IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-04-106
	:	O P I N I O N
- vs -		4/19/2010
	:	
KIMBLE V. MILLER,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2008-09-1596

Robin N. Piper, Butler County Prosecuting Attorney, Gloria J. Sigman, Government Services Center, 315 High Street, 11th Floor, Hamilton, Ohio 45011, for plaintiff-appellee

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YOUNG, P.J.

{¶1} Defendant-appellant, Kimble Miller, appeals his conviction in the Butler County Court of Common Pleas for child endangering.

{¶2} Appellant was indicted in September 2008 on one count of child endangering in violation of R.C. 2919.22(B)(1), a second-degree felony. The state alleged that on May 12, 2007, appellant shook his 38-day-old daughter four to five times, causing her head to go back and forth, after she would not drink her bottle. Upon her

arrival at Cincinnati Children's Hospital, the child was diagnosed as being "neurologically devastated" with a "global dying off of the brain." The child also had several rib fractures, some old, some new, and fractures on one foot. The hospital was able to keep her alive but her brain could not be saved; her brain injuries are permanent. As a result of her injuries, the child has cerebral palsy and vaso quadriplegia, and is at a "continual risk for death."

{¶3} On March 3, 2009, a jury found appellant guilty as charged. He was sentenced to eight years in prison. Appellant appeals, raising three assignments of error.

{¶4} Assignment of Error No. 1:

{¶5} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT PERMITTED THE STATE TO IMPROPERLY INTRODUCE HEARSAY EVIDENCE OF HOSPITAL RECORDS."

{¶6} At trial, the state argued that the child's injuries were the result of physical abuse and being shaken four to five times by appellant on May 12, 2007. Appellant's defense centered around his claim that: he did not shake the child on May 12 or abuse her; there were complications at birth; as a result of these complications, the child was prone to seizures, and in fact suffered a seizure on May 12 which caused the damage to her brain; at birth and in the following weeks, the child never cried but whimpered instead; she had never been alert and was listless. Lindsey Breen (the child's mother), the child's grandmother and great great grandmother, and appellant all testified about the birth complications, the child's whimpering and failure to cry, and her listless behavior. Lindsey also testified the child suffered a seizure on May 12 which caused the brain damage.

{¶7} At trial, Lindsey testified as a witness for the state.[1] On cross-examination,

1. Although Lindsey testified as a witness for the state, her testimony corroborated appellant's version of the events on May 12, the child's birth complications, and the fact she was a listless child who never cried. The state never requested that she be declared a hostile witness.

she testified the child never cried at birth or in the following weeks. On redirect examination, she again testified the child never cried at birth. The state then asked Lindsey about notes taken by a nurse at the time of the child's birth indicating that the child was alert and had a lusty cry. Defense counsel objected to the prosecutor's reference to the nurse's notes. During a sidebar conference, the trial court advised the prosecutor: "was she crying [at birth] *** and if she denies it, then you show her the nursing notes and ask her if that refreshes her recollection and then cross-examine her on that." Lindsey's testimony then resumed.

{¶8} Lindsey again testified the child did not cry at birth, and was not alert or active. The prosecutor asked Lindsey to review the nurse's notes, and then asked her to read aloud what was written at the bottom of the notes. Lindsey complied and read: "Alert, active, lusty cry." Subsequently, Lindsey testified the notes were incorrect as the child did not cry at birth. The nurse's notes were certified, marked as a state exhibit for identification, but never offered in evidence.

{¶9} On appeal, appellant argues that the prosecutor's use of the nurse's notes during Lindsey's redirect examination violated Evid.R. 612.

{¶10} As evident from the sidebar conference, the nurse's notes were used to refresh the witness' recollection under Evid.R. 612. A party may refresh the recollection of a witness under Evid.R. 612 by showing him a prior writing. However, the party may not read the statement aloud, have the witness read it aloud, or otherwise place it before the jury. *State v. Ballew*, 76 Ohio St.3d 244, 254, 1996-Ohio-81, certiorari denied (1997), 519 U.S. 1065, 117 S.Ct. 704; *State v. McQueen* (June 26, 2000), Butler App. No CA99-05-083. Rather, the witness should read the writing silently to refresh his recollection. *State v. Knott*, Athens App. No. 03CA30, 2004-Ohio-5745, ¶15, citing *Dayton v. Combs* (1993), 94 Ohio App.3d 291. If his recollection has been revived, the witness may then continue

with his testimony. *Dayton* at 298. The writing used to refresh the witness' recollection is not admitted into evidence unless admission is requested by the adverse party. Id. The writing may not be used to circumvent Evid.R. 607's limitations on the impeachment of witnesses. Id. The writing does not have to be executed or previously adopted by the testifying witness. *McQueen* at 8.

