[Cite as *State v. Cross*, 2015-Ohio-2735.]

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
MARION COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE, **CASE NO. 9-14-51**

v.

JANET CROSS, **O P I N I O N**

DEFENDANT-APPELLANT.

Appeal from Marion Municipal Court
Trial Court No. CRB1401374

Judgment Affirmed

Date of Decision: July 6, 2015

APPEARANCES:

Nathan D. Witkin **for Appellant**

Steven E. Chaffin **for Appellee**

SHAW, J.

{¶1} Defendant-appellant Janet Cross ("Cross") appeals the December 3, 2014, judgment of the Marion Municipal Court sentencing Cross to 180 days in jail with 170 suspended after Cross was found guilty in a jury trial of Theft in violation of R.C. 2913.02, a misdemeanor of the first degree.

{¶2} The facts relevant to this appeal are as follows. On June 12, 2014, a complaint was filed alleging that on April 30, 2014, Cross committed Theft from Meijer in violation of R.C. 2913.02, a misdemeanor of the first degree. (Doc. No. 1).

{¶3} On August 18, 2014, Cross entered a plea of not guilty by reason of insanity. (Doc. No. 14). On August 19, 2014, Cross filed a motion for a determination of her competency. (Doc. No. 16). On September 25, 2014, Cross withdrew her plea of not guilty by reason of insanity and entered a plea of not guilty. (Doc. 26).

{¶4} On November 19, 2014, Cross filed a motion in limine to determine the admissibility of evidence related to Cross's mental health. (Doc. No. 30). Cross indicated that she intended to produce evidence that she had a history of "mental clouding, misplacing items, forgetfulness, confusion, and general cognitive deficiencies." (*Id*.) Cross argued that the evidence would support her

defense that she did not have purpose to deprive Meijer and that she did not knowingly exert control over the items allegedly taken from Meijer. (*Id*.)

{¶5} On November 24, 2014, the State filed a motion in limine contending that Cross should be precluded from presenting any evidence at trial of any alleged diminished capacity based on *State v. Wilcox*, 70 Ohio St.2d 182 (1982), which held, "[a] defendant may not offer expert psychiatric testimony, unrelated to the insanity defense, to show that the defendant lacked the mental capacity to form the specific mental state required for a particular crime or degree of crime." *Wilcox* at syllabus. On November 25, 2014, Cross filed a response to the State's motion. (Doc. No. 36).

{¶6} On December 1, 2014, the trial court filed an entry granting the State's motion in limine, precluding Cross from presenting any testimony toward a diminished capacity defense. In making its ruling, the trial court reasoned,

> **[u]pon review of said matter, it appears the Defendant has subpoenaed an expert * * * to testify about Defendant's diminished capacity. In [*State v. Fulmer*], 117 Ohio St.3d 319, the Court found that expert testimony could not be offered for a defense of diminished capacity because said defense is not recognized in Ohio. Therefore, Defendant Cross in this present matter shall not present any testimony regarding diminished capacity[.]**

(Doc. No. 37).

{¶7} On December 3, 2014, the case proceeded to a jury trial. At trial the State called two witnesses beginning with Julie Mitchell, who worked in Asset

Protection for Meijer in Marion, Ohio. Mitchell testified that she had worked for Meijer for 22 years, and had worked in Asset Protection specifically for 15 years. (Tr. at 53, 57).

{¶8} Mitchell testified that while working on April 30, 2014, she was in Meijer's monitoring room where she observed Cross through the monitors acting suspiciously, looking at the cameras on the ceiling of the store. (Tr. at 59). Mitchell testified that Cross was "kind of hiding herself over in the corner between a cabinet and [the] cosmetic bags which were * * * right along the wall. [Cross] situated herself there and she was messing with the merchandise[.] (*Id*. at 59). Mitchell testified that at one point Cross was removing "smaller items from the packaging." (*Id*.) Mitchell testified that while it is not a crime to remove the items from their packaging, it was suspicious, so Mitchell left the monitor room and went down to the floor, getting within three feet of Cross. (*Id*. at 61).

