[Cite as *State v. Skrzynski*, 2010-Ohio-2579.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio — Court of Appeals No. WD-09-027

Appellee — Trial Court No. 08 CR 558

v.

Justin Skrzynski — **DECISION AND JUDGMENT**

Appellant — Decided: June 4, 2010

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, and
Melissa A. Freeman, Assistant Prosecuting Attorney, for appellee.

Kurt W. Bruderly, for appellant.

* * * * *

COSME, J.

{¶1} Appellant, Justin Skrzynski, was found guilty by a jury of felonious assault of a police officer, a first degree felony. The Wood County Common Pleas Court rejected appellant's motion for a new trial and sentenced him to five years of incarceration. Appellant asserts that he should have been granted a new trial because a juror changed her vote to "guilty" after being threatened with violence by another juror

during jury deliberation. Appellant also asserts the trial court committed prejudicial error when it compelled him to disclose to the court for in camera inspection, tape-recorded statements made by witnesses to appellant's investigator. For the reasons set forth below, we find the trial court correctly ruled the juror's affidavit was inadmissible and did not deny appellant his due process rights or his right to an impartial jury. We also find that the trial court did not err in requiring the disclosure of the tape-recorded witness statements for in camera inspection. As such, the judgment of the trial court is affirmed.

I. BACKGROUND

{¶2} Bowling Green Police Officer Brian Houser was on routine patrol at 2:30 a.m. when he was flagged down by an employee of Kamikaze's Bar because of a fight inside. While attempting to quell the disturbance, Officer Houser was knocked unconscious by a blow to the head. Although Officer Houser did not see who struck him, appellant was identified by witnesses as the person striking Officer Houser. Appellant was arrested for the assault.

{¶3} Appellant was convicted following a jury trial. After the trial, Ms. Beth Ramey, a juror, told appellant's counsel - "I feel sorry for your client, as I had reasonable doubt." The next day, Ramey met with appellant's counsel and his private investigator, Mr. Sturgill. She told them that she believed appellant was not guilty, and that she had voted that way until threatened with physical harm by another juror.

{¶4} According to Ramey, after several hours of deliberations, another juror became visibly agitated and stated "I am so angry that I could slug someone - and I have

done it before!" That juror stated "he had two sons who are police officers," before pushing away from the table and glaring at Ramey. Assuming the comment was directed at her, Ramey asked - "do you mean me?" The juror did not respond, and others in the jury room went silent. Ramey decided to change her vote to "guilty."

{¶5} Ms. Ramey signed a sworn affidavit which was submitted to the trial court with appellant's motion for new trial. The trial court determined that Ramey's affidavit was inadmissible under Ohio Evid.R. 606(B) and denied appellant's motion. This appeal followed.

II. STANDARD OF REVIEW

{¶6} As a reviewing court, we show deference to the trial judge, who sees and hears the events and thus is in a better position to accurately evaluate the situation and determine the appropriate scope of inquiry. *State v. Huertas* (1990), 51 Ohio St.3d 22, 29. Therefore, we employ an abuse-of-discretion standard and will not reverse the trial court unless it handled the alleged juror misconduct or ruled upon the post-trial motion in an "unreasonable, arbitrary, or unconscionable" manner. *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

III. JUROR MISCONDUCT

{¶7} In his first assignment of error, appellant asserts that:

{¶8} "The trial court erred in denying appellant's motion for a new trial, violating his right to a fair and impartial jury."

{¶9} Appellant contends that the aliunde rule encompassed within Ohio Evid.R. 606(B) had the effect of denying him due process of law under the Fourteenth

Amendment to the United States Constitution and Article I, Section 16 of the Ohio Constitution, and his right to a public trial by an impartial jury under the Sixth Amendment to the United States Constitution.

{¶10} "It is a longstanding rule that 'the verdict of a jury may not be impeached by the evidence of a member of the jury unless foundation for the introduction of such evidence is first laid by competent evidence aliunde, i.e., by evidence from some other source.'" *State v. Reiner* (2000), 89 Ohio St.3d 342, 349-350, reversed on other grounds by *Ohio v. Reiner* (2001), 532 U.S. 17, quoting *State v. Adams* (1943), 141 Ohio St. 423, 427. See *State v. Hessler* (2000), 90 Ohio St.3d 108, 123; *State v. Robb* (2000), 88 Ohio St.3d 59, 79.

{¶11} Appellant suggests that we create an exception to the aliunde rule to combat the most egregious forms of juror misconduct - specifically that violence or credible threats of violence in the jury room are overt acts to which a juror may testify with no reference to the effects on the jury. However, in this case, we find the trial court correctly ruled the juror's affidavit was inadmissible. We also find that appellant was not denied his due process rights or his right to an impartial jury.