{¶11} We find the prosecutor's examination of Lindsey did not comport with the rules governing how a party may refresh the memory of its own witness with a writing. The prosecutor did not simply show the nurse's notes to Lindsey. Rather, the prosecutor had Lindsey read aloud the statement in the nurse's notes describing the child at birth as "alert, active, lusty cry." The manner in which the prosecutor had Lindsey read aloud was more indicative of impeachment techniques and as such violated the purpose of Evid.R. 612. Evidence that the child cried at birth was therefore improperly admitted.

{¶12} However, reversal is not necessarily warranted when evidence is improperly admitted. Improper admission of evidence is harmless error if the remaining evidence alone comprises overwhelming proof of defendant's guilt. *State v. Lyles* (1989), 42 Ohio St.3d 98, 100. In addition, in the case at bar, although appellant objected to the prosecutor's initial reference to the nurse's notes, he did not object when Lindsey was asked to read the statement aloud. Thus, appellant has waived all but plain error. Plain error exists only if it can be said that, but for the error, the outcome of the proceedings would have been otherwise. *State v. Jackson*, 92 Ohio St.3d 436, 438, 2001-Ohio-1266; *State v. Cappadonia*, Warren App. No. CA2008-11-138, 2010-Ohio-494, ¶15.

{¶13} Appellant claimed the child was a listless child who never cried and whose injuries on May 12 were the result of complications at birth. Several witnesses testified to that effect. Sergeant John Jones of the Oxford Police Department separately interviewed Lindsey and appellant twice (on May 12 at Children's Hospital and on May 15 at the police

station). The officer testified that both Lindsey and appellant told him that the child was alert and observant on May 12 right before she went into respiratory distress and suffered a seizure. In fact, the child was more alert than they had ever seen her and was following appellant with her eyes as he walked. Lindsey never told the officer about the child's birth complications. In both interviews, appellant denied shaking the child.

{¶14} Butler County Sheriff's Department Specialist Frank Smith interviewed appellant in August, 2008. During the interview, appellant eventually admitted shaking the child on May 12 and demonstrated how he did it. Appellant told Specialist Smith that he "was attempting to eat a sandwich. *** The child kept crying. And at that point, he abruptly yanked the child off the couch. He held the child in front of him and was asking, 'why are you crying? Why won't you take the milk?' And at that point, [appellant] demonstrated to me how he was shaking the child. And, at the time, when he was actually demonstrating to me, his teeth were gritted in a very, what I would consider a violent mode[.]". As appellant shook the child four or five times, her head was bouncing back and forth. The child then drank some of her bottle; 10 to 15 minutes later, she started shaking and seizing. During the interview, appellant acknowledged causing the child's injuries even though it was not intentional. Specialist Smith did not recall appellant referring to the child having complications at birth.

{¶15} At trial, appellant denied shaking the child on May 12, and stated that Specialist Smith's testimony was a lie. Appellant testified that a couple of hours before her seizure, the child was alert and appeared to be watching Lindsey and him. Lindsey denied telling Sergeant Jones that the child was alert and observant on May 12.

{¶16} Dr. Robert Shapiro is a physician at Children's Hospital who examined the child upon her arrival there, as well as an expert in pediatric medicine and child abuse. Dr. Shapiro testified several times that given the constellation of the child's injuries, the

broken ribs and the neurological devastation, the only possible and reasonable diagnosis was child abuse, not birth complications. He also testified that the x-rays of the child's brain were consistent with shaken baby syndrome.

{¶17} In light of the foregoing, we cannot say that evidence that the child cried at birth contributed to appellant's conviction for child endangering. We therefore find that the admission that the child cried at birth, by means of Lindsey reading the nurse's notes aloud, does not constitute grounds for reversal. Appellant's first assignment of error is accordingly overruled.

{¶18} Assignment of Error No. 2:

{¶19} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT REFUSED TO EXCUSE VENIREMAN JONAS FOR CAUSE."

{¶20} At the beginning of voir dire, the trial court advised prospective jurors that the matter involved a "shaken baby case." When questioned by the state and defense counsel, three prospective jurors expressed concerns as to whether they could be fair and impartial, namely, juror Jonas, juror Cuzzort, and juror Pass. At the end of voir dire, defense counsel challenged the three jurors for cause. The trial court excused jurors Pass and Cuzzort for cause but declined to excuse juror Jonas for cause. Appellant argues that considering jurors Jonas and Cuzzort expressed identical concerns as to whether they could be fair and impartial, the trial court was arbitrary in excusing juror Cuzzort but not juror Jonas.

