

IN THE SUPREME COURT OF OHIO

TRACIE M. HUNTER,	:	Case No. 2016-0092
	:	
Appellant,	:	On Appeal from the Hamilton County
	:	Court of Appeals First Appellate District
v.	:	
	:	Court of Appeals Case Nos.
STATE OF OHIO,	:	C1400684, C140704, C140717
	:	
Appellee.	:	

MEMORANDUM IN RESPONSE OF APPELLEE STATE OF OHIO

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TABLE OF CONTENTS

STATEMENT AS TO WHY THIS CASE IS NOT ONE OF GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION..... 1

STATEMENT OF THE CASE AND FACTS 5

RESPONSE TO HUNTER’S PROPOSITIONS OF LAW 8

RESPONSE TO PROPOSITION OF LAW NO. 1 8

The trial court did not commit plain error when it polled the jury before the verdict was published.

RESPONSE TO PROPOSITION OF LAW NO. 2 10

There was no prosecutorial misconduct and Hunter received a fair trial.

RESPONSE TO PROPOSITION OF LAW NO. 3 11

Hunter was not denied due process or equal protection of the law because her appeal was on the accelerated calendar.

RESPONSE TO PROPOSITION OF LAW NO. 4 11

A violation of R.C. 2921.42(A)(1) includes not only interference with the initial decision to employ a family member, but also extends to other areas of employment, including termination proceedings.

RESPONSE TO PROPOSITION OF LAW NO. 5 13

There was sufficient evidence to convict Hunter of violating R.C. 2921.42(A)(1).

CONCLUSION..... 14

CERTIFICATE OF SERVICE 15

**STATEMENT AS TO WHY THIS CASE IS NOT ONE OF
GREAT GENERAL INTEREST AND DOES NOT INVOLVE
A SUBSTANTIAL CONSTITUTIONAL QUESTION**

This case is not one of public and great general interest and does not involve any substantial constitutional questions. While the case did garner significant media attention, the decision of the First District Court of Appeals did not announce any new rule of law. Rather, the First District's decision applied long standing and established law to the specific facts of the case.

Hunter first argues that this Court should accept jurisdiction of this case because, in her view, a criminal defendant is entitled to request a jury poll after the verdict is verbally announced regardless of whether the jury has already been polled. There is no reason for this Court to accept jurisdiction on this issue because it has long been the precedent of this Court that a jury poll is the "benchmark of finality." *State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396, ¶ 36. "The poll is a solemn ceremony whose formality signals the conclusive nature of the verdict to all who are present." *Id.* In other words, once the jury is polled, the verdict is final. There is no right to have the jury polled a second time.

Moreover, Ohio law does not require that a court verbally announce the verdict before polling the jury. The Revised Code states that "[b]efore the verdict is accepted, the jury may be polled at the request of either the prosecuting attorney or the defendant." R.C. 2945.77. Likewise, Crim.R. 31(D) states that "[w]hen a verdict is returned and before it is accepted the jury shall be polled at the request of any party or upon the court's own motion." Crim.R. 31(D). There is nothing in Crim. R. 31 or R.C. 2945.77 stating that a verdict needs to be verbally announced before a poll of the jury occurs.

Contrary to Hunter’s suggestion, the First District’s decision in this case does not run afoul of this Court’s decision in *Williams*. In *Williams*, this Court addressed whether a juror could recant his or her verdict after polling but before the verdict is journalized. This Court held that a juror could not do so because “[o]nce a poll of the jurors has been completed and all have assented to verdict, a juror may not thereafter rescind or modify his or her vote.” *Williams*, supra, at syllabus. The sentence lifted out of *Williams* by Hunter was not necessary to the Court’s analysis and was dicta. *Williams* is not a case about when a jury poll should occur as suggested by Hunter. Instead, *Williams* stands for the proposition that a verdict is final once the jury is polled – nothing more. *Williams*, supra, at syllabus.

