trial court had instructed the jury:

If you find that The State has proven beyond a reasonable doubt all of the essential elements of the crime of aggravated murder, then your verdict must be that the Defendant is guilty of aggravated murder; and you will not consider the lesser offense.

However, if you find that The State has failed to prove beyond a reasonable doubt the element of prior calculation and design, then your verdict must be that the Defendant is not guilty of aggravated murder.

You will then proceed with your deliberations and decide whether The State has proven beyond a reasonable doubt all of the essential elements of the lesser crime of murder.

*Id.* at 220. The Supreme Court noted that the “instruction does not expressly require unanimous acquittal on the charged crime, but rather addresses possible disagreement by the jury on the element of prior calculation and design and a corresponding inability to reach a verdict of guilty of aggravated murder.” *Id.* It also determined that the instruction “has negligible coercive potential because it speaks to the jury’s inability to find, whether unanimously or not, a certain element of the greater offense.” *Id.* It, therefore, concluded that the trial court’s instructions did not prejudice Henry Thomas, even though it recommended that instructions incorporate

“inability to agree” language to more clearly indicate to juries that they do not have to reach unanimity on a charged offense before considering lesser-included offenses. *Id.* at 220-221.

{¶6} In *State v. Mathes*, 9th Dist. Summit No. 20225, 2001 WL 651527 (June 13, 2001), this Court applied *Thomas* to a case involving a charge of murder and the lesser-included offense of involuntary manslaughter. The trial court instructed the jury in that case that:

[I]f you find the State failed to prove beyond a reasonable doubt all the essential elements of murder, then your verdict would be not guilty of that offense, and in that event you would continue your deliberations to decide whether the State has proved beyond a reasonable doubt all the essential elements of the lesser included offense of involuntary manslaughter.

\* \* \*

[I]f you have found that the State of Ohio proved beyond a reasonable doubt all the essential elements of involuntary manslaughter, then you would find the defendant guilty of involuntary manslaughter. And that-of course, that is if you find they did not prove the initial offense in the indictment, murder, and have gone onto that consideration.

(Alterations sic.) *Id.* at \*3. After being convicted of murder, Larry Mathes argued on appeal that the instructions improperly told the jury that it had to unanimously agree that he was not guilty of murder before it could consider whether he committed involuntary manslaughter. *Id.* This Court compared the instructions to the ones given in *Thomas*, and concluded that they were “virtually identical.” *Id.* This Court explained that Mr. Mathes was mistaken about the reasoning in *Thomas* and noted that, in *Thomas*, the “Supreme Court found that the trial court’s instruction complied with the new syllabus law because it did not expressly require the jury to unanimously acquit Thomas of aggravated murder before considering the offense of murder.” *Id.* This Court held that, even though the trial court’s instruction may not have been ideal, the “reasoning from *Thomas* applie[d] with equal force to the instruction given to Mathes’ jury.” *Id.* at \*4. It, therefore, overruled Mr. Mathes’ assignment of error.

{¶7} In this case, the trial court told the jury that it could consider the lesser-included offense of assault if and only if the State failed to prove beyond a reasonable doubt that Ms. Ware committed felonious assault. Although that language is slightly different than the language at issue in *Thomas* and *Mathes*, the difference is not material. The trial court did not expressly instruct the jury that it could not consider a lesser-included offense unless it was unanimous in its determination about felonious assault. Instead, as in *Thomas*, it spoke only “to the jury’s inability to find, whether unanimously or not,” that it was beyond a reasonable doubt that Ms. Ware committed felonious assault. *Thomas* at 220. As this Court concluded in *Mathes*, we conclude that, “[a]lthough it may not have been an ideal instruction, the trial court committed no error.” *Mathes* at \*4.

