[Cite as *State v. Richardson*, 2021-Ohio-3482.]

IN THE COURT OF APPEALS OF OHIO
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY

STATE OF OHIO, Plaintiff-Appellee, - v - VINCENT L. RICHARDSON, JR., Defendant-Appellant.	**CASE NO. 2020-T-0037** Criminal Appeal from the Court of Common Pleas Trial Court No. 2018 CR 00498

O P I N I O N

Decided: September 30, 2021
Judgment: Affirmed

Dennis Watkins, Trumbull County Prosecutor, and *Ryan J. Sanders*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481 (For Plaintiff-Appellee).

Barbara J. Rogachefsky, Barbara J. Rogachefsky Co., LPA, 12 East Exchange Street, Fifth Floor, Akron, OH 44308 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Vincent L. Richardson, Jr., appeals from the judgment of the Trumbull County Court of Common Pleas, convicting him, after trial by jury, on multiple felony drug counts and having weapons under disability. We affirm.

{¶2} On March 30, 2018, a warrant was executed by the Warren Police Department on 1367 Hamilton Street, Warren, Ohio. Appellant was the only individual at the residence and was listed as its owner. During the raid, appellant was arrested at the

residence. Officers also collected various items indicative of drug trafficking, a police scanner, a digital scale, plastic spoon with residue, money, plastic baggies, and hypodermic needles. Officers also discovered a loaded .45 caliber firearm. Numerous other personal items were found that belonged to appellant. Appellant was indicted for felony-three, trafficking in heroin; felony-three possession of heroin; felony-two trafficking in cocaine; felony-two possession of cocaine; four counts of felony-five aggravated possession of drugs; and felony-three having weapons under disability. After a trial by jury, appellant was convicted on all counts and sentenced to an aggregate prison term of 10 years. He appeals and assigns two errors for our review. The first provides:

{¶3} "The trial court committed plain error to the prejudice of defendant/appellant in making statements in the presence of the jury which denied the defendant a fair trial."

{¶4} Under this assignment of error, appellant contends the trial court "repeatedly berated, cut off, and threatened" his only witness, Justin Schubert. In effect, he asserts the trial court's participation and/or interaction with Mr. Schubert resulted in an unfair trial.

{¶5} "It is well established that a trial judge must at all times be impartial and refrain from comments which might influence the jury." *State v. Boyd*, 63 Ohio App.3d 790, 794 (8th Dist.1989). Evid.R. 611(A), however, provides a trial judge considerable latitude in controlling a trial. Evid.R. 611(A) states as follows:

{¶6} Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid

needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

{¶7} Similarly, R.C. 2945.03 provides, "[t]he judge of the trial court shall control all proceedings during a criminal trial, and shall limit the introduction of evidence and the argument of counsel to relevant and material matters with a view to expeditious and effective ascertainment of the truth regarding matters in issue."

{¶8} On appellate review, "[c]hallenged statements and actions of the trial judge in a criminal case will not justify a reversal * * * where the defendant has failed in light of the circumstances under which the incidents occurred to demonstrate prejudice." *State v. Wade*, 53 Ohio St.2d 182 (1978), paragraph two of syllabus; vacated on other grounds 438 U.S. 911 (1978). The test for the trial court's actions is whether those actions interfered with the defendant's constitutional right to a fair trial. *State v. Thomas*, 36 Ohio St.2d 68, 71 (1973). The Ohio Supreme Court has set forth five factors a reviewing court must consider when determining whether a trial court's actions and remarks prejudice a criminal defendant's right to a fair trial:

> **{¶9}** (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. *Wade, supra*, at 188.

{¶10} If a defendant does not object to the trial court's actions or remarks, then the defendant has waived all but plain error. *Id.* Here, because no objections were leveled, we shall review appellant's challenges for plain error.

{¶11} Appellant's witness, Mr. Schubert testified that he was leasing the residence in question at the time of the raid and, while he was not present, he maintained the drugs and firearm were his, not appellant's. On cross-examination, the trial court interacted with Mr. Schubert on multiple occasions. These varied interactions are the subject of appellant's constitutional argument. Appellant first asserts the trial court improperly threatened to hold Mr. Schubert in contempt. At trial, the following exchange took place:

{¶12} [Prosecutor:] [The defendant's] attorney will have an opportunity to let you explain your story again.

