

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 09AP-202
 : (M.C. No. 2008 TRC 177903)
 Anthony DiPietro, : (REGULAR CALENDAR)
 :
 Defendant-Appellant. :

D E C I S I O N

Rendered on November 5, 2009

Richard C. Pfeiffer, Jr., City Attorney, *Lara N. Baker*, City Prosecutor, and *Melanie R. Tobias*, Appellate Director, for appellee.

Yeura R. Venters, Public Defender, and *David L. Strait*, for appellant.

APPEAL from the Franklin County Municipal Court.

BRYANT, J.

{¶1} Defendant-appellant, Anthony DiPietro, appeals from a judgment of the Franklin County Municipal Court finding him guilty, pursuant to jury verdict, of violating R.C. 4511.19(A)(1), operating a motor vehicle while under the influence of alcohol.

Defendant assigns a single error:

The trial court erred in denying the defense motion for a mistrial when the record demonstrated a violation of R.C. 2945.33.

Because the trial court did not err in denying defendant's motion for a mistrial, we affirm.

I. Procedural History

{¶2} At approximately 3:30 a.m. on Saturday, August 16, 2008, Officer Paul Grundei observed a car on Riverside Drive swerve, nearly miss a guardrail, and repeatedly come into contact with and cross over the center line. After pulling the car over, Officer Grundei approached the driver, a man he later identified as defendant. Officer Grundei noticed defendant's glassy eyes and detected a strong odor of alcohol on defendant's breath. The traffic stop resulted in defendant's arrest for operating a motor vehicle while under the influence of alcohol, a violation of R.C. 4511.19(A)(1).

{¶3} At trial, the state called Officer Grundei as its only witness; the defense called no witnesses. Officer Grundei testified that during the traffic stop, defendant admitted to being drunk and stated he should not have been driving. When defendant stepped out of the car, he stumbled and lost his balance.

{¶4} Officer Grundei asked defendant to submit to a series of field sobriety tests, including the horizontal gaze nystagmus and walk-and-turn tests. Defendant had difficulty performing the tests and eventually asked Officer Grundei to stop administering them. The state played for the jury the videotape of the traffic stop recorded from Officer Grundei's police cruiser dashboard camera; no audiotape of the stop was presented. On cross-examination, Officer Grundei admitted other conditions, other than alcohol impairment, could explain defendant's poor balance and glassy eyes.

{¶5} The state rested its case at the conclusion of Officer Grundei's testimony. After the court denied defendant's motion for acquittal, defendant also rested. Following

instructions to the jury and closing arguments, the trial judge submitted the matter to the jury. Before the jury finished deliberating, defendant moved for a mistrial based on communication between the bailiff and the jury. The court denied the motion but permitted defendant, through his attorney, to question the bailiff under oath about what happened in terms of the bailiff's communication with the jury.

{¶6} In response to the questions counsel for the parties posed to him, the bailiff stated the jury during deliberations rang the bell, summoning the bailiff for assistance. The jury explained to the bailiff that it was deadlocked and could not reach a decision. The bailiff told the jury to "[h]old on," and then went to the trial judge to ask how to proceed. (Tr. 86.) The bailiff stated the trial judge instructed him to tell the jury to continue deliberations until lunch and then, after lunch, to continue to deliberate until the end of the day or until it reached a verdict. The bailiff returned to the jury room where he relayed the trial judge's instructions to the jury.

{¶7} The bailiff further explained that counsel for defendant, upon learning of the jury's call for assistance, told the bailiff the jury's question needed to be in writing. The bailiff asked defendant's counsel what counsel wanted the bailiff to do, and counsel told him to tell the jury to stop deliberating and wait for further instructions; the bailiff complied with that request. According to the bailiff, he then gave the jury a piece of paper with instructions about submitting a written question to the court. Five minutes later, the jury gave the bailiff its written question. The bailiff stated about two minutes elapsed between when he first told the jury to continue deliberating and then returned to the jury room to tell the jury to stop and wait for further instruction from the court.

{¶8} The court recalled the jury to the courtroom and read the written question into the record. As submitted to the court, the jury's written question was:

Currently we are deadlocked with our decision, six to two. How do we proceed? After thoughtful conversation yesterday and overnight consideration and this morning's discussions have brought us no closer in agreement. We do not think further conversation will bring us to full agreement on whether alcohol was the cause of the impairment. However we are in agreement that defendant was impaired.

