

[Cite as *State v. Mack*, 2010-Ohio-1420.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93091

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

COLUMBIA MACK

DEFENDANT-APPELLANT

**JUDGMENT:
REVERSED AND REMANDED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-518304

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

RELEASED: April 1, 2010

**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), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten 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. 2.2(A)(1).

ANN DYKE, P.J.:

{¶ 1} Defendant-appellant, Columbia Mack ("appellant"), appeals his

convictions for rape and kidnapping. For the reasons that follow, we reverse and remand for proceedings consistent with this opinion.

{¶ 2} On November 25, 2008, the Cuyahoga County Grand Jury indicted appellant on five counts: counts one, two, and three alleged rape in violation of R.C. 2907.02(A)(2); count four alleged kidnapping in violation of R.C. 2905.01(A)(4); and count five alleged aggravated burglary in violation of R.C. 2911.11(A)(1). All counts included a notice of prior conviction and repeat violent offender specifications. Count three also included a sexual motivation specification. Appellant pled not guilty to all charges in the indictment.

{¶ 3} The case proceeded to a jury trial on March 11, 2009. At trial, D.D.¹ testified that she met appellant in the parking lot of a clothing store where he provided her with his phone number. Sometime thereafter, D.D. telephoned appellant and a few days later they had lunch. That same evening, D.D. sent appellant a text message and he telephoned her at 10:00 a.m. asking if he could come visit. She agreed and upon arrival, the two conversed for a couple hours.

{¶ 4} When appellant was about to leave, he grabbed her, began kissing her, and tugging at her pants. D.D. told him to stop and was crying but appellant ignored her requests. He then hoisted her up by her pants and D.D. fell to the ground. While she laid on her back, he removed her pants and placed his face in her vaginal area. D.D. attempted to scoot away from appellant but was

¹ The victims are referred to herein by initials in accordance with this court's policy regarding non-disclosure of the identities of victims of sexual violence.

unsuccessful. Instead, he took her to the couch and vaginally penetrated her for about an hour.

{¶ 5} Thereafter, appellant penetrated D.D. again on the bed in the bedroom. D.D. then testified that appellant forced her to take a shower. Afterwards, he walked her back to the bed and laid next to her with his arm around her neck. At 6:00 a.m., D.D. and appellant awoke and appellant left the apartment.

{¶ 6} D.D. then telephoned a friend and her sister, informing them she had been raped. She then proceeded to her mother's house. There, she met with police and continued to the hospital.

{¶ 7} After presentation of the evidence, the trial court denied appellant's request for acquittal pursuant to Crim.R. 29(A) and he rested his case.

{¶ 8} On March 19, 2009, the jury returned a verdict of guilty of rape as charged in counts one and two of the indictment as well as kidnapping and the sexual motivation specification under count four of the indictment. The jury, however, found appellant not guilty of rape as charged in count three and aggravated burglary as charged in count five. After appellant waived his right to a jury trial, the trial court found him guilty of the repeat violent offender specifications and notice of prior convictions in counts one, two and four.

{¶ 9} On March 20, 2009, the court conducted a hearing regarding alleged juror misconduct proposed by appellant. First, appellant's wife, Tenisha Mack, alleged that she saw Juror Number 4 speaking with the prosecutor outside the

lunch room. The court interviewed the juror and he denied any such conversation. As such, the court did not find any juror misconduct in that instance.

{¶ 10} Next, the court reviewed Tenisha's allegation that she had a conversation with Juror Number 12 outside the courthouse on March 16, 2009, while the jury was still deliberating and prior to a verdict. The court questioned both Tenisha and Juror Number 12 and each admitted to discussing the trial, appellant's character, and his guilt or innocence. Thereafter, the court concluded that the private communications between Tenisha and Juror Number 12 did not influence the juror's verdict, and thus, was harmless and not prejudicial to appellant.

{¶ 11} On March 30, 2009, the trial court sentenced appellant to 10 years each for counts one, two, and four. The court ordered the sentence in count four to merge with the sentences imposed in counts one and two and ordered those two sentences to be served concurrently to each other. Finally, the court imposed five years of mandatory postrelease control.

