[Cite as *State v. Biggs*, 2016-Ohio-5305.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. John W. Wise, P.J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	Case No. 2016CA00024
	:	2016CA00025
JAY L. BIGGS	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Stark County Court of Common Pleas, Case No. 2008CR0653
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	August 1, 2016

APPEARANCES:

For Plaintiff-Appellee:	For Defendant-Appellant:
MIKE DEWINE OHIO ATTORNEY GENERAL SPECIAL PROSECUTOR PAUL SCARSELLA 30 E. Broad St., 14th Fl. Columbus, OH 43215	JAY L. BIGGS, PRO SE #A560289 Toledo Correctional Institution 2001 East Central Ave. Toledo, OH 43608

Delaney, J.

{¶1} Appellant Jay L. Biggs appeals from the January 6, 2016 "Judgment Entry Denying Defendant's Motion for Hearing Regarding Possible Juror Misconduct" and "Judgment Entry Denying Defendant's Motion for Resentencing." Appellee state of Ohio did not appear in this appeal.

FACTS AND PROCEDURAL HISTORY

{¶2} A statement of the facts is not necessary to our resolution of this appeal arising from appellant's 2008 convictions for the rape and murder of his 4-month old daughter.

{¶3} On May 28, 2008, the Stark County Grand Jury indicted appellant on two counts of aggravated murder with death penalty specifications in violation of R.C. 2903.01, two counts of murder in violation of R.C. 2903.02, one count of rape in violation of R.C. 2907.02, and one count of endangering children in violation of R.C. 2919.22. The case proceeded to trial by jury on October 1, 2008. The jury found appellant guilty as charged and recommended that appellant serve a term of life imprisonment without the possibility of parole. By judgment entry filed December 5, 2008, the trial court sentenced appellant to life in prison without parole.

{¶4} In *State v. Biggs*, 5th Dist. Stark No. 2008CA00285, 2009-Ohio-6885, appeal not allowed, 125 Ohio St.3d 1438, 2010-Ohio-2212 [*Biggs I*], appellant directly appealed from his convictions and sentence, raising one assignment of error. Appellant argued the guilty findings of the trial court were against the manifest weight and sufficiency of the evidence. We disagreed and affirmed appellant's convictions and sentence. Id.

{¶5} On November 7, 2012, the Ohio Innocence Project filed a motion to release biological samples in the case, seeking new copies of the tissue slides in order to evaluate appellant's case for any possible postconviction proceedings. By judgment entry filed December 12, 2012, the trial court denied the motion.

{¶6} Appellant appealed from the trial court's order and raised four assignments of error: the trial court created an unconstitutional "circular and self–defeating legal standard for obtaining tissue slides from an autopsy" such that no such application would ever be granted; the trial court erred in failing to release re–cuts of tissue slides to appellant's experts; the trial court erred when it analyzed defendant's request for tissue slides as being based solely on advancements in S.I.D.S.; and the trial court erred in treating the motion as a petition for post–conviction relief. We overruled the four assignments of error and the Ohio Supreme Court declined review. *State v. Biggs*, 5th Dist. Stark No. 2013CA00009, 2013-Ohio-3333, appeal not allowed, 137 Ohio St.3d 1441, 2013-Ohio-5678, 999 N.E.2d 696 [*Biggs II*].

{¶7} On October 28, 2015, appellant filed a "Motion for Remmer Hearing Due to Judge Farmer's Discovery from Jury Commissioner of Possible Jury Misconduct." Appellee filed a motion in opposition. The trial court overruled the motion on January 6, 2016.

{¶8} On December 7, 2015, appellant filed "Defendant's Motion for Resentencing." Appellee responded with a motion in opposition and the trial court denied the motion by separate judgment entry dated January 6, 2016.

{¶9} Appellant appealed from both judgment entries of the trial court dated January 6, 2016. Those appeals were consolidated in the instant case.

{¶10} Appellant raises three assignments of error:

ASSIGNMENTS OF ERROR

{¶11} "I. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO HOLD AN EVIDENTIARY HEARING ON THE ALLEGED JUROR MISCONDUCT ISSUE, WHERE IT WAS REPORTED THAT SAID JUROR LIED TO A MATERIAL QUESTION DURING VOIR DIRE."

{¶12} "II. THE TRIAL COURT ERRED, AND DUE PROCESS WAS DENIED, WHEN THE COURT FAILED TO FILE A SEPARATE SENTENCING OPINION PURSUANT TO R.C. 2929.03(F), THUS THE APPELLANT'S JUDGMENT IS NOT FINAL."

{¶13} "III. THE APPELLANT'S JUDGMENT IS VOID AS IT PERTAINS TO SPECIFICATIONS ONE AND TWO TO COUNT TWO (DEATH PENALTY SPECIFICATIONS) BECAUSE THE INDICTMENT ALLEGES THAT SAID SPECIFICATIONS ARE TO R.C. 2903.01(B), WHEN IN FACT COUNT TWO ALLEGES A VIOLATION OF R.C. 2903.01(C)."

ANALYSIS

I.

