

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
SANDUSKY COUNTY

State of Ohio

Court of Appeals No. S-08-018

Appellee

Trial Court No. 08CR43

v.

Amy M. Hall

DECISION AND JUDGMENT

Appellant

Decided: October 30, 2009

* * * * *

Thomas L. Stierwalt, Sandusky County Prosecuting Attorney,
and Norman P. Solze, Assistant Prosecuting Attorney, for appellee.

Nancy L. Jennings, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Sandusky County Court of Common Pleas that found appellant guilty of six counts of aggravated robbery with firearm specifications, three counts of complicity to commit robbery with firearm specifications, three counts of complicity to commit aggravated robbery with firearm specifications, one count of complicity to commit theft, and one count of complicity to

commit aggravated burglary with a firearm specification. For the reasons set forth below, the judgment of the trial court is reversed.

{¶ 2} Appellant sets forth ten assignments of error:

{¶ 3} "I. Appellant was denied her Sixth Amendment right guaranteed by the United States Constitution by being denied effective assistance of counsel.

{¶ 4} "II. The errors set forth in the first assignment of error amount to cumulative error.

{¶ 5} "III. Appellant was denied her right under the United States Constitution and the Ohio Constitution to a jury composed of impartial and unbiased jurors.

{¶ 6} "IV. Appellant's conviction is against the manifest weight of the evidence.

{¶ 7} "V. Appellant's convictions were against the sufficiency of the evidence.

{¶ 8} "VI. The trial court erred by not declaring a mistrial sua sponte for the act of public justice after jurors had been exposed to improper commentary that created a bias against the appellant.

{¶ 9} "VII. The trial court's sentence is contrary to law because the trial court did not consider the factors enumerated in O.R.C. 2929.11 or 2929.12.

{¶ 10} "VIII. The trial court abused its discretion when sentencing appellant to a term of incarceration of 18 years.

{¶ 11} "IX. The trial court erred when it convicted and sentenced appellant on the offenses aggravated robbery, robbery and theft in that robbery and theft are allied offenses of similar import.

{¶ 12} "X. The robbery, aggravated robbery counts and the aggravated burglary counts should have been dismissed."

{¶ 13} The undisputed facts relevant to the issues raised on appeal are as follows.

{¶ 14} On the night of December 30, 2007, appellant and a female friend spent several hours socializing with some men at various bars in Fremont, Ohio. Late in the evening, the group moved on to the home of one of the men to continue socializing. Shortly after midnight, three men forcibly entered the apartment brandishing guns and demanding money. The intruders assaulted and robbed six men in the apartment. For her role in planning and carrying out the crimes, appellant was charged with three counts of robbery, nine counts of aggravated robbery, three counts of felonious assault, one count of theft and one count of aggravated burglary. All charges carried firearm specifications. Following trial to a jury, appellant was convicted of six counts of aggravated robbery, four counts of complicity to commit aggravated robbery, two counts of complicity to commit robbery, one count of complicity to commit theft, and one count of complicity to commit aggravated burglary. Appellant was sentenced to a total of 18 years incarceration.

{¶ 15} In support of her first assignment of error, appellant claims that she was denied effective assistance of counsel. First, appellant asserts that trial counsel was ineffective for failing to object to the continued presence on the jury of an individual who expressed bias toward appellant. The facts behind this claimed error will be discussed in detail as the outcome is dispositive of this appeal.

{¶ 16} On the morning of the second day of trial, one of the jurors told the bailiff that after the jury was excused the previous day she overheard a conversation in the courthouse restroom between two women whom the juror believed to be appellant and her sister. The following inquiry was made in chambers:

{¶ 17} "THE COURT: Why don't you tell us what you told the Bailiff?

{¶ 18} "MS. LEHEY: Okay. Yesterday after jury selection was made, we were excused and allowed to use the restrooms, and I believe, I know it was Amy and I think it might have been her sister having a conversation in the restroom about, I guess she pregnant again, Amy, a couple of months along. She's already got four kids. Her sister said she should have her tubes tied because she had five kids and upon hearing the recorded interrogation, the kids were spread out among all these houses and *I feel somebody like that is not a [sic] believe responsible person, I cannot believe anything that she would say*, I mean, your own blood, you don't give a damn about.

{¶ 19} "THE COURT: All right. The conversation that you overheard had to do with Amy's life style, her living is [sic] conditions, but it had nothing to do with the facts of this case, correct?

