IN THE SUPREME COURT OF OHIO

STATE OF OHIO	:	Case No. 2023-0683
Appellee	:	On Appeal from the Montgomery County Court of Appeals, Second Appellate
vs.	:	District
DOSHIE BOND	:	Court of Appeals Case No. 29516
Appellant	:	

BRIEF OF APPELLEE, STATE OF OHIO

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THE COURT SHOULD DECLINE JURISDICTION

While this case does involve a felony conviction, this Court should decline to hear Doshie Bond's appeal because this case does not involve a substantial constitutional question, nor does it raise a matter of public or great general interest. *See* Ohio Constitution, Article IV, Section 2(B)(2)(a)(ii) and (e); S.Ct.Prac.R. 5.02(A). The issues presented for this Court's review are well-settled. First, a trial court does not abuse its discretion when it denies a defendant's request for an aggravated assault jury instruction when that request is based upon the mere words of the victim or when the evidence does not support the defendant's claim that he was afraid of the victim. Second, a trial court does not err in exercising its broad discretion in retaining one juror while dismissing another. Finally, an appellate court does not err in analyzing a claim for ineffective assistance under the analysis outlined in *Strickland v. Washington* rather than the analysis outlined in *United States v. Cronic*.

As such, the propositions of law that Bond sets forth for consideration by this Court are well-settled issues of law and of interest only to Bond. In affirming his sentence, the Second District Court of Appeals did not misapply or misinterpret the law, did not create any new law, or did it change any existing law. As noted above, the Second District applied well-settled principles and case law. Therefore, further review of this case by this Court is not warranted.

STATEMENT OF THE CASE AND FACTS

On October 27, 2021, Ms. Ashworth began her workday as the store manager of the Grandview Home Center Outlet in Trotwood, Ohio like any other day. Ms. Ashworth and her husband, Ronald ("Mr. Ashworth"), traveled to the area from Kentucky so that Ms. Ashworth could work her shift at the store. While in the Trotwood area, Mr. and Ms. Ashworth resided in a living quarters within the warehouse.

Grandview Home Center Outlet is a flooring outlet store, specializing in "B-grade flooring," which is flooring that may have been damaged or did not meet initial quality testing requirements. Due to the nature of the flooring, Grandview Home Center Outlet operates on a strict "all sales are final" policy. This policy was known and enforced by the employees who assist with sales on the warehouse floor.

Jennifer McCarty, sister of Ms. Ashworth and an employee at Grandview Home Center Outlet, was working on October 27, 2021. She was approached by Bond, a repeat customer of the store, who wanted to initiate a return for product that he purchased the prior day. Bond believed that the flooring was defective and wanted to return the product for reimbursement. Bond, as a frequent customer of the store, knew that the store had an "all sales are final" policy. McCarty informed Bond that the store would not initiate any returns or exchanges pursuant to its policy.

Bond then went to speak to Ms. Ashworth. Bond asked Ms. Ashworth if he could return the product. Ms. Ashworth initially misinterpreted Bond's request, believing that Bond required more flooring to complete a product. Bond clarified that he wanted to make a return and showed Ms. Ashworth the piece of flooring that he brought into the store and attempted to illustrate the alleged defect. Ms. Ashworth told Bond that the store would not accept any returns or exchanges.

Bond then demanded to speak to "the man" and began heading toward his truck, which was parked near one of the garage doors entrances of the warehouse. Ms. Ashworth approached her husband, told him about her conversation with Bond, and asked him to speak with Bond about the sales policy. Mr. Ashworth went outside to Bond's truck to speak with him about the store's sales policy.

Bond and Mr. Ashworth have differing accounts of this initial conversation. According to Mr. Ashworth, he told Bond that the store did not accept returns and that all sales were final. Mr.

Ashworth then closed the garage door, locked it, and reentered the store. Upon reentering the store, Mr. Ashworth headed toward the checkout counter area of the warehouse.

