

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. Julie A. Edwards, P.J.
	:	Hon. W. Scott Gwin, J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	
-VS-	:	
	:	Case No. 2009-CA-0011
DAMIEN LAKE	:	
	:	
Defendant-Appellant	:	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING:	Criminal appeal from the Richland County Court of Common Pleas, Case No. 2008-CR-546H
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JUDGMENT:	Affirmed
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DATE OF JUDGMENT ENTRY:	March 18, 2010
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APPEARANCES:

For Plaintiff-Appellee

JAMES J. MAYER, JR.
PROSECUTORING ATTORNEY
KIRSTEN L. PSCHOLKA-GARTNER
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For Defendant-Appellant

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Gwin, J.

{¶1} Defendant-appellant Damien Lake appeals from his conviction and sentence in the Richland County Court of Common Pleas on one count of felonious assault on a peace officer in violation of R.C. 2903.11 (B), a felony of the first degree, with a firearm specification. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On the afternoon of July 27, 2008, Jordan Bryant, Corey Fix, and David Webb went to the Forest Hills Mobile Home Park located off Ashland Road in Richland County, Ohio. Jordan Bryant's aunt lived in that trailer park, and he was going to pay her back some money that she had loaned him.

{¶3} When they pulled into the drive of the trailer park, they saw Ricky Davis and the Appellant, Damien Lake, who went by the street name "Larry." Jordan indicated that he had been in a fight with Ricky Davis about two weeks prior to that date, and he had heard from other people that Ricky was planning to shoot him.

{¶4} The boys parked the car near the entrance to the trailer park, and Jordan and Corey got out confronting Ricky. Jordan asked Rickey if he had said he was going to shoot him, which started an exchange of words. During this verbal confrontation, the Appellant put his hand under his shirt and removed something, which he hid behind his right leg. Fearing that something was about to happen, Jordan and Corey started to get back in the car. Jordan told the Appellant that they would settle the matter another time. At that point, the Appellant pointed a gun at Jordan and told him that he had "better get [his] boy in the car or he's going to blow [his] f'ing brains all over the back of the seat."

{¶5} As the Appellant stood in the drive pointing the gun at the three boys, Richland County Sheriff's Deputy Jeffrey Frazier drove by on Ashland Road. He was on his way to meet Sergeant Donald Zehner in the area of State Route 30 and Ashland Road to look for a suspect in an unrelated matter. When he saw the confrontation in the drive of the trailer park, he radioed that he was responding to a disturbance in the area of 710 Ashland Road. He did a U-turn and turned into the trailer park.

{¶6} When Deputy Frazier saw the Appellant pointing a gun, he immediately radioed that he had a subject with a gun and needed back up. He then exited his cruiser, pulled his gun, and ordered the Appellant to drop his weapon. The Appellant swung around and pointed his gun at Deputy Frazier.

{¶7} As this occurred, Jessica Crain was driving out of the trailer park on her way back to work. She observed this confrontation between Deputy Frazier and the Appellant, and heard a clicking noise that sounded like it came from a gun as the Appellant backed up behind her vehicle with the gun still pointed at the officer. The Appellant then said "shit," and turned and fled up the hill into the trailer park with Deputy Frazier in pursuit. As the Appellant fled through the trailer park, he turned and pointed the gun at Deputy Frazier a second time. Deputy Frazier indicated that he continued to train his weapon on the Appellant; however, he could not get a clear shot because his gun was bouncing up and down as he was running, and there were bystanders in the area.

{¶8} Deputy Frazier continued to pursue the Appellant to the Eastgate Apartment Complex located next to the trailer park. As they were running between the apartment buildings, they encountered Vendetta Camper, who had heard what she

thought were gunshots and was attempting to locate her grandchildren. As the Appellant ran towards her, Deputy Frazier yelled at her to go inside because he had a gun. He then lost sight of the Appellant.

