[Cite as *State v. Brakeall*, 2009-Ohio-3542.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

FAYETTE COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NOS. CA2008-06-022 CA2008-06-023
- vs -	:	O P I N I O N
	:	7/20/2009
JESSE R. BRAKEALL,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM FAYETTE COUNTY COURT OF COMMON PLEAS
Case No. 08-CRI-00017

David B. Bender, Fayette County Prosecuting Attorney, 110 East Court Street, Washington C.H., OH 43160, for plaintiff-appellee

Bryant Law Office, Anthony J. Baker, 21 North South Street, Wilmington, OH 45177, for defendant-appellant

POWELL, P.J.

{¶1} Defendant-appellant, Jesse R. Brakeall, appeals his conviction and sentence in the Fayette County Court of Common Pleas for felonious assault and murder, as well as the trial court's denial of his motion for a new trial. We affirm.

{¶2} In the early morning hours of December 23, 2007, Brakeall and two of his friends went to the Waffle House located off State Route 35 in Fayette County, Ohio.

When they tried to order some food, a waitress told them she could not serve them because the cash register was broken. Nevertheless, Brakeall kept insisting on being served, even offering to pay $20 to the waitress and to allow her to keep the change if she would give him and his friends some food.

{¶3} Upon seeing the confrontation, Ross Sykes, who was a regular customer of the Waffle House, came to the waitress' defense, telling Brakeall and his friends they should wait to be served, just as he had. Brakeall and Sykes then exchanged words, culminating in Brakeall challenging Sykes to step outside. Sykes followed Brakeall outside to the parking lot. Sykes dodged Brakeall's first punch, but Brakeall's second punch landed on Sykes' mouth, causing him to fall backward and strike his head on the pavement, thereby knocking him unconscious. Sykes later died from his injuries.

{¶4} In February 2008, Brakeall was indicted for felonious assault in violation of R.C. 2903.11(A)(1), a felony of the second degree ("count one"), and murder in violation of R.C. 2903.02(B), a felony of the first degree ("count two"). In June 2008, Brakeall was tried by jury, which convicted him as charged. The trial court sentenced Brakeall to an indefinite prison term of 15 years to life. In July 2008, Brakeall moved for a new trial based on alleged juror misconduct. In September 2008, the trial court denied Brakeall's motion for a new trial, without holding an evidentiary hearing.

{¶5} Brakeall now appeals his conviction and sentence, as well as the trial court's denial of his motion for a new trial, and assigns the following as error:

{¶6} Assignment of Error No. 1:

{¶7} "THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION FOR A NEW TRIAL."

{¶8} Brakeall argues the trial court erred by denying his motion for a new trial based on juror misconduct, or at least, by denying his motion without holding an evidentiary hearing. We disagree.

{¶9} A new trial may be granted on motion of a criminal defendant due to juror misconduct that materially affects the defendant's substantial rights. Crim.R. 33(A)(2). A motion for a new trial based on juror misconduct must be supported by affidavit showing the truth of the allegation. Crim.R. 33(C). The decisions whether to grant a motion for a new trial or hold an evidentiary hearing on the motion are committed to the trial court's sound discretion, and the trial court's decision will not be reversed absent an abuse of discretion, i.e., the decision is arbitrary, unconscionable or unreasonable. See *State v. Hessler*, 90 Ohio St.3d 108, 122-124, 2000-Ohio-30.

{¶10} Attached to Brakeall's motion for a new trial was an affidavit from his defense counsel who averred that on June 27, 2008, the trial court informed him "that pursuant to information learned from a deputy, two jurors referred to extrinsic materials and/or evidence while deliberating [Brakeall's] verdict." In a memorandum supporting the motion for a new trial, defense counsel represented that the extrinsic material to which the jurors had referred was a Black's Law Dictionary.

{¶11} On September 11, 2008, the trial court issued a judgment entry denying Brakeall's motion for a new trial. The trial court noted that Brakeall's motion was filed in response to the trial court's informing defense counsel and the prosecutor "that a court employee had received information from a juror concerning the use of a law dictionary during jury deliberations." The trial court overruled the motion for a new trial on the basis that under the "aliunde rule" contained in Evid.R. 606(B), the jury's verdict could

not be impeached with the information the court employee had received from a juror. We agree with the trial court's ruling.

