

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Case No. 01-1518

Plaintiff-Appellee,

ON APPEAL FROM THE
MONTGOMERY COUNTY COURT
OF COMMON PLEAS,
CASE NO. 00-CR-2945

vs.

LARRY JAMES GAPEN

THIS IS A DEATH PENALTY
CASE

Defendant-Appellant.

PLAINTIFF-APPELLEE'S MEMORANDUM IN OPPOSITION
TO DEFENDANT-APPELLANT'S APPLICATION FOR
REOPENING PURSUANT TO S.CT. PRAC.R. XI(6)

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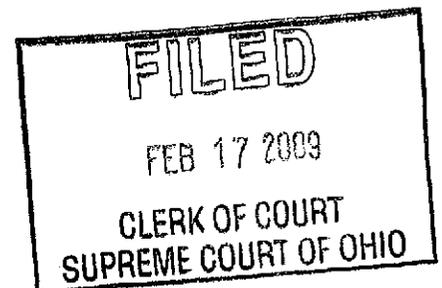
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MEMORANDUM

I. Procedural Posture

Appellant Larry James Gapen was charged with 12 counts of aggravated murder and four related felonies. He was sentenced to death for the aggravated murder of 13-year-old Jessica Young with prior calculation and design. He received life without parole for all other aggravated murder counts and a consecutive 25 years total for the felonies.

On direct appeal, this Court reversed Gapen's conviction for escape and the R.C. 2929.04(A)(4) specifications that alleged murder in the course of breaking detention, but affirmed the remaining convictions and the death sentence. *State v. Gapen*, 104 Ohio St.3d 358, 2004-Ohio-6548, 819 N.E.2d 1047, at ¶1. The judgment entry was filed on December 15, 2004. (State's Exhibit A: Judgment Entry) This Court denied Gapen's motion for reconsideration in an entry filed February 16, 2005. (State's Exhibit B: Reconsideration Entry)

Gapen's attempt to appeal this Court's decision to the United States Supreme Court was unsuccessful. His petition for post-conviction relief and his multiple appeals from the trial court's decision denying the petition were likewise unsuccessful.

On December 17, 2008, this Court appointed counsel to Gapen to pursue an application for reopening. His application for reopening was filed on January 16, 2009.

II. Law and Argument

A. Lack of Good Cause for Untimely Filing

Under Supreme Court Rule of Practice XI(6), a defendant in a death penalty case who believes that he received ineffective assistance of appellate counsel in his appeal to this Court may apply to the Court to reopen his appeal and to present propositions of law or arguments in support of propositions of law that previously were not considered on the merits in the case.

S.Ct.Prac.R. XI(6)(A) & (B)(3). The rule requires the application to be filed within 90 days from entry of the judgment of the Court. S.Ct.Prac.R. XI(6)(A). An application that is filed beyond the 90-day deadline must show good cause for its untimeliness. S.Ct.Prac.R. XI(6)(A) & (B)(2). Applications that do not show good cause for having been untimely filed are subject to denial. See *State v. Cunningham*, 114 Ohio St.3d 1503, 2007-Ohio-4285, 872 N.E.2d 946; *State v. Bryan*, 103 Ohio St.3d 1490, 2004-Ohio-5605, 816 N.E.2d 1078.

To be timely, Gapen's application for reopening was due for filing on March 15, 2005. It was not filed until January 16, 2009, nearly four years after the filing deadline. His reason for his late application is that his appellate counsel did not inform him that he could file an application for reopening, which he claims is "good cause." (Application for Reopening, at pp. 5-6) It should be noted that Gapen was represented by different counsel for purposes of pursuing post-conviction relief as of October 4, 2002 at the latest. Gapen recognizes this, but suggests nonetheless that post-conviction counsel's failure to inform him that he could file an application for reopening is also "good cause." He points out that both post-conviction counsel and appellate counsel were from the Ohio Public Defender's Office and argues that post-conviction counsel could not be expected to argue the ineffectiveness of counsel from their own office. (Application for Reopening, p. 6, fn. 2)

Gapen's excuse for missing the filing deadline falls well short of demonstrating good cause for his late application. This Court has repeatedly rejected claims that a defendant has good cause for filing an untimely application because his original appellate counsel were still representing him in collateral litigation. *State v. Keith*, 119 Ohio St.3d 161, 2008-Ohio-3866, 892 N.E.2d 912, at ¶6, citing *State v. Gumm*, 103 Ohio St.3d 162, 2004-Ohio-4755, 814 N.E.2d

861, and *State v. LaMar*, 102 Ohio St.3d 467, 2004-Ohio-3976, 812 N.E.2d 970. This Court stated in *Keith*, at ¶7:

It is true, as Keith argues, that his counsel could not be expected to argue their own ineffectiveness. But then, there is no right to counsel on an application to reopen. Thus, lack of counsel cannot be accepted as good cause for the late filing of Keith's application. As we explained in *Gumm* and *LaMar*, Keith could have attempted to obtain other counsel to file his application; failing that, he could have filed an application himself. "What he could not do was ignore the rule's filing deadline."

(Citations omitted). Gapen had over four years from this Court's decision affirming his death sentence to either secure new counsel to file an application for reopening or file the application himself. He did neither. As a result, he does not establish good cause for his late application.

Nor is his late application excused by the alleged failure of his appellate and post-conviction counsel to tell him that he could file an application for reopening. As this Court said in *LaMar*, "[l]ack of effort or imagination, and ignorance of the law" do not establish good cause for an untimely application. *Id.* at ¶9. The rule's 90-day requirement is applicable to all appellants. *Id.* As in *LaMar*, Gapen offers no sound reason why he – unlike so many other Ohio criminal defendants – could not comply with that fundamental aspect of the rule.