{¶9} Mitchell testified that she observed Cross "removing the items from the rest of the packaging" and that she observed Cross dump "packaging on a shelf on one of the end caps." (Tr. at 61). Mitchell testified that Cross took the items and then "concealed" them in her purse.[1] (*Id*.) Mitchell testified that she personally observed Cross put the items in her bag. (*Id*.)

[1] While Mitchell specifically initially characterized the bag as a "purse," Mitchell also refers to it as a bag, and Cross later testified that it was a bag large enough to put her purse inside.

{¶10} Mitchell testified that she then followed Cross as Cross proceeded out into the garden center, through the garden center doors, and outside the store. (Tr. at 65). Mitchell testified that Cross passed the last point of sale, past the planters outside, and went into the parking lot. (*Id*. at 65). Mitchell testified at that point she approached Cross and identified herself as Meijer Loss Prevention and asked to speak with her in the Meijer office about the merchandise Cross did not pay for. (*Id*.)

{¶11} Mitchell testified that Cross accompanied her back to the office and emptied out her bag, which contained the unpaid merchandise.[2] Mitchell testified that she asked Cross to take the "unpaid items" out of her purse, and she did. (Tr. at 66). Mitchell testified that Cross did not deny the items had come from the store. (*Id*. at 67). Mitchell testified that the items Cross had taken had a value of $82.44. (*Id*. at 63).

{¶12} On cross-examination Mitchell testified that while she spoke with Cross, Cross complained about not having her medication, but Cross did not have any problems expressing herself. (Tr. at 99).

{¶13} The State next called Lori Velazco. Velazco testified that she had previously worked with Mitchell at Meijer and that they worked together on the date of the incident. Velazco testified that along with Mitchell she observed Cross

[2] Photographs of six items that were in Cross's bag were introduced into evidence.

leave the store through the garden center. Velazco testified that Cross went past where the cars go by in front of the store, into the paved area of the lot. (Tr. at 109-111). Velazco testified that it looked like Cross had no intentions of going back into the store. (*Id*. at 111).

{¶14} On cross-examination Velazco testified that when Cross got back to the office she stated she had intended to pay for the merchandise. (*Id*. at 112).

{¶15} At the conclusion of Velazco's testimony, the State rested its case. Cross then took the stand to testify on her own behalf. Cross testified that her daughter worked at Meijer and she sometimes went into the store and wandered around while her daughter worked. (Tr. at 115). Cross testified that on the day of the incident she was bargain shopping. (*Id*. at 115).

{¶16} Cross testified that she was not looking at cameras, but rather looking at the top shelves because she was short and had to "crank" her neck up. (Tr. at 116). Cross testified that she has bad days sometimes so she kept a notebook and a bag with her because she kept losing things and dropping things, so she put everything in her bag. (*Id*. at 116-118). Cross testified that she put items in her bag at Meijer with the intention of showing them to her daughter to see if she should buy them. (*Id*. at 119). Cross testified that she was not taking packaging off items as Mitchell testified, but rather looking for a price. (*Id*. at 124).

{¶17} Cross testified that when she walked out of the garden center exit she was still shopping and looking at items outside the store. (Tr. at 130). However, Cross testified that she left the cart she had been pushing inside the store when she went outside because "the aisles are different out there where the flowers are." (*Id.* at 140). Cross testified that she intended to buy the items, and that she was intimidated by Mitchell when Mitchell approached her. (*Id.* at 131).

{¶18} When Cross concluded her testimony, the defense rested and the case was submitted to the jury. The jury returned a guilty verdict on Theft, the sole count against Cross.

{¶19} The trial court proceeded to sentencing that same day. Ultimately Cross was sentenced to serve 180 days in jail, with 170 suspended, and she was ordered to pay a $400 fine with $250 suspended.[3] A judgment entry memorializing Cross's sentence was filed December 3, 2014.

{¶20} It is from this judgment that Cross appeals, asserting the following assignments of error for our review.