According to Bond, Mr. Ashworth came out to his truck and told him that "we're not taking that shit back." Bond told Mr. Ashworth that he had spoken to Ms. Ashworth about the defective flooring and that she authorized the return. Mr. Ashworth responded with "[W]ell, fuck that. You won't get shit back." Bond says that Mr. Ashworth began closing the garage door. As he closed the door, Mr. Ashworth allegedly said "Fuck you, n*****. Deal with that shit."

Eventually, Bond reentered the store and engaged with Mr. Ashworth again. The two men continued their previous conversation about Bond's desire to return the flooring. This discussion appeared cordial to onlookers. At some point during the interaction, Bond punched Mr. Ashworth two separate times, causing him to fall to the ground. Bond then struck Mr. Ashworth a third time while Mr. Ashworth was lying on the ground.

There were several accounts regarding this altercation between Bond and Mr. Ashworth. According to Bond, he reentered the store in a calm demeanor and reengaged Mr. Ashworth about making the exchange. Bond stated that Mr. Ashworth again said "fuck you, you ain't getting shit." Bond calmly tried to explain what he wanted to do, but Mr. Ashworth continued to curse at Bond and continued to use racial slurs throughout the conversation. Bond stated that Mr. Ashworth had a hand in his pocket and began to approach him. Bond interpreted this as a threatening action and "[went] to defend [himself] at that point." Bond never saw any weapon on Mr. Ashworth's person during the altercation.

Bond then punched Mr. Ashworth two times "because he [was] being hostile and he's coming at me." After Mr. Ashworth fell to the ground, Bond then punched Mr. Ashworth a third

time before exiting the store. Although Bond was agitated due to Mr. Ashworth's alleged use of racial slurs, Bond stated that he never became angry at any time during the altercation.

A two-day jury trial was held on June 6 and June 7, 2022. During the first day of trial, two members of the jury, one male and one female, were seen struggling to stay awake during the testimony of Ginger Ashworth. The court continued to monitor both jury members until the afternoon break. During that break, the female juror spoke in chambers with the judge and the parties. She admitted that she was struggling to stay awake. She also admitted that she was unsure whether she had missed any testimony. Further, the female juror stated that she could not guarantee to the court that she could stay awake for the remainder of the day. While speaking to counsel about whether to dismiss the female juror, the trial court provided an analogy about his spouse regarding her missing dialogue in a television show while she dozed on the couch before bed.

At the start of the second day, the court and the parties spoke to the male juror in chambers. The trial court noted that, although he was still somewhat struggling, the male juror improved during the afternoon. The male juror stated that he had worked things out with his employer and that he was able to get extra sleep the previous night. Moreover, the male juror guaranteed to the court that he would not have any issues moving forward.

At the conclusion of the evidence, defense counsel requested a jury instruction regarding aggravated assault. Specifically, defense counsel highlighted that Mr. Ashworth's demeanor, coupled with his use of racial slurs, created a hostile environment for Bond. The State countered that mere words are insufficient to support a jury instruction for aggravated assault. Further, the State opined that fear, without more, is also insufficient to support an instruction for aggravated assault.

In its decision to deny defense's request for an aggravated assault instruction, the trial court noted that applicable case law shows that mere words are insufficient to support the instruction. Additionally, Bond testified that he was not upset with Mr. Ashworth's use of racial slurs toward him. Finally, the trial court noted that there was no testimony regarding fear of a weapon, no description of a weapon, and no testimony of a weapon discovered on Mr. Ashworth's person.