{¶ 20} "JUROR: Yes.

{¶ 21} "THE COURT: Now I think, Mr. Prosecutor, isn't it your intent to introduce the second tape?

{¶ 22} "MR. KOLESAR [prosecutor]: Yes.

{¶ 23} "THE COURT: And I think, can we agree, Miss Moreland, that on the second tape Amy admits how many kids she has and where they're at?

{¶ 24} "MR. KOLESAR: She did on the first tape.

{¶ 25} "THE COURT: So you did not really did not [sic] acquire any information about the case itself, right? And you didn't acquire any new information that you didn't already hear?

{¶ 26} "MS. MORELAND [defense counsel]: The pregnancy was the new information.

{¶ 27} "JUROR: Uh-huh.

{¶ 28} "THE COURT: And it goes back to the question I asked you at the beginning: Can you can you [sic] wait until the end to make your decision?

{¶ 29} "JUROR: To me, somebody like that they're just pumping out kids and if you don't care about your own flesh and blood, *why would you care about somebody else or about lying* or –

{¶ 30} "THE COURT: Because they have absolutely no connection with each other.

{¶ 31} "JUROR: I'm just trying to be honest. *I consider somebody like that to be very irresponsible and pond scum* and –

{¶ 32} "THE COURT: Well, I understand.

{¶ 33} "JUROR: Sorry for a lack of –

{¶ 34} "THE COURT: You can think that about her as an individual, but what you need to do is to put that off to the side and decide this case based on the facts that Mr.

Kolesar presents to you and Miss Moreland present to you. There is absolutely no connection between her as a person and whether or not she committed this crime.

{¶ 35} "The facts of committing the crime or not committing the crime is completely different than the kind of person she is. I mean, she could be the greatest person in the world from a character standpoint and still have committed a crime, correct? So you admit that those – and you kind of have to answer because the court reporter is taking this down.

{¶ 36} "JUROR: Yes.

{¶ 37} "THE COURT: We all acknowledge that you can have wonderful person who can still be guilty of a crime, correct?

{¶ 38} "JUROR: Yes.

{¶ 39} "THE COURT: So the opposite of that is that you can have a bad person that's not guilty of a crime, correct?

{¶ 40} "JUROR: Yes.

{¶ 41} "THE COURT: So we're back to the question I asked before: Can you wait until the end of the case, until you have heard all the facts, until you go back with the other 11 jurors before you make a decision?

{¶ 42} "JUROR: *I'll try.*

{¶ 43} "THE COURT: Good. Miss Moreland?

{¶ 44} "MS. MORELAND: Do you feel that your bias about my client's lifestyle will impact you in your deliberations?

{¶ 45} "THE WITNESS: That's why I'm here. I'm trying to be honest and I wanted to be on a jury trial. My boss was going to write me a note to get out of this and I said, no, I don't think that's right, you know, and –

{¶ 46} "MS. MORELAND: Was there anyone else in the bathroom besides Amy and her sisters?

{¶ 47} "JUROR: * * * I don't know who else was in there * * *. I'm just trying to be – I have never done this before. I'm trying to be totally honest about what's going on and, and I'm nervous as heck to come in here and say this, and I thought about this a lot last night.

{¶ 48} "THE COURT: Sounds to me like you're a very conscientious girl and that's what want [sic]. But every time I open my mouth I'm going to ask the same question: Can you wait until you hear all the facts, okay, at the end of this case Miss Moreland is going to say or Mr. Kolesar is going to say I have no further witnesses, okay, and you can't start making your decision then, you have to wait until I give you the instructions and you have to wait until you're back in the jury room, and that's when you start making your decision, okay? And so once again, can you do that?

{¶ 49} "THE WITNESS: *I will try, okay, I'll try my best.*

{¶ 50} "THE COURT: *So as you walk out of here, the answer is yes.* It's your intent to follow my instructions all right anything else from anybody?

{¶ 51} "MS. MORELAND: We appreciate your honesty." (Emphasis added.)

{¶ 52} To establish a claim of ineffective assistance of counsel, the defendant must prove that counsel's performance fell below an objective standard of reasonable representation and that prejudice arose from counsel's performance. *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph two of syllabus. "To warrant reversal, '[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Bradley*, supra at 142, quoting *Strickland v. Washington* (1984), 466 U.S. 668, 694.