ASSIGNMENT OF ERROR 1

THE TRIAL COURT IMPERMISSIBLY EXERCSIED DISCRETION IN FINDING THAT AN EMPLOYEE OF ONE OF THE PARTIES SHOULD NOT BE DISMISSED FOR CAUSE UNDER R.C. 2313.17(B)(5).

[3] Cross was also offered the option of serving 34 days house arrest in lieu of 10 days in jail.

ASSIGNMENT OF ERROR 2

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING CHALLENGES FOR CAUSE REGARDING JURORS WHO DISCLOSED ANSWERS INDICATING THAT THEY WOULD NOT BE FAIR AND IMPARTIAL OR WOULD NOT FOLLOW THE LAW.

ASSIGNMENT OF ERROR 3

THE TRIAL COURT VIOLATED DEFENDANT'S SIXTH AMENDMENT RIGHTS TO RAISE A DEFENSE BY PREVENTING THE DEFENDANT FROM BEING ABLE TO TESTIFY HERSELF ABOUT HER MENTAL STATE CONCERNING THE ALLEGATIONS IN THIS MATTER AND EXCLUDED HABIT EVIDENCE THAT WAS PERMISSIBLE UNDER EVIDENCE RULE 406.

First Assignment of Error

{¶21} In her first assignment of error, Cross argues that the trial court erred by not granting Cross's challenge for cause to remove an employee of Meijer who was in the jury pool. Specifically, Cross argues that the juror was an employee of a "party" and that based on *Hall v. Banc One Mgmt. Corp*, 114 Ohio St.3d 484, 2007-Ohio-4640, there was a "conclusive presumption" requiring disqualification of a prospective juror who was an employee of a party.

{¶22} " '[T]he determination of whether a prospective juror should be disqualified for cause is a discretionary function of the trial court. Such determination will not be reversed on appeal absent an abuse of discretion.' " *State v. Allsup*, 3d Dist. Hardin No. 6–10–09, 2011–Ohio–404, ¶ 47, quoting *Berk v. Matthews*, 53 Ohio St.3d 161, 169, 559 N.E.2d 1301 (1990). "This is so

because a trial court is in the best position to assess the potential juror's credibility." *Id.* "Accordingly, the trial court's determination will be affirmed absent a showing that the court's attitude is arbitrary, unreasonable, or unconscionable." *Id.*, citing *Berk* at 169, 559 N.E.2d 1301.

{¶23} In this case, Cross based her challenge for cause that was denied by the trial court on the following examination during voir dire.

> **[PROSECUTOR]: * * * The witnesses that I'm gonna present is a Ms. Julie Mitchell. She works out [at] Meijer's here in town. Does anybody know her?**
>
> **[JUROR WOLFE]: Uh, I work at Meijer's.**
>
> **[PROSECUTOR]: You do work at Meijer's?**
>
> **[JUROR WOLFE]: Yes.**
>
> **[PROSECUTOR]: Okay. How long you been working at Meijer's, Tracy?**
>
> **[JUROR WOLFE]: 18 years.**
>
> **[PROSECUTOR]: 18 years, okay. Well it's a case involving Meijer's. So what I'm gonna ask you right now is because you work there do you feel that you'd be overly biased in favor of one side o[r] the other?**
>
> **[JUROR WOLFE]: No.**
>
> **[PROSECUTOR]: Okay. Why do you say that? How do you feel that way?**
>
> **[JUROR WOLFE]: I never listen to – when there's a fight – fight at work or something I don't listen to neither one of 'em.**

[PROSECUTOR]: Okay. Okay. Well, they're technically the victim of the crime in this case. It's a Theft case. So, I need to be concerned – I know [defense counsel] will be concerned that you might feel some bias --

[JUROR WOLFE]: Yeah.

[PROSECUTOR]: -- towards Meijer's.

[JUROR WOLFE]: Well, I don't think I should.

[PROSECUTOR]: You don't think you should what?

[JUROR WOLFE]: No. Because I work at Meijer's and – and I won't get any trust by her.

[PROSECUTOR]: You won't get any what?

