

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellant,	:	
	:	No. 09AP-972
v.	:	(C.P.C. No. 08CR08-6930)
	:	
James E. Green,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on August 17, 2010

Ron O'Brien, Prosecuting Attorney, and *John H. Cousins IV*,
for appellant.

Yeura R. Venters, Public Defender, and *Allen V. Adair*, for
appellee.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Plaintiff-appellant, state of Ohio ("state"), appeals from the September 17, 2009 decision and entry of the Franklin County Court of Common Pleas granting the new trial motion of defendant-appellee, James E. Green ("appellee"). For the following reasons, we reverse.

{¶2} On September 19, 2008, appellee was indicted by a Franklin County Grand Jury on one count of felonious assault with a firearm specification and a repeat violent offender specification and one count of having a weapon while under disability.

{¶3} A jury trial commenced on July 20, 2009. Evidence adduced during the state's case-in-chief established the following. Quentin Green, appellee's nephew, testified that he lived with appellee in a "family house" located at 1580 East Rich Street. (Tr. Vol. I, 57.) On the evening of June 22, 2008, appellee, Quentin, and appellee's nephews and Quentin's cousins, Dayon and Dajuan Rispress, were in the backyard of the East Rich Street house having a cookout. Quentin admitted that he was "buzzing" because he had consumed a bottle of wine earlier in the evening. (Tr. Vol. I, 85.)

{¶4} At some point, appellee and Quentin began arguing about the condition of the house and other family issues. Quentin called his girlfriend, Angela McClain, and asked her to come over to the house. Angela arrived sometime between 9:45 and 10:00 p.m., carrying a baseball bat. Angela testified that she knew appellee well, having seen him almost every day in the eight months she dated Quentin.

{¶5} Soon after Angela's arrival, the argument between appellee and Quentin escalated. Quentin threatened to fight appellee because appellee called Quentin's mother a derogatory name. According to Quentin, appellee told him several times to leave or he would "do something bad" to him. (Tr. Vol. I, 62.) Angela testified that appellee told Quentin he was not going to fight him, he was going to shoot him. (Tr. Vol. I, 96.) Quentin and Angela both testified that when Quentin refused to leave, appellee went inside the house. About a minute later, appellee exited the house carrying a .22 gauge bolt-action rifle, which, according to Quentin, appellee kept in the house at all

times. After appellee and Quentin exchanged words, appellee, who was standing approximately three feet from Quentin, pointed the rifle at Quentin and shot him in the groin. After the shooting, appellee and Dayon went inside the house. Quentin and Dajuan ran down an alley, where Quentin eventually collapsed. Angela ran over to Quentin and called 911.

{¶6} The state played Angela's 911 call for the jury without objection from appellee. During the call, Angela reported that a shooting had occurred at 1580 East Rich Street, but that she did not see the shooter. (Tr. Vol. I, 101-03.) Angela identified the call as the one she made to 911.

{¶7} Columbus Police Officer Troy Hamel responded to the scene at approximately 10:43 p.m. and discovered Quentin on the ground, bleeding profusely from a gunshot wound to his groin. An unidentified man was hovering over Quentin; an unidentified woman was pacing nearby. According to Hamel, the man said he was not present when Quentin was shot; the woman said she did not know what had happened.

{¶8} Angela generally corroborated Quentin's testimony as to the facts both leading up to and including the shooting. In addition, she testified that during a June 24, 2008 interview with a Columbus police detective, she reported that appellee shot Quentin once and then reloaded the rifle to shoot him again; however, Quentin ran away before appellee could fire a second shot. She further testified that on June 26, 2008, she again told the detective that appellee reloaded the rifle; she also identified appellee as the shooter from a photo array. Angela admitted on cross-examination, however, that her statements to the detective regarding appellee reloading the rifle were untrue.

{¶9} Kimberly Wooden testified on behalf of appellee. Kimberly stated that she had been friends with Quentin for many years and had often seen him with a gun. When she arrived at the cookout on June 22, 2008, Quentin, Angela, Dayon, and several other people were standing in the backyard. Kimberly spoke to Quentin and Angela and then walked inside the house. She and her sister, Samantha, started to watch a movie in the living room. At some point, Kimberly heard a gunshot coming from the backyard. She ran toward the back door and saw appellee standing in the backyard; he did not have a gun in his possession. She also saw Quentin and Angela standing in the alley talking. According to Kimberly, Quentin did not appear to have been shot.

