

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

State of Ohio

Court of Appeals No. WD-12-050

Appellee

Trial Court No. 2011-CR-0465

v.

Herbie H. Betz

DECISION AND JUDGMENT

Appellant

Decided: January 10, 2014

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney,
Gwen Howe-Gebers, Chief Assistant Prosecuting Attorney,
and David E. Romaker, Jr., Assistant Prosecuting Attorney,
for appellee.

Jeffrey M. Gamso and Jeremy Levy, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant, Herbie H. Betz, appeals from the April 18, 2012 judgment of the Wood County Court of Common Pleas sentencing appellant following his conviction by a jury. Because we find the trial court committed a structural error, we reverse.

{¶ 2} Appellant was tried on an eight-count indictment. During the trial, a juror notified the court that over the lunch hour recess, while she and an alternate juror had lunch at the same restaurant, she observed that appellant's daughter and future daughter-in-law appeared to be watching her. The juror recognized the women because of their presence in the courtroom. After leaving the restaurant, the two women followed the juror to another location and, while intently staring at her, appeared to be writing down her license plate number. When the juror returned to the parking lot near the court, she saw the same two women openly writing down her license plate number and watching the juror. The alternate juror also noticed, upon her return to the court, the women were observing the alternate juror and appeared to be writing down her license number. After the jury returned to the court after lunch, the defense presented its case.

{¶ 3} Approximately two and one-half hours after the jury retired for deliberations, the juror relayed to the remainder of the jury as well as the bailiff, that she had felt intimidated by the lunchtime incident. The court instructed the bailiff to inform the jury members that he "did not want any consideration of any of this in their deliberations." The juror was reassured that the authorities would be contacted and she would be escorted to her car.

{¶ 4} The judge and counsel met to discuss the matter. The prosecution noted that the witnesses had been threatened and, therefore, the prosecution was concerned about the safety of the jurors. Defense counsel and the prosecution agreed with the court that since there was no communication with the jurors, it was not prudent to voir dire either

the particular jurors involved nor the entire panel because such examinations might increase the prejudice to appellant. Approximately one hour later, the jury returned its guilty verdict. Appellant immediately moved for a mistrial. The court denied the motion. Appellant appealed from the judgment of conviction and sentencing asserting the following assignments of error:

Assignment of Error No. 1

The trial court committed error when it overruled Mr. Betz's motion for a mistrial based on the jurors being told that one of their number as well as an alternate believed that members of Mr. Betz's family were following them and making note of the license plate numbers on their cars and that they were concerned for their safety.

Assignment of Error No. 2

The order for restitution is void and should be vacated because it was not entered in open court.

Assignment of Error No. 3

Because a government agency which advances money for purposes of an undercover operation is not a statutory "victim" of a crime, the trial court erred in ordering restitution to that government agency.

Assignment of Error No. 4

Because a restitution order must bear a reasonable relationship and be limited to the actual economic loss suffered by the victims of crimes of

which the defendant was convicted, the trial court committed error when it imposed a restitution order that was not limited to the victims' actual economic loss.

{¶ 5} In his first assignment of error, appellant argues that the trial court erred by denying his motion for a mistrial. Appellant argues that any improper contact with a juror in a criminal action is presumptively prejudicial especially in light of the fact that the improper communication occurred just as the defense began to present its case. Further, he argues the prosecution had the duty to establish, at a hearing, that the contact was harmless. Finally, appellant argues that when the trial court denied his motion for a new trial without a hearing, the trial court erred as a matter of law.

{¶ 6} Crim.R. 33(A)(1) provides that a new trial may be granted for improper third-party communication with a juror if the defendant is prejudiced by such misconduct. *State v. Hipkins*, 69 Ohio St.2d 80, 83, 430 N.E.2d 943 (1982), modified on other grounds by *State v. Gilmore*, 28 Ohio St.3d 190, 503 N.E.2d 147 (1986), syllabus, and *State v. Maxwell*, 6th Dist. Wood No. WD-89-47, 1990 WL 109959, *6 (Aug. 3, 1990). A trial court's ruling on a motion for new trial, for a reason which requires the exercise of discretion, will not be reversed on appeal unless there has been a showing that the trial court abused its discretion. *State v. Grant*, 67 Ohio St.3d 465, 480, 620 N.E.2d 50 (1993), and *State v. Schiebel*, 55 Ohio St.3d 71, 76, 564 N.E.2d 54 (1990).

{¶ 7} First, we agree with appellant that the incident in this case involved an improper “outside communication with a juror” even though it involved non-verbal communication. “[A]ny private communication, contact, or tampering directly or indirectly, with a juror” intended to influence the juror’s deliberations constitutes an improper outside communication with a juror. *Remmer v. United States*, 347 U.S. 227, 229, 74 S.Ct. 450, 98 L.Ed. 654 (1954). The juror who witnessed the incident clearly believed there had been an attempt to intimidate her and expressed her concerns to the bailiff and the jury panel.

{¶ 8} The second question is whether the improper third-party communication affected the ability of each juror to be fair and impartial and thus prejudiced appellant. Whenever a colorable claim of an improper third-party communication with a juror has been presented, the court must hold a *Remmer* hearing to determine the factual circumstances, the impact upon the juror, and whether the communication was prejudicial to the defendant. *Id.*; *Smith v. Phillips*, 455 U.S. 209, 215-217, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982); and *State v. Gunnell*, 132 Ohio St.3d 442, 2012-Ohio-3236, 973 N.E.2d 243, ¶ 30-37. Compare *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, 837 N.E.2d 315, ¶ 192. Once the trial court has all of the facts and the parties have had an opportunity to present their arguments, the court can properly exercise its discretion to deal with the situation. *United States v. Olano*, 507 U.S. 725, 738-739, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993); *Remmer*; *McKnight* at ¶ 191; and *State v. Phillips*, 74 Ohio St.3d 72, 88, 656 N.E.2d 643 (1995).

{¶ 9} In the case before us, the court learned from the bailiff of the third-party communications and directed the bailiff to tell the jury panel to ignore them during deliberations. While the court met with counsel in chambers and on the record, the court did not make any inquiry regarding how the jurors were affected by the third-party communication and whether they could remain fair and impartial.

{¶ 10} We conclude the trial judge failed to fulfill his fundamental duty to ensure the trial was fair and impartial. Appellant has a constitutional right to due process, including the right to a presumption of innocence and the right to a fair and impartial jury. Without knowledge that the jurors could remain fair and impartial, the court could not exercise its sound discretion in ruling on the motion for a new trial. Therefore, we find that the trial court's error gave rise to a constitutional presumption of prejudice and requires automatic reversal of the denial of the motion for a mistrial. *State v. Fisher*, 99 Ohio St.3d 127, 2003-Ohio-2761, 789 N.E.2d 222, ¶ 9-10. Appellant's first assignment of error is well-taken.

{¶ 11} Because our ruling on appellant's first assignment of error requires the case to be retried, we find the remaining two assignments of error are rendered moot.

{¶ 12} Having found that the trial court did commit error prejudicial to appellant, the judgment of the Wood County Court of Common Pleas is reversed. This case is remanded to the trial court for further proceedings. Appellee is ordered to pay the court costs of this appeal 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.

Arlene Singer, J.

JUDGE

Thomas J. Osowik, J.

JUDGE

James D. Jensen, 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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