

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Julie A. Edwards, P.J.
Plaintiff-Appellee	:	Sheila G. Farmer, J.
	:	Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 2008 CA 00119
DARLA R. BALKA	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Criminal Appeal From Licking County Court
Of Common Pleas Case No. 2006 CR 574

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: September 11, 2009

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Edwards, J.

{¶1} Appellant, Darla Balka, appeals a judgment of the Licking County Common Pleas Court overruling her motion for a new trial following her conviction for one count of tampering with evidence (R.C. 2921.12(A)(1)). Appellee is the State of Ohio.

STATEMENT OF FACTS AND CASE

{¶2} On May 18, 2006, law enforcement officers from the Licking County Sheriff's Department and investigators from the Ohio Department of Insurance executed a search warrant at a residence in St. Louisville in Licking County. The search was conducted pursuant to an investigation of Timothy Snyder, who was alleged to have committed multiple thefts from two elderly persons from 2004-2006, involving about \$74,000.00.

{¶3} Appellant lived at the residence with Snyder, who was her boyfriend. When the officers arrived with the search warrant, appellant told them she had to go change clothes because she was wearing a bathrobe. The officers began searching for documents relevant to their investigation while appellant moved from room to room getting dressed.

{¶4} The officers advised appellant to remain seated in the kitchen after she was dressed. The officers had placed some documents on the kitchen table.

{¶5} Deputy Scott Keene observed appellant walking around the residence after she had been told to stay in the kitchen. When he checked the kitchen, he discovered that some of the documents the police had collected were missing from the kitchen table. Appellant initially denied knowledge of the whereabouts of the

documents. After the officers advised her that she could be arrested for tampering with evidence, appellant directed them to a smaller room near the back door, where they found a gambling statement and a bank statement addressed to Snyder and one of the victims. The documents were hidden underneath clothing in a basket.

{¶6} Appellant told the officers that she had only intended to preserve the documents for Snyder's attorney.

{¶7} On October 20, 2006, appellant was indicted by the Licking County Grand Jury in Case No. 2006CR574 with two counts of complicity to commit theft, one count of money laundering, and one count of tampering with evidence. On June 20, 2008, appellant was indicted on one count of money laundering in Case No. 2008CR410.

{¶8} Both cases proceeded to jury trial on July 14, 2008. Prior to commencement of trial, the state dismissed the charge of money laundering in Case No. 2006CR574. Following presentation of the state's case-in-chief, the court granted appellant's motion for acquittal on the two counts of complicity to commit theft in 2006CR574.

{¶9} Appellant admitted at trial to moving some documents while the officers were executing the search warrant. Tr. 535. She testified that she moved a "casino paper" and another paper because Snyder had told her he had two papers to take to his attorney, and she knew he went to a lot of trouble to get the "casino paper." Tr. 536. She testified that she thought the officers were not being fair to Snyder because the way she saw it, he was doing nothing but trying to help the alleged victim. Tr. 539. She testified that three different times she told the officers that those documents were for Snyder's lawyer. Id.

{¶10} Appellant was convicted of tampering with evidence. The jury could not reach a verdict on the indictment for money laundering in Case No. 2008CR410.

{¶11} On August 8, 2008, appellant filed a motion seeking leave to file a motion for a new trial pursuant to Crim. R. 33. The court granted leave to file the motion.

{¶12} In her motion for new trial, appellant argued that several jurors committed misconduct. She attached an affidavit of Juror No. 8. In his affidavit, the juror averred that during the course of deliberations, he initially voted not guilty. When he asked the other jurors why he should change his vote to guilty, Juror Number One told Juror No. 8 that he couldn't understand the situation because his parents had not been financially exploited like hers had been, and she was visibly upset, yelling and crying. He also averred that in response to his request for the other jurors' reasons for voting to convict appellant, Jurors No. 3 and 7 indicated that he should change his vote to guilty because the government presented more witnesses than appellant, and Juror No. 7 indicated that the government did not put people on trial for no reason, implying that appellant must be guilty if she was charged with a crime.

{¶13} The court set the motion for non-oral hearing. The court overruled the motion, finding that the remedy of new trial may be granted for misconduct of the jury when it is substantial and the moving party can show prejudice. The court found that "the alleged jury misconduct had no prejudicial effect on the verdict of guilty in the tampering with evidence count." Judgment Entry, September 16, 2008.