{¶12} Evid.R. 606(B) states:

{¶13} "Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. A juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear on any juror, *only after some outside evidence of that act or event has been presented*. However, a juror may testify without the presentation of any outside evidence concerning any threat, any bribe, any attempted threat or bribe, or any improprieties of any officer of the court. A juror's affidavit or *evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying will not be received for these purposes*." (Emphasis added.)

{¶14} Evid.R. 606(B) embodies the rule on evidence aliunde or the "aliunde rule." *State v. Schiebel* (1990), 55 Ohio St.3d 71, 75-76; *State v. Lewis* (1990), 70 Ohio App.3d 624, 640-642. As stated in *Schiebel* at 75-76:

{¶15} "Evid.R. 606(B) governs the competency of a juror to testify at a subsequent proceeding concerning the original verdict.

{¶16} "***

{¶17} "In order to permit juror testimony to impeach the verdict, a foundation of

extraneous, independent evidence [i.e., evidence aliunde] must first be established. This foundation must consist of information from sources other than the jurors themselves [citation omitted], and the information must be from a source which possesses firsthand knowledge of the improper conduct. One juror's affidavit alleging misconduct of another juror may not be considered without evidence *aliunde* being introduced first. [Citations omitted.] Similarly, where an attorney is told by a juror about another juror's possible misconduct, the attorney's testimony is incompetent and may not be received for the purposes of impeaching the verdict or for laying a foundation of evidence *aliunde.* [Citations omitted.]"

{¶18} The purposes of the aliunde rule are to (1) maintain the sanctity of the jury room and the deliberations therein, (2) ensure the finality of jury verdicts, and (3) protect jurors from being harassed by defeated parties. See *Schiebel*, 55 Ohio St.3d at 75; and *Hessler*, 90 Ohio St.3d at 123.

{¶19} In this case, Brakeall failed to present evidence aliunde of the alleged juror misconduct and thus failed to lay the requisite foundation for the introduction of any testimony from a member of the jury regarding alleged juror misconduct. Evid.R. 606(B); *Schiebel*, 55 Ohio St.3d at 75-76; *Lewis*, 70 Ohio App.3d at 640-642. The only evidence Brakeall presented of juror misconduct was his defense counsel's affidavit that contained information defense counsel had received from the trial court, which the trial court had received from a court employee, who had received the information from a juror. Such evidence does not qualify as evidence aliunde, since the evidence came from a juror. Evid.R. 606(B); *Schiebel*; *and Lewis*.

{¶20} Specifically, the affidavit of Brakeall's defense counsel does not constitute

firsthand knowledge of the alleged juror misconduct, nor was there any showing that the trial court or the court employee had firsthand knowledge of the alleged juror misconduct. Instead, the information regarding the alleged juror misconduct came from a member of the jury. Defense counsel, the trial court, and the court employee merely served as conduits through which the allegation of juror misconduct was repeated. See *Lewis*, 70 Ohio App.3d at 642. Therefore, defense counsel's affidavit, which included defense counsel's averment that the trial court had informed him "that pursuant to information learned from a deputy, two jurors referred to extrinsic materials and/or evidence while deliberating [Brakeall's] verdict," was incompetent, and therefore, the affidavit could "not be received for the purposes of impeaching the verdict or for laying a foundation of evidence *aliunde*." *Schiebel*, 55 Ohio St.3d at 75-76. See, also, Evid.R. 606(B); and *Lewis*, 70 Ohio App.3d at 640-642.

{¶21} Consequently, the trial court did not abuse its discretion by refusing to grant Brakeall a new trial on the grounds of juror misconduct, since Brakeall failed to present evidence aliunde of the alleged juror misconduct. *Schiebel* and *Lewis*. Also, the trial court did not abuse its discretion under the circumstances of this case by denying Brakeall's motion without holding an evidentiary hearing. *Hessler*, 90 Ohio St.3d at 124.

{¶22} Brakeall's first assignment of error is overruled.

