

IN RE DISQUALIFICATION OF HOWARD.

THE STATE OF OHIO v. SINGH.

[Cite as *In re Disqualification of Howard*, ___ Ohio St.3d ___,
2022-Ohio-4675.]

Judges—Affidavits of disqualification—R.C. 2701.03—Affiant failed to demonstrate bias, prejudice, or appearance of impropriety—Disqualification denied.

(No. 22-AP-139—Decided December 9, 2022.)

ON AFFIDAVIT OF DISQUALIFICATION in Butler County Court of Common Pleas,
General Division, Case No. CR-2019-07-1095.

O’CONNOR, C.J.

{¶ 1} Michael T. Gmoser, the Butler County Prosecuting Attorney, has filed an affidavit pursuant to R.C. 2701.03 and Article IV, Section 5(C) of the Ohio Constitution seeking to disqualify Judge J. Gregory Howard from the above-referenced capital case. Three assistant prosecuting attorneys have filed affidavits attesting to the truth of the averments in Mr. Gmoser’s affidavit.

{¶ 2} In October 2022, Judge Howard presided over a 12-day jury trial. After two days of deliberations, Judge Howard found that the jury was deadlocked and declared a mistrial. In his affidavit of disqualification, Mr. Gmoser avers that for three reasons, Judge Howard is biased against the state of Ohio and should not preside over the retrial. First, Mr. Gmoser alleges that Judge Howard “steer[ed] the jury into a deadlock” by, among other things, giving a *Howard* charge despite no indication of a deadlock,¹ denying the jury’s request to review the transcript of a

1. A *Howard* charge is the standard jury instruction given to deadlocked juries. It “reminds deadlocked jurors that their duty is to decide the case if they can conscientiously do so” and

witness’s testimony, and failing to remove two jurors for misconduct. Second, Mr. Gmoser alleges that throughout the first trial, Judge Howard repeatedly held off-the-record conferences in his chambers about material issues. Third, Mr. Gmoser avers that Judge Howard displayed an offensive sign in his office, made crude and sexual jokes to counsel, and failed to conduct the first trial with the decorum required for a capital case.

{¶ 3} Judge Howard submitted a response to the affidavit and denies any bias against Mr. Gmoser or the prosecution. The judge disputes that he “steer[ed]” the jury into a deadlock and explains why he declared a mistrial. Judge Howard further notes that the state never objected to holding unrecorded conferences in his chambers and never complained about the alleged lack of decorum in the courtroom. With respect to the other allegations, Judge Howard says that he removed the sign from his office and that he never intended to offend anyone with his comments or stories—although the judge denies making any “sexual jokes.” The judge says that in the future, he will refrain from any similar attempts at humor.

{¶ 4} In disqualification requests, “[t]he term ‘bias or prejudice’ ‘implies a hostile feeling or spirit of ill-will or undue friendship or favoritism toward one of the litigants or his attorney, with the formation of a fixed anticipatory judgment on the part of the judge, as contradistinguished from an open state of mind which will be governed by the law and the facts.’ ” *In re Disqualification of O’Neill*, 100 Ohio St.3d 1232, 2002-Ohio-7479, 798 N.E.2d 17, ¶ 14, quoting *State ex rel. Pratt v. Weygandt*, 164 Ohio St. 463, 132 N.E.2d 191 (1956), paragraph four of the syllabus. “The proper test for determining whether a judge’s participation in a case presents an appearance of impropriety is * * * an objective one. A judge should step aside or be removed if a reasonable and objective observer would harbor

“challenges them to try a final time to reach consensus.” *Jones v. Cleveland Clinic Found.*, 161 Ohio St.3d 337, 2020-Ohio-3780, 163 N.E.3d 501, ¶ 25; *State v. Howard*, 42 Ohio St.3d 18, 537 N.E.2d 188 (1989), paragraph two of the syllabus.

serious doubts about the judge’s impartiality.” *In re Disqualification of Lewis*, 117 Ohio St.3d 1227, 2004-Ohio-7359, 884 N.E.2d 1082, ¶ 8. In addition, a “presumption of impartiality” is accorded all judges in affidavit-of-disqualification proceedings. *In re Disqualification of Celebrezze*, 101 Ohio St.3d 1224, 2003-Ohio-7352, 803 N.E.2d 823, ¶ 7.

{¶ 5} For the reasons explained below, Mr. Gmoser has not established that Judge Howard has hostile feelings toward him or his office or that the judge has formed a fixed anticipatory judgment on any issue in the underlying case. Nor has Mr. Gmoser set forth a compelling argument for disqualifying Judge Howard to avoid an appearance of partiality.

