

[Cite as *State v. Bowser*, 2016-Ohio-6999.]

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

STATE OF OHIO,)	
)	
PLAINTIFF-APPELLEE,)	
)	CASE NO. 15 MA 0158
V.)	
)	OPINION
PAUL BOWSER,)	
)	
DEFENDANT-APPELLANT.)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Youngstown Municipal Court of Mahoning County, Ohio Case No. 14 CRB 2136
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JUDGMENT:	Affirmed
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APPEARANCES: For Plaintiff-Appellee	Dana Lantz Youngstown City Prosecutor Kathleen Thompson Assistant Prosecutor 26 S. Phelps St., 4 th Floor Youngstown, Ohio 44503
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For Defendant-Appellant	Stephen P. Hardwick Assistant Public Defender 250 E. Broad St., Suite 1400 Columbus, Ohio 43215
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JUDGES:

Hon. Gene Donofrio
Hon. Cheryl L. Waite
Hon. Carol Ann Robb

Dated: September 21, 2016

[Cite as *State v. Bowser*, 2016-Ohio-6999.]
DONOFRIO, P.J.

{¶1} Defendant-appellant, Paul Bowser, appeals his conviction for telecommunications harassment in violation of R.C. 2921.17(A)(3) entered in the Youngstown Municipal Court following a jury trial.

{¶2} Before trial, Dr. Thomas Gasley performed a competency assessment on Appellant and submitted a report dated December 24, 2014. Appellant makes reference to this competency report in his Merit Brief. According to Appellant, the parties stipulated to the report. The report is not a part of the court's file. In his Merit Brief, Appellant discusses facts apparently included in that report. In its Brief, the State does not object to any of Appellant's representations. The facts included in Appellant's Merit Brief are that Appellant is a 69-year-old Vietnam veteran with a mental illness severe enough to entitle him to disability benefits from the Social Security Administration, but not severe enough to make him incompetent to stand trial. While growing up he spent 13 years in special education classes. He has a mild speech articulation disorder due to a childhood tongue injury. He enlisted in the Army upon graduating from high school and was honorably discharged. He has had past problems with alcohol. According to his Merit Brief, the competency report indicated that Appellant suffers from "hypomanic characteristics" that "do not meet the full criteria for Bipolar Disorder" and paranoia. All of these facts are set forth at p. 2 of Appellant's Brief. Again, the Brief of Plaintiff-Appellee, State of Ohio, does not challenge or question these facts. Appellant offered no evidence at his trial.

{¶3} On September 22, 2014, Appellant visited the Mahoning County Domestic Relations Court to discuss a hearing that took place on September 19, 2014, regarding a civil protection order. Tr. 88, 100-101. (All references to "Tr." are to the July 5, 2015 trial transcript and August 12, 2015 sentencing transcript, which, physically, is one transcript). Appellant's request for a protection order had been denied. *Id.* Appellant asked to speak to the Magistrate in his case. *Id.* An employee of the Domestic Relations Court informed him that he could not speak to the Magistrate and that he could either file a motion or wait until a full hearing on his case was scheduled. Tr. 92. Appellant was insistent and became loud. *Id.* The court employee became uncomfortable and was afraid of being hit. Tr. 93. Despite the request of two

attorneys who happened to be present to stop his behavior, Appellant continued to verbalize. Tr. 93-94.

{¶4} Security was called. Tr. 94. A Mahoning County Deputy Sheriff arrived at the Domestic Relations Court and asked Appellant if he had any business with the court on that particular date, to which Appellant responded “No.” *Id.* Appellant was then escorted from the court. *Id.* The court employee testified that Appellant was “upset, screaming, angry, yelling.” *Id.*

{¶5} About 15 minutes later the court employee received a phone call from a caller who identified himself as Appellant. Tr. 95-96. According to the court employee, Appellant continued his “rant” about wanting to speak to the Magistrate. Tr. 97. Appellant complained that it was the Magistrate’s fault that his girlfriend came to his house and stole everything that was there. Tr. 97, 100-101. This was, apparently, because the Magistrate had denied Appellant’s request for a civil protection order against the same woman. Tr. 101. Appellant was yelling. He frightened the court employee. *Id.* Appellant explained that he had been in the Army and the Marines. Tr. 97-98. He asked the court employee if she knew what that meant. He told her it meant he knew how to take care of business. *Id.* At that point, the court employee became even more frightened. Tr. 98. She testified that she was afraid that he might try to harm her. *Id.* After three to four minutes, Appellant hung up on the court employee. Tr. 105.