There is no requirement in Crim. R. 31 or R.C. 2945.77 that a verdict be verbally announced before the jury is polled and this Court’s precedent is clear that a verdict is final once a jury is polled. The First District applied the plain language of the rule and statute and applied the established precedent of this Court in concluding that the trial court did not commit plain error in its polling of the jury in this case and therefore, there is no need for this Court to accept jurisdiction. In fact, this Court has already declined to accept jurisdiction of an Eighth District case, which held, just as in this case, that polling a jury before reading the verdict does not run afoul of Crim. R. 31(D), because the rule only requires the court to poll the jury for unanimity before accepting the verdict. *State v. Bradley*, 8th Dist. No. 79354, 2002-Ohio-3895, ¶ 66, appeal not allowed in *State v. Bradley*, 98 Ohio St.3d 1462 (2003).

Even if this Court wanted to reaffirm the rule of law that a verdict is final once a jury is polled, this is not the case for it to do so because the Court’s review would be limited to a plain error standard. In this case, the jurors reached a verdict on one count, but not all of the counts at issue. Consistent with the provisions of Crim. R. 31(D) and R.C. 2945.77, the foreperson gave

the completed verdict form to the trial court. In open court, and again consistent with the provisions of Crim. R. 31(D) and R.C. 2945.77, the trial court reviewed the document and ordered the jury to be polled as to whether the verdict was theirs. The jury was polled and the trial court then accepted the verdict and sealed it. Notably, Hunter did not object to the procedure employed for polling the jury. Because she did not object, the First District correctly reviewed the polling issue under a plain error standard. Because this Court's review would be limited to evaluating the polling issue for plain error, the case would have little precedential value for future cases.

Hunter next argues that this Court should accept jurisdiction because of her allegations that prosecutorial misconduct occurred during the state's closing argument. The issue of whether there was prosecutorial misconduct depriving a defendant of a fair trial is based on the record as a whole. *See State v. Lott*, 51 Ohio St.3d 160, 166 (1990). By its nature, therefore, whether misconduct occurred and whether it deprived the defendant of a fair trial are case specific determinations based on the specific facts and circumstances of the case at issue. In this case, the First District applied the well established law regarding whether prosecutorial misconduct occurred and if so, whether it deprived Hunter of a fair trial to the specific facts of the case in the context of the lengthy and intense trial that occurred. In doing so, the First District correctly noted that Hunter had waived all but plain error by failing to object to nearly all of the alleged instances of misconduct, opened the door for many of the comments at issue and that the trial court repeatedly admonished the jury that closing arguments were not evidence. The case specific and factual determinations made by the First District in concluding that Hunter was not deprived of a fair trial have no great or general interest beyond the current case and provide no reason for this Court to accept this case.

Hunter next argues that this Court should accept jurisdiction because the First District allegedly places every appeal in Hamilton County on the accelerated calendar. Hunter further alleges that she was denied the full opportunity to discuss her prosecutorial misconduct arguments. As an initial matter, the propriety of the First District allegedly placing all appeals on the accelerated calendar was not at issue in this matter, and has not been preserved as an appellate issue in this case. Regardless, Hunter's argument that she was denied an adequate opportunity to brief and argue the prosecutorial misconduct assignment of error is belied by the record. Hunter filed a twenty-five page brief over three assignments of error, including the prosecutorial misconduct assignment of error. In addition, she significantly expanded her brief by attaching a detailed chart, nine pages in length with small font, alleging 51 different instances of misconduct. The lengthy chart set forth the specific statement made by the prosecutor and the alleged issue taken with it, among other things. In its decision, the First District specifically stated that it had considered the chart in its review of the case. Hunter had a more than adequate opportunity to present her alleged assignments of error. Moreover, the issue of whether Hunter had an adequate opportunity to brief her assignments of error under the record of this particular case is, obviously, a case specific determination that would have no precedential value beyond the current case.

