

[Cite as *State v. Roper*, 2023-Ohio-2681.]

STATE OF OHIO            )  
                                  )ss:  
COUNTY OF SUMMIT     )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No.     30396

Appellee

v.

ROBERT ROPER

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF SUMMIT, OHIO  
CASE No.     CR 12 09 2618

Appellant

DECISION AND JOURNAL ENTRY

Dated: August 2, 2023

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FLAGG LANZINGER, Judge.

{¶1} Robert Roper appeals from the judgment of the Summit County Court of Common Pleas that denied his motion for a new trial. This Court affirms.

I.

{¶2} This is Mr. Roper’s third appeal before this Court. In 2013, a jury found Mr. Roper guilty of one count of rape, which was premised upon allegations that Mr. Roper sexually abused his girlfriend’s five-year-old daughter. *State v. Roper*, 9th Dist. Summit No. 29466, 2021-Ohio-188, ¶ 2 (“*Roper I*”). This Court affirmed Mr. Roper’s conviction on direct appeal in 2014. *State v. Roper*, 9th Dist. Summit No. 27025, 2014-Ohio-4786, ¶ 37 (“*Roper I*”); *but see State v. Roper*, 143 Ohio St.3d 419, 2015-Ohio-3379, ¶ 1 (reversing this Court’s judgment in *Roper I* relative to the no-contact order).

{¶3} In 2017, Mr. Roper filed a motion for a new trial under Crim.R. 33 premised upon newly discovered evidence of juror misconduct. *Roper II* at ¶ 4. Mr. Roper based his motion upon

the fact that, in 2015, prosecutors in an unrelated criminal case learned that Juror No. 4 in Mr. Roper's case did not disclose certain information during voir dire at Mr. Roper's trial. *Roper II* at ¶ 12. The unrelated criminal case was *State v. Pistawka*. *Id.*

{¶4} In *Pistawka*, Juror No. 4's estranged husband faced charges of sexually abusing his stepdaughter, C.G., who was Juror No. 4's biological daughter. *Id.* By way of background, in 2007, when C.G. was fifteen years old, C.G. reported that Mr. Pistawka sexually abused her when she was ten years old. *Id.* at ¶ 13. Summit County Children Services ("CSB") "removed [C.G.] from her home and temporarily placed [her] in foster care before going to live with her biological father." *Id.* at ¶ 14. C.G. then recanted her allegations against Mr. Pistawka and returned to living with her mother (Juror No. 4). *Id.* As a result, CSB terminated its investigation into C.G.'s allegations against Mr. Pistawka. *Id.*

{¶5} In late 2013, after Mr. Roper's trial, "C.G.'s two stepsisters—Mr. Pistawka's biological daughters—made their own allegations of sexual abuse against Mr. Pistawka. C.G. then reaffirmed her prior accusations against Mr. Pistawka." *Id.* at ¶ 14. Those allegations became the basis for the charges against Mr. Pistawka in *State v. Pistawka*. *Id.* at ¶ 12. Despite C.G.'s reaffirmance of her prior allegations, Juror No. 4 did not believe (and never believed) C.G.'s allegations and testified on Mr. Pistawka's behalf at his trial. *Id.* at ¶ 15-16, 28.

{¶6} Prior to Juror No. 4 testifying on Mr. Pistawka's behalf, the prosecutors learned that Juror No. 4 served as a juror in Mr. Roper's case and obtained a transcript of the voir dire portion of Mr. Roper's trial. *Id.* at ¶ 15. The prosecutors learned that Juror No. 4 never raised her hand when asked whether the potential jurors had prior dealings with children services and/or familial incidents of sexual misconduct. *Id.* at ¶ 16. As noted, Mr. Roper based his motion for a new trial upon Juror No. 4's failure to disclose her prior dealings with CSB and C.G.'s allegations

of sexual abuse against Mr. Pistawka. More specifically, “Mr. Roper alleged that, during voir dire in his trial, Juror No. 4 had deliberately concealed her daughter’s report of sexual abuse against Juror No. 4’s husband, and argued that his right to a fair trial had been violated by juror misconduct.” *Id.* at ¶ 4. “Mr. Roper argued that, had Juror No. 4 truthfully disclosed information in response to certain questions during voir dire, his trial counsel would have had the opportunity to pose further questions and to seek her removal from the jury panel for cause.” *Id.*