{¶6} The court employee called her supervisor. Tr. 99. The Domestic Relations Judge then called Sheriff’s Deputies to her court and the court employee completed an incident report. *Id.* State’s Exhibit A.

{¶7} On September 22, 2014, the same day, a complaint was filed in Youngstown Municipal Court charging Appellant with telecommunications harassment in violation of R.C. 2917.21(A)(3), a misdemeanor of the first degree.

{¶8} On July 15, 2015, Appellant was tried by a jury in Youngstown Municipal Court. He was found guilty.

{¶9} On August 12, 2015, Appellant was sentenced to 180 days in jail, stayed pending further order of the court. Tr. 152. He was fined \$100.00 and ordered

to pay a \$100.00 probation fee. *Id.* He was placed on intensive probation for two years and electronically monitored house arrest for 60 days. *Id.* Appellant was ordered to have no contact with the Mahoning County courthouse or any of its employees without written permission from security at the courthouse. *Id.*

{¶10} During voir dire, potential juror number 11, referred to by Appellant as “DB”, a designation we will use, indicated that she knew Appellant through her employment with the Western Reserve Transit Authority (“WRTA”), where she was a bus driver. Tr. 44. DB indicated that she knew a lot about Appellant and stated - “I really need to talk in chambers.” *Id.* The Prosecutor asked the trial judge if DB could have the opportunity to discuss the matter in chambers. *Id.* The trial judge responded that he would question DB further to determine if a discussion in chambers was necessary. Tr. 45. DB then told the trial court that she was familiar with Appellant because he rides her bus frequently and had been trouble on her bus. *Id.* DB stated that Appellant argued with another passenger. She completed an incident report. She said there had been approximately three such “confrontations”. Tr. 45-46. DB stated that these events would affect her ability to keep an open mind, and her ability to be fair and impartial. Tr. 46. All of these comments were made in the presence of the entire jury pool.

{¶11} After a bench conference, the trial judge told the prospective jurors that they had just observed DB indicate she could not be fair and impartial. Tr. 47. He told the prospective jurors that what DB said was just her opinion and he asked them, collectively, if what DB said would change their mind or keep them from having an open mind. *Id.* Another potential juror, “MB”, stated that he would have some doubt in his mind as to whether or not what DB said was true. *Id.* Another prospective juror, “DJ”, told the trial judge that she felt the same as MB. Tr. 48. DB and MB were excused. *Id.*

{¶12} DJ was then questioned in chambers. Tr. 49-50. DJ indicated that she had been a victim of telephone harassment and as a result could not be fair and impartial. Tr. 49-50. DJ was dismissed. Tr. 50-51.

{¶13} The trial court then questioned “GJ” in chambers. Tr. 50-51. (Appellant

argues that this questioning occurred before the entire jury pool. Merit Brief of Appellant, p. 7. This appears to be contrary to the record. Tr. 49-53. Throughout its argument, Appellant relies on the apparently mistaken belief that GJ was questioned before the entire jury pool. [Trial counsel and appellate counsel are different]). Juror GJ stated that she, too, believed she would have some problems serving as a juror. Tr. 50. GJ indicated that she worked at St. Elizabeth Hospital emergency room and that Appellant was in a few days prior. *Id.* She stated that Appellant was rude to her and other staff and had to be escorted off the premises by the hospital security. *Id.* GJ was excused. Tr. 51.