[JUROR WOLFE]: I won't get any trust. She might think I turn against her –

[PROSECUTOR]: I don't understand what you're --

[JUROR WOLFE]: -- of this lady.

[PROSECUTOR]: Okay. Well, here's what I'm askin' you, Can you sit here and listen to the evidence and then arrive at a Verdict. It doesn't – really we're not askin' you trust us, per say, just to be fair.

[JUROR WOLFE]: Yeah.

[PROSECUTOR]: And what I'm askin' is do you think you could be fair?

[JUROR WOLFE]: Yes.

(Tr. at 9-11).

{¶24} Defense counsel then conducted the following voir dire with the same juror.

> **[DEFENSE COUNSEL]: * * * I'm gonna pick on you Tracy, * * * you say you've been workin' at Meijer's for 18 years?**
>
> **[JUROR WOLFE]: Yes**
>
> **[DEFENSE COUNSEL]: And you know at least Lori? You – you --**
>
> **[JUROR WOLFE]: Yes.**
>
> **[DEFENSE COUNSEL]: And have you also worked with Julie, as well?**
>
> **[JUROR WOLFE]: Yes.**
>
> **[DEFENSE COUNSEL]: Okay. * * * [D]o you understand the idea that if you hear, like, two different people come up to you on the street and they each tell ya something different and you happen to know one of 'em, which one are you gonna be more likely to believe? I mean, between someone you know and just some complete stranger?**
>
> **[JUROR WOLFE]: Someone I know.**
>
> **[DEFENSE COUNSEL]: Yeah, so, I mean, basically we're gonna have a – one person's word against another person's word and you happen to know two of 'em. How long have you worked with Lori?**
>
> **[JUROR WOLFE]: I've been there 18 years but I don't know how long she's been there.**
>
> **[DEFENSE COUNSEL]: Has it been like a number of years that Lori's been there?**
>
> **[JUROR WOLFE]: Yes.**

[DEFENSE COUNSEL]: And has it been a number of years that Julie's been there, as well?

[JUROR WOLFE]: Yeah.

[DEFENSE COUNSEL]: * * * [S]o it's fair to say you know Lori and – and Julie, is that correct?

[JUROR WOLFE]: Yes.

[DEFENSE COUNSEL]: Okay.

Your Honor, I'd like to ask Ms. Wolfe to be excused for cause. She knows two of the[] – the[] only two witnesses for the State And furthermore, she works for Meijer who is the victim in this matter. She might even have just some, you know, she – she claims that she won't be – be prejudice and we all feel that we cannot be prejudice but that is not usually something that we are – that's able to assess. It's very difficult to look into your own head and determine that you can be impartial and --

[COURT]: Do you wanna ask her questions to see if she, you know, believes she can be fair and impartial? I mean, you asked about somebody she knows on the street but you can ask her more direct questions if you want.

[DEFENSE COUNSEL]: [The Prosecutor] has already asked those questions and she indicated that she believes that she can be fair and impartial but under my questioning she indicated that she would intend to believe, between two people coming up to her on the street, someone she knew and she pretty clearly expressed that she does know both – both witnesses for the State.

[COURT]: Okay. Well, then I'll ask the question, Ms. Wolfe. If you have a person from Meijer that you work with seated in the witness chair and somebody else is testified the very opposite of what they're saying, are you going to believe the person from Meijer more than you're gonna believe the other person?

> **[JUROR WOLFE]: No.**
>
> **[COURT]: Why do you say that?**
>
> **[JUROR WOLFE]: Because, I – because, let's see – because I listen to both sides and I make up my own mind and I don't go to someone that I like or work with.**

(Tr. at 13-16).

{¶25} Based on the juror's response, the trial court denied defense counsel's challenge for cause. Defense counsel then used his first peremptory challenge to remove Ms. Wolfe from the jury.