{¶ 12} Appellant now appeals his convictions and presents three assignments of error for our review. His first assignment of error states:

{¶ 13} "The trial court erred when it denied Mack's motion for a new trial when there was clear juror misconduct by Juror No. 12, and the juror unequivocally indicated that she did not think Mack was guilty."

{¶ 14} Here, appellant maintains that the trial court erred in denying his

motion for a new trial because his substantial rights were materially affected by Juror Number 12's misconduct. Because we find that the trial court erred in failing to permit appellant the opportunity to meet his burden of establishing prejudice due to Juror Number 12's misconduct, we reverse and remand for proceedings consistent with this opinion.

{¶ 15} One of the bedrocks of our justice system is the right of an accused to be tried before an “impartial, unprejudiced, and unbiased jury.” *State v. Daniels* (1993), 92 Ohio App.3d 473, 486, 636 N.E.2d 336; see, also, *State v. Hessler*, 90 Ohio St.3d 108, 133, 2000-Ohio-30, 734 N.E.2d 1237. This right is firmly rooted in both the Ohio and United States Constitutions. Section 10, Article I, Ohio Constitution; *Duncan v. Louisiana* (1968), 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491. Accordingly, a jury’s verdict must be based solely on the evidence presented at trial and not any outside influence. *McIlwain v. United States* (1983), 464 U.S. 972, 974-75, 104 S.Ct. 409, 78 L.Ed.2d 349; *Apaydin v. Cleveland Clinic Found.* (1995), 105 Ohio App.3d 149, 154, 663 N.E.2d 745. An accused’s fundamental right to a fair trial is denigrated when a court permits a verdict to stand after deliberations were tainted by a juror’s impropriety. *McIlwain, supra*.

{¶ 16} The Supreme Court of Ohio has held that a new trial may be granted when (1) there is jury misconduct (2) that has materially affected the substantial rights of the accused. *State v. Taylor* (1991), 73 Ohio App.3d 827, 833, 598 N.E.2d 818. Typically, any private communication or contact between a juror and another person, especially a person connected with one of the parties to the

litigation, concerning a matter before the jury constitutes juror misconduct and is presumptively prejudicial. *Remmer v. United States* (1954), 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654, syllabus; *Taylor*, supra at 820. This presumption of prejudice, however, is not conclusive. *Remmer*, supra at 229. The Supreme Court of Ohio in *State v. Keith*, 79 Ohio St.3d 514, 1997-Ohio-367, 684 N.E.2d 47, “reaffirmed [the] long-standing rule that a court will not reverse a judgment based upon juror misconduct unless prejudice to the complaining party is shown.” *Id.* at 526. Therefore, the party alleging misconduct bears the burden of demonstrating that the contact was prejudicial. *Smith v. Phillips* (1982), 455 U.S. 209, 215-217, 102 S.Ct. 940, 71 L.Ed.2d 78; see, also, *State v. Sheppard*, 84 Ohio St.3d 230, 233, 1998-Ohio-323, 703 N.E.2d 286; *State v. Phillips*, 74 Ohio St.3d 72, 88, 1995-Ohio-171, 656 N.E.2d 643.

{¶ 17} When reviewing allegations of juror misconduct, a reviewing court must “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.” *Hessler*, supra at 115-116. Accordingly, this court utilizes an abuse-of-discretion standard and will not disturb the trial court’s decision unless it is “unreasonable, arbitrary, or unconscionable.” *Id.* at 116, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

{¶ 18} On March 20, 2009, the trial court questioned both appellant’s wife, Tenisha Mack, and Juror Number 12 regarding the allegations of juror misconduct. Tenisha testified that during their conversation on March 16, 2009, Juror Number

12 spoke about the trial and Tenisha informed her that appellant was her husband. Juror Number 12 then volunteered that five of the jurors believed he was guilty and the remaining believed he was not guilty. Juror Number 12 also stated that she was one of the jurors who believed in appellant's innocence. Finally, the two separated after Tenisha informed the juror that her husband was a good person.

{¶ 19} Juror Number 12 testified that, during the conversation, she became aware that Tenisha was appellant's wife and that Tenisha stated that he "didn't do these kind of things, he's not that kind of person." Juror Number 12 admitted that she responded to this statement by stating, "I don't believe he's guilty myself."

