**[Cite as *State v. Bunce*, 2010-Ohio-3629.]**

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

State of Ohio — Court of Appeals No. L-08-1237

Appellee — Trial Court No. CR200802146

v.

Rodney J. Bunce — **DECISION AND JUDGMENT**

Appellant — Decided: August 6, 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Evy M. Jarrett, Assistant Prosecuting Attorney, for appellee.

Bertrand R. Puligandla, for appellant.

* * * * *

OSOWIK, P.J.

**{¶ 1}** This is an appeal from a judgment of the Lucas County Court of Common Pleas. A jury found appellant guilty of Count I, aggravated murder, R.C. 2903.01(B) and (F), an unclassified felony, and Count II, aggravated robbery, R.C. 2911.01(A)(3), a felony of the first degree. The trial court sentenced appellant to life in prison with

eligibility of parole after 20 years for Count I. In addition, appellant was sentenced to eight years in prison for Count II. These counts were to be served consecutively. For reasons set below, this court affirms the judgment of the trial court.

**{¶ 2}** Appellant, Rodney J. Bunce, sets forth the following four assignments of error:

**{¶ 3}** "I. The trial court allowed Evelyn Johnson to opine, over objection, that Bunce was guilty, even though that testimony was not rationally based on her perception, and not based on her personal knowledge. Where the State's case was circumstantial, and the other evidence did not overwhelmingly establish guilt, did the trial court abuse its discretion, and was Bunce deprived of his due-process right to a fair trial?

**{¶ 4}** "II. The State's evidence was conflicting in several key areas, left important questions unanswered, and at least one of the State's key witnesses gave testimony that was shown to be untrue. Was Bunce's conviction obtained in violation of his due-process rights, and against the manifest weight of the evidence?

**{¶ 5}** "III. Trial counsel failed to move for a mistrial based on invalid lay opinion testimony of Bunce's guilt, and based on sleeping jurors; and his deficient cross-examination of the State's DNA expert was not a matter of trial strategy. Was Bunce deprived of his right to the effective assistance of counsel?

**{¶ 6}** "IV. Two jurors fell asleep during the trial, the first instance of which occurred during a critical testimony, and which was acknowledged by the trial court sua sponte. Was Bunce deprived of his due-process right to an attentive jury?"

**{¶ 7}** In March 2005, Jesse Coleman was approximately 75 years old. He lived alone in a small apartment building located in North Toledo. Mr. Coleman used a cane and required help around the house. Given his advanced age and diminished mobility, Coleman's daughter would customarily check-in with and assist her father with chores and errands.

**{¶ 8}** Appellant's brother was Coleman's landlord. Appellant had resided in and performed maintenance tasks at the apartment since 2003. The eight-unit apartment building where Coleman, appellant, and the co-defendant all resided was comprised of two floors. The first floor included Coleman's small efficiency apartment and a storage room. The second floor consisted of seven boarding style rooms and a single shared bathroom. Appellant and the co-defendant had rooms on the second floor.

**{¶ 9}** On March 1, 2005, Coleman's daughter spoke with him over the telephone. On March 3, 2005, Coleman cashed a $995 social security check and a $421 pension check. That same day, appellant's brother collected the monthly rent from Coleman. Coleman habitually paid his rent in cash. On March 4, 2005, a Mobile Meals volunteer made a delivery to Coleman before noon. Coleman accepted the delivery.

**{¶ 10}** Coleman's daughter attempted to contact her father the following day, March 5, 2005, and again on March 6, 2005. She was unable to reach him. Phone records confirm these attempted calls. Amid growing concerns, Coleman's daughter went to the apartment complex to check on her father on March 7, 2005. When she arrived,

she discovered her father's door standing partially open. She proceeded in, observed her father on the floor, and immediately contacted 911.

