

[Cite as *State v. Masalko*, 2018-Ohio-2560.]

STATE OF OHIO            )  
                                  )ss:  
COUNTY OF WAYNE        )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No.        17AP0002

Appellee

v.

DAVID MASALKO

APPEAL FROM JUDGMENT  
ENTERED IN THE  
WAYNE COUNTY MUNICIPAL COURT  
COUNTY OF WAYNE, OHIO  
CASE No.        2014 CRB 1615

Appellant

DECISION AND JOURNAL ENTRY

Dated: June 29, 2018

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HENSAL, Judge.

{¶1} David Masalko appeals a judgment of the Wayne County Municipal Court that convicted and sentenced him for one count of public indecency. For the following reasons, this Court reverses.

I.

{¶2} The assistant county prosecutor filed a complaint against Mr. Masalko, charging him with public indecency based on the allegations of one of his co-workers. A jury found him guilty of the offense, and the municipal court sentenced him to 30 days in jail. Mr. Masalko has appealed, assigning three errors.

II.

ASSIGNMENT OF ERROR I

THE TRIAL COURT ABUSED ITS DISCRETION BY PRECLUDING DEFENSE COUNSEL FROM QUESTIONING THE ACCUSER REGARDING A LAWSUIT SHE FILED AGAINST MR. MASALKO AND HIS EMPLOYER.

{¶3} Mr. Masalko argues that the municipal court should have allowed him to cross-examine his co-worker about a civil suit that she had filed against him and his employer. He notes that, in *State v. Ferguson*, 5 Ohio St.3d 160 (1983), the Ohio Supreme Court held that “[a]n accused is permitted to cross-examine the prosecuting witness as to the witness’ pending or contemplated civil action against the accused, in order to demonstrate any possible bias or prejudice arising out of the witness’ financial interest in the outcome of the prosecution.” *Id.* at paragraph three of the syllabus. He also argues that, even though he made a proffer of the expected testimony at the conclusion of the trial, under Evidence Rule 103(A)(2), he was not required to make one because his inquiry was on cross-examination.

{¶4} During his cross-examination of the co-worker, Mr. Masalko asked about a text message that she had sent to their employer. He asked the co-worker whether she had given the text message to anyone else, and she answered that she had given it to her attorney. Mr. Masalko then asked her “who is your attorney?” The State objected, and the trial court sustained the objection, directing Mr. Masalko to “[g]o onto another line of questioning please.” After the jury retired for deliberations, Mr. Masalko made a proffer regarding the line of questioning that the court had prohibited him from exploring. He indicated that he believed “the evidence would have shown that [the co-worker] hired a lawyer prior to even the first trial \* \* \* and ask[ed] for over fifty thousand dollars in damages. I believe this shows bias on the part of [her] and a motive to embellish and/or fabricate allegations.” The State responded that the Court’s ruling was actually based on its determination that the introduction of the testimony would confuse the jurors because it would open up the fact that there had been a prior criminal trial and that the

case between Mr. Masalko and his co-worker had ended in a settlement.<sup>1</sup> The State alleged that the testimony, therefore, was more prejudicial than probative.

{¶5} In *Ferguson*, the Ohio Supreme Court considered whether “the trial court erred in refusing to allow cross-examination of the victim concerning the fact that she had consulted a law firm regarding bringing a civil action against appellee’s former employer.” *Ferguson*, 5 Ohio St.3d at 165. The prosecutor in that case had objected when Mr. Ferguson attempted to cross-examine “the victim concerning her knowledge of a certain law firm.” *Id.* Mr. Ferguson proffered “that the victim was contemplating a civil action against [Mr. Ferguson]’s former employer as a result of the incident[.]” *Id.* Recognizing that a witness who has a pecuniary interest in a case could be biased, the Ohio Supreme Court agreed with Mr. Ferguson that, because the victim “stood to benefit financially from [Mr. Ferguson’s] conviction[.]” he should have been allowed to examine her about her contemplated civil action. *Id.* at 166. It concluded that, because the victim’s testimony was vital to the State’s case, the trial court abused its discretion when it refused to allow evidence of the contemplated civil suit. *Id.*

{¶6} This case closely resembles *Ferguson*. The co-worker was the only witness who allegedly saw Mr. Masalko commit the offense. Her testimony was vital to the State’s case. The trial court prevented Mr. Masalko from cross-examining her on the lawsuit she had filed, however, which “prevented the jury from considering whether the financial motivation for [her] testimony rendered her testimony not credible.” *Id.* Contrary to the State’s assertion, the court did not provide an explanation for its decision. Under these circumstances, we conclude that the trial court abused its discretion when it refused to allow Mr. Masalko to cross-examine his co-worker about her civil suit. *Id.* Mr. Masalko’s first assignment of error is sustained.

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<sup>1</sup> It is not clear from the appellate record whether there was a settlement in the civil action and, if so, whether it was between all or just some of the parties to that action.

## ASSIGNMENT OF ERROR II

THE TRIAL COURT COMMITTED PLAIN ERROR BY COMMENTING DURING DEFENSE COUNSEL'S CLOSING ARGUMENT AND DURING CROSS-EXAMINATION OF THE ACCUSER, WHICH HAD THE EFFECT OF BOLSTERING HER CREDIBILITY AND RENDERED THE TRIAL UNFAIR.

## ASSIGNMENT OF ERROR III

MR. MASALCO'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶7} Mr. Masalko also argues that the trial court improperly bolstered his co-worker's credibility with certain comments that it made during the trial and that his conviction is against the manifest weight of the evidence. In light of our resolution of his first assignment of error, we conclude that these assignments of error are moot, and they are overruled on that basis. *See* App.R. 12(A)(1)(c).

## III.

{¶8} Mr. Masalko's first assignment of error is sustained. His second and third assignments of error are overruled as moot. The judgment of the Wayne County Municipal Court is reversed, and this matter is remanded for further proceedings consistent with this decision.

Judgment reversed,  
and cause remanded.

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There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Wayne County Municipal Court, County of Wayne, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

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JENNIFER HENSAL  
FOR THE COURT

TEODOSIO, P. J.  
CARR, J.  
CONCUR.

APPEARANCES:

PATRICK L. BROWN, Attorney at Law, for Appellant.

DANIEL R. LUTZ, Prosecuting Attorney, and NATHAN R. SHAKER, Assistant Prosecuting Attorney, for Appellee.