{¶7} The trial court held an evidentiary hearing on Mr. Roper’s motion for a new trial. During the hearing, Juror No. 4 testified that she thought she raised her hand when asked about prior dealings with CSB. Juror No. 4 also testified that C.G. had recanted her allegations of sexual abuse against Mr. Pistawka shortly after C.G. made them. Juror No. 4 further testified that she never believed C.G.’s allegations against Mr. Pistawka, and that she thought she was a fair and impartial juror. Despite Juror No. 4 claiming that she thought she raised her hand when asked about prior dealings with CSB, the parties stipulated at the hearing that she did not. The parties also stipulated that Juror No. 4 did not raise her hand when asked whether anyone in her family had been a victim of sexual abuse.

{¶8} After the hearing, the trial court granted Mr. Roper’s motion for a new trial. *Id.* at ¶ 5. In doing so, the trial court found that “Juror No. 4 may well have been ‘a fair and impartial juror, as she testified she believed she was[,]’ but conclude[ed] that the circumstances created a ‘cloud of doubt hanging over the fairness of Mr. Roper’s trial.’” *Id.*

{¶9} The State appealed the trial court’s decision granting Mr. Roper’s motion for a new trial. *Id.* at ¶ 1. This Court reversed the trial court’s decision in *Roper II*. *Id.* In reversing the trial court’s decision granting Mr. Roper’s motion for a new trial, this Court set forth the applicable law as follows:

This Court reviews a trial court's decision to grant or deny a motion for new trial for an abuse of discretion. *State v. Pyle*, 9th Dist. Summit No. 28802, 2018-Ohio-3160, ¶ 47. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). When applying an abuse of discretion standard, a reviewing court is precluded from simply substituting its own judgment for that of the trial court. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621 (1993).

Crim.R. 33(A)(2) provides that "[a] new trial may be granted on motion of the defendant for \* \* \* [m]isconduct of the jury \* \* \*." "[U]nder Crim.R. 33(A)[ and also R.C. 2945.79(B)], juror misconduct justifies a new trial only if it materially affected an accused's substantial rights." *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, ¶ 45. The trial court's consideration of a motion for a new trial based on juror misconduct involves two steps: (1) a "determination [of] whether misconduct actually occurred," and (2) "whether that misconduct materially prejudiced the defendant's substantial rights." *State v. Jalowiec*, 9th Dist. Lorain No. 14CA010548, 2015-Ohio-5042, ¶ 48.

Defendants in criminal prosecutions are guaranteed the right to a trial by an impartial jury through the Due Process Clause of the Fourteenth Amendment and Sixth Amendment to the United States Constitution, as well as the Ohio Constitution, Article I, Section 10. *See State v. Roberts*, 9th Dist. Wayne No. 14AP0035, 2015-Ohio-5044, ¶ 17; *Duncan v. Louisiana*, 391 U.S. 145 (1968). Due process requires "an impartial trier of fact—'a jury capable and willing to decide the case solely on the evidence before it.'" *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554, (1984) quoting *Smith v. Phillips*, 455 U.S. 209, 217, (1982). "Voir dire examination serves to protect that right by exposing possible biases, both known and unknown, on the part of potential jurors." *Id.* To establish a constitutional violation where a claim of jury misconduct is based on a juror's concealment of information or failure to disclose potential bias, the defendant has the burden to establish that a seated juror was not impartial. *State v. Williams*, 79 Ohio St.3d 1, 4 (1997).