A. Ohio Evid.R. 606(B)

{¶12} According to the Ohio Supreme Court, "The [aliunde] rule is intended to preserve the integrity of the jury process and the privacy of deliberations, to protect the finality of the verdict, and to insulate jurors from harassment by dissatisfied or defeated parties by prohibiting a court from questioning a juror about what occurred during

deliberations, or about anything else that may have affected the juror's mind or emotions in the deliberations process once a final verdict is rendered." *State v. Reiner* (2000), 89 Ohio St.3d 342, citing *State v. Schiebel* (1990), 55 Ohio St.3d 71, 75; *State v. Adams* (1943), 141 Ohio St. 423, 427.

{¶13} This restriction upon impeaching a jury verdict is codified in Ohio Evid.R. 606(B):

{¶14} "Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith. A juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear on any juror, only after some outside evidence of that act or event has been presented. However a juror may testify without the presentation of any outside evidence concerning any threat, any bribe, any attempted threat or bribe, or any improprieties of any officer of the court. A juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying will not be received for these purposes."

{¶15} Appellant asks the court to make an exception to the second sentence of this subdivision, which conforms to the aliunde rule, in order to protect his rights to a fair trial. We find that the juror affidavit presented on behalf of appellant does not justify such an exception.

{¶16} Appellant also argues the aliunde rule should not apply in this case because the juror's misconduct must be construed as being external to the proper deliberative process. In other words, appellant argues that Evid.R. 606(B)'s exception for extraneous information should also apply to threats of intra-juror violence because they are not a proper part of the deliberative process and its occurrence is prejudicial not only to appellant, but to our system of justice.

{¶17} The Staff Notes to Evid.R. 606(B) says, "The third sentence was designed primarily to conform to the Ohio law pertaining to a violation of duty by a court officer." It does not say that it was "designed exclusively," leaving open the possibility of an aliunde exception beyond impropriety of court officers.

{¶18} Further, a strict grammatical reading of that third sentence may also allow for expanded possible exceptions.[1] This court, however, is not prepared to reach the conclusion contrary to case law that all threats form an exception to the aliunde rule. Importantly, the facts of this case do not require a finding on this specific issue.

B. The Ramey Affidavit

{¶19} Appellant asks this court to consider the affidavit by juror Ramey. In her affidavit, Ramey states that she felt threatened. However, the offending juror did not

[1]If "any officer of the court" were intended to be the object of a preposition modifying threats, bribes and improprieties, then the sentence should have included the preposition "by" as the appropriate preposition to follow the nouns "threat" and "bribe." Presuming the intent stated in the staff notes, because the nouns, threats, bribes, and improprieties, call for the use of different propositions, the sentence would have read, "However a juror may testify without the presentation of any outside evidence concerning any threat, any bribe, or any attempted threat or bribe *by* or any improprieties of any officer of the court."

make a statement of intent to harm Ramey. Ramey's interpretation of the juror's remarks and angry demeanor was that she was being threatened. In another interpretation, the juror's comments could have instead been related to his anger at the appellant who attacked the police officer. Other possible interpretations could exist as well, but none could document with certainty the juror's mental process. The very intent of the first sentence in Evid.R. 606(B) is to prevent the trial court from having to interpret each juror's mental and emotional states during the deliberation process. Ramey felt threatened, but what affects the juror's minds or emotions falls under the prohibited testimony in Evid.R. 606(B).

{¶20} In addition, Ramey did not make the court aware of her concerns until after the verdict. She did not make the judge, the bailiff, or any of the participants in the trial, aware that she felt threatened. She did not do anything at the time of juror deliberation that would suggest to others that she feared for her safety, or felt unfairly coerced, harassed, intimidated, or in physical danger. Nor did any other juror step forward with an account of a stated or perceived threat, attempted threat, internal impropriety, or jury coercion. Thus, the affidavit from Ramey does not document a justification for an exception to the aliunde rule in either the second or third sentences of Evid.R. 606(B).

C. Constitutional Violations

{¶21} Appellant also argues that Evid.R. 606(B) cannot be used to avoid a possible constitutional violation and that Ramey's fear for her safety and well being prevented her from deliberating, to the prejudice of appellant, and denied him his right to

a fair and impartial panel of jurors guaranteed under the Sixth Amendment of the United States Constitution and Section 10, Article 1, of the Ohio Constitution.

{¶22} Appellant relies on *Doan v. Brigano* (C.A.6, 2001), 237 F.3d 722, abrogated on other grounds, *Wiggins v. Smith* (2003), 539 U.S. 510, to support his proposition that Ohio's application of the aliunde rule effectively denied him the opportunity to show a violation of his Sixth and Fourteenth Amendment right to have a jury consider only the evidence before it, as well as appellant's constitutional right to a fair trial.