(Tr. 81.)

After inquiring whether any juror had engaged in any independent, overnight research, the court provided the instruction from *State v. Howard* (1989), 42 Ohio St.3d 18, in response to the jury's written question.

{¶9} The jurors deliberated further, eventually returning a guilty verdict. A judgment entry filed February 25, 2009 journalized the verdict, and defendant appeals.

II. Assignment of Error

{¶10} Defendant's sole assignment of error asserts the trial court erred in denying defendant's motion for a mistrial. In reviewing a trial court's decision to overrule a motion for mistrial, an appellate court uses an abuse of discretion standard because "the trial judge is in the best position to determine whether the situation in [the] courtroom warrants the declaration of a mistrial." *State v. Glover* (1988), 35 Ohio St.3d 18, 19; see also *State v. Garner*, 74 Ohio St.3d 49, 59, 1995-Ohio-168. "An appellate court will not disturb the trial court's exercise of discretion absent a showing that the accused has suffered material prejudice." *State v. Stanley* (1997), 121 Ohio App.3d 673, 699, citing *State v. Sage* (1987), 31 Ohio St.3d 173, 182.

{¶11} Defendant argues the trial court erred in denying his motion for a mistrial when the record demonstrates a violation of R.C. 2945.33. In pertinent part, R.C. 2945.33 states that "[w]hen a cause is finally submitted the jurors must be kept together in a convenient place under the charge of an officer until they agree upon a verdict, or are discharged by the court." With an exception inapplicable here, the trial court "may permit the jurors to separate during the adjournment of court overnight, under proper cautions, or under supervision of an officer." *Id.* The statute, however, specifies "[s]uch officer shall not permit a communication to be made to them, nor make any himself, except to ask if they have agreed upon a verdict, unless he does so by order of the court." *Id.* Nor may such officer "communicate to any person, before the verdict is delivered, any matter in relation to their deliberation." *Id.*

{¶12} Similarly, Crim.R. 24(H)(4) provides that "[w]hen the jury is in the care of an officer of the court and until the jury is discharged by the court, the officer may inquire whether the jury has reached a verdict[.]" The officer, however, "shall not * * * [c]ommunicate any matter concerning jury conduct to anyone except the judge." Crim.R. 24(H)(4)(a). Nor may the officer "[c]ommunicate with the jurors or permit communications with jurors, except as allowed by court order." Crim.R. 24(H)(4)(b).

{¶13} In this case, the bailiff had two separate communications with the jury: (1) the bailiff's instruction to the jury to continue deliberations until lunch ("the first communication"), and (2) the bailiff's return two minutes later to tell the jury to stop deliberations and await further instruction ("the second communication"). Defendant argues that either communication individually is grounds for a mistrial as an improper communication under R.C. 2945.33. Thus, we consider each communication separately

to determine whether either violated R.C. 2945.33 and, if so, whether that violation requires a mistrial.

A. The First Communication

{¶14} The first communication between the bailiff and the jury occurred when the bailiff instructed the jury to continue deliberations until lunch. Specifically, after the jury rang the bell for assistance, the bailiff listened to the jury and presented the matter to the judge. The judge then instructed the bailiff to tell the jury to continue deliberations until lunch; the bailiff did just that.

{¶15} R.C. 2945.33 states that an officer of the court shall not make any communication to the jury "unless he does so by order of the court." See also *State v. Adams* (1943), 141 Ohio St. 423, 430-31 (stating "the bailiff shall not, *unless by order of the court*, make any communication to the jurors"). (Emphasis added.) See also Crim.R. 24(H)(4). Here, because the trial court ordered the first communication to the jury, the bailiff's conduct did not violate R.C. 2945.33. Accordingly, the first communication is not grounds for a mistrial.

B. The Second Communication

{¶16} The court did not authorize the second communication, so it does not fall within the arena of permissible communication under R.C. 2945.33. Misconduct of a court officer, including a bailiff, in communicating to the jury during its deliberations "will be presumed to be prejudicial to a defendant against whom, after such communication, a verdict is returned by such jury." *Adams* at paragraph three of the syllabus. Thus, as a general rule, court personnel's communication with the jury in the defendant's absence may be grounds for a new trial. *State v. Abrams* (1974), 39 Ohio St.2d 53, 55-56; *Bostic*

v. Connor (1988), 37 Ohio St.3d 144, 149 (superseded by statute on other grounds). The presumption of prejudice, however, is not conclusive. Rather, the burden shifts and "rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant." *State v. Murphy* (1992), 65 Ohio St.3d 554, 575, quoting *Remmer v. United States* (1954), 347 U.S. 227, 229, 745 S.Ct. 450, 451 (internal quotation marks omitted).