{¶9} Despite an exhaustive search of the area by many police agencies, the Appellant was not located on August 27, 2008. However, based upon witness statements, Officers were able to determine his identity. They prepared a photo line-up containing the Appellant's BMV picture, along with photos of five other individuals. This line up was shown to Jordan Bryant, Corey Fix, David Webb, and Vendetta Camper. All four witnesses identified the Appellant as the subject who was involved in the confrontation with Deputy Frazier.

{¶10} At some point during the foot pursuit, the Appellant threw down the gun. Ricky Davis' cousin, Gary Crain, saw Ricky and the Appellant running from the officer, and knew that the gun belonged to his cousin. He picked the gun up and hid it underneath his trailer in an attempt to keep his cousin from getting in trouble for carrying a loaded weapon. Mr. Crain initially lied to the police about knowing the parties involved or the whereabouts of the gun; however, later that evening, he admitted that he lied and led Sergeant Zehner to the opening under his trailer where he had hidden the weapon.

{¶11} An examination of the weapon revealed that it was a fully loaded .357 Taurus revolver. The round in the top chamber, which was lined up to fire, had a firing pin impression in the primer cap, indicating that it had been misfired.

{¶12} The Appellant was eventually located and arrested on August 7, 2008. The police received information that he was staying at the home of Barbara Neace, located at 410 Lawnsdale Avenue in Mansfield, Ohio. When the police arrived at the

residence and made contact with Ms. Neace, she denied that the Appellant was there and gave police permission to search her residence. The search uncovered items that led police to believe that the Appellant was in the residence, or had been there recently. It also revealed a small amount of marijuana in plain view in an ashtray and ten bindles of heroin in the kitchen cupboard. A secondary search of the attic revealed the Appellant hiding under the insulation. Nearby, they observed a large bag of white powder that appeared to be cocaine. The Appellant initially refused to comply with orders to show his hands, and had to be tasered before he could be secured in handcuffs and removed from the attic. The Appellant was taken into custody for the August 27, 2008 felonious assault against Deputy Frazier, and Barbara Neace was taken into custody for obstruction of justice and possession of drugs. When he was secured in the cruiser, the Appellant asked why Barbara Neace was being arrested. When he was told that drugs were found in the residence, he became upset and stated that the drugs in the house belonged to him. The drugs were weighed and tested at the Mansfield Police Crime Lab. The white powder contained in the bag found in the attic did not reveal the presence of any controlled substances; however, the tan substance in the bindles found in the kitchen cupboard tested positive for heroin in the amount of .98 grams.

{¶13} The Appellant was indicted by the Richland County Grand Jury for one count of felonious assault on a peace officer, a felony of the first degree, for attempting to fire a gun at Deputy Frazier during the July 27, 2008 confrontation. Count I included a mandatory three-year firearm specification. He was also indicted for one count of

possession of drugs, a felony of the fifth degree, for the heroin found at Barbara Neace's house when he was arrested on August 7, 2008.

{¶14} The Appellant's trial commenced on January 8, 2009 and lasted three days. During the trial, the State presented testimony from eyewitnesses, Jordan Bryant, Corey Fix, David Webb, Jessica Crain, Gary Crain, and Vendetta Camper, and the victim, Deputy Jeffrey Frazier. The State also presented testimony from Sergeant Donald Zehner, Detective Robert Mack, Deputy Stan Montgomery, and Captain Eric Bosko regarding the investigation into the July 27, 2008 incident and the arrest of the Appellant. Finally, the State presented testimony from experts Jonathan Gardner of the Ohio Bureau of Identification and Investigation, and Anthony Tambasco and Dawn Fryback of the Mansfield Police Crime Lab regarding testing performed on the gun and the drugs.

{¶15} After the State rested, the defense called Barbara Neace, the Appellant's girlfriend Dannette Davis, and Ricky Davis, Jr., who each claimed that the Appellant was in Chicago at the time of the felonious assault, and that it was committed by some other man named "Larry." The Appellant did not take the stand on his own behalf. After the defense presented its case, the State re-called Detective Robert Mack as a rebuttal witness. Detective Mack testified regarding his conversation with Dannette Davis, where she referred to the Appellant as "Larry" and did not mention that he was in Chicago.