ARGUMENT

I. A TRIAL COURT DOES NOT ABUSE ITS DISCRETION IN DENYING A DEFENDANT'S REQUEST FOR AN AGGRAVATED ASSAULT WHEN THE EVIDENCE DOES NOT ESTABLISH THAT THE DEFENDANT WAS SERIOUSLY PROVOKED

In affirming the decision of the trial court, the Second District reviewed the entire record and found that the evidence presented at trial was insufficient to support an instruction for aggravated assault. "Aggravated assault, defined in R.C. 2903.12, contains elements which are identical to those of felonious assault, R.C. 2903.11, except it adds a mitigating element of 'serious provocation.'" *State v. Greene*, 2d Dist. Clark No. 2021-CA-48, 2022-Ohio-2311, ¶ 10, quoting *State v. Deem*, 40 Ohio St.3d 205, 533 N.E.2d 294 (1988), paragraph four of the syllabus. "[S]erious provocation has been described as provocation that is 'reasonably sufficient to bring on extreme stress and * * * to incite or to arouse the defendant into using deadly force.'" *State v. Thornton*, 2d Dist. Montgomery No. 20652, 2005-Ohio-3744, ¶ 50.

Further, the trial court must engage in a two-part analysis in determining whether the instruction is appropriate: first, whether the provocation would have incited an ordinary person beyond his or her control; and second, whether the defendant was actually under the influence of a sudden fit of passion or rage. *See State v. Mack*, 82 Ohio St.3d 198, 201, 694 N.E.2d 1328 (1998). As this Court previously held in *Shane v. Shane*, 63 Ohio St.3d 630, 637, 590 N.E.2d 272

(1992), "words alone will not constitute reasonably sufficient provocation to incite the use of deadly force in most situations."

Bond argues that the holdings of *State v. Smith*, 168 Ohio App.3d 141, 2006-Ohio-3720, 858 N.E.2d 1222 (1st Dist.), and *State v. Rhymer*, 1st Dist. Hamilton Case No. C-200164, 2021-Ohio-2908, support his argument regarding the trial court's error in denying his request for an aggravated assault instruction. This argument, however, is flawed for several reasons. First, both cases cited by Bond are not mandatory authority for the trial court located in Montgomery County. Second, both cases are factually distinct from the facts alleged in this case. *Smith* centered upon an all-day altercation between Smith and the victim that culminated with a struggle over a handgun that was produced by Smith. *Rhymer* also dealt with a struggle over a handgun between Rhymer and the victim, which all occurred during a custody exchange with Rhymer's child present. The facts present in Bond's case had nothing to do with a struggle over a firearm and, therefore, are factually distinct.

Moreover, the trial court, as well as the Second District, both found that the evidence presented was insufficient to support the instruction. Bond testified that Mr. Ashworth's alleged use of racial slurs did not anger him. Bond also did not claim that he was afraid of Ashworth, just that Ashworth seemed "hostile." This testimony was considered alongside other lay witness testimony, which stated that the conversation between Bond and Ashworth appeared to be civil.

In sum, Bond's argument centers upon his displeasure with the denial of his request for an aggravated assault instruction. Both the trial court and the Second District applied well-settled principles of law in examining the denial of the aggravated assault instruction. Although Bond is unhappy with the opinions of the trial court and the Second District, he has not established why

this case is of such importance to warrant review by this Court. Therefore, this Court should deny his request for review on this issue.

II. A TRIAL COURT DOES NOT ERR WHEN IT EXERCISES ITS CONSIDERABLE DISCRETION AND PERMITS A JUROR TO REMAIN EMPANELED AFTER DETERMINING THAT THE JUROR DID NOT MISS CRITICAL PORTIONS OF THE TRIAL

Bond argues that the trial court committed plain error in permitting the male juror to remain empaneled during his criminal trial. The record supports the trial court's decision. As such, Bond's second proposition of law is not well-taken.

This Court has previously stated that trial courts have "considerable discretion in deciding how to handle a sleeping juror." *State v. Sanders*, 92 Ohio St.3d 245, 750 N.E.2d 90 (2001). Additionally, "if a sleeping juror has not missed 'large or critical portions' of the proceedings, no prejudice results from that juror's remaining on the jury." *State v. Montgomery*, 148 Ohio St.3d 347, 372, 2016-Ohio-5487, 71 N.E.3d 180 (2016), quoting *Sanders* at 253.

