[Cite as *State v. Casino*, 2010-Ohio-510.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92536

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

RAYMOND CASINO

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-500113

BEFORE: Dyke, P.J., Celebrezze, J., and Jones, J.
RELEASED: February 18, 2010

JOURNALIZED:

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ANN DYKE, P.J.:

{¶ 1} Defendant-appellant, Raymond Casino ("appellant"), appeals his conviction for theft. For the reasons set forth below, we affirm.

{¶ 2} On August 23, 2007, the Cuyahoga County Grand Jury indicted appellant on one count of breaking and entering in violation of R.C. 2911.13(A) and one count of theft in violation of R.C. 2913.02(A)(1). He pled not guilty to the charges and the case proceeded to trial on April 30, 2008.

{¶ 3} At trial, the evidence established that on May 21, 2007, Paul Driver moved out of the Riverside Gardens apartment complex. Living with him that month was his brother, Matthew Driver. Paul testified that he sent his brother, along with appellant, to retrieve a grill, headboard, footboard, air conditioner, and bicycle from his storage locker.

{¶ 4} Jason D'Andrea testified that on May 22, 2007, a day after Paul Driver moved from the complex, he, also a resident at the apartment complex, noticed his stereo equipment and speakers, along with some carpet samples, stolen from his walk-in storage locker. He explained that his storage locker was adjacent to Paul Driver's locker and that, not only did he notice his stereo equipment and speakers, which were quite large in size, were missing, but that the latch, which had a personal padlock at the end, had been cut on his locker. He further provided that all the storage lockers were located in the same basement of the apartment building and that only residents had possession of the key necessary to access the room. After realizing his property was gone, he

asked the other tenants about the situation, and soon thereafter, contacted the police.

{¶ 5} Deanna Zawacki, D'Andrea's fiancée and co-resident, testified that on the day D'Andrea noticed his stereo equipment missing, she saw a big black box that resembled D'Andrea's speakers in appellant's truck. She further provided that the truck was parked approximately ten feet from the storage locker area. Initially, she did not make a connection between the stolen speakers and the truck because she knew that Paul Driver was moving out at that time. Two days later, however, after speaking with D'Andrea and realizing that the boxes were his speakers, she took note when the truck returned and was parked in the same spot. At that time, she obtained its license plate number. Later, the police were able to identify the vehicle as belonging to appellant.

{¶ 6} Detective Jeanie Joyce of the Cleveland Police Department testified that both Matthew and appellant admitted to being at the building during the time of the incident, but both denied stealing anything.

{¶ 7} Finally, Helen Miskovitz testified that while appellant was scheduled to work from noon until 4:00 p.m. on the day of the incident, she was unable to verify his presence because attendance is based upon an "honor system."

{¶ 8} After hearing the foregoing testimony and receiving instructions from the court, the jury proceeded to deliberations. On May 1, 2008, the jury found appellant not guilty of breaking and entering as charged in the first count but guilty of theft as charged in count 2. On June 2, 2008, the trial court sentenced

him to time served.

{¶ 9} Appellant now appeals and presents two assignments of error for our review. His first assignment provides:

{¶ 10} "A trial judge commits misconduct and undermines a defendant's constitutional right to due process and a fair trial by making inappropriate and prejudicial comments during the charge to the jury and following the verdict. Fifth and Fourteenth Amendments to the United States Constitution; Section 16, Article I of the Ohio Constitution (T.p. 285-286)."

{¶ 11} In this assignment of error, appellant complains that the trial court committed judicial misconduct when it "made statements that effectively coerced the jury into reaching a speedy verdict." In maintaining this proposition, appellant argues that the trial judge made comments that jury questions are a time-consuming process and that he hoped that a verdict could be reached that day. Because appellant failed to object to the judge's statements at trial, we review only for plain error, which "does not exist unless it can be said that, but for the error, the outcome of the trial would clearly have been otherwise." *State v. Moreland* (1990), 50 Ohio St.3d 58, 62, 552 N.E.2d 894.

{¶ 12} While performing his or her duties, a trial judge must recognize the effect his comments may have upon a jury. *State v. Thomas* (1973), 36 Ohio St.2d 68, 71, 303 N.E.2d 882, 884. There is no doubt that juries tend to give great deference to a trial judge's words. Id. Therefore, certain improper remarks by a trial judge may prejudice a defendant's constitutional rights to a fair

trial. *State v. Wade* (1978), 53 Ohio St.2d 182, 188, 373 N.E.2d 1244.

{¶ 13} "Generally, in determining whether a trial judge's remarks were prejudicial, the courts will adhere to the following rules: (1) The burden of proof is placed upon the defendant to demonstrate prejudice, (2) it is presumed that the trial judge is in the best position to decide when a breach is committed and what corrective measures are called for, (3) the remarks are to be considered in light of the circumstances under which they are made, (4) consideration is to be given to their possible effect upon the jury, and (5) to their possible impairment of the effectiveness of counsel. See, generally, Annotation, 62 A.L.R.2d 166 (1958)." Id.