{¶16} After both sides rested, Assistant Prosecutor Bishop brought a problem with one of the jurors to the trial court's attention. He advised that throughout the trial, one female juror refused to make eye contact or observe the witnesses demeanor on the stand. She also made disparaging gestures and comments directed toward the

presentation of the State's case. This was confirmed by court security officer Pennywitt. As a result of this information, the trial court determined that the juror in question appeared to be biased. She was made the alternate juror and was dismissed from deliberating the case.

{¶17} Following the dismissal of the alternate juror, the remaining twelve jurors deliberated and found the Appellant guilty on the felonious assault charge and the attached firearm specification, but not guilty on the possession of drugs charge.

{¶18} The trial court sentenced the Appellant to ten years in prison with a three-year mandatory sentence for the firearm specification.

{¶19} Appellant timely appealed and raises the following four assignments of error for our consideration:

{¶20} "I. DEFENDANT/APPELLANT WAS DENIED HIS FIFTH AMENDMENT RIGHT TO A FAIR TRIAL DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL.

{¶21} "II. THE TRIAL COURT COMMITTED PLAIN ERROR BY FAILING TO SEVER THE FELONIOUS ASSAULT COUNT FROM THE POSSESSION OF DRUGS COUNT.

{¶22} "III. THE VERDICT OF [SIC.] FELONIOUS ASSAULT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶23} "IV. THE COURT ABUSED ITS DISCRETION IN REMOVING A SITTING JUROR WITHOUT CONDUCTING A VOIR DIRE OF JURORS IN VIOLATION OF THE SIXTH AMENDMENT TO THE CONSTITUTION."

I & II.

{¶24} In his first assignment of error, the Appellant argues that his trial counsel was ineffective because he did not file a motion to sever the felonious assault charge and the possession of heroin charge. In his second assignment of error, the Appellant contends that the trial court committed plain error when it failed to sua sponte order severance of the charges for trial. The underlying premise for both assignments of error is that the charges against the Appellant should have been severed and tried in two separate proceedings. Because we find the issues raised in the Appellant's first and second assignments of error are closely related, for ease of discussion, we shall address the assignments of error together.

{¶25} A claim of ineffective assistance of counsel requires a two-prong analysis. The first inquiry is whether counsel's performance fell below an objective standard of reasonable representation involving a substantial violation of any of defense counsel's essential duties to the Appellant. The second prong is whether the Appellant was prejudiced by counsel's ineffectiveness. *Lockhart v. Fretwell* (1993), 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180; *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136.

{¶26} In determining whether counsel's representation fell below an objective standard of reasonableness, judicial scrutiny of counsel's performance must be highly deferential. *Bradley*, 42 Ohio St. 3d at 142. Because of the difficulties inherent in determining whether effective assistance of counsel was rendered in any given case, a strong presumption exists that counsel's conduct fell within the wide range of reasonable, professional assistance. *Id.*

{¶27} In order to warrant a reversal, the Appellant must additionally show he was prejudiced by counsel's ineffectiveness. This requires a showing that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Bradley*, supra at syllabus paragraph three. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

{¶28} The United States Supreme Court and the Ohio Supreme Court have held a reviewing court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Bradley* at 143, quoting *Strickland* at 697. Accordingly, we will direct our attention to the second prong of the *Strickland* test.

{¶29} With respect to the Appellant's claim that the trial court's failure to sua sponte sever the charges for trial constitutes plain error, we note that notice of plain error under Crim.R. 52(B) is to be taken with utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice. See *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, at paragraph three of the syllabus. More important, to find plain error we must be able to say that, but for the error, the outcome of the trial would have been otherwise. *Id.* at paragraph two of the syllabus; *State v. Braden*, 98 Ohio St.3d 354, 785 N.E.2d 439, 2003-Ohio-1325, at ¶ 50; *State v. Sanders* (2001), 92 Ohio St.3d 245, 263, 750 N.E.2d 90.