{¶13} A. I don't need to explain my story, sir.

{¶14} Q. All right. Now - -

{¶15} A. The drugs are mine.

{¶16} Q. - - on the date - -

{¶17} THE COURT: Listen - -

{¶18} Q. On the date - -

{¶19} THE COURT: You have to listen.

{¶20} A. I'm trying, sir.

{¶21} THE COURT: Well, you're not trying very well.

{¶22} Q. On the date of this incident, the date of the raid, did you tell the police that Stackz was staying at Hamilton Street?

{¶23} A. No. What do you mean? I don't know. Maybe. Who cares. I also tell them that drugs aren't found at the house.

{¶24} THE COURT: I'm going to hold you in contempt.

{¶25} A. That's fine, sir. I'm sorry. I'm trying. I don't know what you - -

{¶26} THE COURT: Well, you're not trying very well.

{¶27} Prior to the previous exchange, the prosecutor attempted to elicit answers from the witness; while the witness did provide answers, he frequently attempted to elaborate. The prosecutor reminded the witness to only answer the question before him, but the witness would still attempt to provide a context for his answers. Ultimately, the prosecutor interrupted the witness during one attempt, advising him "there's no question [before him]." At that point, the court stated: "Hold on. This is cross examination. I know you don't know how it works but - - * * * When he asks you a question, you answer the question." After this admonition, the prosecutor attempted to elicit a response regarding whether the witness told police that one "Stackz" was present at the home on the day of the raid. To this, the witness ambiguously stated "no," then "what do you mean," then "I don't know," then "maybe," then "who cares." In light of the circumstances, we fail to see how the court's advisement that he may hold the witness in contempt was improper. The court was attempting to properly regulate and streamline the presentation of testimony and make certain the witness offered structured answers within the framework of cross-examination. We see no error.

{¶28} Next, appellant contends the trial court improperly and repeatedly interrupted the witness, advising him to answer "yes, no, or I don't know." Specifically, he cites the following:

{¶29} Q. Okay. So did you tell the police that during this conversation, did you tell them that you had never lived there?

{¶30} A. Probably, sir. Probably, sir. It doesn't mean - -

{¶31} THE COURT: Stop. It's yes or no. This is cross examination, okay. If he asks to go - -

{¶32} A. Yes, sir.

{¶33} THE COURT: You don't get to do that. That's not how cross examination works.

{¶34} A. I'm sorry. I'm new to this.

{¶35} THE COURT: And I'm telling you if he asks you a yes or no question, you answer yes or no.

{¶36} A. That's very, very fair, sir.

{¶37} Again, like the previous exchange, we fail to perceive how the trial court's intervention was problematic or prejudicial. The court was simply defining a fundamental rule of cross-examination; namely, only respond to the question posed and if it is a yes or no question, respond accordingly. Moreover, at the outset of cross-examination, the witness was informed by the prosecutor that if he did not understand a question, the prosecutor would rephrase it. The witness agreed he would do so; there is nothing to suggest the witness was led to believe he could elaborate on an otherwise ambiguous answer. We see the court's actions as an active means of avoiding unnecessary consumption of time and directing the witness to efficiently and effectively testify on cross-examination. We discern no error.

{¶38} Next, appellant takes issue with the court's later, albeit abrupt, admonitions that the witness answer the question posed. To wit, the court intervened on one occasion advising the witness to keep his "mouth shut," because there was no question before him. On multiple other occasions, the court advised the witness to answer "yes," "no," or "I

don't know." Again, we fail to see how these remarks would influence the jury's perception of appellant or its ability to independently weigh the witness' testimony. The witness repeatedly attempted to elaborate on his answers to avoid answering a question. The court was within its authority to control the trial by advising the witness to only answer when there is a question and to answer directly, without elaboration, unless the question called for him to expand. We cannot say appellant suffered any prejudice from the court's remarks.