Gapen did not demonstrate good cause for his failure to file his application for reopening within the 90-day deadline. Therefore, his untimely application is subject to summary denial.

B. Standard for Reopening

S.Ct.Prac.R. XI(6)(E) provides that "[a]n application for reopening shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal." The standard for assessing whether the applicant has raised a "genuine issue" is the two-pronged test in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. *State v. Hill* (2001), 90 Ohio St.3d 571, 572, 740 N.E.2d 282. To prevail on a

claim of ineffective assistance of appellate counsel, the applicant must prove that his counsel were deficient for failing to raise the issues he now presents and that there was a reasonable probability of success had he presented those claims on appeal. *Id.* Thus, to justify reopening the appeal, the applicant “bears the burden of establishing that there was a ‘genuine issue’ as to whether he has a ‘colorable claim’ of ineffective assistance of counsel on appeal.” *State v. Spivey* (1998), 84 Ohio St.3d 24, 25, 701 N.E.2d 696. Gapen fails to meet his burden.

C. There is not a genuine issue as to whether Gapen was deprived of the effective assistance of counsel on appeal.

1. Jury’s consideration of invalid aggravating factors.

On appeal, this Court vacated Gapen’s conviction for escape, as well as the guilty findings on the R.C. 2929.04(A)(4) specifications attached to each count of aggravated murder that alleged murder in the course of breaking detention. *State v. Gapen*, 104 Ohio St.3d 358, 2004-Ohio-6548, 819 N.E.2d 1047, at ¶73. In light of the Court’s decision invalidating the “breaking detention” specifications, Gapen now argues that the jury improperly considered the specification and the evidence admitted to prove it as an aggravating circumstance when weighing the aggravating circumstances against the mitigating factors.

Appellate counsel were not deficient when they did not raise this claim before this Court in their motion for reconsideration. This is because Gapen’s death sentence was not subject to reversal based on the jury’s consideration of the evidence admitted to prove the “breaking detention” specifications. In Ohio, constitutional harmless-error analysis or re-weighing at the trial or appellate level suffices to guarantee that the defendant receives an individualized sentence even when the weighing process itself has been skewed by the sentencer’s consideration of an invalid aggravating factor. *Stringer v. Black* (1992), 503 U.S. 222, 232, 112

S.Ct. 1130, 117 L.Ed.2d 367; *Wilson v. Mitchell* (C.A.6, 2007), 498 F.3d 491, 507, construing *Brown v. Sanders* (2006), 546 U.S. 212, 126 S.Ct. 884, 163 L.Ed.2d 723.

Gapen received an individualized sentence despite the jury's consideration of the evidence admitted to prove the "breaking detention" specifications. On appeal, this Court independently re-weighed the mitigating factors against the aggravating circumstances without considering the evidence admitted to prove the "breaking detention" specifications. *Id.* at ¶148, 174. The Court affirmed the death sentence for the aggravated murder of Jesica Young only after concluding that the remaining aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt. *Id.* at ¶181. Thus, this Court's independent re-weighing of the aggravating circumstances and the mitigating factors cured any error in the jury's consideration of evidence admitted to prove the "breaking detention" specifications. Had appellate counsel raised the claim in the motion for reconsideration that Gapen makes in his application for reopening, it would have been rejected.

2. Ineffective assistance of trial counsel in voir dire.

Trial counsel is entitled to exercise broad discretion in formulating voir dire questions. *State v. Mundt*, 115 Ohio St.3d 22, 2007-Ohio-4836, 873 N.E.2d 828, at ¶84. "Few decisions at trial are as subjective or prone to individual attorney strategy as juror voir dire, where decisions are often made on the basis of intangible factors" such as experience and intuition. *Id.* at ¶64. It is for this reason that "counsel is in the best position to determine whether any potential juror should be questioned and to what extent." *Id.* Counsel's formulation of questions in voir dire will not be second-guessed on appeal or subjected to hindsight views about how current counsel might have vired the jury differently. *Id.* at ¶63. Where counsel's decisions in voir dire are challenged as ineffective on grounds that counsel allowed a biased juror to be empaneled, a

defendant can establish prejudice only by showing that the jury “was *actually biased* against him.” (Emphasis sic.) *Id.* at ¶67.

Gapen fails to meet his burden as to either David Nedostup or Bradley Ivey. Neither juror was “actually biased” against him.

Nedostup’s answers to questions in voir dire established that he would set aside his personal feelings about the death penalty and decide the case based on the facts and the law. (Gapen’s Exhibit 3, p. 692, 705) Although his questionnaire revealed his belief that the death penalty was “a just punishment for a relative crime,” none of the answers he gave even remotely suggested that he would automatically vote for a death sentence. Nedostup told the prosecutor: “I believe if you can pull the evidence together, enough evidence, then I could go either way. If the evidence is in support of the death penalty I could go with that. If not, if not enough evidence, then we can’t.” (*Id.* at 691)

Likewise, his answers did not suggest that he would not consider mitigating evidence. In fact, just the opposite was true; Nedostup assured defense counsel that he would find that the aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt before voting to impose the death penalty. (*Id.* at 706) Nedostup stated that if the State did not prove beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating factors, he could bring in a penalty less than death. (*Id.*)

Gapen’s claim that Ivey was unable to be impartial is similarly unpersuasive. *State v. Zerla* (Mar. 17, 1992), Franklin App. No. 91AP-562, which Gapen cites in the affidavit attached to his application, does not support his argument. This is because, unlike the situation in *Zerla*, the murder of Ivey’s father by Ivey’s mother had occurred 40 or more years before Gapen’s trial.