Bond's proposition of law is without merit because the record clearly supports the trial court's decision to permit the male juror to remain empaneled. The bailiff of the trial court initially addressed a female and a male juror to determine why they appeared to be sleeping during the proceedings. When confronted by the bailiff, the male juror never admitted to sleeping. Moreover, the trial court stated that it believed that the male juror appeared to have just closed his eyes.

Additionally, at the start of the second day of trial, the court met with the male juror. The male juror stated that he worked out a deal with his employer to allow him to leave work early so that he could get an adequate night's rest before trial. The male juror also assured the court that he was feeling well and that he would not have any issues for the remainder of the trial.

Further, Bond's reliance on *State v. Majid*, 182 Ohio App.3d 730, 2009-Ohio-3075, 914 N.E.2d 1113 (8th Dist.) is misplaced for two reasons. First, the decision of the Eighth District

Court of Appeals in *Majid* is not binding upon the trial court in Bond's case. Secondly, the cases are factually distinct. In *Majid*, the juror was found to be sleeping several times throughout the trial, including during eyewitness testimony. *Majid* at 735. The court, in response, acknowledged the sleeping juror, but did not monitor the situation. *Id*. Additionally, the court chose not to admonish the jury, but rather, told counsel "I saw it. So what. Let him sleep. You guys picked the jury. I didn't." *Id*.

Similar conduct was not found in Bond's trial. The trial court had the bailiff admonish the jury and ask if anyone was having trouble staying awake. Further, the court and counsel met with both the female and the male jurors to determine whether they should remain empaneled. The trial court only retained the male juror after evaluating the circumstances and determining that the male juror had not fallen asleep or missed critical portions of the proceedings.

In sum, Bond's argument is based largely on his perceived conflict between the Second and Eighth Districts. However, as shown above, no conflict exists because the cases are factually distinct. Furthermore, the trial court exercised its considerable discretion and evaluated the entirety of the circumstances before allowing the male juror to remain empaneled, which it was permitted to do under relevant case law. Since the trial court did not err in allowing the male juror to remain empaneled, there is no need for this Court to accept review in this case.

III. A TRIAL COURT DOES NOT VIOLATE A DEFENDANT'S DUE PROCESS RIGHTS UNDER THE UNITED STATES CONSTITUTION AND THE OHIO CONSTUTITION WHEN THE DISMISSAL OF A FEMALE JUROR WAS NOT BASED ON HER GENDER

In his third proposition of law, Bond alleges that the trial court violated his right to equal protection under the Sixth and Fourteenth Amendments to the United States Constitution and under Article I, Sections II and X of the Ohio Constitution when it dismissed a female juror for sleeping, but retained the male juror referenced above in his second proposition of law. Bond also seems to

take issue with the Second District's handling of this claim in its written opinion on the issue. As such, Bond believes that this case "involves a substantial question about the standard and method for evaluating claims that a court dismissed a juror for discriminatory reasons . . ." (Motion of Appellant, p. 11) Bond's argument is not well-taken for several reasons and should be dismissed.

As noted previously, a trial court has considerable discretion in handling a sleeping juror. *State v. Sanders*, 92 Ohio St.3d 245, 750 N.E.2d 90 (2001). If the juror is seen sleeping through critical portions of testimony, the juror cannot be expected to perform his or her duties. *United States v. Warner*, 690 F.2d 545 (6th Cir. 1982). If the juror has not missed critical portions of the proceedings, however, no prejudice results from permitting the juror to remain empaneled. *State v. Montgomery*, 148 Ohio St.3d 347, 372, 2016-Ohio-5487, 71 N.E.3d 180 (2016), quoting *Sanders* at 253.

The record in this case makes it clear that the trial court dismissed the female juror on gender neutral grounds. On the first day of trial, the female juror admitted to sleeping during the testimony of Ginger Ashworth. She told the court that she usually worked nights and was accustomed to sleeping during the day. When asked by the trial court if she could stay awake through the rest of the trial, she told the court that she could not guarantee that she would remain awake. The female juror also told the trial court that it could dismiss her if it so chose. All of these facts are gender neutral and support the trial court's decision to dismiss the female juror.