{¶14} Appellant assigns a single error on appeal:

{¶15} “THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT’S MOTION FOR A NEW TRIAL BASED UPON JUROR MISCONDUCT, OR IN THE ALTERNATIVE, AN ORAL HEARING ON THE MERITS OF THE MOTION.”

{¶16} A motion for a new trial made pursuant to Crim. R. 33 is addressed to the sound discretion of the trial court, and may not be reversed unless we find an abuse of discretion. *State v. Schiebel* (1990), 55 Ohio St.3d 71, 564 N.E.2d 54. An abuse of discretion implies that the trial court’s judgment is arbitrary, unreasonable, or unconscionable. *State v. Sage* (1987), 31 Ohio St.3d 173, 510 N.E.2d 343.

{¶17} Evid. R. 606(B) incorporates the common law rule on evidence aliunde and governs the competency of a juror to testify at a subsequent proceeding concerning the original verdict:

{¶18} “Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury’s deliberations or to the effect of anything upon that or any other juror’s mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror’s mental processes in connection therewith. 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. A juror’s affidavit or evidence of any statement by the juror concerning a

matter about which the juror would be precluded from testifying will not be received for these purposes.”

{¶19} The rule embodies the common-law tradition of protecting and preserving the integrity of jury deliberations, and is designed to protect the finality of verdicts and to ensure that jurors are insulated from harassment by defeated parties. *Schiebel* at 75.

{¶20} The state argues that the affidavit of Juror No. 8 falls squarely within the aliunde rule as codified in Evid. R. 606(B) and is therefore inadmissible. Appellant states at page 14 of her brief, “Appellant concedes this rule would exclude Juror Number Eight’s affidavit from consideration upon a motion for a new trial.” However, appellant argues that Evid. R. 606(B) cannot be used to avoid a possible constitutional violation and that she was denied her right to a fair and impartial jury. Appellant relies on *Doan v. Brigano* (C.A. 6, 2001), 237 F.3d 722, abrogated on other grounds, *Wiggins v. Smith* (2003), 539 U.S. 510, to support her proposition.

{¶21} In *Doan*, a juror conducted an experiment outside of court and presented the results to the jury. The Sixth Circuit Court of Appeals held that if the court applied, Evid. R. 606(B), to exclude evidence of the experiment, a juror could conduct an experiment in her home, even though it might have been flawed in its methodology, and present the results to her fellow jurors even though it may have substantially impaired the defendant’s credibility. *Id.* at 732. The court found that Evid. R. 606(B), by denying the court the ability to consider evidence of the jury misconduct, denied the defendant his right to confront the witnesses and the evidence against him. *Id.*

{¶22} However, the *Doan* court was careful to stress that the decision did not call the verdict into question by reviewing the private deliberations of the jury:

{¶23} “A review of this misconduct stands in stark contrast to an examination of internal factors affecting the jury. Whether the jury understood the evidence presented at trial or the judge’s instructions following the presentation of the evidence, whether a juror was pressured into arriving at a particular conclusion, and even whether jurors were intoxicated during deliberations, are all internal matters for which juror testimony may not be used to challenge a final verdict.” *Id.* at 733, citing *Tanner v. United States* (1987), 483 U.S. 107, 117-22, 107 S. Ct. 2739, 97 L.Ed.2d 90.

{¶24} The instant case does not involve a juror conducting an outside experiment or bringing in outside evidence which the defendant had no opportunity to refute or challenge. The averments in the affidavit of Juror No. 8 concerning other jurors attempting to persuade him to vote “guilty” based on the number of witnesses and the belief that the state wouldn’t bring the case with no evidence fall squarely within Evid. R. 606(B). Such statements fall directly in the first statement of the rule regarding the inadmissibility of statements made during the jury’s deliberations or the effect of anything upon the juror’s mind or emotions which influenced the juror to assent to or dissent from the verdict or concerning the juror’s mental processes. Further, while the *Doan* case criticized the rule excluding evidence of extraneous information without corroborating outside evidence, the court in *Doan* expressly noted that whether the jury understood the judge’s instructions or whether a juror was pressured into arriving at a particular conclusion are matters for which jury testimony may not be used to challenge the verdict. *Id.* Accordingly, the court did not err in overruling the motion for new trial as to the statements of Jurors No. 3 and 7, as presented in the affidavit.

