

[Cite as *State v. Hubbard*, 2009-Ohio-5817.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92033

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MYLAND HUBBARD

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-508804

BEFORE: Dyke, J., Rocco, P.J., and Boyle, J.
RELEASED: November 5, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

ANN DYKE, J.:

{¶ 1} Defendant-appellant, Myland Hubbard (“appellant”), appeals the trial court’s denial of his motion for mistrial. For the reasons set forth below, we affirm.

{¶ 2} On April 8, 2008, the Cuyahoga County Grand Jury indicted appellant on two counts of drug trafficking, one count of possession of drugs and one count of possession of criminal tools. All four counts included forfeiture specifications. Appellant pled not guilty to the charges and a trial ensued on June 25, 2008.

{¶ 3} At trial, Detective Robert McKay of the Cleveland Police Department testified that he witnessed appellant sell drugs to a confidential reliable informant on March 11, 2008 in the area of East 153rd Street and Kinsman Avenue. He explained that via binoculars, he saw appellant speak with the informant, go to a vehicle, pull out a baggy and exchange it with the informant for money. Thereafter, the police arrested appellant and searched the vehicle where they discovered two bags of crack cocaine and a cell phone. Additionally, police found \$67 in appellant’s pocket.

{¶ 4} After the state presented its evidence, appellant moved for acquittal pursuant to Crim.R. 21(A). The trial court denied this request and appellant rested his case in chief.

{¶ 5} On June 27, 2008, defense counsel made an oral motion for mistrial. That day, the court was made aware that juror number nine (“Juror No. 9”) mentioned to the 11 other jurors that, while at home, she used her binoculars as

an experiment to determine how much she could see from 50 feet away. The court performed a voir dire of Juror No. 9 outside the presence of the other jurors and reminded her that it had instructed her to not conduct any independent investigations outside the courtroom. She apologized for the behavior and acknowledged that she notified the other jurors of her investigation. She further stated that she would be able to set aside her findings and deliberate solely on the evidence introduced at trial.

{¶ 6} In response, the court called the 11 other jurors in the courtroom for a meeting, excusing only Juror No. 9 from the discussion. The court discussed the situation with the remaining 11 jurors and each assured the court that Juror No. 9's experiment would have no bearing on their deliberations. The court then denied appellant's motion for a mistrial.

{¶ 7} On that same day, the jury found appellant guilty of one count of drug trafficking and one count of drug possession, as well as the forfeiture specifications associated with those charges. The jury, however, found appellant not guilty of the remaining charges of drug trafficking and possession of criminal tools.

{¶ 8} On August 27, 2008, the trial court sentenced appellant to ten months imprisonment for the drug trafficking conviction and 12 months for the drug possession conviction, both sentences to be served concurrently, for a total of 12 months imprisonment.

{¶ 9} Appellant now appeals and presents one assignment of error for our

review. Appellant's sole assignment states:

{¶ 10} "The trial court erred and/or abused its discretion when it denied appellant's motion for mistrial."

{¶ 11} Appellant maintains that the trial court erred when it denied his motion for a mistrial because Juror No. 9's independent investigation was juror misconduct that materially affected his substantial rights of due process. He argues that the record demonstrates that his convictions were not based solely on the evidence introduced at trial. We find appellant's argument without merit.

{¶ 12} A motion for a new trial is a matter within the sound discretion of the trial court. Thus, this court shall not reverse the trial court's decision absent an abuse of discretion. *State v. Schiebel* (1990), 55 Ohio St.3d 71, 76, 564 N.E.2d 54; *Toledo v. Stuart* (1983), 11 Ohio App.3d 292, 293, 465 N.E.2d 474. Moreover, motions for a new trial are not to be granted lightly. *Toledo v. Stuart*, supra.

{¶ 13} In assessing an alleged case of juror misconduct, a trial court must conduct a "two-tier" analysis. *State v. Taylor* (1991), 73 Ohio App.3d 827, 833, 598 N.E.2d 818. First, the court must find the existence of juror misconduct. *Id.* Then, it must decide if the misconduct materially affected the defendant's substantial rights. *Id.*

{¶ 14} While we acknowledge that Juror No. 9's independent investigation with the binoculars amounted to juror misconduct, we are unpersuaded that such actions substantially affected the outcome of the case. The law is well-established that any independent inquiry or experiment by a juror concerning

the evidence violates the juror's duty to limit his considerations to the evidence, arguments and law presented in open court, and thus, amounts to juror misconduct. *State v. Spencer* (1997), 118 Ohio App.3d 871, 873-874, 694 N.E.2d 161; *State v. King* (1983), 10 Ohio App.3d 161, 165, 460 N.E.2d 1383. However, "[n]ot every instance of juror misconduct requires reversal. The misconduct must be prejudicial." *King*, supra; see, also, *State v. Owens*, Richland App. No. 2004-CA-87, 2005-Ohio-4402.

{¶ 15} In support of his argument that Juror No. 9's misconduct was prejudicial, appellant relies on this court's opinion in *State v. Spencer*, supra. In that case, one juror notified the other 11 jurors that he had contacted a number of physicians over the weekend about prescribing methadone, an issue in the case. *Id.* at 162. The trial court learned of this misconduct and held a hearing to determine the effect of the juror's statement on the deliberations. *Id.* The trial court failed to individually question the jurors about any influence this may have had upon them, and instead, issued a stern warning about using any outside information in its deliberations. *Id.*

{¶ 16} In *Spencer*, we reversed the trial court's denial of the defendant's motion for a mistrial. *Id.* at 163. While we acknowledged that the trial court appropriately attempted to remedy the misconduct by issuing curative instructions and conducting a hearing, we found fault with the manner in which the court performed this task. *Id.* at 162-163. We determined that "[t]he trial court was required to inquire of that particular juror to determine whether he or she

remained impartial after the independent investigation.” *Id.* at 163. Without doing so, we were unable to conclude that the curative instructions overcame any prejudice and that the defendant in that case received the benefit of 12 impartial jurors. *Id.*

{¶ 17} This case, however, is quite different from that presented in *Spencer*. In this case, the trial court followed the parameters established in *Spencer*, in determining the impact of the juror misconduct and attempting to cure said actions. First, unlike the situation in *Spencer*, the trial court interviewed Juror No. 9 outside the presence of the other jurors. The court inquired in depth into the exact actions taken by the juror and whether she was influenced by her actions. She responded that she had not. He then inquired whether she would be able to set aside her findings and deliberate solely on the evidence introduced at trial. Juror No. 9 repeatedly responded that she was able to do so. Finding Juror No. 9 unpersuaded by the independent investigation, the court then performed a voir dire of the remaining jurors in the absence of Juror No. 9. Each of the 11 remaining jurors independently affirmed that they would be able continue deliberations without “taking into account the information that was brought in extraneously by juror number nine and continue deliberating this case to the best of [their] ability * * *.” (Tr. 262.)

{¶ 18} Given the record and representations made by each of the jurors, we conclude that the trial court did not abuse its discretion in denying a motion for mistrial on this ground. The record fails to demonstrate any influence that

would improperly affect the jurors' fairness and impartiality when they returned to deliberations. Appellant's sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from 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.

ANN DYKE, JUDGE

KENNETH A. ROCCO, P.J., and
MARY J. BOYLE, J., CONCUR