{¶39} Appellant additionally claims the court's interventions were an attempt to prevent the witness from answering questions or directed at guiding the witness' testimony. The context of the trial court's interactions with the witness does not suggest any such intent. On several occasions, the court intervenes, ordering appellant to "stop" answering or "stop talking" because, again, he was either not responsive to the question(s) or failed to answer with "yes," "no," or "I don't know." And, on another occasion, when the witness engaged in an argumentative exchange with the prosecutor, the trial court intervened, stating: "Hold on. * * * Listen to me. Do you want me to gag you?" * * * "Cross-examination you answer yes or no unless they tell you to answer differently." After being continuously advised to answer the questions posed with a "yes," "no," or "I don't know," we cannot find the trial court's statements inherently problematic.

{¶40} Nevertheless, in support of his position, appellant cites this court's opinions in *Mentor-on-the-Lake v. Griffen*, 105 Ohio App.3d 441 (11th Dist.1995) and *State v. Smith*, 11th Dist. Portage Nos. 2006-P-0101 and 2006-P-0102, 2008-Ohio-3251. In *Griffen*, the trial judge actively engaged in questioning of witnesses in a brusque and arguably tendentious fashion. The questioning reflected what could reasonably be

viewed as the court's view on the credibility of testimony being offered; and, in some cases, the trial court anticipated answers to questions before counsel could elicit the same from witnesses. The court ultimately gave the following curative instruction: "If during the course of trial I have said or done anything that you consider an indication of my viewpoints on these facts, you are hereby instructed to disregard it." *Id.* at 450. This court, however, determined the instruction could not overcome quality and quantity of the court's participation. This court observed: "In the instant action, we are troubled by the court's commentary during the questioning of witnesses. * * * [T]he degree of the court's involvement is extensive. Furthermore, the court's involvement exceeded merely questioning the witnesses as some of the court's remarks could have been interpreted by the jury to reflect the court's attitude or opinion of the witness and the proponent's testimony." *Id.* This court consequently determined: "we are able to discern an attitude reflecting disdain for this particular proceeding. Such demeanor and tenor lead to a prejudicial effect upon the trial and reflect poorly upon the judicial process." *Id.* at 449.

{¶41} In this matter, the trial judge did not offer any commentary reflecting his view of the substantive testimony of the witness or his perception regarding the credibility of the state's case against appellant. As noted above, his involvement was limited to keeping the witness focused on being responsive to questions posed and prohibiting him from elaborating where no such narrative was requested. *Griffen* is therefore inherently distinguishable from this case.

{¶42} In *Smith*, *supra*, this court determined that the trial court's expression of an opinion on the merits of the evidence, which favored the prosecution, in conjunction with

disparaging remarks the judge made to defense counsel while he was giving his closing, were sufficient to deny the defendant a fair trial. This court held:

> **{¶43}** [A] judge's declaration, in front of the jury, regarding the validity and therefore the legal sufficiency of the state's evidence is more than adequate to overcome this general presumption of fairness. Moreover, the judge's interruptions, remarks, and rebukes during defense counsel's closing, all of which again occurred in front of the jury, exhibit a fundamental lack of restraint and judicial temperament. Counsel's effectiveness was wholly impaired by the cumulative effect of the trial judge's remarks and criticisms during trial. Viewed objectively, such conduct cannot be seen as fair and impartial. *Id.* at ¶78.

{¶44} The interaction of the trial court and the witness in this matter had nothing to do with the weight or sufficiency of the state's evidence. Moreover, the trial court did not impugn defense counsel or express an opinion on the content of the witness' testimony. We decline to find that the actions and interactions of the trial judge with the witness in this case had any deleterious influence on the jury's deliberation. This case is fundamentally different from *Smith.*

{¶45} Appellant asserts the trial court's collective interactions demonstrate an interest in interfering with the witness' testimony and/or intimidating him. As discussed above, the trial court, in light of the surrounding circumstances, appropriately intervened during cross-examination. And we fail to see how any of the trial court's interactions had any meaningful effect on the jury's perception of the witness' substantive testimony. While the witness was frequently admonished, the context of the admonishments demonstrate they were prompted by the witness' consistent attempt to ignore or skirt the court's many, previous directives; directives which we hold were reasonable and within the proper authority as set forth under Evid.R. 611(A) and R.C. 2945.03. We accordingly hold the court did not inappropriately intervene during cross-examination and thus, appellant has

failed to show he was prejudiced by the court's comments. We therefore discern no error, let alone plain error.

{¶46} Appellant's first assignment of error lacks merit.