{¶17} In examining a claim of prejudice, the court must consider the nature and content of the communication. *Murphy* at 575. The presumption of prejudice from *Adams* does not arise if the court's communication with the jury is not substantive in nature. *State v. Allen* (1995), 73 Ohio St.3d 626, 630. See also *State v. Schiebel* (1990), 55 Ohio St.3d 71, 84, citing *Remmer* at 229 (noting "[t]he communication must have been of a substantive nature and in some way prejudicial to the party complaining"); *State v. Jenkins* (1984), 15 Ohio St.3d 164, 236-37 (observing "the complaining party must first produce some evidence that a private contact, without full knowledge of the parties, occurred between the [court] and jurors which involved substantive matters"). A statement of the trial court or its official is not substantive if it does not address any legal issues, any fact in controversy, any law applicable to the case, or some similar matter. *State v. Cook*, 10th Dist. No. 05AP-515, 2006-Ohio-3443, ¶36, citing *Orenski v. Zaremba Mgt. Co.*, 8th Dist. No. 80402, 2002-Ohio-3101.

{¶18} In the second communication, the bailiff told the jury to stop deliberating and await further instructions. The second communication did not address any legal issue, any fact in controversy, or any law applicable to the case. Statements concerning the status of deliberations generally are procedural rather than substantive. See, e.g.,

State v. Robinson, 12th Dist. No. CA2005-11-029, 2007-Ohio-354, ¶41 (concluding bailiff's question to jurors "regarding whether they intended to continue to deliberate or retire for the evening, was merely procedural and did not involve substantive issues of the case or in any way relate to appellant's guilt or innocence"); *State v. Tate* (Dec. 11, 1985), 9th Dist. No. 12111 (noting trial court's instruction to the jury to "continue their deliberations" did not address any fact in controversy nor any law applicable to the case, and thus was not substantive). Because the second communication to the jury was not substantive in nature, the presumption of prejudice does not arise. Absent defendant's demonstrating prejudice, the second communication is harmless. *Bostic* at paragraph four of the syllabus.

{¶19} "An appellant bears the burden of showing prejudicial error by reference to matters in the record." *Karras v. Rogers*, 10th Dist. No. 08AP-221, 2008-Ohio-5760, ¶12, citing *State v. Fed. Ins. Co.*, 10th Dist. No. 04AP-1350, 2005-Ohio-6807. Here, only two minutes elapsed between the first communication and the second communication. After the second communication, five additional minutes elapsed before the jury delivered its written question to the bailiff. The trial court addressed the written question in open court with counsel for both parties present, and the court provided the jury with the *Howard* instruction to clarify how the jury should proceed. Only after the court addressed that question on the record with counsel present did the jury resume its deliberations and return a guilty verdict. Defendant thus does not point to anything in the record indicating actual prejudice.

{¶20} Even if the second communication were debatable in terms of prejudicial error, defendant invited the alleged error. "Under the invited-error doctrine, '[a] party will

not be permitted to take advantage of an error which he himself invited or induced.' " *State v. Bey*, 85 Ohio St.3d 487, 493, 1999-Ohio-283, quoting *Hal Artz Lincoln-Mercury, Inc. v. Ford Motor Co.* (1986), 28 Ohio St.3d 20, at paragraph one of the syllabus, following *Lester v. Leuck* (1943), 142 Ohio St. 91, at paragraph one of the syllabus. The second communication occurred at the express request of defendant's attorney. Were it not for defense counsel's instructions to the bailiff to tell the jury to stop deliberating, a second communication likely would not be under consideration on appeal.

{¶21} In the final analysis, the trial court did not abuse its discretion in denying defendant's motion for a mistrial as neither the first communication nor the second communication present sufficient grounds for such action. The first communication did not violate R.C. 2945.33. The second communication not only did not constitute prejudicial error, but defendant requested the second communication. Accordingly, we overrule defendant's sole assignment of error and affirm the trial court's judgment.

Judgment affirmed.

BROWN and McGRATH, JJ., concur.