{¶ 53} *Strickland* cautioned that "[j]udicial scrutiny of counsel's performance must be highly deferential. * * *" *Strickland*, supra, at 689. In addition, "[b]ecause of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. * * *" *Id.*

{¶ 54} Accordingly, this court must consider not only whether trial counsel's failure either to ask for the juror to be removed and replaced by an alternate or to request a mistrial fell below an objective standard of reasonable representation, but also whether there is a reasonable probability that the result of the trial would have been different absent the alleged error.

{¶ 55} It is significant that the scenario that occurred in the ladies' restroom and the juror's reaction to what she heard came to the attention of the trial court and defense

counsel early in the proceedings – on the morning of the second day of trial. At that point, only one witness had testified; there remained at least nine witnesses to testify. When questioned by the trial court, the juror did not affirmatively or clearly state that she would listen to the testimony and make a decision only after the close of all evidence. She said she would *try*. However, the juror's statement that she would try came after she (1) told the court that she considered anyone who behaved as appellant to be "pond scum," (2) specifically indicated she "[could] not believe anything that she would say" and (3) stated that she did not believe "somebody like that" was a "responsible person."

{¶ 56} The record reflects that the trial court attempted to rehabilitate the juror by reminding her that there was no connection between appellant's actions "as a person" and whether or not she committed the crimes for which she was being tried.

{¶ 57} "An accused is entitled to a trial before an impartial, unprejudiced, and unbiased jury." *State v. Daniels* (1993), 92 Ohio App.3d 473, 486. This right is guaranteed by both the Ohio and United States Constitutions. *State v. Jaryga*, 11th Dist. No. 2003-L-023, 2005-Ohio-0352, at ¶ 72. A jury's verdict must be based solely on the evidence and argument presented in open court, not on any outside influence. *Patterson v. Colorado* (1907), 205 U.S. 454, 462; see also *Smith v. Phillips* (1982), 455 U.S. 209, 217. ("Due process [requires] a jury capable and willing to decide the case solely on the evidence before it.")

{¶ 58} Prejudice is presumed when a criminal defendant has proven juror misconduct. See *State v. Hood* (1999), 132 Ohio App.3d 334, 338; *State v. Spencer* (1997), 118 Ohio App.3d 871, 873; *State v. King* (1983), 10 Ohio App.3d 161, 165.

{¶ 59} Trial courts are given broad discretion in the disposition of allegations of juror misconduct. *State v. Keith*, 79 Ohio St.3d 514, 526, 1997-Ohio-0367. These assertions of juror misconduct are reviewed for an abuse of discretion. *Id.* at 528. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Adams* (1980), 62 Ohio St.2d 151, 157. When applying this standard of review, we may not substitute our judgment for that of the trial court. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621. Therefore, while we must defer to the trial court if its decision is reasonable, in this instance, the seated juror expressed an openly adverse and hostile opinion about the defendant herself. Referring to the defendant as "pond scum" had, in fact, not only evidenced the juror's ability to be impartial but ascended to the realm of prejudicial.

{¶ 60} By her own words, the juror demonstrated an extremely strong negative opinion about appellant and, to her credit, clearly was attempting to be open and honest with the court about her feelings. Further, the likelihood that defense counsel, no matter how experienced or highly skilled, could overcome the extent of juror bias described above is so slim that we are left with no choice but to assume that appellant was prejudiced by counsel's failure to ask the trial court to remove the juror immediately.

{¶ 61} This court is mindful of the *Strickland* court's insistence that judicial scrutiny of counsel's performance must be highly deferential. However, the bias expressed by the juror in this case clearly undermines our confidence in the outcome of

the proceedings herein. If we cannot have confidence in the outcome, we cannot conclude that substantial justice was done.

{¶ 62} Therefore, finding a reasonable probability that the outcome of the trial would have been different but for counsel's unprofessional error as discussed herein, appellant's first assignment of error is well-taken. As a result of our disposition of assignment of error No. 1, appellant's second, third, fourth, fifth, sixth, seventh, eighth, ninth and tenth assignments of error are rendered moot.

{¶ 63} On consideration whereof, the judgment of the Sandusky County Court of Common Pleas is reversed and this matter is remanded for further proceedings consistent with this decision. Costs of this appeal are assessed to appellee pursuant to App.R. 24.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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