{¶47} Appellant's second assignment of error provides:

{¶48} "The trial court deprived appellant of his constitutional rights to a public trial in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Section 10, Article I of the Ohio Constitution, when it closed his sentencing hearing to the public."

{¶49} Appellant contends the trial court erred to his prejudice and violated his constitutional rights when it limited access to the courtroom at his sentencing hearing due to the COVID-19 pandemic. He, through counsel, specifically requested that his family members be permitted to speak on his behalf at sentencing. We find no error.

{¶50} Prior to the commencement of sentencing, defense counsel made the following statement to the court:

{¶51} "Your Honor, briefly. And please forgive me, I don't know what the legal parameters are around the pandemic, so I am going to, out of an abundance of caution just make note that my client's family did want to appear today, and as I understand it, the Court is trying to limit entry into the Court only to essential personnel, attorneys and, of course, staff, as I understood it. And the victims, people who are constitutionally required to be here.

{¶52} THE COURT: That's correct.

{¶53} [Counsel]: So they were trying to be here and they would have been here. I had many conversations with many members of this family who planned to appear and,

therefore, while I don't have letters in support as I want you to know their cases, pleas, I don't want the Court - - remember back to the trial that he did have a lot of support and that also that those individuals did want to come and several of them would have like to have spoken in mitigation and character. So we would just ask the Court to consider that."

{¶54} Defense counsel then proceeded to argue mitigating factors weighing, in his view, in favor of a relatively lenient sentence. The state then responded, arguing in favor of a more severe sentence. The matter of the presence of relatives in court was never ultimately discussed again and defense counsel did not request the court to issue a specific ruling.

{¶55} A public trial serves the interests of both the defendant and the public by "ensuring that judge and prosecutor carry out their duties responsibly, * * * encourag[ing] witnesses to come forward[,] and discourag[ing] perjury." *Waller v. Georgia*, 467 U.S. 39, 46 (1984). And, the right to a public trial attaches at sentencing proceedings. *See e.g. United States v. Rivera,* 682 F.3d 1223, 1229 (9th Cir.2012). In *Waller*, the United States Supreme Court set forth several considerations relating to the partial closure of otherwise public proceedings. It stated: "the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." *Id.* at 48.

{¶56} Appellant accurately asserts that the trial court did not consider or make any of the foregoing findings. The trial court, however, did not make an affirmative declaration

that appellant's family members were necessarily barred from the proceedings. Further, counsel was obviously aware of the administrative order issued by the Trumbull County Court of Common Pleas regarding certain restrictions and limitations relating to courtroom attendance. The order proscribed family members, guests, and other ancillary participants from attending court proceedings. The order, however, did not prohibit those having business before the court from attending. Counsel did not state the family was available to appear, only that they "planned to appear" and "would have like to have spoken." Had appellant's family been available, their attendance could have fallen under the rubric of those having business with the court. Counsel did not couch his request in this fashion, let alone specifically seek the family's attendance under this exception and, as a result, we cannot conclude the trial court prohibited the family members' attendance.

{¶57} Moreover, counsel failed to formally object and, indeed, acquiesced to sentencing in the absence of appellant's family. Appellant's counsel only asked the court to "consider" permitting family members to speak in mitigation; counsel, however, did not revisit the issue or object to the court proceeding to sentencing. To the contrary, he specifically stated, once argumentation was finished, that appellant was "prepared to proceed to sentencing."

{¶58} Furthermore, nothing in Crim.R. 32 (governing sentences) or R.C. 2929.19 (governing the sentencing hearing) requires the court to allow live witnesses to testify on a defendant's behalf. *See State v. Ross*, 5th Dist. Perry No. 20-CA-00011, 2020-Ohio-5284, ¶19. And, regardless of this point, appellant could have preserved his interest in having his family speak by requesting they write to the judge on his behalf. He apparently

failed to do so. Given the circumstances, we decline to hold appellant's right to a public trial was violated.

{¶59} Appellant's second assignment of error lacks merit.

{¶60} For the reasons discussed in this opinion, the judgment of the Trumbull County Court of Common Pleas is affirmed.

MATT LYNCH, J., concurs,

THOMAS R. WRIGHT, J., dissents with a Dissenting Opinion.

