

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

State of Ohio

Court of Appeals No. L-11-1086

Plaintiff

Trial Court No. CR-10-1636

v.

Ray Gott

DECISION AND JUDGMENT

Defendant

Decided: July 19, 2011

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
John J. Weglian, Assistant Prosecuting Attorney, for plaintiff.

* * * * *

PER CURIAM.

{¶ 1} This matter is before the court on the state of Ohio's motion for leave to appeal, pursuant to R.C. 2945.67 and App.R. 5. The state seeks leave to appeal "(1) several evidentiary *decisions* by the trial court during the course of a jury trial; (2) the trial court's instructions to the jury, and (3) the trial court's denial of the State's motion for a mistrial." The defendant in this case, Ray Gott, has filed a separate appeal, which is currently pending. See *State v. Gott*, 6th Dist. No. L-10-1070.

{¶ 2} Appeals by the state in criminal proceedings are specifically governed by R.C. 2945.67(A). *In re A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, ¶ 30. Pursuant to R.C. 2945.67(A), the state may appeal as of right an order which: "(1) grants a motion to dismiss all or any part of an indictment, complaint, or information; (2) grants a motion to suppress evidence; (3) grants a motion for the return of seized property; and (4) grants postconviction relief. " *In re A.J.S.*, supra, at ¶ 30. The statute also provides that, with the exception of final verdicts, the state may appeal any other decision in a criminal case by leave of the court of appeals. *Id.*

{¶ 3} Thus, under R.C. 2945.67(A), an appellate court has discretionary authority to determine whether to hear an appeal from a decision which is adverse to the prosecution, other than a final verdict. *State v. McGhee*, 10th Dist. No. 07AP-216, 2007-Ohio-6537, ¶ 5, citing *State v. Bistricky* (1990), 51 Ohio St.3d 157. Review in a state appeal is granted when the underlying legal question is capable of repetition yet evading review. See *Bistricky*, supra, at 158-159; *Storer v. Brown* (1974), 415 U.S. 724, 737, fn. 8.

{¶ 4} Therefore, the decision to grant or deny the state's motion for leave to appeal lies solely within the discretion of the court of appeals. *State v. Fisher* (1988), 35 Ohio St.3d 22, paragraph two of the syllabus; *State v. Burke*, 10th Dist. No. 06AP-656, 2006-Ohio-4597, ¶ 8. "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." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 5} In this case, the state's first five proposed assignments of error, which are based upon the trial court's evidentiary decisions during the course of trial, state:

{¶ 6} "I. The trial court abused its discretion in admitting testimony regarding a victim's past acts, when the defendant failed to establish that he knew about any of those acts at the time of the shootings.

{¶ 7} "II. The trial court abused its discretion in permitting testimony from a treating physician as to defendant's past mental state, when he had not treated the defendant for several months, the defendant had not entered an insanity plea, and the doctor acknowledged that he could not offer any testimony as to the defendant's state of mind on the night of the shootings. The trial court compounded the error by refusing to permit cross-examination regarding the reasons for the treatment, even though the doctor proffered for the record that the circumstances of the treatment had a direct bearing on his diagnosis of the defendant.

{¶ 8} "III. The trial court abused its discretion by permitting defense counsel to elicit testimony from a detective about statements by witnesses made to other detectives, when the testifying detective never spoke to those witnesses and had only read the other detectives' reports.

{¶ 9} "IV. The trial court abused its discretion in admitting over the State's objection a prior recorded statement of a witness, who was present and available to testify. The recorded statement included hearsay and other objectionable testimony, but

because the tape was played in full, the prosecution was deprived of a meaningful opportunity to object to each impermissible statement on the tape.

{¶ 10} "V. The trial court abused its discretion by permitting defendant to present testimony from his thirteen-year-old niece by videoconference from the Coosa Valley Detention Center in Alabama, when the defendant did not demonstrate that he had made reasonable efforts to obtain her personal appearance at trial, and when the State was not permitted to verify the reason for her detention at Coosa Valley."

{¶ 11} It is well-established that a trial court "has broad discretion in the admission of evidence and unless it has clearly abused its discretion * * * the appellate court should not disturb the decision of the trial court." *State v. Barnes* (2002), 94 Ohio St.3d 21, 23, *State v. Issa* (2001), 93 Ohio St.3d 49, 64. Since the first four assignments of error involve decisions regarding hearsay, admissibility of evidence, and mode of testimony, such decision would be reviewed only for an abuse of the trial court's discretion. Our review of the arguments indicates that such errors, if any, were dependent on the specific facts of this case and do not pose any potential for repetitive error which might evade review. Therefore, the state's motion for leave to appeal on assignments of error one through five is denied.

{¶ 12} The State also asks for leave to appeal on the following assignment of error:

{¶ 13} "VI. The trial court erred in instructing the jury on voluntary manslaughter, when there was no evidence suggesting defendant was under the influence of sudden

passion or in a sudden fit of rage, brought on by serious provocation occasioned by the victim and reasonably sufficient to incite defendant into using deadly force."

{¶ 14} The giving of jury instructions is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *State v. Martens* (1993), 90 Ohio App.3d 338. A defendant charged with murder is entitled to an instruction on voluntary manslaughter when the evidence presented at trial would reasonably support both an acquittal on the charged crime of murder and a conviction for voluntary manslaughter. *State v. Shane* (1992), 63 Ohio St.3d 630, 632; *State v. Deem* (1988), 40 Ohio St.3d 205, 211. When the evidence presented at trial going to a lesser included offense (or inferior-degree offense) meets this test, the trial judge *must* instruct the jury on the lesser (or inferior-degree) offense. *State v. Loudermill* (1965), 2 Ohio St.2d 79, syllabus.

{¶ 15} Again, this error, if any, is limited to the facts within this case, and the trial court's decision that enough evidence had been presented to warrant the instruction. The state does not claim that the instruction given was not a correct statement of the law, but only that it was not warranted. We note that the inclusion of the instruction is supported by the fact that the jury did find the defendant guilty of the lesser crime of involuntary manslaughter. In addition, even if an error occurred, the state has not shown that this is likely to be repetitive or not subject to further review. Therefore, the state's motion for leave to appeal the sixth assignment of error is denied.

{¶ 16} Finally, the state seeks leave to appeal a seventh issue:

{¶ 17} "VII. The trial court abused its discretion in denying the State's motion for a mistrial."

{¶ 18} The state's argument that a mistrial should have been granted is based on claimed errors in the admission of evidence as presented in previous proposed assignments of error. Since we have already determined that any evidentiary issues were within the discretion of the trial court and did not present errors which were likely to be repeated and yet evade review, we decline to grant leave to appeal any such alleged error.

{¶ 19} Accordingly, the state's motion for leave to appeal in this case is not well-taken and is denied. Costs assessed to plaintiff.

MOTION DENIED.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, P.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: http://www.sconet.state.oh.us/rod/newpdf/?source=6.
