

Not Reported in N.E.2d, 1993 WL 5524 (Ohio App. 6 Dist.)

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

Court of Appeals of Ohio, Sixth District, Huron County.

STATE of Ohio, Appellee,  
v.  
Edward ELLIS, Jr., Appellant.

No. H-91-055.  
Jan. 15, 1993.

Charles Derby, Michael Fegen, for appellee.

Paul Croushore, for appellant.

#### OPINION AND JUDGMENT ENTRY

[SHERCK](#), Judge.

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\_\_\_\_\_(Cite as: 1993 WL 5524, \*1 (Ohio App. 6 Dist.))\_\_\_\_\_

This is an appeal from a judgment rendered on a jury verdict and a subsequent sentence imposed by the Huron County Court of Common Pleas. Appellant was convicted of felonious assault in violation of [R.C. 2903.11\(A\)](#) and a firearm enhancing specification in violation of [R.C. 2941.141](#). Because we find that the trial court erred to the prejudice of appellant when it erroneously instructed the jury as to an element of the felonious assault charge, we reverse the conviction.

Appellant is Edward Ellis, Jr. In the summer of 1990 appellant was employed as a paddle boat captain at the Cedar Point Amusement Park. This is where he met and began dating Stacey Spencer. Eventually, the two decided to share an apartment together; however, this relationship soon soured. In January 1991, Stacey left the apartment she shared with appellant, returned to her parent's home, and attempted to cut off contact with appellant.

As a result of these events, appellant became suicidally depressed to the extent that he required hospitalization. When he was not hospitalized, appellant continued his attempts to see Stacey. She refused appellant's unwanted overtures. Nevertheless, on February 4, 1991, appellant followed Stacey from her work and forced her car from the road. When she locked herself in the car, appellant smashed her rear window and entered the car through the broken window. He then struggled with Stacey until she fled to the safety of a nearby house. This incident resulted in appellant being charged and ultimately convicted of misdemeanor assault and criminal damaging. A restraining order was also issued prohibiting appellant from having any further contact with Stacey.

The restraining order, however, was ineffective as appellant proceeded to plan his next encounter. He purchased a replica of the Paddle Boat Captain's uniform which he had worn when he and Stacey had met. Not satisfied with the replica's likeness to his actual uniform, he

exchanged it for an authentic uniform at Cedar Point. The same day appellant took prescription drugs from his father, acquired an expensive luxury car, bought a gun along with ammunition, beer, and a tape of Hank Williams, Jr. singing "Tear in my Beer."

Appellant encountered Stacey Spencer on a highway as she was driving toward her home near Norwalk, Ohio. Appellant turned and followed her in his vehicle, passing several cars as he attempted to get her to stop. Once in Norwalk, appellant pulled parallel to the Spencer vehicle. Stacey Spencer testified that as the two vehicles were side by side she saw appellant point a handgun in her direction and saw a puff of smoke come from the barrel of the weapon. Spencer eventually drove her car to the sheriff's office in Norwalk where appellant abandoned the chase and fled. He was arrested several days later when he crashed a boat into rocks along the Lake Erie Shore at Cedar Point.

On August 16, 1991, a Huron County Grand Jury indicted appellant for felonious assault in violation of [R.C. 2903.11](#) with an [R.C. 2941.141](#) firearm enhancement specification to which appellant eventually entered a plea of not guilty.

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On October 21, 1991, one day before the commencement of appellant's trial, appellant filed a motion *in limine*. Appellant's counsel, asserts in his appellate brief that he was criticized by the trial court for filing the motion so close to the commencement of the trial date. Appellant's counsel asserts that the trial judge informed him that the court would tell the jury that it was defense counsel who caused the delay in the proceedings. On the morning of October 22, 1991, the day of the trial and prior to the beginning of *voir dire*, the court did inform the prospective jurors that the trial's start was delayed to hear a motion filed by the defense. Appellant objected and the trial commenced.