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{¶61} In disagreement with the majority, I find reversible error under appellant's first assigned error, which renders moot his second assigned error. Appellant has demonstrated that the trial judge's statements to defense witness, Mr. Schubert, prejudicially affected the jury's ability to objectively weigh his testimony.

{¶62} The due process right to a fair trial demands not only the absence of actual judicial bias, but the absence of an appearance of judicial bias; the trial judge must avoid any conduct by which the jury could infer bias against either party, as it may compromise its ability to fairly adjudicate the evidence. "'[T]he judiciary must not only remain detached and neutral in any proceeding before it, but the court must also epitomize itself as the paragon of impartiality.'" *Mentor-on-the-Lake v. Giffin*, 105 Ohio App.3d 441, 449, 664 N.E.2d 557 (11th Dist.1995), quoting *State v. Bayer*, 102 Ohio App.3d 172, 174, 656 N.E.2d 1314 (11th Dist.1995).

{¶63} Patently, in the exercise of its duty to control the criminal trial, the trial judge must be cognizant of the effect his or her intervention has upon the jury. "'It is well known, as a matter of judicial notice, that juries are highly sensitive to every utterance by the trial judge, the trial arbiter[.]'" *State v. Thomas*, 36 Ohio St.2d 68, 71, 303 N.E.2d 882 (1973), quoting *Bursten v. United States*, 395 F.2d 976, 983 (5th Cir.1968). "In a trial before a jury, the court's participation by questioning or comment must be scrupulously limited, lest the court, consciously or unconsciously, indicate to the jury its opinion on the evidence or on the credibility of a witness." *State ex rel. Wise v. Chand*, 21 Ohio St.2d 113, 256 N.E.2d 613, paragraph three of the syllabus. "[W]here the intensity, tenor, range and persistence of the court's interrogation of a witness can reasonably indicate to the jury the court's opinion as to the credibility of the witness or the weight to be given his testimony, the interrogation is prejudicially erroneous." *Id.* at paragraph four of the syllabus. Thus, a trial judge's comments made in the presence of a jury that affect the credibility of a witness central to the determination of a defendant's guilt or innocence may justify a reversal of the conviction. *Thomas* at syllabus; *State v. Stedman*, 8th Dist. Cuyahoga No. 77334, 2001 WL 1398469, *3 (Nov. 1, 2001).

{¶64} This court has previously recognized instances where a trial judge's comments exceeded its duty to control the trial and ascertain the truth, where the jury could have interpreted the judicial intervention as a reflection of the court's attitude or opinion toward a party or the credibility of a witness. *E.g.*, *Giffin* at 445-450 (where judge's many comments made during questioning of certain witnesses reflected disdain for the proceeding, generally reflected poorly upon the judicial process, and led to a prejudicial effect upon the trial); *State v. Smith*, 11th Dist. Portage Nos. 2006-P-0101 & 2006-P-

0102, 2008-Ohio-3251, ¶ 57-78 (where judge's remarks and criticisms toward defense counsel in front of the jury were prejudicial and denied defendant a fair trial). *See also Maumee v. Nycz*, 6th Dist. Lucas No. L-92-178, 1994 WL 39060 (Feb. 11, 1994) (where the combination of judge's comments and interferences was significant enough to deny defendant a fair trial); *State v. McCarley*, 9th Dist. Summit No. 22562, 2006-Ohio-1176, ¶ 8-19 (where judge's comments on reputation of a prosecution witness in front of the jury were prejudicial to defendant's right to fair trial).

{¶65} The judicial intervention in this matter likewise deprived appellant of the right to an impartially administered trial. I recognize that the witness, Mr. Schubert, was somewhat obstreperous, and I take no exception with most of the trial court's efforts to limit his responses to the questions asked. Nevertheless, instead of *removing the jury* and firmly explaining the rules of cross-examination, the judge, with the jury present, told Mr. Schubert to "keep his mouth shut," and threatened to hold him in contempt, and ultimately threatened to have him "gagged." Although the judge did not offer commentary on the substance of Mr. Schubert's testimony, the statements negatively affected the manner in which the jury viewed Mr. Schubert and, necessarily, his credibility. Given that Mr. Schubert's testimony was that he, not appellant, was responsible for the contraband at issue, the prejudicial effect the trial judge's statements had cannot be underestimated.

{¶66} I accordingly dissent. The matter should be reversed and remanded for a new trial.