{¶30} "The law favors joining multiple offenses in a single trial under Crim.R. 8(A) if the offenses charged 'are of the same or similar character.' " *State v. Lott* (1990), 51 Ohio St.3d 160, 163, 555 N.E.2d 293, 298, quoting *State v. Torres* (1981), 66 Ohio

St.2d 340, 343, 20 O.O.3d 313, 315, 421 N.E.2d 1288, 1290. Under Crim.R. Join 8(A), offenses that are based on acts “connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct” may be joined together for trial.

{¶31} Nonetheless, “[i]f it appears that a defendant * * * is prejudiced by a joinder” a court may grant a severance under Crim.R. 14. However, the defendant bears the burden to prove prejudice and that the trial court abused its discretion in denying severance. *State v. Torres*, 66 Ohio St.2d 340, 20 O.O.3d 313, 421 N.E.2d 1288, syllabus.

{¶32} When a defendant claims that he or she was prejudiced by the joinder of multiple offenses, the court must determine (1) whether evidence of the other crimes would be admissible even if the counts were severed; and (2) if not, whether the evidence of each crime is simple and distinct. *State v. Schaim* (1992), 65 Ohio St.3d 51, 59, 600 N.E.2d 661, citing *State v. Hamblin* (1988), 37 Ohio St.3d 153, 158-159, 524 N.E.2d 476 and *Drew v. United States* (C.A.D.C.,1964), 331 F.2d 85. “If the evidence of other crimes would be admissible at separate trials, any ‘prejudice that might result from the jury’s hearing the evidence of the other crime in a joint trial would be no different from that possible in separate trials,’ and a court need not inquire further.” *Id.*, citing *Drew v. United States*, 331 F.2d at 90 and *United States v. Riley* (C.A.8, 1986), 530 F.2d 767

{¶33} In the case at bar, the two offenses occurred on different dates and at different locations. The assault on a police officer charge arose from the July 27, 2008 encounter between the Appellant and Deputy Frazier at the Forest Hills Mobile Home

Park on Ashland Road. The drug possession charge arose from heroin found in the residence of 410 Lawnsdale Avenue, where the Appellant was arrested on August 7, 2008. Assuming, *arguendo*, that the evidence did not fit the "other acts" exception, it nevertheless fits the second prong of the *Schaim* test, which requires the evidence of the crime under each indictment to be simple and distinct. 65 Ohio St.3d at 59.

{¶34} In the case at bar, regarding Count I, the State presented testimony about the events surrounding the July 27, 2008 confrontation between the Appellant and Deputy Frazier at the Forest Hills Mobile Home Park. With regard to Count II, the State presented testimony from Officer Stan Montgomery and Captain Eric Bosko regarding the Appellant's arrest and the discovery of drugs at 410 Lawnsdale Avenue on August 7, 2008. The counts related to two distinct crimes that occurred on different dates, and the evidence relating to each count was clearly distinguishable.

{¶35} In addition, at the conclusion of the evidence, the trial court specifically instructed the jury:

{¶36} "Each of the two offenses charged in this case constitutes a separate and distinct matter. You must decide each charge and the evidence applicable to it separately and you must state your findings as to each charge uninfluenced by your verdict as to the other charge. Mr. Lake may be found guilty or not guilty of either one or both of the crimes charged." (3T. at 625).

{¶37} Finally, the jury found the Appellant guilty of the felonious assault charge in Count I, and not guilty of the drug possession charge in Count II. (3T. at 672). Based upon this verdict, it is clear that the jury did not confuse or conflate the evidence relating to the two separate charges. Accordingly, the Appellant cannot establish that, but for

counsel's failure to move for, and the trial court's failure to order separate trials, he would have been acquitted of both charges.

{¶38} The Appellant was not able to demonstrate that he was prejudiced by the joinder of claims; therefore, he cannot meet the first element of the *Schaim* test. Given the facts *sub judice*, we find that counsel was not ineffective in failing to file a motion to sever the counts, and the trial court did not err in failing to sua sponte order separate trials.

{¶39} Appellant's first and second assignments of error are overruled.