{¶21} The determination of a juror's ability to be impartial and whether a prospective juror should be disqualified for cause is a discretionary function of the trial court and will not be reversed on appeal absent an abuse of that discretion. *State v. Nields*, 93 Ohio St.3d 6, 20-21, 2001-Ohio-1291; *Wilhoite v. Kast*, Warren App. No. CA2001-01-001, 2001-Ohio-8621. Good cause exists to excuse a juror for cause when

"he discloses by his answers that he cannot be a fair and impartial juror or will not follow the law as given to him by the court." R.C. 2313.32(J). "A prospective juror who has been challenged for cause should be excused 'if the court has any doubt as to the juror's being entirely unbiased.'" *Nields* at 20-21.

{¶22} Juror Pass was removed for cause after he candidly admitted he did not think he could follow the trial court's instructions and apply the law to the facts of the case, and/or be fair and impartial as "it just ma[de] [him] angry to think about it" (the fact it was a shaken baby case). Likewise, juror Cuzzort was removed for cause after he frankly admitted he had "zero tolerance for anybody that abuses children or women. I haven't heard anything here yet, but I don't know if that would trip my wire or not. It's a possibility that it would." During voir dire, juror Cuzzort emphasized he was "not sure [he] could be fair and impartial in this case. I don't know. I really don't. I have issues with this whole idea of shaken baby syndrome."

{¶23} In removing juror Cuzzort for cause, the trial court noted how "he questioned whether or not he could be fair and impartial. He indicated that he may have difficulty being fair and impartial. *** Based upon the totality of his answers, we have plenty of jurors here and I have concerns. And I think you can't punish him for being honest, but at the same time, I can't reward him for his honesty."

{¶24} In response to defense counsel's question as to fairness and impartiality, juror Jonas explained that he and his wife were "going through a long and involved process of trying to adopt. And when you go through home studies and everything else, it's kind of frustrating to us that it's this tough to become a parent, yet other people can be." In addition, "an uncle who is very close to me is the head of pediatric medicine at University Hospital in Cleveland, and he is in charge of the peds trauma. So he sees abuse on a regular basis." Asked whether he could be fair and impartial, juror Jonas

replied "I'm not 100 percent that I can. I'm not saying that I can't be, but it's just given my experience, like I said, I'm not sure."

{¶25} In declining to remove juror Jonas for cause, the trial court stated: "unlike Mr. Cuzzort, I think his overall indications was that he could be fair and impartial. I think that again, this is a situation and it does involve certain judgment or judgment of credibility by the Court, but the Court is satisfied, based upon not only his answers but the things which the Court observed in the courtroom, that Mr. Jonas could be fair and impartial. I think he was being very honest about his reservations. *** I'm not going to strike him for cause. I certainly think that he was honest about his concerns, but I don't think that rises to the same level of the other juror, where we had a situation where he said he just simply could not tolerate this kind of situation."

{¶26} We find that the trial court did not abuse its discretion by declining to remove juror Jonas for cause after it excused juror Cuzzort for cause. The trial court had the opportunity to observe the demeanor of both prospective jurors and evaluate first hand the sincerity of their responses to questions about fairness and impartiality. See *Wilhoite*, 2001-Ohio-8621. When a juror equivocates or gives contradictory answers, "it is for the trial court to determine which answer reflects the juror's true state of mind." *State v. Group*, 98 Ohio St.3d 248, 2002-Ohio-7247, ¶66. "Deference must be paid to the trial judge who sees and hears the juror." *Nields* at 21.

{¶27} Both jurors Jonas and Cuzzort expressed reservations as to whether they could be fair and impartial. However, the similarity between the two jurors ends here. Whereas juror Jonas described the frustration of the adoption process and that his uncle worked with abused children, juror Cuzzort unequivocally stated he had zero tolerance for child abusers and had "issues with this whole idea of shaken baby syndrome." We find that given juror Jonas' answers in contrast to the strong stance of juror Cuzzort, the trial

court did not abuse its discretion in failing to remove juror Jonas for cause. The trial court found juror Jonas to be unbiased, a finding supported by the juror's answers. See *State v. Johnson*, 112 Ohio St.3d 210, 2006-Ohio-6404, certiorari denied (2007), 552 U.S. 836, 128 S.Ct. 74 (Prospective jurors represent a cross section of the community[.] Jurors *** cannot be expected invariably to express themselves carefully or even consistently. Every trial judge understands this, and under our system it is that judge who is best situated to determine competency to serve impartially).