(Gapen's Exhibit 4, T.p. 2216; State's Exhibit C: Prosecutor's Voir Dire of Bradley A. Ivey (Transcript pages 2146-48), at p. 2147)

Furthermore, Ivey never expressed doubts about his ability to be impartial. Gapen's claim is based on Ivey's statement that he didn't think his father's murder would affect his ability to serve as a juror "but it has bothered me a lot though." (Gapen's Exhibit 4, p. 2216) The State does not concede that this was an expression of partiality. See *Miller v. Francis* (C.A.6, 2001), 269 F.3d 609, 617-19 (no statement of partiality when juror expressed discomfort about sitting on the jury, but consistently answered that she could be fair).

However, even if Ivey was equivocal about his ability to serve as a juror, he was satisfactorily rehabilitated through defense counsel's follow-up questions. When counsel subsequently asked him whether he could be fair to Gapen just as he could be fair to the State, he responded, "I can. Yes." Compare *Miller v. Webb* (C.A.6, 2004), 385 F.3d 666, 678 (wherein juror never gave an assurance of impartiality after expressing doubt about her ability to be impartial). Ivey's clear and unconditional assertion that he could be fair to both sides was credible; it was wholly consistent with his prior responses, in which he affirmed that he could follow the law, sign a guilty verdict and recommend a death sentence if the State met its burden beyond a reasonable doubt, but likewise that he would have no problem signing a verdict of not guilty or recommending something less than a death sentence if the State did not fulfill its burden. (State's Exhibit D: Prosecutor's Voir Dire of Bradley A. Ivey (Transcript pages 664-67), at p. 666-67; State's Exhibit E: Defense Voir Dire of Bradley A. Ivey (Transcript pages 678-80), at p. 678-79)

Neither Nedostup nor Ivey were actually biased against Gapen. In fact, both provided assurances that they would be fair and impartial and would apply the law as instructed. Defense

counsel could not have successfully challenged Nedostup and Ivey for cause, and they wisely preserved Gapen's peremptory challenges for other jurors. Gapen does not establish ineffective assistance of trial counsel in voir dire. Consequently, this is not something that appellate counsel would have or should have raised in Gapen's direct appeal.

3. The trial court's rejection of Gapen's *Batson* challenge.

Batson v. Kentucky (1986), 476 U.S. 79, 82, 106 S.Ct. 1712, 90 L.Ed.2d 69, created the following three-part test for determining whether a prosecutor's use of a peremptory challenge is racially motivated: "First, the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the juror in question. Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination."

Initially, the State does not concede that Gapen met his burden of demonstrating a prima facie case of discrimination in the first instance, but recognizes this Court's decision in *State v. White* (1999), 85 Ohio St.3d 433, 437, 709 N.E.2d 140, which states that the issue is moot once the proponent explains the challenge and the trial court rules on the ultimate issue of discrimination.

Putting the first step of the test aside, it is the State's position that the trial court correctly applied the second and third steps of the test to Gapen's *Batson* challenge. In the second step of the test, "the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Purkett v. Elem* (1995), 514 U.S. 765, 768, 115 S.Ct. 1769, 131 L.Ed.2d 834. The third step focuses on whether the race-neutral explanation offered by the proponent of the strike

is credible or instead is a pretext for discrimination. *State v. Gowdy* (2000), 88 Ohio St.3d 387, 393, 727 N.E.2d 579 (rev'd on other grounds).

Turning to the court's application of the second and third steps in this particular case, the prosecutor proffered his reasons for the challenge in the second step, which included Gooden's strong feelings against the death penalty, his statements during voir dire that indicated that he would hold the State to a higher standard of proof than was required by law, the fact that the Montgomery County Prosecutor's Office was currently handling a case involving Gooden's nephew, Gooden's negative feelings against police as a result of a prior incident, and his body language while answering questions about the death penalty. (Gapen's Exhibit 5, p. 2249-50) Once the prosecutor had proffered his reasons, each of which was race-neutral and thus facially valid, the court stated in the third step: "It doesn't say that it has to be an absolute reason that makes sense. It has to make sense to the person who gives it. And accordingly the challenge is overruled." (Id. at 2250)

Gapen's argument that the court misapplied steps two and three relies on an incorrect interpretation of the court's statement following the prosecutor's race-neutral explanation. Though the court's transition from the second step to the third step of the test was subtle, the court's statement was actually made in step three. It was not a comment on the facial validity of the prosecutor's explanation in step two. It also did not impermissibly combine steps two and three and comment on the persuasiveness or credibility of the prosecutor's explanation, which was the issue in *Purkett*, supra, and *United States v. Kimbrel* (C.A.6, 2008), 532 F.3d 461, both of which are cited in the affidavit attached to Gapen's application for reopening. Rather, the court's statement constituted a finding that the prosecutor's facially valid explanation was credible and not just a pretext for unconstitutional discrimination. Essentially, the court was saying that it

believed that the prosecutor's challenge to Gooden was for the reasons he stated on the record. The court's credibility determination in step three is not clearly erroneous; therefore, it is not subject to reversal. See *Gowdy*, at 393. Consequently, Gapen falls short of demonstrating that this argument should have been raised on direct appeal.

In each of his three claims, Gapen fails to establish that there is a genuine issue as to whether he was deprived of the effective assistance of counsel on appeal. Accordingly, the State asks this Court to deny Gapen's application for reopening.

Respectfully submitted,

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PLAINTIFF-APPELLEE

FILED

DEC 15 2004

The Supreme Court of Ohio

MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

State of Ohio,
Appellee,
v.
Larry James Gapen,
Appellant.

Case No. 01-1518

JUDGMENT ENTRY

APPEAL FROM THE
COURT OF COMMON PLEAS

This cause, here on appeal from the Court of Common Pleas for Montgomery County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the court of appeals is affirmed in part and reversed in part consistent with the opinion rendered herein.