III.

{¶40} In his third assignment of error, the Appellant contends that the evidence does not support his conviction for felonious assault. The Appellant correctly points out the mere pointing of a deadly weapon, without more, is not sufficient evidence to prove the *mens rea* of the offense of felonious assault. *State v. Brooks* (1989), 44 Ohio St.3d 185, 542 N.E.2d 636, syllabus.

{¶41} The function of an appellate court on review is to assess the sufficiency of the evidence "to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus. In making this determination, a reviewing court must view the evidence in the light most favorable to the prosecution. *Id.*; *State v. Feliciano* (1996), 115 Ohio App. 3d 646, 652, 685 N.E.2d 1307, 1310- 1311.

{¶42} While the test for sufficiency requires a determination of whether the state has met its burden of production at trial, a manifest-weight challenge questions whether

the state has met its burden of persuasion. *State v. Thompkins* (1997), 78 Ohio St. 3d 380, 390, 678 N.E. 2d 541, 548-549 (Cook, J., concurring). In making this determination, we do not view the evidence in the light most favorable to the prosecution. Instead, we must "review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Thompkins*, supra, 78 Ohio St.3d at 387. (Quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717, 720-721). Accordingly, reversal on manifest weight grounds is reserved for "the exceptional case in which the evidence weighs heavily against the conviction." *State v. Thompkins*, supra. In *State v. Thompkins*, supra, the Ohio Supreme Court further held "[t]o reverse a judgment of a trial court on the basis that the judgment is not sustained by sufficient evidence, only a concurring majority of a panel of a court of appeals reviewing the judgment is necessary." 78 Ohio St.3d 380 at paragraph three of the syllabus.

{¶43} The elements of felonious assault are set forth in R .C. 2903.11, which provides in pertinent part:

{¶44} "(A) No person shall knowingly:

{¶45} " * * *

{¶46} "(2) Cause or attempt to cause physical harm to another by means of a deadly weapon or dangerous ordinance, as defined in section 2923.11 of the Revised Code."

{¶47} The syllabus of the Ohio Supreme Court's opinion in *State v. Green* (1991), 58 Ohio St.3d 239 holds:

{¶48} "The act of pointing a deadly weapon at another coupled with a threat, which indicates an intention to use such weapon, is sufficient evidence to convict a defendant of the offense of "felonious assault" as defined by R.C. 2903.11(A) (2). (*State v. Brooks* [1989], 44 Ohio St.3d 185, 542 N.E.2d 636, syllabus, explained and followed.)"

{¶49} In *Green*, the Supreme Court opined:

{¶50} "In *State v. Brooks* (1989), 44 Ohio St. 3d 185, 542 N.E.2d 636, we were confronted with a case similar to the one at bar concerning the propriety of a felonious assault charge. In *Brooks*, the defendant was involved in a "heated conversation" with a barmaid that resulted in the defendant pointing a handgun at the woman's face and stating, "Bitch, I will kill you." Id. at 187, 542 N.E. 2d at 638. We upheld Brooks' felonious assault conviction based upon the totality of the circumstances; however, we went on to say that, "[t]he act of pointing a deadly weapon at another, without additional evidence regarding the actor's intention, is insufficient to convict a defendant of the offense of 'felonious assault' * * *." Id. at syllabus.

{¶51} "It can be readily gleaned from our holding in *Brooks*, supra, that the additional evidence needed to uphold a felonious assault charge could include verbal threats as perceived by a reasonable person under the circumstances. Thus, the act of pointing a deadly weapon at another coupled with a threat, which indicates an intention to use such weapon, is sufficient evidence to convict a defendant of the offense of "felonious assault" as defined by R.C. 2903.11(A) (2)."