{¶10} Dajuan Rispress also testified on behalf of appellee. Dajuan averred that he and Quentin were together for about an hour prior to the cookout and that Quentin was drinking and taking Ecstasy. Dajuan arrived at the cookout at approximately 7 p.m. Dajuan testified that although he often saw Quentin carry a gun, he did not see Quentin with a gun at the cookout. Dajuan further testified that he did not have a gun at the cookout and had never seen a gun on appellee's person or in appellee's house.

{¶11} According to Dajuan, Quentin wanted to fight appellee because appellee disparaged Quentin's mother; appellee refused because his right hand was injured and bandaged. Dajuan testified that when Angela arrived at the cookout, she was carrying a baseball bat and a rather large purse; he did not, however, see a gun in Angela's possession. After Angela arrived, Dajuan left the cookout and walked across the street to a friend's house. Shortly thereafter, Dajuan heard a gunshot and saw Quentin and Angela running down a nearby alley. Quentin told Dajuan that someone shot him; he did not, however, divulge the name of the shooter. Because Quentin was bleeding heavily,

Dajuan bound the wound with his belt. Dajuan insisted that he did not witness the shooting and that he did not tell his brother, Damon Rispress, that appellee shot Quentin.

{¶12} Damon testified during the state's rebuttal case. Damon averred that he was at his mother's house around 10 p.m. on June 22, 2008 when she received a phone call. Pursuant to that call, Damon drove her to the scene of the shooting. Upon arrival, Damon saw Dajuan covered in blood. According to Damon, Dajuan told him that appellee and Quentin had gotten into an argument about Quentin's mother, that appellee went inside his house, retrieved a rifle and shot Quentin, and that Dajuan and Quentin then ran away.

{¶13} Damon testified that after he spoke to Dajuan, he (Damon) called 911 twice and reported what Dajuan had told him, that is, that appellee shot Quentin with a rifle. Damon further averred that he had previously listened to a recording of the 911 calls and that the information on the recording was the same as that to which he had testified. (Tr. Vol. II, 92.) The state did not play Damon's 911 calls for the jury, nor did it request that the calls be admitted into evidence. On cross-examination, Damon verified that he was not present during the shooting incident.

{¶14} On July 27, 2009, the jury began its deliberations during which it received, inter alia, State's Exhibit 4, a CD purportedly containing only the 911 call made by Angela. Early in its deliberations, the jury requested that the court provide a CD player. Both the prosecutor and defense counsel agreed to the jury's request. That same day, the jury returned verdicts finding appellee guilty of felonious assault with the firearm specification and having a weapon while under disability; the trial court found appellee guilty of the repeat violent offender specification. Sentencing was set for August 4, 2009.

{¶15} About an hour before the sentencing hearing was to commence, appellee filed a motion for mistrial or, in the alternative, a new trial on grounds that the jury received evidence during its deliberations that was never presented, identified or admitted into evidence during the trial. More specifically, appellee contended that he had recently discovered that State's Exhibit 4, the CD purportedly containing only Angela's 911 call, actually contained three additional 911 calls that had not been played for the jury and had never been marked or offered for admission into evidence by the state. The first of the additional calls was made by a neighbor; the second and third additional calls were made by Damon. Appellee averred that he was unaware that the CD provided to the jury contained the three additional 911 calls. While appellee acknowledged Damon's testimony that he called 911 and provided the information he had received from Dajuan, appellee noted that such call was never played for the jury, was never authenticated by Damon, and was never admitted into evidence.

{¶16} Appellee maintained that he was entitled to a mistrial because his statutory rights under R.C. 2945.35 and his due process rights under the Fourteenth Amendment to the United States Constitution were violated when the jury received evidence of the 911 calls during its deliberations that had not been admitted at trial. Appellee further argued that he was entitled either to a mistrial or to a new trial, pursuant to Crim.R. 33(A)(2), because the prosecutor had engaged in misconduct in submitting the additional 911 calls to the jury. Appellee confined his arguments to the submission of the two 911 calls made by Damon.

{¶17} Appellee attached to his motion an unauthenticated, uncertified, and unsworn typewritten transcription of the three additional 911 calls. As noted above, the

first of the three additional calls was made by a neighbor reporting a shooting in the neighborhood. The second and third additional calls were made by Damon. In the first call, Damon states, as relevant here, that "we just had an incident on * * * 1580 East Rich Street," and that "everybody told me [the shooter] was * * * James Green." Appellee argued that Damon's use of the pronoun "we" in reporting the incident suggests that he was actually at the scene of the shooting, a fact which bolsters Damon's credibility with the jury to the prejudice of appellee. Appellee also argued that Damon's statement that "everybody" told him appellee was the shooter significantly prejudiced appellee because the jury could infer that multiple persons, not just Dajuan, reported that appellee shot Quentin.