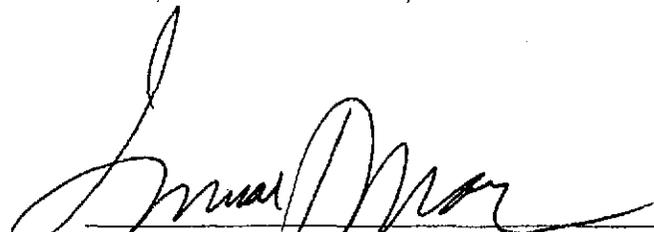
Furthermore, it appearing to the Court that the date heretofore fixed for the execution of judgment and sentence of the court of common pleas has passed,

IT IS HEREBY ORDERED by the Court that said sentence be carried into execution by the Warden of the Southern Ohio Correctional Facility or, in his absence, by the Deputy Warden on Tuesday, the 5th day of April, 2005, in accordance with the statutes so provided.

IT IS FURTHER ORDERED that a certified copy of this entry and a warrant under the seal of this Court be duly certified to the Warden of the Southern Ohio Correctional Facility and that said Warden shall make due return thereof to the Clerk of the Court of Common Pleas for Montgomery County.

IT IS FURTHER ORDERED by the Court that a mandate be sent to the Court of Common Pleas for Montgomery County to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Common Pleas for Montgomery County for entry.

(Montgomery County Court of Common Pleas; No. 2000CR02945)


THOMAS J. MOYER
Chief Justice

FILED

FEB 16 2005

MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

The Supreme Court of Ohio

State of Ohio,
Appellee,
v.
Larry James Gaspen,
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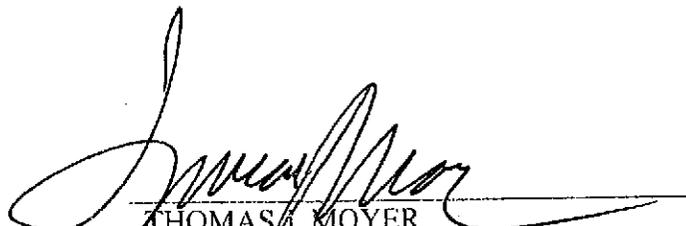
Case No. 01-1518

RECONSIDERATION ENTRY

Montgomery County

IT IS ORDERED by the Court that the motion for reconsideration in this case be, and hereby is, denied.

(Montgomery County Court of Common Pleas; No. 2000CR02945)



THOMAS J. MOYER
Chief Justice

1 IN OPEN COURT:

2 (Juror 32, Michael D. Garlitz is now here,
3 having come just before lunch.)

4 THE COURT: Good afternoon, ladies and
5 gentlemen, see everybody looks like they had a good lunch.
6 Cut you loose just in time for the rain to start. Juror
7 number 32 will now stand and receive the oath so it doesn't
8 get overlooked.

9 (Whereupon, the jurors were sworn by the
10 Bailiff.)

11 THE COURT: Mr. Daidone, you may proceed.

12 MR. DAIDONE: Thank you, Your Honor.

13 VOIR DIRE EXAMINATION OF BRADLEY A. IVEY

14 BY MR. DAIDONE:

15 Q Mr. Ivey?

16 A Yes.

17 Q You indicated earlier you had a hearing problem. Have
18 you had any trouble hearing me?

19 A Most of the time I hear you pretty good.

20 Q You have problems with hearing some of the other jurors
21 speak?

22 A Yes, yes.

23 Q You were selected as a juror and we could put you maybe
24 closer to the jury box -- closer to the witness box; would
25 that make it easier for you to hear?

1 A It probably would, but I can't hear a phone. I'm a
2 little bit weak in this ear and can't hear in this ear.

3 Q You would raise your hand if we were speaking and you
4 couldn't hear, you would let us know?

5 A Yes.

6 Q Is it the loudness or softness, or you can't hear just
7 certain tones?

8 A It's soft tones and softness. I was in the service and
9 I lost part of my hearing there, and worked in a forming shop
10 and lost some there too.

11 Q If you were put closer to whoever is talking, that would
12 help you?

13 A It would.

14 Q I notice you're retired. What type of work did you do
15 at GM?

16 A I was a job setter, assembly.

17 Q You had pretty much that same type of work throughout
18 your whole career there?

19 A Yes.

20 Q Also noticed on your form that you were the victim of a
21 breaking and entering?

22 A It's been a long time ago, 25 years ago.

23 Q Long time. I notice you weren't happy the way the
24 police handled that particular event but that was back 20,
25 25, 30 years ago?

1 A Yes, sir.

2 Q You realize in this case the police had nothing to do
3 with your being upset over their handling of the other case?

4 A They done the best they could.

5 Q So you'd be able to set that aside and judge this case
6 fairly on the facts presented?

7 A Oh, yes.

8 MR. DAIDONE: Thank you, sir.

9 THE COURT: Okay.

10 VOIR DIRE EXAMINATION OF DAVID NEDOSTUP

11 BY MR. DAIDONE:

12 Q Mr. Nedostup?

13 A Yes.

14 Q You indicated earlier that you--are you the one that
15 hired Patrick Mulligan?

16 A Yes.

17 Q If I might ask, is that a civil or criminal matter?

18 A It's a divorce.

19 Q Have you ever actually met with him or have a
20 relationship with him?

21 A Just one time.

22 Q The fact that he may or may not come in, take the
23 witness stand and testify, you were retaining him as a
24 lawyer, are you still going to subject him to the test, same
25 test of credibility you would, according to the Court's

1 Q Now, do you have any of your own preconceived notions of
2 what a particular case would have to be like before you would
3 think in your mind it's a death penalty case?

4 A No.

5 Q If the Judge were to instruct you what the law was
6 concerning the area of aggravated murder and the aggravating
7 circumstances, you would be able to follow the law?