{¶23} In *Doan*, a juror conducted an experiment outside of court and presented the results to the jury. The Sixth Circuit Court of Appeals held that failure to exclude evidence of an experiment that might have been flawed in its methodology substantially impaired the defendant's credibility. *Doan*, 237 F.3d at 732. The court in *Doan* found that application of Ohio Evidence Rule 606(B) denied the defendant his right to confront the witnesses and the evidence against him. Id.

{¶24} The *Doan* court was careful to stress the decision did not call the verdict into question by reviewing the private deliberations of the jury: "A review of this misconduct stands in stark contrast to an examination of internal factors affecting the jury. Whether the jury understood the evidence presented at trial or the judge's instructions following the presentation of the evidence, whether a juror was pressured into arriving at a particular conclusion, and even whether jurors were intoxicated during deliberations, are all internal matters for which juror testimony may not be used to

challenge a final verdict." Id. at 733, citing *Tanner v. United States* (1987), 483 U.S. 107.

{¶25} Unlike *Doan*, this case does not involve a juror conducting an outside experiment or bringing in outside evidence which the defendant had no opportunity to refute or challenge. Everything that occurred took place in the jury room. The only witnesses to what took place were the jurors. Ramey's affidavit concerns her interpretation of another juror's emotional statement.

{¶26} Here, the trial court properly refused to consider the Ramey affidavit because it relies in substantial part on her mental and emotional state and conjecture about the mental and emotional state of other jurors during the deliberation process instead of objective facts. This is precisely what Evid.R. 606(B) prohibits.

{¶27} Thus, we find that the trial court did not abuse its discretion in denying appellant's motion for new trial. Appellant's first assignment of error is not well-taken.

IV. DISCLOSURE OF EVIDENCE

{¶28} In his second assignment of error, appellant asserts that:

{¶29} "The trial court erred by ordering Appellant to provide Appellee with privileged work-product not discoverable under Criminal Rule 16(C)(2)."

{¶30} Appellant argues the trial court erred in ordering him to produce tape-recorded witness statements of Mr. Hodgson and Mr. Lucious for in camera inspection. The tapes were made by appellant's investigator, Mr. Sturgill. Appellant contends these statements were not discoverable under Crim.R. 16, and the statements are attorney work

product not subject to disclosure. The state argues the tape recordings of the witness interviews are not work product, and even if they were, the disclosure was not prejudicial. We agree that once the witnesses testified, their statements were subject to in camera inspection under the rule. Thus, the disclosure of the witness's statement was not prejudicial.

{¶31} During the trial, appellant called Hodgson and Lucious to show that appellant did not strike Officer Houser. During Hodgson's testimony, it became evident that appellant's investigator, Mr. Sturgill, had audio-taped the interviews. The interviews had not been disclosed to the state. Following Hodgson's direct testimony, the state asked that the trial court conduct in camera inspection to determine whether any inconsistencies in Hodgson's testimony existed.

{¶32} The trial court conducted an in camera inspection of Hodgson's statement, with counsel for the state and appellant present, and concluded that no inconsistencies existed. The trial court declined to find the state was entitled to the statements under Crim.R. 16.

{¶33} Following Lucious' direct testimony, the state asked that the trial court conduct an in camera inspection to determine whether any inconsistencies in Lucious' testimony existed.

{¶34} The trial court conducted an in camera inspection of Lucious' statement, with counsel for the state and appellant present, and concluded that no inconsistencies existed. The trial court declined to find the state was entitled to the statement under Crim.R. 16.

{¶35} We first note that "the allowance or overruling of various discovery motions in a criminal case rests within the sound discretion of the trial court, and only in cases of clear abuse will that discretion be disturbed upon review." *State v. Laskey* (1970), 21 Ohio St.2d 187, 192, judgment vacated in part, (1972), 408 U.S. 936. Accordingly, only when a trial court's ruling on a discovery motion is unreasonable, arbitrary, or unconscionable will we reverse that ruling. *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 169.

{¶36} Crim.R. 16(C)(1) addresses information that is known to the defendant and subject to disclosure. Crim.R. 16(C)(1)(d) provides:

{¶37} "In camera inspection of witness' statement. Upon completion of the direct examination, at trial, of a witness other than the defendant, the court on motion of the prosecuting attorney shall conduct an in camera inspection of the witness' written or recorded statement obtained by the defense attorney or his agents with the defense attorney and prosecuting attorney present and participating, to determine the existence of inconsistencies, if any, between the testimony of such witness and the prior statement.

{¶38} "If the court determines that inconsistencies exist the statement shall be given to the prosecuting attorney for use in cross-examination of the witness as to the inconsistencies.