{¶ 20} Following this testimony, the trial court questioned Juror Number 12 further and asked whether this conversation affected her deliberations, to which Juror Number 12 responded, "Well, you know, in my heart I don't feel that the man is guilty from the things that were brought out by the prosecution and the defense. There was not enough evidence and the way it evolved and the circumstances of what happened, it sounded very flaky to me. * * *"

{¶ 21} Following this statement, the court engaged in the following discussion with Juror Number 12:

{¶ 22} "THE COURT: Obviously I know what your verdict is because you were individually polled for your verdicts. You're obviously able to put your personal feelings aside and follow the law in this case?"

{¶ 23} "THE WITNESS: I did because they were compromising and, you know, this or that. And this is a first for me, your Honor. So yes, I put my

personal feelings aside.

{¶ 24} “THE COURT: All right. And at this point you’re still in agreement with your verdict that you gave in court here on Tuesday the 17th?

{¶ 25} “THE WITNESS: As I said, no, I’m not. I don’t feel that he’s guilty of all she said.

{¶ 26} “THE COURT: You’re not withdrawing your verdict at this point?”

{¶ 27} The court then suspended the hearing without the juror answering the court’s question. Rather, Juror Number 12 spoke with her attorney off the record and the hearing resumed with the following interaction:

{¶ 28} “THE COURT: Let me just try and rephrase what I was asking you before. Anything about this conversation with Mrs. Mack, the wife of the Defendant, prior to the verdict, did any of that influence you with respect to your verdict on this case?

{¶ 29} “THE WITNESS: No, sir.

{¶ 30} “THE COURT: Okay. And did you communicate any of those conversations between you and Ms. Mack to any other members of the jury?

{¶ 31} “THE WITNESS: No, sir.”

{¶ 32} In this case, we find that the trial court erred in not affording appellant the opportunity to meet his burden of proof in demonstrating that the contact between Tenisha and Juror Number 12 was prejudicial to him. In this case, there can be no dispute that juror misconduct occurred when Juror Number 12 spoke with Tenisha about appellant’s character and his guilt or innocence while the jury

was still deliberating.

{¶ 33} Having determined that the allegations of juror misconduct were with merit, the trial court should have then allowed appellant to present evidence of prejudice. As previously stated, it is appellant's burden to demonstrate that the contact was prejudicial in that it materially affected his substantial rights. *Phillips*, 455 U.S. at 215-217; *Sheppard*, supra at 233; *Phillips*, 74 Ohio St.3d at 88. The United States Supreme Court in *Remmer*, supra, stated the following with regard to the type of hearing a trial court should hold when reviewing claims of juror misconduct:

{¶ 34} "The integrity of jury proceedings must not be jeopardized by unauthorized invasions. The trial court should not decide and take final action ex parte on information such as was received in this case, but should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, ***in a hearing with all interested parties permitted to participate.***" *Id.* at 229. (Emphasis added.)

{¶ 35} Some prejudice was established when Juror Number 12 attempted to disavow her verdict. Nevertheless, the trial court did not permit appellant the opportunity to inquire further with Juror Number 12. The court also did not allow him to question Tenisha or the other jurors regarding their knowledge of the conversation in order to demonstrate the prejudice. Therefore, we find that the trial court erred in failing to hold an adequate hearing in which appellant would be permitted the opportunity to meet his burden of establishing prejudice due to the

juror misconduct. Accordingly, we reverse and remand for proceedings consistent with this opinion.

{¶ 36} Our decision in appellant's first assignment of error renders his remaining assignments of error² moot. Accordingly, we decline to address them pursuant to App.R. 12(A).

{¶ 37} Judgment reversed and remanded.

This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is, therefore, considered that said appellant recover of said appellee his costs herein.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

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

ANN DYKE, PRESIDING JUDGE

**LARRY A. JONES, J., CONCURS;
MARY J. BOYLE, J., CONCURS IN JUDGMENT ONLY**

² "II. Mack was denied his right to effective assistance of counsel guaranteed to him by Art. 1, Sec. 10 of the Ohio Constitution and the Sixth and Fourteenth Amendments to the United States Constitution."

"III. The convictions for rape and kidnapping were against the manifest weight of the evidence."