{¶52} In *State v. Seiber* (1990), 56 Ohio St.3d 4, 564 N.E.2d 408, the Court upheld a felonious assault conviction where the defendant's "revolver was not just loaded, it was cocked. The Appellant had already terrorized the Schoenberger brothers by threatening to kill them and forcing them to the floor. He had just shot Norris and threatened to kill everyone in the bar if they did not tell the police that an unknown black man had shot Norris. In the midst of this, McDaniel appeared, identified himself as a police officer, and twice ordered the Appellant to drop his gun. After initially lowering his gun, the Appellant then raised it and pointed it at McDaniel." *Id.*, at 15, 564 N.E.2d at 420.

{¶53} The trial testimony in the case sub judice established that the Appellant pulled a gun and pointed it at the young men at the trailer park. The Appellant took a couple of steps towards those individuals, pointed the gun at Jordan and told him that he had "better get [his] boy in the car or he's going to blow [his] f'ing brains all over the back of the seat." Around this time, a sheriff's deputy pulled into the trailer park. The deputy drew his gun and ordered the Appellant to drop the gun he was holding. While the Appellant and the deputy had their guns pointed at each other, the Appellant moved behind Jessica's car. As he did so, she thought she heard a click like the trigger being pulled on a gun. As the Appellant fled through the trailer park, he turned and pointed the gun at Deputy Frazier a second time.

{¶54} Sergeant Zehner testified that upon retrieving the gun from its hiding place underneath Gary Crain's trailer, he discovered that the gun was fully loaded, and that the round that was lined up with the barrel was attempted to be fired. There was an indentation on the primer cap where the hammer had slammed into it. However, for

some unknown reason, it did not fire. Jonathan Gardner, a firearms analyst with the Ohio Bureau of Criminal Identification and Investigation, explained that if the gun misfired, he would expect the misfired round to still be in the top position in line with the barrel as long as the trigger or hammer was not moved. He then attempted to compare the firing pin impressions from rounds that he had test fired and the misfired round under a microscope. Although the misfired round did not contain sufficient marking to say that it came from the same gun as the test fired rounds, Mr. Gardner indicated that is not uncommon for misfires because there is not a lot of pressure being brought to bear on the primer area.

{¶55} Mr. Gardner explained that the trigger of the gun would have to be pulled in order for the firing pin to have created an impression on the misfired round. He testified that when the trigger is pulled, the hammer falls forward, striking the transfer bar, which can only be struck when the trigger is depressed. If the hammer falls forward without the trigger being pulled, the transfer bar slides out of the way, preventing the gun from being fired.

{¶56} From these additional facts, the jury could find that all the elements of this felonious assault offense had been proven beyond a reasonable doubt. See *State v. Brooks*, supra, at 192 and 196, 542 N.E.2d at 643 and 646 (Moyer, C.J., concurring); *State v. Eley*, supra; *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560. Therefore, the Appellant's conviction for felonious assault is not against the manifest weight and sufficiency of the evidence.

{¶57} Accordingly, the Appellant's third assignment of error is overruled.

IV.

{¶58} In his fourth assignment of error, the Appellant argues the trial court abused its discretion in removing juror Signorraci without first conducting a voir dire examination of her and the remaining jurors on the panel. We disagree.

{¶59} The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires that a defendant accused of a state criminal violation shall be tried before a panel of fair and impartial jurors. See *Duncan v. Louisiana* (1968), 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491, and *State v. King* (1983), 10 Ohio App.3d 161, 10 OBR 214, 460 N.E.2d 1383. See, also, Section 10, Article I, Ohio Constitution.

{¶60} The conclusions reached in a case should be generated only by evidence and argument in open court, and not by any outside influence. *Patterson v. Colorado* (1907), 205 U.S. 454, 27 S.Ct. 556. The jury is obligated to decide a case solely on the evidence, and any communication or contact outside the courtroom or jury room about the matter at trial between a juror and another person, and any independent inquiry or experiment by a juror concerning the evidence or the law, constitutes juror misconduct. *State v. Taylor* (1991), 73 Ohio App. 3d 827, 831, 598 N.E.2d 818. Further, when a juror refuses to consider the evidence or forms an opinion as to guilt or innocence before all the evidence is presented, such activity constitutes misconduct. *Id.* See also, *Carr v. State* (1926), 22 Ohio App. 78, 153 N.E. 233; *Busick v. State* (1850), 19 Ohio 198; and *State v. Carter* (1890), 11 Ohio Dec.Rep. 123; *State v. McMillen*, Stark App. No. 2008-CA-0122, 2009-Ohio-210 at ¶ 122.