{¶14} In his first assignment of error, appellant argues the trial court was required to conduct a hearing to determine whether juror misconduct occurred. We disagree.

{¶15} The evidence supporting appellant's motion in the trial court, and his argument on appeal, is entirely outside the record. Appellant supports his motion with letters to him from counsel at the Ohio Innocence Project and the Office of the Ohio Public Defender. These letters state the trial court notified counsel "that a juror in [his] original

trial recently spoke to the jury commissioner in Stark County" and "another juror in [appellant's] case had told the other jurors some personal information but had not disclosed this information to the court." The letters further state counsel investigated the matter and discovered a female juror claimed a male juror told her his son was sexually assaulted by a babysitter. Subsequent letters detail a substantial investigation into the allegation but conclude counsel discovered no sufficient competent evidence that would support a motion for new trial based upon juror misconduct.

{¶16} Appellant argues, though, the trial court was required to hold an evidentiary hearing "to compel the male juror to answer questions relevant to the proper resolution of the allegation made by the female juror." We find appellant has failed to show any juror misconduct occurred, much less that any misconduct materially affected his substantial rights. See, *State v. Hopkins*, 69 Ohio St.2d 80, 430 N.E.2d 943 (1982), holding on other grounds modified by *State v. Gilmore*, 28 Ohio St.3d 190, 503 N.E.2d 147 (1986) [appellant has not demonstrated prejudice absent evidence in the record establishing verdict was influenced by alleged juror conversation].

{¶17} The analysis of a case involving alleged juror misconduct requires a two-tier inquiry. First, it must be determined whether there was juror misconduct. Second, if juror misconduct is found, it must then be determined whether the misconduct materially affected appellant's substantial rights. *State v. Meeks*, supra, 2015-Ohio-1527 at ¶ 115, citing *State v. Taylor*, 73 Ohio App.3d 827, 833, 598 N.E.2d 818 (4th Dist.1991). We are also mindful of Ohio Evid. R. 606(B), which states in pertinent part:

> 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 that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's 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. * * * *.

{¶18} The trial court concluded no evidence of juror misconduct existed which would necessitate a hearing, a decision which is not an abuse of discretion. In cases involving outside influences on jurors, trial courts are granted broad discretion in dealing with the contact and determining whether to declare a mistrial or to replace an affected juror. Id. at ¶ 117, citing *State v. Phillips*, 74 Ohio St.3d 72, 89, 656 N.E.2d 643, 661 (1995), and *United States v. Daniels*, 528 F.2d 705, 709–710 (C.A.6, 1976); *United States v. Williams*, 822 F.2d 1174, 1189 (C.A.D.C.1987); Annotation, 3 A.L.R.5th 963, 971, Section 2 (1992). A trial judge's determination of possible juror bias should be given great deference only upon the appellate court's satisfaction that the trial judge exercised sound discretion in determining whether juror bias existed and whether it could be cured. Id., citing *State v. Gunnell*, 132 Ohio St.3d 442, 2012-Ohio-3236, 973 N.E.2d 243, ¶ 29. We are satisfied the trial court exercised sound discretion.

{¶19} Appellant failed to produce sufficient evidence of improper outside influence upon the jury. The unsupported allegation presented here does not rise to the level of "outside evidence of that act or event" which would permit testimony on the matter.

{¶20} Appellant argues the trial court was required to conduct a *Remmer* hearing yet fails to affirmatively demonstrate prejudice arising from the trial court's failure to do so. *State v. Wooten*, 5th Dist. Stark No. 2008 CA 00103, 2009-Ohio-1863, ¶ 37. In *Remmer,* the Supreme Court held that when the parties discover improper contacts with a jury after the verdict, the trial court must conduct a hearing to determine the effect of those contacts. However, cases that are more recent have determined that the complaining party must show actual prejudice. See *Smith v. Phillips*, 455 U.S. 209, 215, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982); *United States v. Olano*, 507 U.S. 725, 738, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993); *United States v. Sylvester*, 143 F.3d 923, 934 (C.A.5, 1998). The instant case is not a case of extraneous contact or extraneous juror influence. *State v. Lewers*, 5th Dist. Stark No. 2009-CA-00289, 2010-Ohio-5336, ¶ 85. An "extraneous influence" is "one derived from specific knowledge about or a relationship with either the parties or their witnesses." *United States v. Herndon*, 156 F.3d 629, 636 (6th Cir.1998).

{¶21} Appellant's first assignment of error is overruled.

II.

{¶22} In his second assignment of error, appellant argues his judgment of conviction is not final because the trial court did not file a separate sentencing opinion required by R.C. 2929.03(F). We disagree.