**{¶ 11}** Coleman had been killed. There was no sign of forced entry into his apartment. There was dried blood found on Coleman's clothing and hands indicative of defensive wounds. A knife was found underneath Coleman's head. A bandage which contained DNA evidence was discovered in close proximity to his bed. The pockets of Coleman's sweatpants were turned inside out. Police were unable to locate Coleman's wallet.

**{¶ 12}** The coroner's examination of Coleman's body indicated that he suffered wounds to his neck and also sustained blunt force injuries to his head. The knife wound to the neck was determined to be the primary cause of death with a contributing cause of blunt force injuries to the head. These injuries were consistent with being caused by separate instruments. The coroner established that Mr. Coleman had been deceased for approximately 12 to 24 hours.

**{¶ 13}** After police concluded investigating the scene, Coleman's daughter began to clean the apartment. In the process, she discovered an additional microwave and a Western Union receipt dated March 4, 2005, in the name of the co-defendant. She promptly turned this evidence in to the police.

**{¶ 14}** Among the residents of the second floor rooming house above victim's apartment were appellant, the co-defendant, and a third-party witness. On the night of March 4, 2005, appellant, co-defendant, and another resident along with her boyfriend

were all in appellant's room watching a movie. The other resident and her boyfriend went back to her room prior to the conclusion of the film.

**{¶ 15}** Later that evening, the co-defendant was witnessed going from room to room soliciting his neighbors wanting to sell a microwave. Sometime after midnight on March 4, 2005, appellant and the co-defendant went to the home of Evelyn Johnson which was nearby their apartment. They sought Mrs. Johnson's assistance in obtaining crack cocaine. Each man was seen with a significant amount of cash in his possession. It appeared to Mrs. Johnson that appellant and the co-defendant were to split the cost of the narcotics purchase. Both men acted noticeably nervous and kept looking behind their backs. Mrs. Johnson refused the request to assist in their quest for crack cocaine. The men left the Johnson home and began walking back toward their apartment complex.

**{¶ 16}** At approximately 1:30 a.m. on March 5, 2005, Black and White Cab Service received a call from the co-defendant. The taxi driver subsequently identified appellant and the co-defendant in a photo lineup. Police obtained phone records revealing appellant's phone as the outgoing number to the cab service. The driver indicated that the end of the ride was at approximately 1:44 a.m.

**{¶ 17}** All residents of the apartment building were interviewed by police after Coleman's body was found. Appellant originally stated that on the night of March 4, 2005, he had been watching a movie with another resident and her boyfriend. Appellant also stated that he went to bed after the couple had left. Investigating detectives were introduced to the co-defendant by the appellant. The co-defendant left the city of Toledo

the day after he was interviewed. Police subsequently located the co-defendant in the state of Florida.

**{¶ 18}** Appellant was interviewed again on June 6, 2007. Appellant denied taking the taxi ride the weekend Coleman was killed. Appellant further denied having any conversations with the co-defendant after his departure from Toledo. Appellant stated that the co-defendant asked him to borrow money, and that he refused because he did not have any money. Approximately a year later, police interviewed appellant again on three additional occasions.

**{¶ 19}** On February 18, 2007, appellant denied knowing anything about the homicide and stated he first learned about the circumstance when the police arrived on March 7, 2005. In this interview appellant once again denied having contact with the co-defendant following his departure from Toledo.

**{¶ 20}** During the second interview on March 2, 2008, appellant denied even knowing the co-defendant. Appellant also denied knowing anything about the additional used microwave found in the victim's apartment.

**{¶ 21}** On March 28, 2008, in the course of the last interview, appellant stated that he informed the co-defendant that Coleman had money, and in turn the co-defendant told him he had plans to rob Coleman. Appellant also claimed that the co-defendant had sold the microwave to Coleman around 6:00 p.m. on March 4, 2005. Appellant further stated that the co-defendant planned on returning to Coleman's apartment under the pretense of dropping off the microwave box as a method of gaining entry into the victim's apartment.

Appellant ultimately conceded that he did receive phone calls from the co-defendant after his departure to Florida. Phone records confirm these previously denied calls.