{¶28} Appellant's second assignment of error is overruled.

{¶29} Assignment of Error No. 3:

{¶30} "DEFENDANT-APPELLANT RECEIVED THE INEFFECTIVE ASSISTANCE OF COUNSEL."

{¶31} Appellant argues that defense counsel was ineffective for failing to exercise a peremptory challenge against juror Jonas after the defense had unsuccessfully challenged him for cause. Defense counsel used his four peremptory challenges to excuse four jurors other than juror Jonas.

{¶32} To establish ineffective assistance of counsel, appellant must show (1) deficient performance by counsel, that is, performance falling below an objective standard of reasonable representation, and (2) prejudice, that is, a reasonable probability that but for counsel's errors, the result of the proceedings would have been different. *Strickland v. Washington* (1984), 466 U.S. 668, 687-688, 694, 104 S.Ct. 2052; *State v. Mundt*, 115 Ohio St.3d 22, 2007-Ohio-4836, ¶62.

{¶33} Voir dire is largely a matter of strategy and tactics. *State v. Keith*, 79 Ohio St.3d 514, 521, 1997-Ohio-367, certiorari denied (1998), 523 U.S. 1063, 118 S.Ct. 1393; *State v. Mills*, Tuscarawas App. No. 2008 AP 08 0051, 2009-Ohio-5654, ¶114. Decisions on the exercise of peremptory challenges are a matter of experience and trial technique

and are a part of that strategy. *Mills* at ¶114, citing *State v. Goodwin*, 84 Ohio St.3d 331, 341, 1999-Ohio-356, certiorari denied, 528 U.S. 846, 120 S.Ct. 118; *State v. Groves* (June 19, 1989), Warren App. No. CA88-11-082. Defense counsel, who observe the jurors firsthand, are in a much better position to determine whether a prospective juror should be peremptorily challenged. *State v. Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961, ¶99, certiorari denied, __ U.S. __, 130 S.Ct. 752.

{¶34} As the Ohio Supreme Court recognized, "[f]ew decisions at trial are as subjective or prone to individual attorney strategy as juror voir dire, where decisions are often made on the basis of intangible factors. The selection of a jury is inevitably a call upon experience and intuition. The trial lawyer must draw upon his own insights and empathetic abilities. Written records give us only shadows for measuring the quality of such efforts. The selection process is more an art than a science, and more about people than about rules." *Mundt*, 2007-Ohio-4836 at ¶64. (Internal citations omitted.) Further, "because the use of peremptory challenges is inherently subjective and intuitive, an appellate record will rarely disclose reversible incompetence in this process." Id. at ¶83.

{¶35} Appellant has failed to establish that defense counsel was deficient or that he was prejudiced by defense counsel's failure to use a peremptory challenge against juror Jonas. With regard to prejudice, "when a defendant bases an ineffective-assistance claim on an assertion that his counsel allowed the impanelment of a biased juror, the defendant '*must* show that the juror was *actually biased* against him.'" *Mundt* at ¶67, quoting *Miller v. Francis* (C.A.6, 2001), 269 F.3d 609, 616. (Emphasis sic.) Although appellant argues that juror Jonas was biased, the record does not support that claim.

{¶36} Further, the record does not demonstrate "reversible incompetence" in defense counsel's decision not to use one of his four peremptory challenges against juror Jonas. The record is devoid of any information regarding one of the four excused jurors.

The other three excused jurors included a juror with a lot of experience as a juror; a juror whose brother-in-law was a police officer, and whose many friends and acquaintances had been charged with various felony offenses; and a juror whose son had been charged with or convicted of burglary.

{¶37} It could very well be that the four jurors peremptorily challenged by defense counsel were deemed to be jurors more damaging to appellant's case than juror Jonas, based on their questionnaires (which are not before us) and their demeanor and answers during voir dire. Although the printed record may not be clear, the reason for using peremptory challenges to excuse four jurors other than juror Jonas may well have been readily apparent to those viewing the jurors as they answered their questions. See *Keith*, 79 Ohio St.3d 514.

{¶38} In light of the foregoing, we find that defense counsel was not ineffective for failing to use a peremptory challenge against juror Jonas. Appellant's third assignment of error is overruled.

{¶39} Judgment affirmed.

POWELL and RINGLAND, JJ., concur.