{¶14} At this stage of the proceedings, Appellant requested a mistrial. *Id.* Appellant observed that the entire jury pool heard DB's comments. *Id.* He argued that the entire pool had been contaminated. *Id.* Appellant argued that the remaining jury pool could not help but to have been affected by DB's comments. Tr. 51-52. The State responded by suggesting that if the trial judge was satisfied that the jury pool had not been contaminated, then a mistrial was not warranted. Tr. 52. The State argued that an instruction to the jury to disregard the statements by DB would suffice. *Id.* The trial court indicated he would take the motion under advisement and make a decision at the end of voir dire. *Id.*

{¶15} When voir dire continued, juror "RG" indicated that his daughters received telephone calls in the 1990's that included profanity and threats. Tr. 53-54. However, RG represented to the trial court that this would not affect his ability to be fair and impartial. Tr. 54. Juror "RM" stated that she had been harassed on the phone and that this would affect her ability to be fair and impartial. Tr. 55-56. RM was excused. Tr. 56.

{¶16} The trial court then turned to the selection of an alternate juror. Tr. 59. The first potential alternate indicated she had been a victim of telephone harassment and was excused. Tr. 59-61. Subsequently, alternate juror, BP, was seated.

{¶17} At this point, since neither party had any additional challenges to the eight jurors and one alternate, the court addressed the potential jury and asked it, collectively, if what DB said might affect how they "would approach listening to the

evidence and making a decision based on the evidence and the law provided by the Court?" Tr. 63. Juror "PC" said that what DB stated upset her and that she felt it would affect her ability to be a juror. Tr. 64. She was excused. *Id.* The trial court did not question the jurors regarding the statements made by GJ (St. Elizabeth Hospital incident) in chambers.

{¶18} Another potential juror was excused because of his prior relationship with the State's attorney. Tr. 69. Another was excused because he was a neighbor of Appellant and did not believe he could be fair and impartial. Tr. 69-72. Another who was a victim of telephone and personal harassment did not believe she could be fair and impartial, and was excused. Tr. 72-73.

{¶19} After questioning 22 jurors, a jury of eight and one alternate was finally seated. Tr. 76. After a recess, the trial court denied Appellant's motion for a mistrial. Tr. 77.

{¶20} Appellant has one assignment of error which states:

The trial court erred by failing to grant defense counsel's motion for a mistrial after two potential jurors described to the entire venire four separate verbal confrontations involving Appellant Paul Bowser. Fifth, Sixth and Fourteenth Amendments to the United States Constitution; Ohio Constitution, Article I, Section 5; T.p. 44-72.

{¶21} An accused is entitled to a trial before an impartial, unprejudiced, and unbiased jury. *State v. Robinson*, 7th Dist. No. 05 JE 0008, 2007-Ohio-3501, ¶ 94, quoting *State v. Daniels*, 92 Ohio App.3d 473, 486, 636 N.E.2d 336 (1st Dist. 1993). This right is guaranteed by both the Ohio and United States Constitutions. *Robinson* at ¶ 94. A jury must decide a cause solely on the evidence and argument, not on any outside influence. *Id.* citing *Patterson v. Colorado* (1907), 205 U.S. 454, 462, 27 S.Ct. 556, 51 L.Ed. 879 (1907).

{¶22} Appellant complains that since two potentials jurors disclosed to the entire jury pool incidents they experienced involving Appellant which were similar to the charge pending against him, the trial court was obligated to at least conduct an

individual voir dire of each potential juror to ensure that Appellant received “a trial before an impartial, unprejudiced, and unbiased jury.”¹ *Robinson* at ¶ 94. According to Appellant, in light of these statements, the trial court’s failure to question each potential juror individually resulted in a tainted jury and the failure to grant Appellant’s motion for a mistrial was error.

{¶23} The decision of whether or not to grant a mistrial lies in the sound discretion of the trial court. *State v. Mitchell*, 7th Dist. No. 14 MA 0119, 2016-Ohio-1439, at ¶ 54, citing *State v. Treesh*, 90 Ohio St.3d 460, 480, 2001-Ohio-4, 739 N.E.2d 749 (2001). The trial court’s decision will not be disturbed absent an abuse of discretion. *Id.* The defendant must demonstrate material prejudice to show an abuse of discretion in failing to grant a mistrial. *Id.* Also see *State v. Adams*, 144 Ohio St.3d 429, 2015-Ohio-3954, 45 N.E.3d 127, ¶ 198.