Furthermore, Bond's attempt to attack the integrity of the trial court by alleging that the judge was sexist and patronizing solely based upon an innocuous analogy about his spouse is a gross mischaracterization of the record. In explaining his hesitation in retaining the female juror, the judge analogized the female juror falling asleep during the testimony to someone sleeping while watching television:

> I'm fearful of what she has missed because we don't know. I sort of – although we're on the record, I'll tell you a humorous story. My wife does this every night. We're trying to watch a show, and she closes her eyes and nods off. And I turn to her, are you awake? She will say yes. But I ask her what was just on, and she can't tell me. So obviously, she has missed something going on, and I think it's the same way because of different levels of sleep.

This analogy does not establish any implicit or explicit bias by the judge against females, nor does it establish that the judge believes that females cannot retain information. Rather, the judge was simply trying to explain his reasoning by illustrating a situation where many people have found themselves: falling asleep while watching television and missing key pieces of the television show's storyline. There is nothing in the record to suggest that the trial court believes this condition to be uniquely female. As such, this analogy falls far short of establishing any kind of gender bias by the court or a violation of Bond's equal protection rights.

Lastly, Bond seemingly takes issue with the Second District's analysis on this analogy. The Second District made clear in its opinion, however, that it examined Bond's argument and found it to be unpersuasive. *State v. Bond*, 2d Dist. Montgomery No. 29516, 2023-Ohio-1226, ¶ 33. Bond has not explained how the Second District's handling of this issue somehow violated his right to equal protection as he claims.

In sum, the trial court did not err in dismissing the female juror on gender neutral grounds. The trial court exercised its considerable discretion and dismissed the female juror because she admitted to sleeping, admitted to missing testimony, and stated that she could not guarantee that she wouldn't have issues moving forward. Furthermore, the trial court's analogy to his spouse sleeping while watching television cannot be stretched to support Bond's contention that the judge had some kind of animus toward the female juror based upon her gender or any other grounds. Therefore, Bond's third proposition of law is meritless and does not warrant further consideration by this Court.

IV. IT IS NOT ERROR FOR AN APPELLATE COURT TO EVALUATE A CLAIM OF INEFFECTIVE ASSISTANCE UNDER THE STANDARD OUTLINED IN *STRICKLAND V. WASHINGTON*

Under his fourth proposition of law, Bond argues that the Second District Court of Appeals erred when it chose to evaluate his claim of ineffective assistance under the standard articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) rather than under *United States v. Cronic*, 466 U.S. 648, 658, 104 S.Ct. 2039, 80 L.Ed. 2d 657 (1984). Bond's argument is meritless and must be dismissed.

This Court has previously stated that, to prevail on a claim for ineffective assistance, a defendant must meet the two-prong test set out in *Strickland*. *State v. Xie*, 62 Ohio St.3d 521, 524, 584 N.E.2d 715 (1992). The United States Supreme Court has articulated that the *Cronic* standard, in which prejudice is presumed, was "a narrow exception to *Strickland's* holding" that a defendant asserting ineffective assistance must demonstrate both deficient performance and prejudice. *See Florida v. Nixon*, 543 U.S. 175, 190, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004). Furthermore, the Supreme Court in *Nixon*, stated that *Cronic*'s presumption of prejudice would only apply in '"circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified."' *Id*., quoting *Cronic*, 466 U.S. at 658; *see also Bell v. Cone*, 535 U.S. 685, 696-97, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002) (stating that counsel's "failure must be complete" for *Cronic's* presumed prejudice standard to apply).