8 A Yes.

9 Q If the State were to prove beyond a reasonable doubt
10 that the -- strike that -- that the elements of aggravated
11 murder and prove beyond a reasonable doubt the aggravating
12 circumstances, you would be able to come and sign a verdict
13 form, come into Court and pronounce your verdict of guilty
14 knowing you would be going to the next phase which the
15 possible punishment can be death?

16 A Yes.

17 Q And if you were to get to that, the sentencing phase,
18 and if the State were to prove to you beyond a reasonable
19 doubt that the aggravating circumstances outweighed the
20 mitigating factors that the Judge will give you, can you sign
21 your name to a verdict form and declare your verdict in open
22 court sentencing the Defendant to death?

23 A Yes.

24 Q Thank you.

25 VOIR DIRE EXAMINATION OF BRADLEY A. IVEY

1 BY MR. DAIDONE:

2 Q Mr. Ivey?

3 A Ivey.

4 Q You indicated on your form that the death penalty was
5 okay with me?

6 A Yes, sir.

7 Q Can you explain that a little bit more?

8 A If I think they deserved it, I think it would be all
9 right. Just according to how bad it was.

10 Q So you have in mind your view of what it would take or
11 what you think death penalty cases are about?

12 A I don't know how to explain it to you.

13 Q Take your time.

14 A If it was an awesome murder, I could go along with that.

15 Q So you have in your view what it would take to be a
16 death penalty, you used the words an awesome type situation?

17 A See, that would be pretty bad. I don't know, I couldn't
18 tell you that. I just don't know.

19 Q You might have in your mind what you think is a death
20 penalty -- I think you're saying you have kind of searched in
21 your mind and tried to decide in your head what you think a
22 death penalty case would be.

23 A It would have to be pretty bad. That's the only thing I
24 can tell you.

5 Q Do you understand that -- You have your opinions. Do

1 you understand that the law might, that when the law
2 interprets what a death penalty case is, it might not be your
3 same definition of what it would be, do you understand that?

4 A I understand that.

5 Q And the Judge is going to instruct you on what the
6 proper situation is in aggravated murder, the aggravating
7 circumstances which would make this a death penalty case, do
8 you understand that?

9 A Yes.

10 Q If the Judge instructs you what the law is and it's
11 outside what you think it is, are you going to be able to
12 push your feelings aside and judge the case on what the Judge
13 says that the law is regarding the death penalty case?

14 A Yes, I can go along with that.

15 Q So your feelings you have would not prevent you or
16 substantially impair you from following the Court's
17 instructions?

18 A No, I don't think so.

19 Q In the trial phase, if the Court were to prove -- strike
20 that. If the State were to prove beyond a reasonable doubt
21 the aggravated murder and prove beyond a reasonable doubt the
22 aggravating circumstances, even if you don't agree with that,
23 if we have proven those, the State has proven those beyond a
24 reasonable doubt, are you going to be able to find the
25 Defendant guilty and sign your name to a verdict form and

1 declare your verdict in open court knowing that you would be
2 going to phase two where the possible punishment is death?

3 A Yes, I can do that.

4 Q And in the sentencing phase of the trial if the Judge
5 instructs you and the State finds, presents evidence and the
6 State has proven beyond a reasonable doubt that the
7 aggravating circumstances outweigh the mitigating factors,
8 even if you don't agree with it, even philosophically you
9 have your own ideas but based upon the facts and the law, are
10 you going to be able to push those feelings aside and render
11 a verdict based on the law and based upon the facts?

12 A Yes, I can do that.

13 Q And sign a verdict form in your own hand and come into
14 Court and declare a verdict knowing that you're sentencing
15 the Defendant to death?

16 A Yes.

17 MR. DAIDONE: One moment, Your Honor. Thank
18 you, Your Honor.

19 THE COURT: Mr. Cox?

20 MR. COX: Thank you, Your Honor.

21 VOIR DIRE EXAMINATION

22 BY MR. COX:

23 Q Good afternoon.

24 A Good afternoon.

25 Q As the Judge introduced us before, my name is Bobby Joe

1 A Yes.

2 MR. COX: Without going through all that again
3 with Mrs. Gunnoe and Mr. Ivey, and just kind of putting it
4 altogether with you three and kind of listening to it,
5 knowing now that the incident that occurred back on September
6 18 of 2000, that three people actually were killed by my
7 client, Larry Gapen, and knowing that, could you still go
8 back to charged with aggravated murder and the Government was
9 not able to prove the aggravated murder with one or more of
10 the death specifications or aggravated circumstances beyond a
11 reasonable doubt, the Government was unable to prove it,
12 would you be able to sign a verdict of not guilty to the
13 aggravated murder and the aggravated circumstances, would
14 anyone have any trouble signing a verdict of not guilty to
15 that and to something less or whatever it may be? Ms.
16 Gunnoe?

17 MS. GUNNOE: No.

18 Q Mr. Ivey?

19 MR. IVEY: I wouldn't have no problem.

20 BY MR. COX:

21 Q But by the same token, if the Government was able to do
22 it, knowing that the Government could prove it beyond a
23 reasonable doubt, and they did prove it, and you were
24 convinced of it, and you signed off knowing that you're going
5 to get now to the second phase. And that's where that's what

1 we call the penalty phase as opposed to trial phase.

2 In that phase there you're going to be given additional
3 information, additional evidence of mitigating factors. You
4 don't know what mitigating factors are, but it's things that
5 the Judge will tell you what they are. You'll have to weigh
6 those with reference to the aggravating circumstances. And
7 if the Government does not prove that the aggravating
8 circumstances outweigh the mitigating factors, in other
9 words, the Government can't prove it beyond a reasonable
10 doubt, that you would have no trouble coming back, even
11 though three people are dead and you have found Larry Gapen
12 guilty of aggravated murder with one or more of the
13 specifications, would you have any problem in following the
14 law as Judge Petzold gives it to you, of coming back with
15 something less than the death penalty? Ms. Gunnoe?