{¶39} "If the court determines that inconsistencies do not exist the statement shall not be given to the prosecuting attorney, and he shall not be permitted to cross-examine or comment thereon."

{¶40} The state contends that Hodgson's and Lucious' statements were discoverable under Crim.R. 16(B)(1)(g) because the statements were audio-taped and not subject to the weaknesses inherent in notes, jottings, or recorded impressions. The audio-tapes recorded exactly what was said. However, the state's reliance upon Crim.R. 16(B)(1)(g) is misplaced. This particular section of the rule deals with disclosures of evidence by the prosecuting attorney, not the disclosure of evidence by the defendant - in this case - appellant. Instead, Crim.R. 16(C)(2) describes the evidence not subject to disclosure:

{¶41} "Information Not Subject to Disclosure. Except as provided in subsections (C)(1)(b) and (d), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal documents made by the defense attorney or his agents in connection with the investigation or defense of the case, or of statements made by witnesses or prospective witnesses to the defense attorney or his agents."

{¶42} Appellant suggests that because Crim.R. 16(C)(2) does not permit the disclosure of the statements, the trial court erred in permitting an in camera inspection. Appellant fails to recognize that Crim.R. 16(C)(2) provides an exception for a witness other than the defendant, permitting an in camera inspection of a witness' statement following completion of direct examination and upon motion of the prosecuting attorney.

{¶43} Upon appellate review, however, error must also be prejudicial to the appellant to be reversible. Both Evid.R. 103(A) and Crim.R. 52(A) provide that error is harmless unless the substantial rights of a defendant have been affected. The test for

harmless nonconstitutional error is whether "there is substantial evidence to support the guilty verdict even after the tainted evidence is cast aside * * *." *State v. Cowans* (1967), 10 Ohio St.2d 96, 104. The test for harmless constitutional error is whether "'beyond a reasonable doubt' * * * the remaining evidence alone comprises 'overwhelming' proof of defendant's guilt." *State v. Williams* (1983), 6 Ohio St.3d 281, 290, certiorari denied (1983), 464 U.S. 1020, quoting *Harrington v. California* (1969), 395 U.S. 250, 254. However, as stated in *State v. Davis* (1975), 44 Ohio App.2d 335, 348, nonconstitutional error may rise to the level of constitutional error if such error amounts to "a violation of the appellant's right to a fair trial as that term is understood under the due process clause of the fourteenth amendment."

{¶44} In this case, we conclude the trial court's order to disclose Hodgson's and Lucious' statements amounts to harmless error under either the test for constitutional or nonconstitutional error. Hodgson's and Lucious' testimony challenged the state's position that appellant was the assailant. There is no evidence to show that the state's presence during the in camera inspection gave it an advantage at trial. The statements were not given to the state and the state was not permitted to cross-examine either witness as to the audio-tapes or comment on the audio-tapes.

{¶45} Appellant further contends the statements were his counsel's work product and that the court committed prejudicial, reversible error in ordering the statements to be produced to the state. We conclude, however, that while the statements constitute work product, an exception existed permitting the trial court to conduct an in camera

inspection. Accordingly, we find no prejudicial error in the trial court's in camera inspection, and the second assignment of error is not well-taken.

V. CONCLUSION

{¶46} The trial court properly refused to consider the Ramey affidavit because her mental and emotional state during the deliberation process may not be considered.

{¶47} The trial court did not err in requiring appellant to disclose the tape-recorded statements of Hodgson and Lucious in camera. Criminal Rule 16(C)(2) protects the work product of the defense attorney and his agent. The rule is limited by the in camera inspection of a witnesses' statements - which the trial court properly did. As such, there was no prejudice to appellant.

{¶48} On consideration whereof, we find that appellant was not prejudiced or prevented from having a fair trial and the judgment of the Court of Common Pleas, Wood County, is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Thomas J. Osowik, P.J. _____
JUDGE

Keila D. Cosme, J. _____
CONCUR.
JUDGE

Arlene Singer, J. _____
CONCURS AND WRITES SEPARATELY.
JUDGE

SINGER, J., CONCURRING.

{¶ 49} I concur with the majority opinion as to the second assignment of error. However, I concur in judgment only as to the first assignment of error.

{¶ 50} In an affidavit, one of the jurors averred that she voted for conviction because of a perceived physical threat by another juror. The exclusion of this affidavit fits squarely within the plain meaning of the words and the purpose of Ohio's aliunde rule, and is properly excluded. Appellant urges this court to not rely on a strict reading of Evid. R. 606 (B), but to look to the spirit of the law and provide an exception. I decline to do so, and for that reason I affirm the decision of the trial court.