[Cite as *State v. Roman*, 2010-Ohio-3593.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92743

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DANIEL ROMAN

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-514570

BEFORE: Jones, J., Boyle, P.J., and Sweeney, J.

RELEASED AND JOURNALIZED: August 5, 2010

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LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, Daniel Roman ("appellant"), appeals his convictions of aggravated menacing, abduction with firearm and forfeiture specifications, and domestic violence. Having reviewed the arguments of the parties and the pertinent law, we hereby affirm the judgment of the lower court.

STATEMENT OF THE CASE

{¶ 2} On July 29, 2008, appellant was arrested, and on August 20, 2008, he was arraigned and charged with one count of attempted murder, in violation of R.C. 2903.02; two counts of felonious assault, in violation of R.C. 2903.11; two

counts of kidnapping, in violation of 2905.01; and two counts of domestic violence, in violation of R.C. 2919.25.

{¶ 3} Appellant pled not guilty to all charges at his August 20, 2008 arraignment. On October 9, 2008, the parties stipulated to the findings of the psychiatric clinic that appellant was sane and competent to stand trial. The jury trial commenced on December 8, 2008, and at the close of the state's case, appellant motioned to dismiss the charges pursuant to Crim.R. 29. The trial court granted the motion as to Count 1, attempted murder; Count 4 kidnapping; and Count 6, felonious assault.

{¶ 4} The trial court denied the motion as to the remaining counts. On December 12, 2008, the jury returned a guilty verdict as to two counts of aggravated menacing, in violation of R.C. 2903.21 (a lesser included offense of Counts 2 and 3, felonious assault).

{¶ 5} The jury also found appellant guilty of abduction, in violation of R.C. 2905.02 (a lesser included offense of kidnapping), and imposed a one-year firearm specification, in violation of R.C. 2941.141, and a three-year gun specification, in violation of R.C. 2941.145. Lastly, the jury found appellant guilty of Count 7, domestic violence, in violation of R.C. 2919.25.

{¶ 6} At sentencing, the court determined that prison was consistent with the purpose of R.C. 2929.11. The court then sentenced appellant as follows:

> THE COURT: "Counts 2, 3, and 7 are first-degree misdemeanors. You'll get six months concurrent to each other. That will also run concurrent to the sentence with respect to Count 5. The

> one-year and three-year firearm specifications merge for purposes of sentencing, so you will do three years prior to and consecutive to two years on the abduction, for a total commitment of five years."

{¶ 7} Appellant filed his timely notice of appeal on February 3, 2009.

STATEMENT OF THE FACTS

{¶ 8} Christine Stevens ("Stevens") testified that she was a close friend of appellant's, and the two spent time together. Stevens was also a friend of the victim, Justina French ("French") for a period of approximately seven to eight months prior to the incident. On July 29, 2008, Stevens, French, appellant, his brother, David Tramell ("Tramell"), and two minor children were at appellant's and French's home in Cleveland, Ohio.

{¶ 9} The four adults left to go to a bar at approximately 9:00 p.m. that evening. The group was at the bar for an hour and had a few drinks. Upon returning to the house, appellant and French began to argue. Stevens and her husband decided to take the children to Stevens's home. Approximately one hour later, Stevens received a call from appellant informing her that it was safe to bring the children back to the house. However, when Stevens entered the house, going into the basement, she observed French with no shirt or bra on and wearing only pants. Appellant and French were still arguing, and Stevens saw appellant punch French in the face and on her body.

{¶ 10} Stevens also saw appellant smother French's face with a pillow for approximately one minute. This act occurred three times. French tried to get

up, but appellant kept pushing her down and telling her to shut up. French was screaming and crying the entire time, and ended up being badly bruised from the neck down. At one point, appellant retrieved a gun and pointed it directly above French's head. Stevens, frightened and worried that the situation was escalating, ran from the house. It was then that Stevens heard one shot fired.

{¶ 11} On cross-examination, Stevens stated that she thought the appellant was only trying to scare French, not kill her. However, in the 911 call played to the jury, Stevens screamed to dispatch that appellant was trying to kill French. French was finally able to escape from the basement, and both she and Stevens entered Steven's car.

{¶ 12} Appellant exited the home and followed French to the car where he grabbed French, removed her from the car, and dragged her by her hair back to the house — all this while he had the gun in his hand. Stevens testified that French was in Fairview Hospital following the assault.