Moreover, this Court has relied on these cases in applying *Strickland* and *Cronic* when evaluating claims of ineffective assistance of counsel. For instance, in *State v. Montgomery*, 148 Ohio St.3d 347, 2016-Ohio-5487, 71 N.E.3d 180, this Court established that the rule outlined in *Strickland* applies when the record does not support application of the exception outlined in *Cronic*. *See Montgomery*, 2016-Ohio-5487 at ¶ 100-104 (finding that *Cronic* did not apply when trial counsel supported a client's decision to plead guilty in a capital case centered upon the murder of three people and that, as a result, *Strickland* was

the proper standard to apply in evaluating Montgomery's claim of ineffective assistance.) This same analysis was applied more recently in *State v. Drain*, Slip Opinion No. 2022-Ohio-3697, in which this Court found that *Strickland* was the proper standard to apply because the facts did not support the exception outlined in *Cronic*. *See Drain* at ¶¶ 69-72.

Jurisdiction must be denied on Bond's proposition of law in this instance because the Second District properly evaluated Bond's claim under the standard articulated in *Strickland*. Although Bond takes issue with the Second District for analyzing his claim under *Strickland*, it is well-settled that *Strickland* is the standard for evaluating such claims and, further, that *Cronic* is a "narrow exception" to the *Strickland* standard and only applies in rare instances. *Nixon* 543 U.S. at 190; *Bell* 535 U.S. at 696-97; *Montgomery*, 148 Ohio St.3d 347; *Drain* at ¶¶ 69-72. By applying the *Strickland* standard in its analysis, the Second District implicitly found that trial counsel's conduct was not egregious enough to warrant *Cronic's* presumption of prejudice.

In sum, Bond cannot establish that the Second District's application of *Strickland* was a misapplication of law. As noted above, *Strickland* is the applicable test to apply in the majority of ineffective assistance claims. Bond's claim does not warrant an additional analysis under the exception outlined in *Cronic* simply because, in his mind, his case warrants such an application. Rather, the Second District implicitly determined that prejudice was not presumed in Bond's case and, as such, properly applied the well-settled analysis outlined in *Strickland*. Therefore, this Court should deny Bond's request for review on this issue.

V. TRIAL COUNSEL DOES NOT RENDER INEFFECTIVE ASSISTANCE IN ADMITTING THAT THE DEFENDANT COMMITTED THE ACT IN QUESTION WHEN SUCH AN ADMISSION FALLS WITHIN THE GAMBIT OF COUNSEL'S TRIAL STRATEGY

It is well-settled that, under the two-prong analysis outlined in *Strickland*, a defendant must establish that his counsel's performance fell below an objective standard of reasonable representation. *Strickland* at 688. In evaluating whether counsel's performance was deficient, the reviewing court "must indulge in a strong presumption that counsel's conduct falls within the wide

range of reasonable professional assistance. *Id*. at 689. Furthermore, this Court has stated that trial strategy decisions, even viewed with the benefit of hindsight, cannot form the basis for an ineffective assistance claim. *State v. Mason*, 82 Ohio St.3d 144, 157, 694 N.E.2d 932 (1998); *Strickland* at 689.

Although Bond argues that his trial counsel's admission of his conduct warrants application of the *Cronic* standard, his argument is wrong for two reasons. First, as stated previously, the Second District properly analyzed this claim under the *Strickland* standard, not that outlined in *Cronic*. Second, as noted in the Second District's opinion on the issue, Bond's trial counsel's performance was not found to be deficient, which would be fatal under both *Strickland* and *Cronic*. Since the Second District decided Bond's claim of ineffective assistance on well-settled case law and principles, there is no need for this Court to accept review in this case on this issue.

CONCLUSION

For the reasons set forth above, the State of Ohio, Appellee herein, respectfully requests that this Court find Bond's propositions of law meritless and deny him jurisdiction to appeal.

Respectfully submitted,

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Certificate of Service

I hereby certify a copy of the foregoing *Memorandum in Response* was sent via mail on June 6, 2023, to counsel for Defendant-Appellant Doshie Bond: Anthony D. Maiorano, 14 E. Main Street, Fairborn, Ohio 45324.

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