Hunter next argues that this Court should accept jurisdiction because the First District, in her view, failed to apply the clear meaning of R.C. 2921.42(A)(1). Hunter argues that the First District relied exclusively upon a decision of the Ohio Ethics Commission interpreting the statute rather than applying the statute's language. Hunter's arguments are belied by the First District's decision. The First District looked to the language of R.C. 2921.42(A)(1) and set forth, in its analysis, that the definition of "secure," within *Black's Law Dictionary*, was contrary to Hunter's

argued for interpretation. The First District also appropriately noted that the First District's interpretation of the statute was consistent with the Ohio Ethics Commissions' interpretation, which is appropriate in Ohio. *See State v. Urbin*, 100 Ohio St.3d 1207, 2003-Ohio-5549, ¶ 4 (Moyer, C.J., concurring) (it is appropriate to consider opinions from the Ohio Ethics Commission when interpreting the scope of R.C. 2921.42). The First District correctly applied established Ohio law as to statutory interpretation and consequently, there is no reason for this Court to accept jurisdiction of this case as argued by Hunter.

Hunter's final argument is that this Court should accept jurisdiction of this case because there was, in her view, insufficient evidence to support her conviction. Whether there was sufficient evidence is, obviously, a case specific determination with no impact beyond the current case. There is no reason for this Court to accept jurisdiction to review whether there was sufficient evidence to convict Hunter.

The First District did not announce any new rule of law in its decision affirming the conviction of Hunter. Rather, it applied existing law to the specific facts of the case. The case specific conclusions reached by the First District have no impact beyond the current matter and fail to raise any issue of great or general importance or unanswered substantial constitutional question. Media attention alone does not make a case one of great or general interest. Hunter has failed to set forth any reason for this Court to accept jurisdiction of this case.

STATEMENT OF THE CASE AND FACTS

A grand jury indicted Hunter on nine felony counts involving alleged illegal conduct while serving as a juvenile judge. The sixth count of the indictment alleged that Hunter had an unlawful interest in a public contract in violation of R.C. 2921.42(A)(1). The charge was based on the fact that Hunter interfered with an investigation and hearing to determine if her brother,

Steven Hunter, then an employee of the Hamilton County Juvenile Court Youth Center should be terminated. A five week jury trial ensued in the Hamilton County Court of Common Pleas.

Steven Hunter is Hunter's brother and was employed at the Hamilton County Juvenile Court Youth Center ("Youth Center") as a juvenile correction officer. On July 7, 2013, Steven Hunter was involved in an incident in which he hit a youth in the intake department of the detention facility. As a result of the incident, Dwayne Bowman, the superintendent at the Youth Center, recommended that Steven Hunter be terminated.

A hearing regarding Steven Hunter's recommended termination was set for August 1, 2013 and Steven Hunter was notified of the hearing on July 25, 2013. On July 29, 2013, Hunter sent an e-mail to Bowman in which she demanded that he provide her with incident reports related to the youth struck by Steven Hunter, all incident reports related to the youth involving the police and drug tests and medical reports of any positive drug tests related to the youth. In follow up e-mails with Bowman, Hunter made clear that she wanted all documentation of every incident and every employee pertaining to the Youth during his stay at the youth center. On July 30, 2013, Bowman provided the requested documents to Hunter. Many of the documents requested and provided to Hunter would not have been provided to any employee under any circumstances and would not have been provided to Steven Hunter relating to his termination hearing. Hunter provided documents to Steven Hunter.

On July 31, 2013, Steven Hunter met with the attorney representing him with respect to the termination hearing, at around 8:00pm at a gas station. At that meeting, Steven Hunter provided his attorney with documents he had received from Hunter. His attorney would not accept some of the documents because she did not want to get involved in anything unethical and because she was concerned if she accepted the documents she would have to make a report to the

Ohio Supreme Court regarding unethical conduct about the person that gave Steven Hunter the documents. Typically, the termination hearings are continued because the employee receives a discovery packet at the first hearing and usually requires time to review the packet. The hearing went forward on August 1, 2013 and lasted six to seven hours.