{¶26} On appeal, Cross now argues that the trial court erred and should have removed Ms. Wolfe for cause because she was the employee of the victim. Cross characterizes the juror, however, as an employee of one of the "parties." In doing so, Cross cites *Hall v. Banc One Mgmt. Corp.*, 114 Ohio St.3d 484, 2007-Ohio-4640, and *Berk v. Matthews*, 53 Ohio St.3d 161 (1990), for the proposition that a juror who is the employee of one of the parties should be automatically removed for cause.

{¶27} Notably, Cross's characterization of Meijer as a "party" does not make Meijer an actual party to this case. *See State v. Godfrey*, 3d Dist. Wyandot Nos. 16-12-06, 16-12-07, 2013-Ohio-3396, ¶ 16 (stating that while a victim can have a meaningful role in the criminal justice system, a victim is not an actual party to a criminal action). Meijer was the *victim* in this case, not a *party* as Cross

attempts to characterize it, thus the authority Cross cites would not be applicable here. In fact, courts have held that where the juror is an actual employee of the State of Ohio, who *is* a party in criminal cases, a juror is not necessarily subject to automatic disqualification absent a showing of bias. *State v. Allsup*, 3d Dist. Hardin No. 6-10-09, 2011-Ohio-404, ¶ 48.

{¶28} Moreover, the juror at issue was questioned by the State and the trial court and she stated that she would keep an open mind to the facts presented, giving no indication of bias based on her employment. However, notwithstanding the prospective juror's statement that she could be unbiased, the prospective juror was *actually removed* from the jury when Cross used a peremptory challenge on her. Although Cross used all three of her allotted peremptory challenges in this case, she does not argue or establish that she wished to use a fourth peremptory challenge if she was able and was prevented from doing so because she had to use a challenge on prospective juror Wolfe. In addition, there is certainly no showing that the trial would have gone differently had another juror been on the jury.

{¶29} Thus for all of these reasons we cannot find that the trial court erred, or even assuming error, that there was any impact on the trial. Accordingly, Cross's first assignment of error is overruled.

Second Assignment of Error

{¶30} In Cross's second assignment of error, she argues that the trial court abused its discretion in denying challenges for cause regarding multiple jurors who "disclosed answers indicating that they would not be fair and impartial or would not follow the law."

{¶31} As the governing law is the same as in the prior assignment of error, we similarly review this issue under an abuse of discretion standard. *State v. Allsup,* 3d Dist. Hardin No. 6–10–09, 2011–Ohio–404, ¶ 47.

{¶32} Under this assignment, Cross argues that the trial court should have excused prospective juror Koonce for cause when Koonce expressed difficulty with the "beyond a reasonable doubt standard." Similar to the juror in the previous assignment of error, despite initially expressing difficulty with the concept of beyond a reasonable doubt, Koonce expressed that he could be "comfortable" with the standard. Regardless, Cross used a peremptory challenge to remove Koonce from the jury. As was the case in the prior assignment of error, even if we were to presume that the court erred in failing to excuse Koonce—which we do not find—Cross makes no showing how it impacted her trial. Cross also does not even establish that she wished to use another peremptory challenge that she did not have. Cross gave no indication that the ultimate jury was not the one she desired. Thus this argument is not well-taken.

{¶33} Next, Cross renews his argument in this assignment of error that the trial court should have dismissed Ms. Wolfe for cause. However, we have already determined that this was not error, and even if it was error, that Cross has made no showing that it impacted the trial, thus we decline to repeatedly address this point.

{¶34} Cross lastly argues that the trial court should have granted her request to dismiss another prospective juror for cause who had worked for Meijer approximately ten years prior to this incident. Cross contends that prospective juror Ramsey's former employment for Meijer should have automatically disqualified her as a potential juror. We find that the same arguments applicable to Ms. Wolfe in the prior assignment of error are applicable to Ms. Ramsey in this argument.[4] In addition, we would note that Ms. Ramsey was also removed from the jury due to a peremptory challenge of Cross, and that Cross does not show that she wished to challenge any other members of the jury or that he was prejudiced by any purported error in the trial court's failure to remove Ramsey. Accordingly, Cross's second assignment of error is overruled.