At trial, appellant admitted that he had stalked Spencer, but denied that it was ever his intention to cause her physical harm. Instead, appellant testified that he planned to demonstrate to Stacey Spencer how great her loss was to him by committing suicide in her presence. This action was designed to make her feel guilty. Appellant admitted that his handgun discharged during the chase; yet, he denied that he was pointing the gun at her when it discharged. Appellant contended that he was trying to point the weapon at himself when the motion of his moving car caused it to fire accidentally.

The case was submitted to the jury on the evidence and the court's instructions on the law. During instructions, however, the trial judge misread his instruction with respect to the [R.C. 2901.01\(C\)](#) definition of the phrase "physical harm". The court properly wrote that, "physical harm means any injury, illness or any other *physiological* impairment \* \* \*." (Emphasis added.) However, on reading the instructions the judge substituted the word "psychological" for the word "physiological." Even so, a printed copy of the instructions with the correct word was given to the jury. Appellant raised no objection to the instruction. The jury convicted appellant as charged and the court entered judgment on the verdict.

Following the entry of conviction, appellant moved for a judgment of acquittal or a new trial. Accompanying appellant's motion was the affidavit of four jurors who stated that they had heard the word "psychological" in the court's instructions and relied on that word in casting their votes. The jurors averred that their decisions might have been different had they correctly understood the instructions.

The trial court granted the state's motion to strike the jurors' affidavits. The court then denied appellant's motion for a new trial and sentenced appellant. Appellant appeals raising the following five assignments of error:

Assignment of Error Number One:

"THE TRIAL COURT ERRED BY PREJUDICING THE JURY AGAINST DEFENSE COUNSEL

Assignment of Error Number Two:

"THE TRIAL COURT ERRED BY GIVING A JURY INSTRUCTION THAT PHYSICAL HARM INCLUDES PSYCHOLOGICAL IMPAIRMENT

Assignment of Error Number Three:

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"THE TRIAL COURT ERRED IN REFUSING TO ADMIT JUROR AFFIDAVITS OR TESTIMONY AS TO THE EFFECT OF THE ERRONEOUS INSTRUCTION ON THEIR DELIBERATIONS

Assignment of Error Number Four:

"THE TRIAL COURT ABUSED ITS DISCRETION BY REFUSING TO GRANT APPELLANT A NEW TRIAL

Assignment of Error Number Five:

"DEFENSE COUNSEL FAILED TO ADEQUATELY REPRESENT DEFENDANT BY FAILING TO OBJECT TO THE ERRONEOUS JURY INSTRUCTION DESPITE KNOWLEDGE OF THE ERROR."

I.

Appellant, in his first assignment of error, asserts that the trial judge's comments to defense counsel at the beginning of the trial in the presence of the jury was prejudicial to him. The remarks of which appellant complains are as follows:

"The Court: \* \* \*

"I'm sorry about the delay, but the defense had filed a motion late yesterday afternoon, and it had to be heard. We had to have an oral hearing on it in the other courtroom, so that's why we're a little late right now. We usually start at 9:00, I apologize.

[Defense Counsel]: Your Honor?

THE COURT: Yes.

[Defense Counsel]: Could we have a side bar, please?

THE COURT: No. If you have any objection, state it right now.

[Defense Counsel]: Your Honor, I have an objection to you stating to these people that the reason we're delayed is that we had a hearing that I filed late yesterday-a motion.

THE COURT: At 3:00.

[Defense Counsel]: 3:35, Your Honor. \* \* \* "

The exchange continues in this vein for a few minutes more at which point *voir dire* is begun.

A trial judge must conduct proceedings before a jury in a scrupulously impartial manner so as not to convey his opinion or bias on the merits of the case. [State ex rel. Wise v. Chand \(1970\), 21 Ohio St.2d 113, 119](#). Remarks made by a trial judge within the hearing of the jury during trial may lend themselves to be interpreted as the judge's opinion on the merits of the case and carry substantial weight with the jury. [State v. Boyd \(1989\), 63 Ohio App.3d 790, 794](#). Where such statements may be construed as a judicial pronouncement on the credibility of a witness or of a defendant or an opinion on the facts of the case, prejudicial error results. [State v. Kay \(1967\), 12 Ohio App.2d 38, 49](#).