The parties agree that the Supreme Court of Ohio's decision in *Grundy v. Dhillon*, 120 Ohio St.3d 415, 2008-Ohio-6324, provides the relevant analytical structure for examining a juror's alleged misrepresentations during voir dire. In *Grundy*, the Court held

[t]o obtain a new trial in a case in which a juror has not disclosed information during voir dire, the moving party must first demonstrate that a juror failed to answer honestly a material question on voir dire and that the moving party was prejudiced by the presence on the trial jury of a juror who failed to disclose material information.

*Grundy* at paragraph one of the syllabus (following the approach of the United States Supreme Court in *McDonough Power Equip. Inc.*, 464 U.S. 548). Further, “[t]o demonstrate prejudice, the moving party must show that an accurate response from the juror would have provided a valid basis for a for-cause challenge.” *Id.* citing *Pearson v. Gardner Cartage Co.*, 148 Ohio St. 425 (1947), paragraph two of the syllabus. A court may infer bias only if it finds that the juror deliberately concealed or failed to disclose information but, “if the concealment was unintentional, the appellant must show that the juror was actually biased.” *Williams* at 4.

*Roper II* at ¶ 8-11.

{¶10} Applying this law, this Court concluded that Juror No. 4’s obligation to affirmatively respond to the prosecutor’s question as to whether anyone in the jurors’ family “*had been*” a victim of sexual abuse was uncertain considering the fact that Juror No. 4 never believed that C.G. had been the victim of sexual abuse, and—at the time of Mr. Roper’s trial—C.G. had recanted her allegations against Mr. Pistawka. *Roper II*, 2021-Ohio-188, at ¶ 28. “It was not until after voir dire and after the conclusion of Mr. Roper’s trial that Mr. Pistawka’s two daughters came forward with their own accusations against him and that C.G. reaffirmed the claims of sexual abuse she made as a child.” *Id.* Nonetheless, this Court concluded that “we need not resolve this issue because the trial court correctly observed that [Juror No. 4] failed to respond to the question about involvement with CSB.” *Id.* at ¶ 29. To that end, this Court concluded that the effect of Juror No. 4’s “failure to raise her hand is sufficient to show juror misconduct[,]” but noted that “[w]hether such juror misconduct was prejudicial is a separate question.” *Id.* This Court then addressed the issue of prejudice.

{¶11} Regarding prejudice, this Court concluded that “[i]n this instance, Mr. Roper could demonstrate prejudice by showing that ‘an accurate response from [Juror No. 4] would have provided a valid basis for a for-cause challenge.’” *Id.* at ¶ 31, quoting *Grundy*, 2008-Ohio-6324, at paragraph one of the syllabus. We then cited Crim.R. 24(C)(9) and R.C. 2945.25(B) for the

proposition that “a valid basis for a challenge for cause \* \* \* requires a showing that a juror was unable to act impartially or was actually biased against the accused.” *Id.* at ¶ 35. This Court reasoned that,

[h]ad [Juror No. 4] disclosed her experience with CSB during voir dire, subsequent questioning may well have led [Juror No. 4] to disclose that her daughter accused [Juror No. 4]’s husband of sexual abuse. Still, this information on its own does not establish bias sufficient to warrant a valid basis for a challenge for cause.

*Id.* at ¶ 38. This Court also reasoned that there was “nothing inherent in [Juror No. 4]’s] experience to suggest bias toward Mr. Roper[.]” and that the record “reveal[ed] no substantive basis for the trial court to have determined bias.” *Id.* at ¶ 38, 40. This Court further reasoned that Juror No. 4’s “personal experience could have been viewed as indicative of her capacity to believe that a person may be falsely accused of committing sexual abuse.” *Id.* at ¶ 38. This Court then pointed out that the trial court found that a “logical basis” existed to challenge Juror No. 4 for cause, which is not equivalent to the required “valid basis” standard for demonstrating prejudice. *Id.* at ¶ 34. As a result, this Court concluded that, “[w]ithout first finding a valid basis to challenge [Juror No. 4] for cause, the trial court erred by finding that Mr. Roper’s substantial rights were prejudiced and a new trial required.” *Id.* at ¶ 41. This Court also concluded that “the trial court’s analysis did not adequately take into account [Juror No. 4]’s] testimony to determine whether or not the court was satisfied she could ‘render an impartial verdict according to the law and the evidence submitted to the jury at the trial.’” *Id.* quoting Crim.R. 24(C)(9).