16 MS. GUNNOE: No.

17 Q Ms. Flournoy?

18 MS. FLOURNOY: No.

19 Q Mr. Ivey?

20 MR. IVEY: I wouldn't have no problem.

21 BY MR. COX:

22 Q Can you think of anything that we ought to know that
23 would interfere in any way with you serving as a juror? Do
24 you think that you can keep your emotions? Now when I tell
5 you three people were killed and in a violent manner, that as

1 a normal human being, emotions come up. Can you control your
2 emotions and listen to the evidence and listen to Judge
3 Petzold, because it's his job to tell you what the law is,
4 and follow the law as he tells you wherever it takes you, not
5 with emotion, but with the law and the facts as they are
6 given to you in this courtroom? Anyone have any problem with
7 that?

8 MS. GUNNOE: No.

9 MR. COX: Thank you, Your Honor.

10 THE COURT: Ladies and gentlemen, one thing
11 that we have, you will be excused at this point and we will
12 be letting you know in a few moment after we complete some
13 other matters in here as to whether or not you will move on
14 to the next phase, which will probably be Thursday morning.
15 And Mrs. Kelley will see to your comfort there once you are
16 notified of that. Those of you who will move on will be back
17 with us Thursday morning. And those of you not, the Jury
18 Commission may find something else for you to do. Thank you
19 much for being here.

20 (Whereupon, the jury panel left the courtroom.
21 The following is in the absence of and out of the hearing of
22 the jury panel with Defendant and all counsel present.)

23 IN OPEN COURT:

24 MR. DAIDONE: Your Honor.

5 THE COURT: Yes, sir.

▷ Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR
 REPORTING OF OPINIONS AND WEIGHT OF
 LEGAL AUTHORITY.

Court of Appeals of Ohio, Tenth District, Franklin
 County.
 STATE of Ohio, Plaintiff-Appellee,
 v.
 Terrance E. ZERLA, Defendant-Appellant.
 No. 91AP-562.

March 17, 1992.

Appeal from the Franklin County Court of Com-
 mon Pleas.

Michael Miller, Prosecuting Attorney, and Joyce S.
 Anderson, for appellant.
 James Kura, Public Defender, and Allen V. Adair,
 for appellant.

OPINION

PETREE, Judge.

*1 Defendant, Terrance E. Zerla, appeals from his conviction and sentence in the Franklin County Court of Common Pleas upon three counts of rape and one count of kidnapping. The primary issue on appeal is whether the trial court abused its discretion in refusing to excuse a juror who had been raped three years earlier. Defendant also contends that the state was erroneously permitted to cross-examine him concerning his post-arrest silence, that the court confused the jury with regard to the state's burden of proof, that the court incorrectly imposed multiple sentences for rape and kidnapping, and that the court erroneously overruled defendant's motion for a new trial. Because we agree that defendant's challenge for cause should have been sustained under these circumstances, we reverse de-

fendant's convictions and remand the matter for a new trial.

Each of the charges against defendant concerns an incident which occurred in the early morning hours of September 1, 1990. Because there was virtually no physical or medical evidence to substantiate the victim's story, the state's case rests primarily on her testimony. The victim testified that she was walking on High Street in the University District when she was accosted by defendant. She testified that he forced her across the street and into an alley where he raped her. Defendant testified that he met the victim that evening and that she took him into the alley. Although he admitted being intimate with the victim, defendant denied having sex with her or forcing her into the alley against her will. Following the trial, defendant was convicted and sentenced on all four counts. From that judgment, defendant brings this timely appeal, asserting five assignments of error:

1. "The court erroneously overruled appellant's challenge for cause of a juror who had recently been the victim of rape, leading to a continuing course of counseling and difficulties with the law. Such juror was 'otherwise unsuitable for any other cause to serve as a juror,' within the meaning of Criminal Rule 24(B)(14)."
2. "The prosecutor was improperly allowed to cross-examine the defendant concerning his post-arrest silence."
3. "The court's erroneous ruling on a prosecution objection, made during the introductory portion of defense counsel's closing argument, confused the separate issues of the manner in which circumstantial evidence is to be weighed and the state's burden to prove guilt beyond a reasonable doubt, thus undermining the state's burden of proof."
4. "The court erroneously imposed multiple sentences for rape and kidnapping."

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5. "The court erroneously overruled the defendant's motion for a new trial. At a minimum, the trial court should have conducted a further hearing, allowing the parties to question jurors as to the nature and effect of suspicious telephone calls received the night before deliberations."

In the first assignment of error, defendant asserts that the trial court erroneously overruled his challenge for cause to a juror who had been raped three years earlier.

*2 During voir dire, the prosecutor asked the last regular juror to be seated on the panel whether there was anything else she might want to disclose. The juror responded that there was, but that she would be more comfortable if it was discussed in private. Outside the presence of the other jurors, she disclosed that she had been raped by an acquaintance three years ago. She had not reported the incident and she was still somewhat apprehensive that the experience might be made public. In the years following the incident, the juror said she had been arrested three times for driving while intoxicated. She attributed these arrests to the emotional trauma caused by the rape. In response to questioning, the juror also admitted that she was still receiving rape related counseling. Nevertheless, the juror was convinced that she could put the experience behind her and decide the case fairly and upon its merits. Impressed with the juror's candor, the trial court overruled defendant's challenge for cause. Because defendant had exhausted all of his preemptory challenges, the juror was seated over defendant's objection.