Jury deliberations began on all nine counts. Two days into their deliberations, the jurors reached a verdict on count six, but not on any other counts. The foreperson gave the completed verdict form to the trial court. In open court, the trial court reviewed the document and ordered that the jury be polled as to whether the verdict was theirs. Each member of the jury answered affirmatively without equivocation. The trial court then accepted the verdict and sealed it. Hunter did not object to any of the procedure employed by the trial court.

On October 14, 2014, the jury indicated it was unable to reach a verdict on the remaining eight counts. After confirming the jury was deadlocked, the Trial Court unsealed the guilty verdict on Count Six and the clerk verbally read it. Hunter requested that the jury be polled a second time. The Trial Court rejected Hunter's request for a second poll of the jury indicating that the jury had already been polled.

The jury convicted Hunter of having an unlawful interest in a public contract in violation of R.C. 2921.42(A)(1). Hunter was sentenced to six months in jail and appealed her conviction. On December 26, 2014, this Honorable Court stayed her sentence pending resolution of her appeal. In her appeal, Hunter briefed three assignments of error. In her first assignment of error, she argued that the trial court erred when it denied her motion for judgment of acquittal. In her second assignment of error, she argued that the trial court erred when it did not poll the jury at the conclusion of the case. In her third assignment of error, she argued that certain comments made in the state's closing deprived her of a fair trial.

On January 15, 2016, the First District Court of Appeals, in a 3-0 decision, overruled all three assignments of error and affirmed the judgment of the trial court. In doing so, the First District concluded that Hunter's conviction was based on sufficient evidence, the trial court did not commit plain error when it polled the jury after receiving the verdict but before it was publicized, and the state's comments during closing did not deprive Hunter of a fair trial. Hunter filed a notice of appeal with this Court and this Court granted a stay of her sentence.

RESPONSE TO HUNTER'S PROPOSITIONS OF LAW

Response to Proposition of Law No. 1:

The trial court did not commit plain error when it polled the jury before the verdict was published

The Revised Code states that “[b]efore the verdict is accepted, the jury may be polled at the request of either the prosecuting attorney or the defendant.” R.C. 2945.77. Likewise, Crim.R. 31(D) states that “[w]hen a verdict is returned and before it is accepted the jury shall be polled at the request of any party or upon the court's own motion.” Crim.R. 31(D). The only requirements of R.C. 2945.77 and Crim.R. 31(D) are that a jury be polled before the Court accepts the verdict. Neither R.C. 2945.77 or Crim.R. 31(D) require that the jury verdict be read before the jury is polled.

Hunter, as she did in her appeal to the First District, continues to quote one sentence out of the decision of this Court in *State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396 to support her position that a verdict is not final until it is read aloud and therefore, a poll should not be taken before the verdict is published. *Williams*, however, simply does not support Hunter's position. In *Williams*, this Court was reviewing whether a juror could repudiate his or her verdict at any time before it was journalized. This Court held a juror could not do so because the jury poll is the “benchmark of finality.” *Id.* at ¶ 36. This holding is succinctly and unequivocally set

forth in the syllabus of the decision, which states that “[o]nce a poll of the jurors has been completed and all have assented to verdict, a juror may not thereafter rescind or modify his or her vote.” *Williams*, supra, at syllabus. Hunter focuses her argument exclusively upon a sentence in the decision, which was not necessary to the Court’s analysis and not included in the syllabus. It was dicta. Moreover, Hunter’s interpretation of *Williams* is inconsistent with the plain language of R.C. 2945.77 and Crim.R. 31(D). There is no reading of the statute or rule that would require the jury to be polled only after the verdict is verbally announced.