{¶ 14} In *State v. Hobbs*, Cuyahoga App. No. 81533, 2003-Ohio-4338, this court was presented with a nearly identical situation and found the trial judge's comments not prejudicial. In that case, the defendant complained of the judge's statements encouraging the jury to continue deliberations through their lunch break and that he was "hopeful" that the jury could have a verdict that day. After reading the judge's comments in their entire context, this court determined that he did not pressure the jury to rush into a decision, but rather merely instructed them that he was "hopeful" that a decision could be reached that day. In finding no evidence demonstrating prejudice to the defendant, we also noted that his acquittal of one of the charges demonstrated, not a hasty decision by the jury, but serious consideration of the charges against him.

{¶ 15} We find the instant action very similar to the situation presented in

Hobbs, supra. Here, the trial judge stated:

{¶ 16} "Each of you must decide this case for yourself, but you should do so only after discussions and considerations of the case with your fellow jurors. Don't hesitate to change an opinion if you become convinced your initial opinion was wrong.

{¶ 17} "* * * However, you should not surrender honest convictions in order to be congenial or to reach a verdict solely because of the opinions of your fellow jurors. We can't try this case for you. Again, we can't provide additional evidence, we can't provide additional exhibits. Hopefully you can reach a conclusion in this case without resorting to questions. If there is a question that comes upon in your deliberations, you'll have put the question down on paper and buzz us, provide me with the question, I'll have to call the attorneys into the courtroom, we'll have to fashion a response, we'll have to bring you in, read it to you.

{¶ 18} "So hopefully you can resolve this case, reach a verdict without resorting to questions because it's a very time-consuming process. At this point, ladies and gentlemen, the case is now in your hands for a verdict. It's 11:55 so it's lunchtime. However, we're going to give you the option, you can take 45 minutes for lunch, at which time you cannot discuss the case, or you can go downstairs, grab a bite, take it up - - bring it up and eat and deliberate at the same time. It's my hope that we can reach a verdict this afternoon.

{¶ 19} "If that occurs, it may obviate the need for you to return to the

courthouse. Neither I - - I can't say for sure, but it's unusual to select jurors on a Friday morning. So if we can conclude the case today, you'll be discharged from jury service. That's why I hope returning to - - I don't want you to rush to any judgment. The first thing I'd like you to do is select a foreperson, determine what you'd like to do for lunch. If you want to take a break, please be prepared to be called up at 12:45. * * *."

{¶ 20} In the case sub judice, the trial judge did not pressure the jury into reaching a verdict. As in *Hobbs*, supra, the judge in this case merely stated that he "hoped" the jury could reach a verdict that day. Also, he only proposed that the jury eat their lunches while deliberating and avoid asking unnecessary questions of the court in order to save time. These statements do not indicate any pressure being asserted upon the jury.

{¶ 21} Moreover, other comments indicate the judge's desire for the jury to reach a calculated and well-considered decision. In the same instructions, the judge cautioned the jurors to only decide the case after discussing the matter thoroughly with their fellow jurors. He further provided that they "should not surrender honest convictions in order to be congenial or to reach a verdict solely because of the opinions of your fellow jurors." Ultimately, the judge announced: "I don't want you to rush to any judgment."

{¶ 22} Finally, as in *Hobbs*, we note that the jury's acquittal of appellant on the breaking and entering charge demonstrates the jury's serious consideration of the charges against appellant. In light of the foregoing, we do not find the trial

judge's comments coercive or prejudicial in any manner. Appellant's first assignment of error is without merit.

{¶ 23} His second assignment of error states:

{¶ 24} "Trial counsel provided ineffective assistance of counsel, in violation of the Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution when he failed to object to the trial judge's prejudicial remarks. *Strickland v. Washington* (1984), 466 U.S. 668."

{¶ 25} This court reviews a claim of ineffective assistance of counsel under the two-part test set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. Under *Strickland*, a reviewing court will not deem counsel's performance ineffective unless a defendant can show that his lawyer's performance fell below an objective standard of reasonable representation and that prejudice arose from the lawyer's deficient performance. *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph one of the syllabus. To show prejudice, a defendant must prove that, but for his lawyer's errors, a reasonable probability exists that the result of the proceedings would have been different. Id. at paragraph two of the syllabus. Judicial scrutiny of a lawyer's performance must be highly deferential. *State v. Sallie* (1998), 81 Ohio St.3d 673, 674, 693 N.E.2d 267.

{¶ 26} Because we have separately addressed the underlying ground for this argument in the first assignment of error and found it to be without merit, appellant's claim of ineffective assistance based upon this same ground is

likewise without merit. See *State v. Henderson* (1988), 39 Ohio St.3d 24, 33, 528 N.E.2d 1237. His final assignment of error is also overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANN DYKE, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., and
LARRY A. JONES, J., CONCUR