{¶18} In Damon's second call, which had apparently been transferred from the 911 dispatcher to the Columbus Police Department, Damon identified himself and stated, in pertinent part, that he "just received a call about 20 minutes ago" that someone had been shot at 1580 East Rich Street. When the operator asked Damon if he had seen the shooting firsthand or if he had obtained the information from someone else, he responded that "all eyewitnesses * * * an eyewitness said he shot in the groin area." The operator then inquired if the eyewitnesses wished to speak to the officers on the scene; Damon responded, "[t]hey probably won't talk." When the operator asked what information the eyewitnesses provided to him, Damon responded, "[t]hey just told me he was shot in the groin area and it happened on 1580 East Rich Street." When the operator asked if the eyewitnesses had provided information about the identity of the shooter, Damon responded, "[t]hey said gave me the name * * * James Green." Appellee argued that Damon's use of the phrase "all eyewitnesses" and his repeated use of the pronoun "they"

bolstered Damon's credibility to the prejudice of appellee by suggesting that multiple persons, rather than just Dajuan, told him that appellee was the shooter.

{¶19} Pursuant to appellee's request, the trial court conducted an oral hearing on August 4, 2009. Defense counsel averred that she had reviewed the CD during trial and heard only Angela's 911 call. However, three days after the jury returned their guilty verdicts, counsel contacted the court reporter and asked him to play the CD that was sent to the jury during deliberations. At that time, counsel heard the three additional 911 calls. When the trial court inquired if counsel "kn[e]w for a fact the jury did receive or hear that" (Tr. Vol. III, 6), counsel stated that the jury had been provided a CD player during its deliberations and that the four 911 calls on the CD played automatically one after another. Counsel averred that "I can only presume that they heard the information when the first question they asked is that they'd like to have a CD player, and that CD plays automatically one after another after another." (Tr. Vol. III, 6.) Counsel argued that appellee was prejudiced by the jury hearing the additional 911 calls from Damon because the calls provided information different than the testimony Damon provided at trial. The court granted the state's request to file a written response.

{¶20} The state filed its memorandum contra on August 13, 2009. The state argued that the additional 911 calls were inadvertently submitted to the jury, that appellee had failed to demonstrate that the jury listened to the additional 911 calls, and that, even if it had, the additional 911 calls were cumulative to Damon's rebuttal testimony and thus constituted harmless error.

{¶21} The trial court conducted further hearing on September 16, 2009. Defense counsel reiterated that she had reviewed the CD (State's Exhibit 4) during trial and heard

only Angela's 911 call. Counsel averred that a different CD, one which contained all four 911 calls and, according to counsel, "looked like the same exact CD" counsel had reviewed earlier, was actually provided to the jury during deliberations. (Tr. Vol. III, 15.)

{¶22} At this juncture, the trial court expressly found that "[t]here was no prosecutorial misconduct in this case," and that "[i]f there was a mistake made, it was a mistake made by both counsel." (Tr. Vol. III, 19.) The court further found that the circumstances provided no basis for a mistrial; accordingly, the court determined that the sole question to be resolved was whether appellee had provided sufficient reason for the court to grant a new trial.

{¶23} Following additional argument by both parties, which generally recapped the arguments set forth in their written memoranda, the court indicated that it would take the matter under advisement and issue a timely decision. The court reiterated its position that there was no prosecutorial misconduct, that appellee was not entitled to a mistrial, and that the singular issue to be decided was whether appellee was entitled to a new trial.

{¶24} The next day, September 17, 2009, the trial court issued a decision and entry granting appellee's August 4, 2009 motion, reasoning, as follows:

The Court finds no prosecutorial misconduct in the case *sub judice*. The Court cannot speculate as to whether the jury improperly listened to the entirety of the compact disc presented or merely the admitted call to 911 by Angela McClain. Thus, upon consideration of the evidence presented, and in the interest of justice, the Court hereby **GRANTS** Defendant's Motion for New Trial in order to ensure Defendant's constitutional rights are protected and preserved. The Court hereby **ORDERS** a new trial be scheduled in this matter.

(Emphasis sic.)

{¶25} The state timely appeals¹ the trial court's decision and entry, advancing a single assignment of error:

THE TRIAL COURT ABUSED ITS DISCRETION BY
GRANTING DEFENDANT'S MOTION FOR A NEW TRIAL.