In the case at bar, the trial judge's comments can only be viewed as a gratuitous attempt to blame a delay on the defense. As such, these remarks are a violation of the court's duty of scrupulous impartiality and, therefore, constitute error. We can not accept, however, appellant's assertion that this error was prejudicial. While these statements may rightfully be interpreted as an attitude of displeasure, impatience, or frustration with defense counsel, they may not reasonably be read as conveying an opinion as to the credibility of a witness or the defendant or a position on the facts of the case. Neither, viewing the trial in its totality, can it be said that the court's comments were so pervasive or egregious as to color the fair deliberations of the jurors. Therefore, we find this error to be harmless beyond a reasonable doubt. [Crim.R. 52\(A\)](#). Accordingly, appellant's first assignment of error is not well-taken.

## II.

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We will discuss appellant's remaining assignments of error out of sequence.

Appellant's fifth assignment of error asserts that he was denied effective assistance of counsel. Appellant's sole example of ineffectual representation is the failure of his trial counsel to object to the erroneous use of the word "psychological" instead of "physiological" during jury instructions.

"A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction \* \* \* has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. \* \* \* Unless a defendant makes both showings, it cannot be said that the conviction \* \* \* resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland v. Washington* (1984), 46 U.S. 674, 687.

Accord, [State v. Smith \(1985\), 17 Ohio St.3d 98, 100](#); [State v. Lytle \(1976\), 48 Ohio St.2d 391, 395](#).

Scrutiny of counsel's performance must be deferential. *Strickland v. Washington, supra* at 689. In Ohio, a properly licensed attorney is presumed competent and the burden of proving ineffectiveness is the defendant's. *State v. Smith, supra*. Counsel's actions which "might be considered sound trial strategy," are presumed effective. *Strickland v. Washington, supra*.

In the case at bar, appellant's trial counsel informed the court during the hearing for a new trial that he had heard the trial judge's instructions, had been aware of the judge's misstatement, yet decided not to object. We must consider such a decision from the perspective at the time it was rendered, not from the benefit of hindsight. Given that perspective, we can not say that such a

tactical decision not to interrupt a judge during the giving of instructions might not have been sound trial strategy. Therefore, appellant's fifth assignment of error is not well-taken.

### III.

Appellant's second, third, and fourth assignments of error are related and will be discussed together. These assignments concern the trial judge's substitution of the word "psychological" for the word "physiological" during the reading of the jury instructions. All parties agree, and the record clearly reflects that this substitution occurred. It occurred, as previously addressed, without objection from appellant.

Ordinarily, a party who fails to object to an erroneous jury instruction prior to the time the jury retires to consider its verdict, waives that error. [Crim.R. 30](#); [State v. Long \(1978\), 53 Ohio St.2d 91](#) at paragraph one of the syllabus. Notwithstanding this rule, an error which has not been brought to the attention of the trial court may be recognized on appeal as plain error if that error affects the substantial rights of a party. [Crim.R. 52\(B\)](#); *State v. Long, supra* at 94. However, " \* \* \* an erroneous jury instruction 'does not constitute a plain error or defect under [Crim.R. 52\(B\)](#) unless, but for the error, the outcome of the trial clearly would have been otherwise.'" [State v. Cooperrider \(1983\), 4 Ohio St.3d 226, 227](#), quoting *State v. Long, supra* at 97. The plain error rule should be applied only with the utmost caution and in exceptional circumstances. [State v. Underwood \(1983\), 3 Ohio St.3d 12, 14](#); *State v. Long, supra* at paragraph three of the syllabus.

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In support of his motion for a new trial appellant submitted the affidavit of a newspaper reporter who had interviewed several of the jurors following the verdict. The reporter averred that some jurors told him that they were unconvinced that appellant had shot at Stacey Spencer and that if the judge had not instructed them that an intent to cause "psychological" harm was sufficient to support a conviction, " \* \* \* we probably would not have convicted him." Appellant also submitted the resulting newspaper article and the affidavits of four of the jurors which confirmed the reporter's statements.