{¶23} Appellant's argument here has been considered and rejected by the Ohio Supreme Court. R.C. 2929.03(F) states:

> The court or the panel of three judges, when it imposes sentence of death, shall state in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors. The court or panel, when it imposes life imprisonment or an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment under division (D) of this section, shall state in a separate opinion its specific findings of which of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code it found to exist, what other mitigating factors it found to exist, what aggravating circumstances the offender was found guilty of committing, and why it could not find that these aggravating circumstances were sufficient to outweigh the mitigating factors. For cases in which a sentence of death is imposed for an offense committed before January 1, 1995, the court or panel shall file the opinion required to be prepared by this division with the clerk of the appropriate court of appeals and with the clerk of the supreme court within fifteen days after the court or panel imposes sentence. For cases in which a sentence of death is imposed for an

> offense committed on or after January 1, 1995, the court or panel shall file the opinion required to be prepared by this division with the clerk of the supreme court within fifteen days after the court or panel imposes sentence. The judgment in a case in which a sentencing hearing is held pursuant to this section is not final until the opinion is filed.

{¶24} As the Court observed in *State ex rel. Stewart v. Russo*, 145 Ohio St.3d 382, 2016-Ohio-421, 49 N.E.3d 1272, at ¶ 11, "[a]t first glance, R.C. 2929.03(F) appears to mandate the relief [appellant] seeks." But here, as in *Stewart*, appellant's life sentence also implicates R.C. 2929.03(D).

{¶25} The Court read the subsections together and concluded:

> Construing R.C. 2929.03(D) and (F) together, we conclude that division (F)'s requirement that the judge issue a separate sentencing opinion when the judge imposes a life sentence can refer *only* to a situation in which the jury recommends death and the judge overrides that recommendation and imposes a life sentence. Reading R.C. 2929.03(F) as [appellant] urges would ignore the plain and unambiguous language of subsection (D)(2), which requires a trial judge to impose the jury's recommended sentence when the jury recommends a life sentence. Because the jury in [appellant's] case recommended that he be sentenced to life in prison with parole eligibility after 30 years, R.C. 2929.03(D)(2) is dispositive and division (F) does not apply.

State ex rel. Stewart v. Russo, 145 Ohio St.3d 382, 2016-Ohio-421, 49 N.E.3d 1272, ¶ 14.

{¶26} In the instant case, the jury recommended the sentence of life without the possibility of parole pursuant to R.C. 2929.03(D)(2)(c). The trial court was thus not required to conduct an independent weighing of aggravating and mitigating factors in a separate sentencing opinion.

{¶27} Appellant's second assignment of error is overruled.

III.

{¶28} In his third assignment of error, appellant argues his judgment of conviction is void because the death penalty specifications in Count II of the original indictment reference R.C. 2903.01(B) when in fact appellant was charged in Count II with a violation of R.C. 2903.01(C), those errors carried through to the jury verdict forms, and rise to the level of structural error. We disagree.

{¶29} In the original indictment, Specification One to Count Two references R.C. 2903.01(B)[1] but appellant was charged in Count Two with a violation of R.C. 2903.01(C).[2] Appellee moved to amend the indictment to correct the subsection and the trial court granted the motion in an entry dated July 16, 2008, noting the amendment merely corrected two typographical errors.

[1] R.C. 2903.01(B) states: "No person shall purposely cause the death of another or the unlawful termination of another's pregnancy while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, kidnapping, rape, aggravated arson, arson, aggravated robbery, robbery, aggravated burglary, burglary, trespass in a habitation when a person is present or likely to be present, terrorism, or escape."

[2] R.C. 2903.01(C) states: "No person shall purposely cause the death of another who is under thirteen years of age at the time of the commission of the offense."

{¶30} We note appellee's motion to amend the indictment was made without objection and did not alter the name, substance, or penalty level of the offenses charged.

{¶31} Appellant's contention here, though, is that the typographical errors carried through to the verdict forms because "no amended indictment was ever filed," resulting in structural error. A structural error is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *State v. Drummond,* 111 Ohio St.3d 14, 2006-Ohio-5084, 854 N.E.2d 1038, ¶ 50, citing *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). Structural errors "permeate '[t]he entire conduct of the trial from beginning to end' so that the trial cannot '"reliably serve its function as a vehicle for determination of guilt or innocence."' *State v. Perry,* 101 Ohio St.3d 118, 2004-Ohio-297, 802 N.E.2d 643, ¶ 17, citing *Fulminante,* supra, 499 U.S. at 309 and 310. The Ohio Supreme Court has recognized that structural error can be found only in a "'very limited class of cases.'" Id. at ¶ 18, quoting *Johnson v. United States*, 520 U.S. 461, 468, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997).

{¶32} Appellant's statement that "* * * an amended indictment was never filed" is incorrect because he ignores the axiom of Ohio law that the court speaks through its journal entries. *State v. Brooke*, 113 Ohio St.3d 199, 205, 2007-Ohio-1533, 863 N.E.2d 1024, 1031, ¶ 47, citing *Kaine v. Marion Prison Warden*, 88 Ohio St.3d 454, 455, 727 N.E.2d 907 (2000). The indictment was thus "amended" via the trial court's entry of July 16, 2008, and any subsequent references to the indictment relate back to the indictment as amended.

{¶33} Appellant's third assignment of error is overruled.

CONCLUSION

{¶34} Appellant's three assignments of error are overruled and the judgments of the Stark County Court of Common Pleas are affirmed.

By: Delaney, J. and

Wise, P.J.

Baldwin, J., concur.