{¶61} However, the United States Supreme Court has recognized:

{¶62} "[D]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable.... [I]t is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Smith v. Phillips* (1982), 455 U.S. 209, 217 102 S.Ct. 940, 946; *United States v. Olano* (1993), 507 U.S. 725, 738, 113 S.Ct. 1770, 1780, 123 L.Ed.2d 508.

{¶63} In *State v. Hessler* (2000), 90 Ohio St.3d 108, 115-116, 734 N.E.2d 1237, 1247 the Ohio Supreme Court set forth our standard of review when juror misconduct is alleged:

{¶64} "As a reviewing court, we show deference to the trial judge, who sees and hears the events and thus is in a better position to accurately evaluate the situation and determine the appropriate scope of inquiry. *State v. Huertas* (1990), 51 Ohio St.3d 22, 29, 553 N.E.2d 1058, 1067; *United States v. Ramos* (C.A.5, 1995), 71 F.3d 1150, 1153-1154. Therefore, we employ an abuse-of-discretion standard and will not reverse the trial court unless it has handled the alleged juror misconduct or ruled upon the post-trial motion in an 'unreasonable, arbitrary, or unconscionable manner'. *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144, 149." *State v. Hessler* (2000), 90 Ohio St.3d 108, 115-116, 734 N.E.2d 1237, 1247; *State v. McMillen*, *supra*, ¶ 124-125.

{¶65} Here the issue is one of possible juror bias. In *State v. Murphy*, 91 Ohio St.3d 516, 747 N.E.2d 765, 2001-Ohio-112, the Ohio Supreme Court noted, "A party

has no right to have any particular juror on the panel. His right is to an impartial jury, and a juror's erroneous excusal does not compromise the jury's impartiality. See, e.g., *United States v. Cornell* (C.C.D.R.I.1820), 25 F.Cas. 650, 656; *State v. Mendoza* (1999), 227 Wis.2d 838, 863, 596 N.W.2d 736, 748 (citing cases); *Jones v. State* (Tex.Crim.App.1998), 982 S.W.2d 386, 392 (citing cases); *People v. Lefebvre* (Colo. 2000), 5 P.3d 295". *Id.* at 525, 747 N.E.2d 782-783. "Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula." *Dennis v. United States*(1950), 339 U.S. 162, 172, 70 S.Ct. 519, 523.(Quoting *United States v. Wood*, 299 U.S. 123, 145-146, 57 S.Ct. 177, 185).

{¶66} In the case at bar, the trial judge did not abuse his discretion by failing to conduct a voir dire examination of juror Signorraci. The court did conduct a hearing at which both parties were permitted to participate. Assistant Prosecutor Bishop brought the matter to the trial court's attention:

{¶67} "Your Honor, I want to challenge Ms. Signorraci for cause at this point. During the entire course of the trial, she has almost purposely refused to observe the witness' demeanor and appearance on the witness stand. She has made disparaging noises, gestures, and ultimately when Detective Mack was called back on rebuttal actually made disparaging comments." (3T. at 661).

{¶68} The Appellant's attorney indicated that he did not hear the disparaging comment, or feel any hostility from her. (3T. at 662). He indicated that he would not agree to a challenge for cause. (3T. at 662).

{¶69} After the lunch recess, the trial court again addressed the issue of juror Signorraci's conduct. (3T. 663-664). At that time, Deputy Pennywitt, a court security officer, indicated that he also heard juror Signorraci utter a disparaging comment. He stated:

{¶70} "As Detective Mack was coming through, heading up for the witness box, you were just coming in, and she said it. I saw Prosecutor Bishop, he was kind of looking at her. She kind of flung her head up and she said it, and then put her hand over her head and was looking down. You told him to go ahead and proceed with the questioning, and I heard him say I think we have an issue with a juror or something at that time, but then it just went on, and I didn't think much about it." (3T. at 664).