**{¶ 22}** Appellant was indicted on May 16, 2008, along with the co-defendant. DNA evidence was introduced at trial to link appellant to the homicide. The bandage found in Coleman's apartment was found to contain a DNA match to that of appellant. The state's forensic expert estimated that the possibility of another DNA match to that of appellant was 1 in 155,600,000,000,000 unrelated individuals. A jury considered this evidence in tandem with phone records and witness testimony. On June 26, 2008, the jury convicted appellant of Count I, aggravated murder, and Count II, aggravated robbery. The trial court sentenced appellant to serve life in prison with eligibility of parole in 20 years and with an additional eight years for Count II, to be served consecutively. Appellant timely filed this appeal.

**{¶ 23}** In his first assignment of error appellant asserts that the trial court erred when it allowed Mrs. Johnson to opine, over objection, that appellant was guilty, because her testimony was not rationally based on her perception or personal knowledge. Mrs. Johnson testified that she reported information to law enforcement authorities because "the [victim] did not deserve to die over some drugs." Mrs. Johnson also stated that "[she] couldn't let it go on that I know my cousin was part or [defendant] was part of something." Evidentiary rulings are given deference on appeal in the absence of an abuse of discretion that has created material prejudice to the appellant. *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, ¶ 66.

**{¶ 24}** Appellant cites *State v. Rakes* (Dec. 30, 1997), 3d Dist. No. 11-97-9, in support of his assertion that Mrs. Johnson's opinion was not based on personal knowledge. In *Rakes* the appellant's wife testified that the autopsy report made her feel like the defendant, her husband, had been the cause of her child's death. The autopsy report led to the witness's suspicions about her husband. The Third District stated that such testimony is not related to firsthand knowledge of the cause of death. Id.

**{¶ 25}** Opinion testimony by lay witnesses must be either "rationally based on his or her perception" or "helpful to a clear understanding of his or her testimony." In the present case Evelyn Johnson's statements were both rationally based on her perception and helpful to a clear understanding of why she was testifying.

**{¶ 26}** Unlike the witness in *Rakes*, Mrs. Johnson did have personal knowledge and experience of events that occurred on March 4, 2005. Earlier that day, she had given the co-defendant a ride to pick up money from Western Union. There was a Western Union receipt which was found in Mr. Coleman's apartment. On that night, Mrs. Johnson witnessed the co-defendant and appellant at her door. Mrs. Johnson was asked by the appellant and the co-defendant for aid in obtaining crack cocaine. She personally observed that each man had significant quantities of cash money on hand in conformity with their intent to purchase illicit drugs. These personal observations were rationally based on the perception of Mrs. Johnson, not a report generated by another individual. Finally, the record shows that both the prosecution and defense explored Mrs. Johnson's relationship with co-defendant and appellant, so that the jury was able to make an

assessment of her credibility. Under these facts and circumstances we find no abuse of discretion. We find appellant's first assignment of error not well-taken.

**{¶ 27}** In his second assignment of error, appellant asserts that the conviction was against the manifest weight of the evidence. In determining whether a judgment was against the manifest weight of evidence, an appellate court "weighs the evidence and all reasonable inferences, and considers the credibility of witnesses." *State v. Tompkins* (1997), 78 Ohio St.3d 380, 387. The court then sits as a "thirteenth juror" and determines whether the fact finder lost its way, resulting in a manifest miscarriage of justice, such that the conviction must be reversed. Id.

**{¶ 28}** The record encompasses ample evidence in this case from which a jury could conclude beyond a reasonable doubt that appellant was guilty. Appellant's DNA was found on a bandage in the victim's apartment. Appellant was aware of and disclosed the victim's habits which lead to the facilitation of a robbery. Appellant denied having any cash that weekend, but Mrs. Johnson testified that he came to her with a "wad" of money to purchase crack cocaine. Appellant implausibly denied knowing anything about the microwave, but later told police of its purpose in facilitating a robbery. Appellant told authorities that he had not spoken with the co-defendant since his departure, but subsequently recanted these misrepresentations when confronted with phone records of contacts with the co-defendant. In sum, appellant has not supported his assertion that his conviction was a miscarriage of justice. Wherefore, we find appellant's second assignment of error not well-taken.