{¶8} The fact that the trial court later told the jury in its instructions that the jury’s verdict had to be unanimous does not distinguish this case from *Thomas* and *Mathes*. The court simply told the jury that it should wait until all the jurors were unanimous in their verdict to complete the verdict forms. The court did not state that the jury should not consider the lesser-included offense of assault until it had reached a unanimous decision about the charged offenses. Ms. Ware’s first assignment of error is overruled.

#### ASSIGNMENT OF ERROR II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR AND PLAIN ERROR WHEN IT SENTENCED THE DEFENDANT WITHOUT PROPERLY GIVING HER ALL THE REQUIRED NOTIFICATIONS CONCERNING POSTRELEASE CONTROL.

{¶9} Ms. Ware next argues that the trial court failed to tell her at the sentencing hearing what the consequences would be if she violated post-release control. In *State v. Qualls*, 131 Ohio St.3d 499, 2012-Ohio-1111, the Ohio Supreme Court explained that,

in order to comply with separation-of-powers concerns and to fulfill the requirements of the postrelease-control-sentencing statutes, \* \* \* a trial court must provide statutorily compliant notification to a defendant regarding postrelease control at the time of sentencing, including notifying the defendant of the details of the postrelease control and the consequences of violating postrelease control.

*Id.* at ¶ 18; *see* R.C. 2929.19(B).

{¶10} At the sentencing hearing, the trial court told Ms. Ware that it was imposing a mandatory period of three years of post-release control. It did not tell her, however, any of the details of post-release control or the consequences of violating post-release control, as required by Revised Code Section 2929.19(B)(2)(c) & (e). We, therefore, conclude that Ms. Ware’s sentence must be vacated in part and that she is entitled to a new sentencing hearing that is limited to the proper imposition of post-release control. *See State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, ¶ 27, 29 (explaining that, if a trial court fails to properly impose post-release control, only that part of its sentence is void and subject to review and correction); *State v. West*, 9th Dist. Summit No. 28051, 2016-Ohio-5694, ¶ 6. Ms. Ware’s second assignment of error is sustained.

### ASSIGNMENT OF ERROR III

THE TRIAL COURT COMMITTED REVERSIBLE AND PLAIN ERROR AT THE SENTENCING HEARING BY FAILING TO COMPLY WITH R.C. 2929.19(B)(2)(F).

{¶11} Ms. Ware also argues that the trial court failed to inform her that she should not ingest or be injected with a drug of abuse and that she would be required to submit to random drug testing, as required under Section 2929.19(B)(2)(f). That section provides that, if the sentencing court determines that a prison term is necessary or required, it shall “[r]equire that the offender not ingest or be injected with a drug of abuse and submit to random drug testing \* \* \*

and require that the results of the drug test administered under any of those sections indicate that the offender did not ingest or was not injected with a drug of abuse.” R.C. 2929.19(B)(2)(f).

{¶12} Although the trial court did not comply with Section 2929.19(B)(2)(f) at the sentencing hearing, this Court has repeatedly concluded that the error is harmless because the requirement is only intended to facilitate drug testing of prisoners in state institutions and creates no substantive rights for defendants. *State v. Mavrakis*, 9th Dist. Summit. No. 27457, 2015-Ohio-4902, ¶ 50; *State v. Taylor*, 9th Dist. Summit No. 27867, 2016-Ohio-3439, ¶ 19; *State v. Cain*, 9th Dist. Summit No. 27785, 2016-Ohio-7460, ¶ 47. Ms. Ware’s third assignment of error is overruled.

### III.

{¶13} Ms. Ware’s second assignment of error is sustained. Her first and third assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed in part and reversed in part, and this matter is remanded for a limited resentencing hearing.

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

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There were reasonable grounds for this appeal.

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

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the

period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed equally to both parties.

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JENNIFER HENSAL  
FOR THE COURT

TEODOSIO, J.  
CALLAHAN, J.  
CONCUR.

APPEARANCES:

NEIL P. AGARWAL, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN DIMARTINO, Assistant Prosecuting Attorney, for Appellee.