{¶71} While the trial court had indicated earlier that it did not hear Ms. Signorraci's comment, the court did indicate, "I did notice [Mr. Bishop] say something to Ms. Signorraci as we started." (3T. at 662, 664).

{¶72} Based on the nature of the conduct and statements reported by Assistant Prosecutor Bishop and Deputy Pennywitt, the trial court held:

{¶73} "It does sound like she is sufficiently frustrated with the way the case is tried that I would have to question her objectivity in the case. Again, I don't know what her views are in the case, but it looks like she is emotionally enough involved in what is happening here not to be as objective as the other jurors appear to be. So I am going to sustain your motion to excuse her as a juror in this case. That means we won't need to pick who the alternate juror is. We will simply seat the other twelve." (3T. at 665).

{¶74} A trial judge is empowered to exercise "sound discretion to remove a juror and replace him with an alternate juror whenever facts are presented which convince

the trial judge that the juror's ability to perform his duty is impaired." *State v. Hopkins* (1985), 27 Ohio App.3d 196, 198, 500 N.E.2d 323, citing *United States v. Spiegle* (C.A.5, 1979), 604 F.2d 961, 967; *State v. Sikola*, Richland App. No. 06CA72, 2008-Ohio-843 at ¶ 39. Put differently, the court has authority to replace jurors with alternates when the jurors "become or are found to be unable or disqualified to perform their duties." Crim.R. 24(F); see, also, R.C. 2945.29. The trial court has discretion to determine when a reportedly disabled juror should be replaced by the appropriate alternate before deliberations begin. *State v. Sallee* (1966), 8 Ohio App.2d 9, 220 N.E.2d 370. Absent a record showing that the court abused that discretion which resulted in prejudice to the defense, the regularity of the proceedings is presumed. *Beach v. Sweeney* (1958), 167 Ohio St. 477, 150 N.E.2d 42. See also, *State v. Shields* (1984), 15 Ohio App.3d 112, 472 N.E.2d 1110.

{¶75} Obviously, body language and facial expressions cannot be recorded in the transcript. In addition, a general disinterest in the proceedings would only be evident through observation, not questioning. Therefore, we must rely on the keen eye of the trial court to assess the significance of these nonverbal responses or reactions. *Rybackzewski v. Kingsley* (April 24, 1998), Lucas App. No. L-97-1048.

{¶76} The record reflects that the trial court's determination to excuse juror Signorraci was based upon a concern that the actions of the juror as noted above would impair the juror's ability to be fair and impartial to both the state and the defense. "Thus, because the State is no less entitled to an unbiased determination than the Appellant, the trial court was within its sound discretion to excuse a juror when the juror's

impartiality toward any party to the action becomes a concern. See *State v. Pruitt*, Trumbull County App. No.2001-T-0101, 2003-Ohio-1882.” *State v. Sikola*, supra at ¶ 49.

{¶77} Excusing prospective jurors without voir dire did not cause any disqualified or biased juror to be seated on the Appellant’s jury. The Appellant has failed to demonstrate how the dismissal of juror Signorraci prejudiced the defense.

{¶78} For these reasons, we find that the trial court did not commit plain error in excusing juror Signorraci.

{¶79} Accordingly, the Appellant’s fourth assignment of error is hereby overruled.

{¶80} The judgment of the Richland County Court of Common Pleas is hereby affirmed.

By Gwin, J.,

Edwards, P.J., and

Delaney, J., concur

HON. W. SCOTT GWIN

HON. JULIE A. EDWARDS

HON. PATRICIA A. DELANEY

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-VS-

DAMIEN LAKE

Defendant-Appellant

JUDGMENT ENTRY

CASE NO. 2009-CA-0011

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Richland County Court of Common Pleas is hereby affirmed. Costs to appellant.

HON. W. SCOTT GWIN

HON. JULIE A. EDWARDS

HON. PATRICIA A. DELANEY