In *State v. Bradley*, 8th Dist. No. 79354, 2002-Ohio-3895, the defendant, just like Hunter, complained that the trial court erred in polling the jury before reading the verdict. *Bradley*, 2002-Ohio-3895, ¶ 62-63. The Eighth District, in an opinion written by current Ohio Supreme Court Justice Terrence O’Donnell, overruled the assignment of error stating that “[t]he sequence of polling a jury before reading the verdict does not run afoul of Crim. R. 31(D) * * because all that rule requires is for the court to poll the jury for unanimity prior to *accepting* it.” *Id.* at ¶ 66 (emphasis in original).¹

In this case, the jury was polled and each member of the jury assented to the verdict without equivocation. The trial court then accepted the verdict. The procedure employed by the trial court met each and every requirement for the return, poll and acceptance of a jury verdict in a criminal case. The trial court did not commit plain error when it polled the jury before the verdict was published.

¹ The court, in *Bradley*, noted that the appellant, in that case, failed to object to the procedure used to poll the jury. Here, just as in *Bradley*, Hunter failed to object to the trial court’s procedure of polling the jury before the verdict was verbally read. Hunter claims she preserved the issue by requesting that a second poll be conducted when the verdict was read aloud. At that point, however, it was too late to lodge an objection to the procedure employed by the Court because the verdict was already accepted.

Response to Proposition of Law No. 2:

There was no prosecutorial misconduct and Hunter received a fair trial

To determine whether a prosecutor's remarks at trial constituted misconduct such to justify the reversal of a conviction, the reviewing court must determine (1) whether the remarks were improper and (2) if so, whether the remarks prejudicially affected the accused's substantial rights. *State v. Leonard*, 104 Ohio St.3d 54, 84, 818 N.E.2d 229 (2004). To be prejudicial, "[t]he remarks must have 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *State v. Freeman*, 138 Ohio App.3d 408, 419 (1st Dist. 2000) (quoting *Donnelly v. DeChristoforo* (1974), 416 U.S. 637, 643).

The alleged improper conduct "should be assessed within the context of the entire case, and more particularly the entire closing argument to determine whether it was prejudicial." *Freeman* at 419-420. The touchstone of the analysis, however, "is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips*, 455 U.S. 209, 219 (1982). Even if some conduct by the prosecutor is improper, the verdict will not be overturned unless the defendant was actually prejudiced by the impropriety. *State v. Carter*, 89 Ohio St. 3d 593, 603 (2000). The Court has noted that "[it has] not treated prosecutorial misconduct as reversible error 'except in rare instances.'" *State v. Keenan*, 66 Ohio St.3d 402, 405 (1993) (quoting *State v. DePew*, 38 Ohio St.3d 275 (1988)).

The prosecutor's comments in closing were not improper. Even if they were, Hunter failed to object to almost all comments about which she now complains, her counsel opened the door to many of the comments and the trial court repeatedly admonished the jury that the prosecutor's comments were not evidence. There is nothing in the record to support the conclusion that Hunter was deprived of a fair trial.

Response to Proposition of Law No. 3:

Hunter was not denied due process or equal protection of the law because her appeal was on the accelerated calendar

As an initial matter, the First District's alleged practice of placing appeals on the accelerated calendar is not at issue in this case. It was not briefed below and is simply not material as to whether Hunter's conviction was correctly affirmed by the First District. Even if it were an issue that could be raised, and it is not, there is nothing in the record below to support Hunter's contention that the alleged practice of placing cases on the accelerated calendar denies appellants due process and equal protection of the laws and she certainly was not denied due process or equal protection of the laws.

Hunter was given more than ample opportunity to appeal her conviction. Hunter filed a twenty-five page brief addressing three assignments of error. In addition, she significantly expanded her brief by attaching a detailed chart, nine pages in length with small font, alleging 51 different instances of prosecutorial misconduct. The lengthy chart set forth the specific statement made by the prosecutor which Hunter claimed was improper and the alleged issue she was taking with it, among other things. In its decision, the First District specifically stated that it had considered the chart in its review of the case. Hunter's counsel represented her at oral argument where she had another opportunity to stake out her arguments on appeal. Hunter had a more than adequate opportunity to present her alleged assignments of error.