{¶23} Assignment of Error No. 2:

{¶24} "THE TRIAL COURT VIOLATED APPELLANT'S STATE CONSTITUTIONAL RIGHT TO A GRAND JURY INDICTMENT AND STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS WHERE APPELLANT'S

INDICTMENT FAILED TO INCLUDE AN ESSENTIAL ELEMENT FO [sic] THE OFFENSE CHARGED."

{¶25} Brakeall argues that count two of the indictment charging him with murder failed to include an essential element of the crime, namely, the mens rea or culpable mental state for the offense. He contends that pursuant to R.C. 2901.21(B), the culpable mental state for murder is "recklessness," because R.C. 2903.02(B), which defines the offense of murder, "neither specifies culpability nor indicates a purpose to impose strict criminal liability" for that offense. He concludes by arguing that since count two of the indictment failed to include the element of recklessness, the indictment failed to charge him with murder, and therefore, his conviction for murder should be reversed. We find this argument unpersuasive.

{¶26} R.C. 2903.02(B) states,

{¶27} "No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree and that is not a violation of section 2903.03 [voluntary manslaughter] and 2903.04 [involuntary manslaughter] of the Revised Code."

{¶28} "[T]he culpable mental state required to support a conviction under R.C. 2903.02(B) is the same one that must be proved to support a conviction for the underlying felony offense of violence." *State v. Johnson*, Hamilton App. Nos. C-020256, C-020257, 2003-Ohio-3665, ¶53, citing *State v. Miller,* 96 Ohio St.3d 384, 2002-Ohio-4931, ¶31-34.

{¶29} The "underlying felony offense of violence" for the murder charge in count two of the indictment was felonious assault, a felony of the second degree, and the

culpable mental state for felonious assault is "knowingly." R.C. 2903.11(A)(1) and (D). Therefore, the culpable mental state for the offense of murder in this case was "knowingly" rather than "recklessness." See *Johnson* and *Miller*.

{¶30} Furthermore, contrary to what Brakeall contends, this is not an instance where the indictment failed to charge the mens rea element of the offenses for which Brakeall was indicted, cf. *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, syllabus, as limited by *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, ¶3-8, since count one of the indictment charging Brakeall with felonious assault alleged that he "knowingly" caused serious physical harm to the victim, and count two of the indictment charging Brakeall with murder specified that the murder charge arose from his committing or attempting to commit felonious assault.

{¶31} Consequently, Brakeall's second assignment of error is overruled.

{¶32} Assignment of Error No. 3:

{¶33} "THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO DUE PROCESS AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION IN ARTICLE I, SECTION X OF THE OHIO CONSTITUTION BY ENTERING VERDICTS OF GUILTY, AS THE JURY'S VERDICT WAS AGAINST THE MANIFES [sic] WEIGHT OF THE EVIDENCE."

{¶34} Brakeall argues his convictions for felonious assault and murder were contrary to the manifest weight of the evidence. We disagree.

{¶35} Brakeall admitted to punching Sykes in the mouth, which caused Sykes to fall back and strike his head on the pavement, causing his death. The evidence showed that Brakeall punched Sykes so hard that Brakeall split open his own hand, requiring

multiple sutures to close. Brakeall defended the felonious assault and murder charges by claiming that Sykes had provoked him, that he was objectively and subjectively afraid of Sykes; and that he was acting in self-defense when he punched Sykes.

{¶36} However, a review of the evidence shows that there was ample evidence presented to support the jury's findings that Brakeall failed to prove his self-defense claim by a preponderance of the evidence, see R.C. 2901.05(A), and that the state had proved Brakeall's guilt beyond a reasonable doubt on the charges of felonious assault and murder.

{¶37} Furthermore, any inconsistencies in the testimony of three of the Waffle House's employees who testified for the state were minor, and any inconsistency between the witnesses' initial and subsequent statements were attributable largely to the fact that a power outage at the Waffle House on the night in question forced the witnesses to write their statements to police using flashlights for illumination. There is nothing in the record to show that the jury lost its way in resolving conflicts in the evidence or created such a manifest miscarriage of justice that a new trial must be ordered. *State v. Bryant*, Warren App. No. CA2007-02-024, 2008-Ohio-3078, ¶30.

{¶38} Therefore, Brakeall's third assignment of error is overruled.

{¶39} Judgment affirmed.

RINGLAND and HENDRICKSON, JJ., concur.