{¶25} The statements made by Juror No. 1 fall under Evid. R. 606(B) as to her personal experience being used to influence other jurors to vote “guilty.” In addition, according to *Doan*, the pressure placed on the other jurors by Juror No. 1 is not a matter for which jury testimony can be used to challenge the verdict.

{¶26} However, the statements in the affidavit concerning Juror No. 1 raise the issue of whether she failed to disclose information in voir dire, and Ohio law is unsettled on the question of whether the aliunde rule prohibits evidence of juror misconduct during voir dire. During voir dire, the jurors were asked if any of them had been the victim of the type of crime involved in the case at bar or if any of them had a close family member who had been a victim of a similar crime. Tr. 24. Juror No. 1 did not respond. Based on the information presented in the affidavit of Juror No. 8, Juror No. 1’s parents had been victims of financial exploitation, and she failed to reveal this information during voir dire.

{¶27} In *Scheibel*, supra, the evidence of juror misconduct involved a juror who stated during voir dire that he did not know anyone with deposits at a bank involved in the case, but he later executed an affidavit stating that his mother-in-law had money in the bank in question. The Ohio Supreme Court held that this evidence by way of an affidavit of a juror fell squarely within the aliunde rule incorporated into Evid. R. 606(B). 55 Ohio St.3d at 76.

{¶28} However, in *Grundy v. Dhillon*, 120 Ohio St.3d 415, 900 N.E.2d 153, 2008-Ohio-6324, the parties agreed that Evid. R. 606(B) did not prohibit a juror’s testimony on whether he recalled during voir dire that his son had a prior experience with the hospital emergency room in question in the case. While the Ohio Supreme

Court did not need to reach the issue due to the agreement of the parties concerning the applicability of Evid. R. 606(B), the court noted that some courts have held that testimony regarding a juror's failure to answer questions honestly during voir dire is not prohibited by Evid. R. 606(B). *Id.* at ¶59, citing *Farley v. Mayfield* (June 30, 1986), Franklin App. No. 86AP-19; *Hard v. Burlington N. RR.* (C.A.9, 1987), 812 F.2d 483; *Alejo Jimenez v. Heyliger* (D.P.R., 1992), 792 F. Supp. 910; *Manrique v. State* (Alaska App. 2008), 177 P.3d 1188, 1191. However, others have held that the rule prohibits juror testimony about matters discussed during deliberations to show that a juror lied during voir dire. *Id.*, citing *United States v. Benally* (C.A. 10, 2008), 546 F.3d 1230.

{¶29} In the instant case the trial court did not base its holding on the aliunde rule, but rather found that appellant failed to demonstrate prejudice from the alleged jury misconduct. To obtain a new trial in a case in which a juror has not disclosed information during voir dire, the moving party must first demonstrate that a juror failed to answer honestly a material question on voir dire and that the moving party was prejudiced by the presence on the trial jury of a juror who failed to disclose material information. To demonstrate prejudice, the moving party must show that an accurate response from the juror would have provided a valid basis for a challenge for cause. *Grundy*, *supra*, at syllabus one. In determining whether a juror failed to answer honestly a material question on voir dire and whether that nondisclosure provided a basis for a for-cause challenge, an appellate court may not substitute its judgment for the trial court's judgment unless it appears that the trial court's attitude was unreasonable, arbitrary, or unconscionable. *Id.* at syllabus 2.

{¶30} In the instant case, appellant has not demonstrated that the juror would have been excused for cause. The record does not demonstrate that the juror's past experience with financial exploitation rendered her unable to be fair and impartial as to the tampering with evidence case, which is the only crime for which appellant was convicted and the only conviction before this court on appeal. The record of voir dire reveals that several jurors, for one reason or another, indicated that they could not be fair and impartial and were accordingly excused. Juror No. 1 did not respond to any of the questions concerning an inability to judge the case fairly on the evidence and the law. The affidavit does not establish that she failed to judge the case based on the evidence and the law, but only that she became emotional during deliberations due to her past experience. The record does not establish that the court abused its discretion in overruling the motion for new trial.

{¶31} The assignment of error is overruled.

{¶32} The judgment of the Licking County Common Pleas Court is affirmed.

By: Edwards, P.J.

Farmer, J. and

Delaney, J. concur

JUDGES