{¶12} On remand, the trial court denied Mr. Roper’s motion for a new trial. In doing so, the trial court concluded that:

The evidence presented did suggest the possibility that juror misconduct and bias may have been present by way of [Juror No. 4]’s nondisclosure. However, beyond the findings originally made concerning [Juror No. 4]’s failure to disclose information, this court cannot conclude that the evidence established that such nondisclosure was deliberate, intentional, or actually based on misconduct or that

Mr. Roper was materially prejudiced by such nondisclosure. The evidence did not establish the existence of a valid basis for a challenge for cause under Crim.R. 24(C)(9).

{¶13} Mr. Roper now appeals that decision, raising one assignment of error for this Court's review.

## II.

### ASSIGNMENT OF ERROR

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED ROBERT ROPER'S MOTION FOR NEW TRIAL. \* \* \*.

{¶14} In his sole assignment of error, Mr. Roper argues that the trial court abused its discretion when it denied his motion for a new trial. This Court disagrees.

{¶15} In *Roper II*, this Court held that Juror No. 4's failure to raise her hand in response to the prosecutor's questions regarding the potential jurors' involvement with CSB was sufficient to establish juror misconduct. *Roper II*, 2021-Ohio-188, at ¶ 29. We did not, however, resolve the issue of whether Juror No. 4's failure to raise her hand in response to the prosecutor's questions regarding whether any of the potential jurors' family members had been victims of sexual misconduct was sufficient to establish juror misconduct. *Id.* On remand, the trial court held that the evidence did not establish that Juror No. 4's nondisclosures were deliberate, intentional, or actually based on misconduct. To the extent the trial court's ruling in this regard relates to Juror No. 4's failure to raise her hand regarding familial incidents of sexual misconduct, this Court concludes that the trial court did not abuse its discretion in rendering its decision. As noted above, at the time of Mr. Roper's trial, Juror No. 4's daughter had recanted her allegations against Mr. Pistawka and CSB had terminated its investigation. *Roper II* at ¶ 14, 28. Additionally, Juror No. 4 testified at the hearing on Mr. Roper's motion for a new trial that she never believed her daughter's allegations against Mr. Pistawka. Further, the prosecutor at Mr. Roper's trial asked if

any of the potential jurors' family members "*had been*" victims of sexual misconduct, not whether they had made allegations of sexual misconduct against anyone. *Id.* at ¶ 28. Based on the record, this Court concludes that the trial court did not err by determining that Juror No. 4's nondisclosure in this regard did not amount to juror misconduct.

{¶16} Having found in *Roper II* that Juror No. 4's failure to raise her hand in response to the prosecutor's questions regarding the potential jurors' involvement with CSB was sufficient to establish juror misconduct, the question before this Court is whether the trial court abused its discretion by determining that the evidence did not establish that Mr. Roper was materially prejudiced by Juror No. 4's nondisclosure, and that it did not establish the existence of a valid basis for a challenge for cause under Crim.R. 24(C)(9). On appeal, Mr. Roper argues that "Juror [No.] 4 deliberately concealed or failed to disclose material information during voir dire, and the only natural inferences from those facts are that she was not impartial, was biased, and was not fit for a sexual abuse criminal trial, all of which constitute valid bases that demand her exclusion from the jury in this case." This Court disagrees.