Crim.R. 24(B)(9) provides that a prospective juror may be challenged for the cause that the juror "is possessed of a state of mind evincing enmity or bias toward the defendant or the state * * *." Because the determination of juror bias necessarily involves a judgment as to the juror's credibility, a reviewing court will normally defer to the trial court's ruling on this issue. *State v. DePew* (1988), 38 Ohio St.3d 275, 280; *State v. Wilson* (1972), 29 Ohio St.2d 203, 211. However, where the facts establishing bi-

as or interest are uncontroverted and the only conclusion that may be legally drawn is one of bias, the refusal to excuse the challenged juror constitutes an abuse of discretion warranting reversal. *Lingafelter v. Moore* (1917), 95 Ohio St. 384, paragraph two of the syllabus.

Bias sufficient to excuse a prospective juror under Crim.R. 24(B)(9) need not be expressly admitted. In many cases, it may be implied from the circumstances. For example, one court has held that bias should be presumed on the part of prospective jurors who are employed by the bank which is alleged to have been robbed by the defendant. *United States v. Allsup* (C.A.9, 1977), 566 F.2d 68, 71-72. Other courts have recognized that the presence of a recent rape victim on a jury in a rape trial could severely compromise the defendant's right to a fair and impartial jury. *Commonwealth v. Fulton* (1979), 271 Pa.Super. 430, 433, 413 A.2d 742, 743; *State v. Hatter* (Iowa App.1985), 381 N.W.2d 370, 372. Because the circumstances from which bias may be implied are so dependent on the nature of each case, there can be no fixed rule to guide the court's discretion in this matter. But where there is substantial emotional involvement with the facts or nature of the case which would adversely affect impartiality in the average person, there may be sufficient cause to excuse such a juror for bias under Crim.R. 24(B)(9).

*3 When it is suggested that a particular juror may have formed an opinion with respect to the guilt or innocence of the accused, the court may rehabilitate the juror "if the court is satisfied, from the examination of the juror or from other evidence, that [the juror] will render an impartial verdict according to the law and the evidence submitted to the jury at trial." Crim.R. 24(B)(9). Nevertheless, the court should not blindly accept the juror's pledge that he or she will render a fair and impartial verdict. Under the Ohio and United States Constitutions, the accused is entitled to a jury composed of impartial and unbiased jurors. *Murphy v. Florida* (1975), 421 U.S. 794, 799; *Lingafelter, supra*, at paragraph

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two of the syllabus. For this reason, any substantial doubts with respect to a juror's impartiality must be resolved in favor of the accused. Whether or not the juror conscientiously believes that he or she can act impartially, the court should sustain the challenge if, under the circumstances, the juror cannot realistically be considered impartial and indifferent.

After a careful examination of the record, we are convinced that the trial court abused its discretion in overruling defendant's challenge to this juror. Of all crimes, the crime of rape is one of the most emotionally devastating to its victims. When victims of recent sexual crimes are seated on a jury in a rape case there is a substantial risk that they will identify themselves emotionally with the victim and against the accused. We do not mean to imply that all rape victims are presumed to be biased. But where the crime is relatively recent and the juror has not yet fully recovered from the experience, it is difficult to believe that such a juror could be objective. Under these circumstances, the juror's pledge to remain impartial and unbiased is insufficient to overcome the clear showing of bias implied from the recent and unresolved sexual attack.

Defendant's first assignment of error is well-taken.

By the second assignment of error, defendant contends that the state used his post-arrest silence for impeachment purposes in violation of *Doyle v. Ohio* (1976), 426 U.S. 610.

During the state's cross-examination of defendant, the prosecutor asked the following series of questions:

"Q. Okay. Tuesday morning you appeared in court. The purpose for that was to set a bond; isn't that correct?"

"A. That is correct.

"Q. At that point in time, you heard a police officer read a statement of the basic statement concerning the facts that had been alleged against you; isn't that correct?"

" * * *

"A. Yes.

"Q. You were then indicted, and you made another appearance by bond?"

"A. I guess.

" * * *

"Q. You stood in the courtroom and you heard someone give a rendition of the facts to the judge that was determining what bond should be set; isn't that correct?"

" * * *

"Q. After the Grand Jury heard the evidence you were indicted, you then went to arraignment and once again you heard a basic rendition of the facts alleged against you; isn't that correct?"

*4 "A. I heard what was, yes, closer to what we're hearing these days.

"Q. Thank you.

"You then appeared in front of Judge McGrath shortly after that, and I was present at that hearing, isn't that correct?"

"A. Yes. That was after I was out on bond for-

"Q. And once again you heard a more detailed rendition of the facts that were alleged against you; isn't that correct?"

" * * *

"A. Yes, it is.

" * * *

"Q. You were present, obviously, at the deposition of Mr. Staysniak?"

"And you heard his entire testimony; isn't that correct?"

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"A. Yes, that's correct.

" * * *

"Q. You were present last week at a motion hearing that lasted some hours in front of Judge McGrath of this court where a number of witnesses in this case testified, including the victim * * *?"

"A. Yes." (Tr. 901-905.)

In *Doyle, supra*, the United States Supreme Court ruled that the use of a defendant's post-*Miranda* silence to impeach an explanation subsequently offered at trial violated the Due Process Clause of the Fourteenth Amendment. *Id.* at 619. The rule in *Doyle* rests upon the court's belief that it is fundamentally unfair to permit the use of post-arrest silence for impeachment when the *Miranda* warnings carry an implicit assurance that the right to remain silent will not be used against a defendant. *Id.* at 618; *Greer v. Miller* (1987), 483 U.S. 756, 763. Under *Doyle*, the prosecution may not call attention to the defendant's post-arrest silence for the purpose of drawing an unfavorable inference from the defendant's failure to tell an exculpatory story when first given the opportunity. *Doyle, supra*, at 619 (quoting *United States v. Hale* [1975], 422 U.S. 171, 182-183). Accordingly, the prosecutor is prohibited from asking why a defendant did not explain his or her conduct once the *Miranda* warnings have been given and the defendant has chosen to remain silent. Undoubtedly, the rule also prohibits questioning which implies that the defendant did not speak when given the opportunity and which is clearly intended to draw the forbidden inference. However, the rule is not so broad as to prohibit any incidental reference which might be construed as a commentary on the defendant's post-arrest silence. Where the prosecutor's cross-examination, taken as a whole, does not refer to the defendant's post-arrest silence or attempt to draw an unfair inference from the exercise of that right, there is no violation of due process under *Doyle*. See *Anderson v. Charles* (1980), 447 U.S. 404, 408-409.