{¶24} Appellant argues that the comments made by these two potential jurors (see footnote 1) are particularly troubling because, whether true or not, the comments are akin to the type of evidence that is considered to be too prejudicial to be admitted. Appellant references this court’s opinion in *State v. Davis*, 7th Dist. No. 08 MA 0236, 2011-Ohio-292, ¶ 62, where we explained the importance of recognizing the difference between evidence that shows the accused is the type of person who might have committed the crime as opposed to evidence that shows the accused is the person who committed the crime. Appellant argues that the potential jurors heard about multiple incidents of a similar nature that were so severe that security had to be called to remove Appellant. After hearing of these incidents, Appellant argues, it was incumbent upon the judge to conduct individual questioning of each juror to ensure Appellant could receive an impartial, unprejudiced, and unbiased trial.

{¶25} In support of his argument, Appellant relies heavily upon *State v. Samuels*, 8th Dist. Nos. 81333, 81334, 2003-Ohio-2865. In *Samuels*, jurors

¹ Appellant assumes and argues that the statements of both DB and GJ were made in the presence of the entire jury pool. Merit Brief of Appellant, pp. 4-8. The State asserts that the statements of GJ were made in chambers and only those of DB were heard by the jury pool. Brief of Plaintiff-Appellee, State of Ohio, pp. 1, 3-4. The record reflects that GJ’s statements were made in chambers outside the presence of other jurors. Tr. 49-53.

discovered a document in the jury room which was not admitted as an exhibit. The document contained, *inter alia*, the defendant's name and referenced prior charges for drug abuse or domestic violence. The judge questioned the juror who brought the exhibit to the court's attention. The exhibit had been passed around the jurors' table. One juror referred to it as the defendant's "rap sheet." The court explained:

The juror testified that the Face Sheet had been "brought up very briefly" and someone made a comment that "there was a history of domestic violence." The juror testified, however, that "a couple other people immediately said we don't know if that is a piece of evidence, and we shouldn't discuss that or even think about it until the bailiff comes back and instructs us." The trial judge then specifically questioned the juror:

"But you are saying so far you guys haven't considered that in your deliberations at all?"

The juror responded, "Not at all."

Samuels at ¶ 32-34. The *Samuels* court explained the trial court's effort to correct the problem:

The trial judge then instructed the jury that the Face Sheet was not evidence in the case and, accordingly, it was not to consider the document or its contents in its deliberations. The judge then asked each juror whether he or she was "able to continue with your deliberations and fairly and impartially continue to deliberate." After each juror responded affirmatively, the trial court denied appellant's motion for a mistrial.

Samuels at ¶ 35. The appellate court reversed the conviction, explaining:

In light of these comments—which strongly suggest the jury was,

indeed, considering extraneous evidence—the trial judge should have voir dired each juror individually, outside the presence of other jurors, regarding his or her ability to impartially decide the case based solely on the evidence presented, despite the record of somewhat similar events contained in the Face Sheet. Because the trial judge failed to do so, it is impossible on this record to ascertain whether or not appellant's substantial rights were adversely affected by the inadvertent disclosure of the Face Sheet to the jury.

Samuels at ¶ 39.

{¶26} The State responds that the information disclosed in *Samuels* is different in nature than the information disclosed here. The State argues that the information disclosed here did not have the same prejudicial effect because what was disclosed here was only DB's perception of what occurred. In *Samuels*, according to the State, the jurors had an exhibit which definitively showed crimes the defendant committed. Here, there was no evidence of prior convictions. There were only the statements of DB.