ASSIGNMENT OF ERROR

{¶ 13} Appellant assigns one assignment of error for our review:

{¶ 14} "[1.] The trial court erred when it denied defendant's motion for mistrial."

LEGAL ANALYSIS

{¶ 15} Appellant argues that the lower court erred when it failed to grant a mistrial. We disagree. We apply an abuse of discretion standard when reviewing this decision. *State v. Rivera* (1994), 99 Ohio App.3d 325, 650 N.E.2d

906. An abuse of discretion is more than an error of law or judgment. Rather, it must be shown that the trial court's attitude was unreasonable, arbitrary or unconscionable. *State v. Montgomery* (1991), 61 Ohio St.3d 410, 575 N.E.2d 167.

{¶ 16} A review of the record demonstrates that as the trial came to a close and the jury began deliberation, the jury was brought back into the courtroom to present a question to the trial judge regarding deliberation. The transcript states that, in the presence of the jury, an unidentified speaker made a comment, and the jury was instructed to disregard the comment. The judge issued a *Howard* charge, and the jury returned to the jury room to continue deliberation.

{¶ 17} A mistrial should not be declared in a criminal case merely because an error or irregularity has occurred unless the substantial rights of the accused or the state have been adversely affected. *State v. Reynolds* (1988), 49 Ohio App.3d 27, 550 N.E.2d 490. The decision to grant or deny a motion for mistrial rests within the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173, 31 N.E.2d 343. This is because the trial court is in the best position to determine whether a mistrial is needed. *State v. Glover* (1988). 35 Ohio St.3d 18, 517 N.E.2d 900.

{¶ 18} Here, the judge who denied the mistrial motion was the same judge who directly observed whether or not members of the jury heard or observed the person making the outburst. The trial judge was in the best position to determine how audible or noticeable the statement was or was not.

{¶ 19} When an emotional outburst takes place in court, the issue is whether the outburst "deprived the defendant of a fair trial by improperly influencing the jury." *State v. Scott*, 101 Ohio St.3d 31, 2004-Ohio-10, 800 N.E.2d 1133, _44. This "is a factual question to be resolved by the trial court, whose determination will not be overturned absent clear, affirmative evidence of error." *State v. White* (1999), 85 Ohio St.3d 433, 709 N.E.2d 140, citing *State v. Morales* (1987), 32 Ohio St.3d 252, 513 N.E.2d 267.

{¶ 20} The *Morales* court held that "[o]nly the trial judge can authoritatively determine whether the jury was disturbed, alarmed, shocked, or moved by the demonstration." *Morales* at 255 (emphasis added).

{¶ 21} In the case at bar, the record does not indicate what language was contained in the outburst during the "*Howard* charge." It does indicate defense counsel's interpretation of what the language was, but the record is devoid of any specific language aired in court. The judge was in the unique position to hear the outburst and determine if it was audible, if it affected any juror's concentration, and if it had any affect on anyone in the courtroom. Moreover, further review of the record demonstrates that the outburst was so inaudible that even the court reporter could not decipher the statements made.

{¶ 22} In *State v. Smith* (Aug. 21, 1997), Cuyahoga App. No. 70855, this court held, in reference to the amount of deference needed to deny a mistrial, that "unless there is clear evidence in the record showing the outburst affected the jury, *only the trial judge* can determine whether the jury was disturbed, alarmed,

shocked or moved by the incident or whether the outburst was of such a nature that it necessarily influenced the verdict." (Emphasis added.) *Smith* at _6, citing *State v. Bradley* (1965), 3 Ohio St.2d 38, 209 N.E.2d 215. Id. The *Smith* court further followed the *Bradley* precedent in holding that "[t]he trial court determines, as a question of fact, whether the demonstration deprived the defendant of a fair trial by improperly influencing the jury. In the absence of clear, affirmative evidence to the contrary, the trial court's decision will not be disturbed." Id.

{¶ 23} A review of the evidence demonstrates that appellant is unable to show that the trial court's ruling denying the mistrial was arbitrary, unreasonable, or unconscionable. Therefore, following precedent and giving deference to the trial judge's rulings on outbursts that occur in front of him or her in the courtroom, we find no error on the part of the lower court.

{¶ 24} Accordingly, appellant's assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

LARRY A. JONES, JUDGE

MARY J. BOYLE, P.J., and
JAMES J. SWEENEY, J., CONCUR