**{¶ 29}** In his third assignment of error, appellant asserts that he was denied effective assistance of counsel. Appellant respectively asserts that defense counsel's failure to move for a mistrial after Mrs. Johnson opined as to appellant's guilt, failure to move for mistrial on the basis of sleeping jurors, failure to adequately preserve the issue of sleeping jurors for appeal, and failure to rebut DNA evidence introduced at trial all constituted ineffective assistance of counsel.

**{¶ 30}** A claim of ineffective assistance of counsel is reviewed under the two-part test found in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2520, 80 L.Ed.2d 674. To prevail on the claim, appellant must show: "(1) that the defense counsel's representation fell below an objective standard of reasonableness and (2) that counsel's deficient representation was prejudicial to the defendant's case." *State v. McGee*, 7th Dist. No. 07 MA 137, 2009-Ohio-6397, citing *State v. Bradley* (1989), 42 Ohio St.3d 136. See, also, *Strickland*, supra, at 694.

**{¶ 31}** We have carefully reviewed and considered appellant's claims of deficient representation and find no evidence that appellant was prejudiced by counsel's alleged missteps. Counsel's failure to move for a mistrial after Mrs. Johnson made a statement about appellant's involvement in this murder was not prejudicial given our finding that the testimony was based on her personal knowledge and did not reach the ultimate issue. Appellant's assertion that counsel's failure to move for mistrial due to sleeping jurors and failure to preserve the issue on appeal were not ineffective assistance of counsel. On the contrary, the trial court determined that the jurors in question were not sleeping.

Furthermore, appellant's allegations, if true, would not lead to a prejudicial outcome. The testimony in question was repeated on several occasions throughout the trial, giving the jurors adequate opportunity to assess all presented evidence. Finally, counsel's mode of cross-examination pertaining to the state's DNA expert is a matter of legal strategy. It is not uncommon for legal representation to avoid an aggressive cross-examination of expert testimony, for risk of further accrediting the expert's analytical results. "The failure to challenge the admissibility of DNA evidence cannot be considered ineffective assistance of counsel." *State v. Nichols* (1993), 66 Ohio St.3d 431, 437. We find appellant's third assignment of error not well-taken.

**{¶ 32}** In his last assignment of error, appellant claims that two jurors fell asleep during the trial, depriving him of his right to due process. If a party fails to express dissatisfaction with the trial court's handling of an issue, the issue is waived in the absence of plain error. *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, ¶ 185. In addition, the party disputing jury conduct must establish prejudice. *State v. King*, 6th Dist. No. L-08-1126, 2010-Ohio-290.

**{¶ 33}** In the present case, appellant never raised the issue of sleeping jurors during trial. Therefore, plain error is the appropriate standard of review. We note that the trial court admonished the jury to be alert, and briefly addressed appellant's concerns with jury misconduct during sentencing. On review, the trial court is given considerable discretion in deciding how to handle perceived shortcoming of jurors. Appellant alleges that jurors missed large and critical portions of appellant's testimony including facts that

appellant performed maintenance work around the apartment, appellant did not possess a key to Coleman's room, there was no problem with the heater in Coleman's apartment, and finally that co-defendant left shortly after the body was found. The trial record reveals that these facts were discussed in evidence from other sources including Mrs. Johnson, residents of the apartment complex, investigating detectives, and other third-party witnesses including the cab driver and Mobile Meals volunteer. Therefore, if appellant's allegations are true, he has failed to establish prejudice. As such, we find appellant's fourth assignment of error not well-taken.

**{¶ 34}** The judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

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

Peter M. Handwork, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
JUDGE

Keila D. Cosme, J. _____
CONCUR.
JUDGE