{¶26} In its sole assignment of error, the state contends the trial court abused its discretion in granting appellee's motion for new trial. We agree.

{¶27} Motions for new trial are governed by Crim.R. 33. Pursuant to Crim.R. 33(A), a defendant may be granted a new trial upon motion to the court if it can be established that at least one of the six enumerated causes materially affected the defendant's substantial rights. As noted above, appellee premised his motion for new trial solely upon Crim.R. 33(A)(2), which provides that a new trial may be granted if a defendant's substantial rights were materially affected by "[m]isconduct of the * * * prosecuting attorney." Appellee's motion argued that the prosecutor had engaged in misconduct in submitting the additional 911 calls to the jury.

{¶28} A motion for new trial, pursuant to Crim.R. 33, is addressed to the sound discretion of the trial court, and will not be disturbed on appeal absent an abuse of discretion. *State v. Scheibel* (1990), 55 Ohio St.3d 71, syllabus. "The term 'abuse of discretion' connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable." *State v. Adams* (1980), 62 Ohio St.2d 151, 157. A decision is unreasonable when it is "unsupported by a sound reasoning process." *State v. Abdullah*, 10th Dist. No. 07AP-427, 2007-Ohio-7010, ¶16,

¹ On December 22, 2009, this court granted the state's motion for leave to appeal. *State v. Green*, 10th Dist. No. 09AP-972 (memorandum decision).

citing *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St.3d 157, 161. "An arbitrary attitude, on the other hand, is an attitude that is 'without adequate determining principle; * * * not governed by any fixed rules or standard.'" *Id.*, quoting *Dayton ex rel. Scandrick v. McGee* (1981), 67 Ohio St.2d 356, 359.

{¶29} New trials are not to be granted lightly. *State v. Townsend*, 10th Dist. No. 08AP-371, 2008-Ohio-6518, ¶12. " 'A more searching inquiry is required' if the new trial is granted than if denied, * * * because of 'the concern that a judge's nullification of the jury's verdict may encroach on the jury's important fact-finding function.' " *State v. Luckett* (2001), 144 Ohio App.3d 648, 655 (internal citation omitted).

{¶30} The grounds for granting a new trial are provided by the rule and courts have no power to either extend or reduce those provisions. *State v. White* (Oct. 17, 1991), 2d Dist. No. 2787. "[A] trial court shall not grant a motion for a new trial unless it affirmatively appears from the record that the defendant was prevented from having a fair trial or was prejudiced by the cause providing the basis of the motion." *State v. Jackson* (Feb. 20, 2001), 10th Dist. No. 00AP-183. See also Crim.R. 33(E)(5) ("No motion for a new trial shall be granted or verdict set aside, nor shall any judgment of conviction be reversed in any court because of: * * * any * * * cause, unless it affirmatively appears from the record that the defendant was prejudiced thereby or was prevented from having a fair trial.").

{¶31} Here, the trial court rejected the sole cause providing the basis for appellee's motion, i.e., that the prosecutor engaged in misconduct in submitting the additional 911 calls to the jury. Indeed, the trial court expressly found in its judgment

entry that no prosecutorial misconduct occurred. Despite this finding, the trial court granted the motion for new trial. In so doing, the trial court impermissibly extended the provisions of Crim.R. 33 beyond the grounds asserted by appellee in his motion.

{¶32} Moreover, the trial court made no affirmative finding that appellee suffered actual prejudice from the inadvertent submission of the additional 911 calls. Indeed, the trial court refused to speculate as to whether the jury listened to the additional calls. Despite its silence on the issue of prejudice, the trial court nonetheless ordered a new trial "to ensure Defendant's constitutional rights [were] protected and preserved." Pursuant to Crim.R. 33(E)(5), this is not a valid basis for nullifying a jury's verdict. Accordingly, the court's judgment was "without adequate determining principle" and "not governed by any fixed rules or standard." *Abdullah* at ¶16. By ordering a new trial without finding prejudice, the trial court effectively refused to exercise its discretion, and thus abused its discretion. See *State v. Raymond*, 10th Dist. No. 05AP-1043, 2006-Ohio-3259, ¶11 (holding that a court abuses its discretion when it refuses to exercise that discretion). Having determined that the trial court abused its discretion in granting appellee's motion for new trial, we sustain the state's assignment of error.

{¶33} For the foregoing reasons, we reverse the judgment of the Franklin County Court of Common Pleas and remand the matter to that court for further proceedings in accordance with law and consistent with this decision.

Judgment reversed and cause remanded.

BROWN and FRENCH, JJ., concur.