{¶27} The State also argues that the trial court gave a curative instruction which insured that Appellant received a fair trial by an impartial jury. The State relies upon our decision in *State v. Bigsby*, 7th Dist. No. 12 MA 0074, 2013-Ohio-5641. In *Bigsby*, defendant complained that a witness mentioned she had visited the defendant in prison revealing his prior bad acts to the jury. *Bigsby* at ¶ 57. Once the jury heard he had been in a correctional facility, defendant argued, he was deprived of his right to a fair trial. *Id.* We reiterated, citing *State v. Sage*, 31 Ohio St.3d 173, 182, 510 N.E.2d 343 (1997), that the decision whether or not to declare a mistrial rests in the sound discretion of the trial court and that the decision of a trial court would not be disturbed absent a showing of an abuse of discretion. *Id.* at ¶ 58. In *Bigsby*, we explained that granting a mistrial is an extreme remedy and should only be granted where “a fair trial is no longer possible and it is required to meet the ends of justice.” *Id.* at ¶ 58 citing *State v. Jones*, 83 Ohio App.3d 723, 737, 615 N.E.2d 713

(2nd Dist. 1992). We observed that error or irregularity is not sufficient “unless the substantial rights of the accused or the prosecution are adversely affected.” *Id.* at ¶ 58 quoting *State v. Lukens*, 66 Ohio App.3d 794, 809, 586 N.E.2d 1099 (10th Dist. 1990). In *Bigsby*, we concluded that the trial court did not err in not declaring a mistrial because, when defendant objected to the comment that he had been in a correctional facility, the court instructed the jury to disregard the statement and it was not unreasonable to presume that the jury followed the court’s curative instruction. *Id.* at ¶ 60.

{¶28} Here, immediately after DB’s statements about Appellant’s actions on her bus, the trial court cautioned the jurors collectively that none of the allegations DB made were proven and that they were just her opinion. Tr. 47. The trial court asked if anyone was affected by what she said and what her opinion was. *Id.* The trial court asked if her comments would change anyone’s mind as to Appellant’s guilt or innocence and whether or not they could base their deliberations on the evidence and the applicable law. *Id.* When MB expressed concern, he was excused. Tr. 47-48. It is at this stage that the trial court questioned DJ and GJ in chambers. Tr. 48-53. The State also argues that the trial court gave an additional curative instruction at the end of voir dire. Brief of Plaintiff-Appellee, *State of Ohio*, p. 4, referring to Tr. 79. However, the statement cited by the State does not mention DB or give any further instruction to ignore her comments. *Id.* Instead, these trial court comments seem to be the usual instructions given in most trials reminding the jury to consider only the evidence received in the courtroom and, if any information from an outside source comes to their attention, they are not to discuss it, but are to bring it to the attention of the bailiff or security. *Id.* The trial court did, however, when eight jurors and an alternate were seated, again question the potential jurors about whether or not DB’s statements would affect them with regard to listening to the evidence and making a decision based on the evidence and the law provided by the court. Tr. 63. Subsequently, additional potential jurors were excused, one based on DB’s comments and others for a variety of reasons Tr. 63-75.

{¶29} It appears that only the comments of DB were heard by the jurors

ultimately selected to decide this case, not by two individuals (adding GJ) as argued by Appellant. Immediately after DB's comments, the trial court cautioned the jury pool about DB's comments. The trial court then questioned a number of potential jurors in chambers. After eight jurors and an alternative were tentatively seated, the trial court again inquired if any of them were affected by DB's comments. One juror was excused for this reason and a number of others for other reasons. This court only reverses a trial court's decisions as to whether to declare a mistrial where there is an abuse of discretion. *Mitchell* at ¶ 54. A defendant must demonstrate "material prejudice" to show an abuse of discretion. *Id.* Granting a mistrial is an extreme remedy which should be granted only where a fair trial is no longer possible and is required to meet the ends of justice. *Bigsby* ¶ 58. It is not unreasonable to assume a jury follows a court's curative instruction. *Bigsby* at ¶ 60. It cannot be said here that there was material prejudice to Appellant simply because the trial court did not conduct an individual voir dire of each potential juror or that the trial court otherwise abused its discretion in this case.

{¶30} Appellant's assignment of error is without merit and is overruled.

{¶31} For the reasons stated above, the trial court's judgment is hereby affirmed.

Waite, J., concurs.

Robb, J., concurs.