Response to Proposition of Law No. 4:

A violation R.C. 2921.42(A)(1) includes not only interference with the initial decision to employ a family member, but also extends to other areas of employment, including termination proceedings

R.C. 2921.42(A)(1) provides as follows:

(A) No public official shall knowingly do any of the following:

(1) Authorize, or employ the authority or influence of the public official's office to secure authorization of any public contract in which the public official, a member of the public official's family, or any of the public official's business associates has an interest;

A "public contract" is defined to include "the purchase or acquisition, or a contract for the purchase or acquisition, of property or services * * * including the employment of an individual by the state, any of its political subdivisions, or any agency or instrumentality of either." R.C. 2921.42(I)(1).

Hunter argues that she did not "secure authorization" of a public contract by interfering in the termination of her brother's employment because, in her view, R.C. 2921.42(A)(1) does not apply to anything except the original award of a public contract. In other words, Hunter argues that once her brother was hired she was allowed to interject herself into any decision, including the decision of whether to terminate or retain her brother as an employee, without violating R.C. 2921.42(A)(1). Hunter's argument fails. As noted by the First District, "the word 'secure' can also relate to preventing exposure to danger, to make safe, or to make 'so strong, stable, or firm as to insure safety and financial security.'" *State v. Hunter*, 1st Dist Nos. C-140684, C-140704, C-140717, 2016 WL 196972, ¶ 18 citing *Black's Law Dictionary* 942 (Abridged 6th Ed.1991). Accordingly, R.C. 2942.42(A)(1), by its plain language, applies not just to the initial hiring of a family member, but also to actions occurring after the initial hiring designed to protect the family member's job.

The question of whether R.C. 2921.42(A)(1) applies beyond the initial hiring of a family member has already been squarely addressed by the Ohio Ethics Commissions and it reached the same conclusion. Indeed, the Ethics Commission held that "[t]he prohibition against a public official "authorizing" the employment of a family member or employing the "authority or

influence of his office” to secure authorization of the employment of a family member extends beyond the initial hiring of a family member and prohibits a public official from participating in any matter or decision which would affect the continuation, implementation, or terms and conditions of an individual contract of employment for a member of his family * * *.” 1992 Ohio Ethics Comm’n Op. No. 92-012. “These matters and decisions include, but are not limited to * * * the renewal, modification, termination, or renegotiation of the family member’s public employment.” *Id.*; *see also* 2001 Ohio Ethics Comm’n Op. No. 2001-02 (reaffirming that R.C. 2921.42(A)(1) applies to the renewal, modification, termination or renegotiation of a public contract).

A violation R.C. 2921.42(A)(1) includes not only interference with the initial decision to employ a family member, but also extends to other areas of employment, including termination proceedings.

Response to Proposition of Law No. 5:

There was sufficient evidence to convict Hunter of violating R.C. 2921.42(A)(1)

When viewing the evidence in a light most favorable to the state, a jury could easily conclude that Hunter provided documents to Steven Hunter that he was not entitled to receive. Hunter’s real argument is that the evidence was not viewed in her favor. Her arguments fail. *State v. Diar*, 120 Ohio St.3d 460, 2008–Ohio–6266, ¶ 113, quoting *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus (In reviewing the sufficiency of the evidence, “[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.”). When viewing all of the evidence and reasonable inferences in the light most favorable to the prosecution, the jury could have found all elements to prove

Hunter violated R.C. 2921.42(A)(1) beyond a reasonable doubt.

CONCLUSION

The First District applied the clear and established law to the specific facts of this case. This case is not one of public and great general interest and does not involve any substantial constitutional questions. Accordingly, this Court should deny Hunter's Memorandum in Support of jurisdiction, and decline to accept jurisdiction of this case.

Respectfully submitted,

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