On appellee's motion, the trial court ordered appellant's affidavits stricken from the record. The court then denied appellant's motion for a new trial.

It is axiomatic that a jury may not impeach its own verdict. Exceptions to the rule are few. Ohio's long established rule on evidence *aliunde* is codified in Evid.R. 606(B) which provides:

"(B)Inquiry into validity of verdict or indictment. 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 his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his 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. His affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying will not be received for these purposes."

The rule is designed to protect the finality of verdicts and to ensure that jurors are insulated from harassment from unsuccessful parties. [State v. Schiebel \(1990\), 55 Ohio St.3d 71, 75](#).

"In order to permit juror testimony to impeach the verdict, a foundation of extraneous, independent evidence must first be established. This foundation must consist of information from sources other than the jurors themselves and the information must be from a source which possesses firsthand knowledge of the improper conduct. One juror's affidavit alleging misconduct of another juror may not be considered without evidence *aliunde* being introduced first. Similarly, where an attorney is told by a juror about another juror's possible misconduct, the attorney's testimony is incompetent and may not be received for the purposes of impeaching the verdict, or for laying a foundation of evidence *aliunde*. [Id. at 75-76](#) (citations omitted).

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In the case at bar, the affidavit of the newspaper reporter is deficient in two respects. First, as it is offered to prove the truth of the matter asserted, it is hearsay without a recognizable exception. Additionally, even if there were a hearsay exception, the affidavit fails because it is based on the statements of jurors who, by the terms of [Evid.R. 606\(B\)](#), are not competent to make such statements unless a foundation of independent evidence of impropriety is laid. The same, of course, is true for the affidavits of the jurors themselves. See, [Tasin v. Sifco Industries, Inc. \(1990\), 50 Ohio St.3d 102, 107-108.](#)

Appellant argues that the existence of the misread instruction on the record is extrinsic evidence sufficient to allow the jurors' affidavits to come into evidence. This argument too must fail. "If the erroneous verdict was brought about by the charge of the court, error should be predicated, not upon affidavits that the jury misunderstood the charge, but upon the ground that the charge was so misleading and prejudicial as to induce an erroneous verdict." [Cleveland Electric Illum. v. Astorhurst Land \(1985\), 18 Ohio St.3d 268, 274](#), citing [Long v. Cassiero \(1922\), 105 Ohio St.123.](#)

Upon examination of the record then, we find that the trial court acted properly in excluding the affidavits of the reporter and jurors. Accordingly, appellant's third assignment of error is not well-taken.

While the statements of the jurors about their deliberations may not be taken into account, their exclusion does not end our consideration. Even without consideration of the jurors affidavits we must determine whether, but for the erroneous instruction, the outcome of the trial would have been clearly different. *State v. Cooperrider, supra.*

The only contested issue in this trial was whether or not appellant intended to cause physical harm to Stacey Spencer. Appellant admitted that he intended to cause psychological harm to Stacey Spencer by committing suicide in her presence. When a jury is told their duty is to follow the law as the court instructs them and the court defines the term "physical harm" to include any "psychological impairment," appellant's battle is lost. The intelligent juror must vote to convict because throughout the trial appellant has repeatedly admitted his intent to cause Stacey Spencer psychological impairment. The error goes to the very heart of appellant's defense. Accordingly, it is clear not so much that, but for the instruction, the outcome would have been different, rather, but for the instruction, no other outcome was permitted. The results are two sides of the same coin. As such, we believe the erroneous instruction constitutes plain error, is unquestionably prejudicial to appellant and falls sufficiently within the standards enunciated in *Cooperrider, supra* to constitute a reversal. Accordingly, appellant's second and fourth assignments of error are found well-taken.

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Upon consideration whereof, the court finds that the defendant was prejudiced and prevented from having a fair trial, and the judgment of the Huron County Court of Common Pleas is

reversed. This case is remanded for a new trial. It is ordered that appellee pay court costs of this appeal.

*JUDGMENT REVERSED.*

[HANDWORK](#), [ABOOD](#) and [SHERCK](#), JJ., concur.

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