The judge’s handling of the jury

{¶ 6} “Tension between a judge and a county prosecutor is bound to occur in our adversary system. Both sides seek to attain justice, but they do not always agree on what that means. However, principles of professionalism require judges and prosecutors to give proper respect to each other and to treat each other with the dignity and courtesy that each office deserves.” *In re Disqualification of Burge*, 142 Ohio St.3d 57, 2014-Ohio-5871, 28 N.E.3d 48, ¶ 27. Here, Mr. Gmoser strongly disagrees with Judge Howard’s decision to declare a mistrial. That disagreement, however, does not mean that Judge Howard must be disqualified from presiding over the retrial.

{¶ 7} “[I]t is well established that ‘[a]dverse rulings, without more, are not evidence that a judge is biased or prejudiced.’” *In re Disqualification of D’Apolito*, 139 Ohio St.3d 1230, 2014-Ohio-2153, 11 N.E.3d 279, ¶ 5, quoting *In re Disqualification of Russo*, 110 Ohio St.3d 1208, 2005-Ohio-7146, 850 N.E.2d 713, ¶ 5. And “affidavits of disqualification cannot be used to remove a judge from a case simply because a party is particularly unhappy about a court ruling or a series of rulings.” *Id.* Under these established principles, it is outside the scope of this matter to determine whether Judge Howard should have given the *Howard* charge,

removed the two jurors, or declared the mistrial. Even if Mr. Gmoser had established that Judge Howard abused his discretion, Mr. Gmoser has not proved that the judge's errors were the product of bias against the state of Ohio.

{¶ 8} Further, Judge Howard claims that the state failed to object to his practice of holding conference in chambers, which deprived the judge of the opportunity to take corrective measures. “ ‘A party who fails to object at trial, but then raises an issue in an affidavit of disqualification * * * bears a particularly heavy burden * * *.’ ” (Ellipses sic.) *In re Disqualification of Ruehlman*, 136 Ohio St.3d 1217, 2013-Ohio-2717, 991 N.E.2d 246, ¶ 5, quoting *In re Disqualification of Solovan*, 100 Ohio St.3d 1214, 2003-Ohio-5484, 798 N.E.2d 3, ¶ 8. Mr. Gmoser has not met that burden here.

The judge's comments to counsel

{¶ 9} Although some types of humor may have a place in the courtroom, a judge's use of undignified language degrades the decorum of the court and diminishes public confidence in the judiciary. Judge Howard has recognized that his attempts at humor, including his comments about other judges, were unnecessary or ill-advised. The issue in this disqualification matter, however, is not whether Judge Howard should be disciplined for making offensive comments or displaying inappropriate signage in the judge's chambers. The issue is whether Judge Howard should be disqualified from the underlying case due to bias against Mr. Gmoser or his office. The facts here are somewhat similar to those in *In re Disqualification of Burge*, 142 Ohio St.3d 57, 2014-Ohio-5871, 28 N.E.3d 48, in which a prosecuting attorney alleged that a judge had engaged in a wide variety of judicial misconduct, including using profanity during court proceedings, making inappropriate comments about other judges, and making sexually inappropriate comments to an assistant prosecutor. The chief justice denied the affidavit of disqualification because, even if the judge had violated the Code of Judicial Conduct, the allegations did not establish that the judge was biased against the

prosecutor’s office. The same rationale applies here. Even if the allegations against Judge Howard were true, Mr. Gmoser has not proved that the judge’s conduct was the product of bias against the state of Ohio.

{¶ 10} Further, the chief justice has concluded that “a judge’s undignified comment—especially during an attorney-only conference outside the courtroom—does not necessarily reflect judicial bias or preclude the judge from fairly and impartially deciding future legal issues in a case.” *In re Disqualification of Fregiato*, 163 Ohio St.3d 1256, 2021-Ohio-1265, 169 N.E.3d 695, ¶ 8; *see also In re Disqualification of Holbrook*, 167 Ohio St.3d 1244, 2022-Ohio-2141, 194 N.E.3d 387, ¶ 9 (“improper comments alone do not always reflect judicial bias or preclude a judge from fairly and impartially presiding over a case”). Here, Judge Howard has apologized for his “comments or stories in chambers with counsel” and affirms that he will refrain from such comments in the future. Mr. Gmoser has not established that those comments—or any of the other behavior alleged in the affidavit—require the judge’s disqualification from presiding over the retrial.

Conclusion

{¶ 11} The affidavit of disqualification is denied. The case may proceed before Judge Howard.