{¶17} While Mr. Roper asserts that Juror No. 4 deliberately concealed material information regarding her involvement with CSB, the trial court found otherwise. As this Court stated in *Roper II*, "a court certainly may infer bias if it finds that a juror deliberately concealed information[.]" *Roper II*, 2021-Ohio-188, at ¶ 33. Here, however, the trial court specifically determined on remand that it "cannot conclude that the evidence established that such nondisclosure was deliberate, intentional, or actually based on misconduct \* \* \*." "In the absence of a finding of intentional or deliberate concealment, the trial court had to determine whether Mr. Roper was prejudiced by juror misconduct: whether an accurate response to the questions would have revealed juror bias sufficient to establish a valid basis to challenge the juror for cause." *Id.*,



citing *Grundy* at paragraph one of the syllabus. As explained below, the trial court determined that it did not.

{¶18} As this Court stated in *Roper II*, “[t]o demonstrate prejudice, the moving party must show that an accurate response from the juror would have provided a valid basis for a for-cause challenge.” *Roper II* at ¶ 11, quoting *Grundy*, 2008-Ohio-6324, at paragraph one of the syllabus. “In determining whether a \* \* \* nondisclosure provided a basis for a for-cause challenge, an appellate court may not substitute its judgment for the trial court’s judgment unless it appears that the trial court’s attitude was unreasonable, arbitrary, or unconscionable.” *Grundy* at paragraph two of the syllabus.

{¶19} Here, had Juror No. 4 raised her hand when the prosecutor questioned the potential jurors regarding the jurors’ involvement with CSB, the prosecutor may have learned that CSB removed Juror No. 4’s daughter from her home after her daughter made sexual abuse allegations against her husband, Mr. Pistawka. The prosecutor also may have learned that: (1) Juror No. 4’s daughter recanted; (2) CSB terminated its investigation; (3) Juror No. 4’s daughter returned to living with Juror No. 4; and (4) Juror No. 4 never believed her daughter’s allegations against Mr. Pistawka. As this Court stated in *Roper II*, “[a] prospective juror is not automatically disqualified by the fact that a close relative has been the victim of a crime similar to the crime on trial.” *Roper II* at ¶ 38, quoting *State v. Stevens*, 5th Dist. Morgan No. 14 AP 0005, 2015-Ohio-307, ¶ 36. It follows that a prospective juror is not automatically disqualified by the fact that a close relative made allegations, which the relative later recanted, of a crime similar to the crime on trial. Moreover, as this Court also stated in *Roper II*, “the record here reveals no substantive basis for the trial court to have determined bias.” *Roper II* at ¶ 40. If anything, like her failure to raise her hand regarding the prosecutor’s questions relative to incidents of familial sexual abuse, Juror No.

4's personal experience with CSB "could have been viewed as indicative of her capacity to believe that a person may be falsely accused of committing sexual abuse." *Id.* at ¶ 38.

{¶20} Additionally, the trial judge here was the same for the trial, the post-trial motion for a new trial, the evidentiary hearing on that motion, and on this Court's remand after *Roper II*. As other courts have noted, "the acumen gained by the trial judge who presided during the entire course of these proceedings makes h[er] well qualified to rule on the motion for a new trial[.]" *State v. Stevens*, 5th Dist. Morgan No. 14 AP 0005, 2015-Ohio-307, ¶ 37, quoting *State v. Davis*, 5th Dist. Ashland No. 02COA9, 2002-Ohio-5286, ¶ 21.

{¶21} Despite Mr. Roper's arguments to the contrary, the record does not support a conclusion that the trial court abused its discretion when it determined that: (1) the evidence did not establish that Juror No. 4's nondisclosure was deliberate, intentional, or actually based on misconduct; (2) the evidence did not establish the existence of a valid basis for a challenge for cause under Crim.R. 24(C)(9); and, accordingly, (3) Mr. Roper was not materially prejudiced by such nondisclosure. Mr. Roper's assignment of error is overruled.

### III.

{¶22} Mr. Roper's assignment of error is overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

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There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, 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 Appellant.

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JILL FLAGG LANZINGER  
FOR THE COURT

HENSAL, P. J.  
CARR, J.  
CONCUR.

APPEARANCES:

PETER GALYARDT, Assistant Public Defender, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and C. RICHLEY RALEY, JR., Assistant Prosecuting Attorney, for Appellee.