Third Assignment of Error

{¶35} In Cross's third assignment of error, Cross argues that she was prevented from raising a defense about her mental state/specific intent and that the trial court improperly excluded "habit" evidence that Cross claims was permissible

[4] As Ramsey was no longer employed by Meijer, any argument toward inherent bias is even further remote for her.

under Evid.R. 406. Specifically, Cross contends that while the Supreme Court of Ohio has held in *State v. Wilcox*, 70 Ohio St.2d 182 (1982), that a defendant cannot offer expert psychiatric testimony unrelated to the insanity defense to show that the defendant lacked the mental capacity to form the specific intent for a particular crime, the Ohio Supreme Court's holding was not applicable to this case because Cross did not attempt to offer "expert" testimony, thus she should have been allowed to testify to her own mental capacity and specific intent.

{¶36} "The trial court has broad discretion in the admission or exclusion of evidence and, in the absence of an abuse of discretion which results in material prejudice to a defendant, an appellate court should be slow to reverse evidentiary rulings." *State v. Phelps*, 10th Dist. Franklin No. 14AP-4 2015-Ohio-539, ¶ 27 citing *Krischbaum v. Dillon*, 58 Ohio St.3d 58, 66 (1991). An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶37} At the outset, we would note that while Cross correctly summarizes part of the Ohio Supreme Court's holding in *State v. Wilcox* in arguing that *Wilcox* does not apply to this case, she completely ignores the Ohio Supreme Court's holding in *State v. Fulmer*, 117 Ohio St.3d 319, 2008-Ohio-936, which the trial

court relied upon in precluding any testimony at trial related to diminished capacity.

{¶38} In *Fulmer*, the Ohio Supreme Court held that "Ohio law does not permit the jury to consider a defendant's alleged diminished capacity." *Fulmer* at ¶ 69. The Court further explained, "[i]n cases in which a defendant asserts the functional equivalent of a diminished-capacity defense, the trial court should instruct the jury to disregard the evidence used to support that defense unless the defendant can demonstrate that the evidence is relevant and probative for purposes other than a diminished-capacity defense." *Id*. at ¶ 70. Here, Cross was specifically attempting to argue that she lacked the capacity to form the specific intent for the crime at the time of the incident. Thus based on *Fulmer*, any testimony related to diminished capacity was properly excluded.

{¶39} Nevertheless, notwithstanding the Ohio Supreme Court's holding in *Fulmer*, Cross contends that evidence of her forgetfulness and memory loss were part of "habit" evidence under Evid.R. 406 and should have been admitted as relevant and probative of Cross's state of mind. We disagree.

{¶40} Evidence rule 406 reads, "[e]vidence of the habit of a person * * * whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person * * * on a particular occasion was in conformity with the habit or routine practice."

{¶41} In this case Cross attempted to assert that she had a habit of placing items in her bag because she was forgetful and did so at Meijer on the day of the incident. Some testimony related to this actually was presented to the jury; however, some was prevented by the trial court. Cross contends that the excluded evidence should have been admissible as part of her "habit."

{¶42} Despite Cross's argument, her own testimony *directly contradicts* her assertion that she had such a "habit." During cross-examination, the following exchange took place between Cross and the State.

> **Q: And so part of your shopping experience is to stick items in the bag?**
>
> **A: *I had never done that before. It was just what was going on that day*.**
>
> **Q: First time you ever did that?**
>
> **A: *Yeah. It was what was going on in my – in that – that day. And that's the truth, yeah*.**

(Emphasis added) (Tr. at 137).

{¶43} Based on this testimony, even if *Fulmer* was somehow not applicable to this case, Cross cannot establish that she had a habit of putting items in her bag while shopping, being forgetful and walking out of the store with them because she *explicitly testified* that this was *the first time* she had ever done it. Accordingly we find Cross's argument not well-taken, and for all of these reasons her third assignment of error is overruled.

{¶44} For the foregoing reasons Cross's assignments of error are overruled and the judgment of the Marion Municipal Court is affirmed.

Judgment Affirmed

PRESTON and WILLAMOWSKI, J.J., concur.

/jlr