In this case, the prosecutor never expressly referred to defendant's post-arrest silence. Nevertheless, defendant asserts that this line of questioning was a "thinly veiled attempt to penalize the defendant" for exercising his rights under the constitution. We cannot agree with defendant's characterization of the prosecutor's questions. Taken as a whole, it is clear that these questions were not intended to draw an unfair inference from defendant's failure to explain himself at each of these hearings. Instead, the questions were intended to establish that defendant was given an outline of the state's case against him and ample time to fashion a story which incorporated as many of these facts as possible. As the closing argument demonstrated, this line of questioning was intended to show that defendant fabricated his story from the facts and evidence introduced at those hearings. This is a permissible method of impeachment which does not violate the rule in *Doyle*.

*5 Defendant's second assignment of error is not well-taken.

The third assignment of error concerns an objection raised by the state during defendant's closing argument. Defendant maintains that the court's ruling on this instruction somehow undermined the state's burden of proof. We have examined the relevant portion of the record and find no abuse of discretion.

Defendant's third assignment of error is not well-taken.

In the fourth assignment of error, defendant maintains that he was erroneously convicted of both rape and kidnapping in violation of R.C. 2941.25. Under that section, a defendant charged with two or more allied offenses of similar import concerning the same conduct may be convicted of only one offense, unless the offenses were committed separately or with a separate animus as to each. Rape and kidnapping are allied offenses of similar import. *State v. Donald* (1979), 57 Ohio St.2d 73. Although the trial court found that the offenses were committed with a single animus, the court con-

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victed defendant of both offenses, imposing concurrent sentences. As the state now concedes, this was error. The imposition of concurrent sentences does not comply with the statute, which provides that the defendant may be convicted of only one offense absent a finding that the offenses were committed separately or with a separate animus. *State v. Brown* (1982), 7 Ohio App.3d 113, 117.

Defendant's fourth assignment of error is well-taken.

In the fifth and final assignment of error, defendant maintains that the trial court abused its discretion in overruling his motion for a new trial.

After the jury was discharged and defendant was sentenced, five of the jurors informed the trial judge that each of them had received a suspicious phone call on the evening before they began their deliberations. In each case, the caller had confirmed the juror's name and then promptly hung up. The next day at lunch, five of the jurors discovered that each of them had received a similar call. As the jury had already been discharged, the trial court did not inquire further. The court did, however, make counsel aware of its communication with the jury. Upon receiving this information, defendant moved for a new trial under Crim.R. 33. Defendant argued that the phone calls were irregularities in the proceedings under Crim.R. 33(A)(1) and that the jury's failure to immediately report the phone calls was misconduct under Crim.R. 33(A)(2). Observing that defense counsel failed to establish evidence *aliunde*, the trial court overruled defendant's motion.

*6 The trial court's reliance on the *aliunde* rule was largely misplaced. Evid.R. 606 was written to conform with Ohio's longstanding *aliunde* rule. Under that rule, a juror's testimony regarding misconduct during the jury's deliberations will not be received absent a prior foundation laid by evidence *aliunde*. *Emmert v. State of Ohio* (1933), 127 Ohio St. 235. This rule was, however, subject to an exception with respect to unlawful communications made to members of the jury by court officers or others dur-

ing the jury's deliberations. *Id.* at syllabus. Both the rule and the exception were incorporated in Evid.R. 606(B). That rule provides in pertinent part:

“ * * * 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. * * * ”

The distinction between improper outside influences for which evidence *aliunde* is required and threats for which outside evidence is not required is rather ambiguous. At the very least, such a determination should not be made until some testimony is heard on this point. The court should not exclude evidence under Evid.R. 606(B) if, under any reasonable construction, the communication could be considered a threat. Because the phone calls in this case can reasonably be construed as threats or harassment, Evid.R. 606(B) would permit the jurors to testify on this subject without any presentation of outside evidence.

Although the court incorrectly ruled that Evid.R. 606(B) prohibited the introduction of evidence on this issue, we do not think the trial court erred in overruling the motion. The denial of a motion for a new trial pursuant to Crim.R. 33 will not be disturbed absent an abuse of discretion. *State v. Schiebel* (1990), 55 Ohio St.3d 71, paragraph one of the syllabus. As the record now stands, there is no evidence to support a conclusion that defendant was materially prejudiced by the phone calls or otherwise denied a fair trial. Moreover, the trial court has no general duty to hold an evidentiary hearing on a motion for a new trial. *State v. Brown* (Jan. 19, 1984), Franklin App. No. 83AP-84, unreported (1984 Opinions 101). Accordingly, the trial court did not abuse its discretion in denying defendant's motion for a new trial.

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Defendant's fifth assignment of error is not well-taken.

For the foregoing reasons, the first and fourth assignments of error are sustained, and the second, third, and fifth assignments of error are overruled. The judgment is reversed and the cause is remanded for further proceedings consistent with this opinion.

Judgment reversed; cause remanded.

McCORMAC and TYACK, JJ., concur.

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END OF DOCUMENT

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Opposition was sent by first class mail on this 17th day of February, 2009, to the following: William S. Lazarow, 400 South Fifth Street, Suite 301, Columbus, Ohio 43215.

MATHIAS H. HECK, JR.
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