

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NOS. C-220440
		C-220441
Plaintiff-Appellee,	:	TRIAL NOS. B-1305265B
		B-1306715
vs.	:	
		<i>OPINION.</i>
KYLE FINNELL,	:	
Defendant-Appellant.	:	

Criminal Appeals From: Hamilton County Court of Common Pleas

Judgments Appealed From Are: Affirmed

Date of Judgment Entry on Appeal: July 26, 2023

Melissa A. Powers, Hamilton County Prosecuting Attorney, and *Keith Sauter*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

The Law Office of John D. Hill and John D. Hill, Jr., for Defendant-Appellant.

WINKLER, Judge.

{¶1} Defendant-appellant Kyle Finnell appeals the judgments of the Hamilton County Court of Common Pleas denying his motions for a new trial filed in the above-cited trial numbers. Because the record before us does not demonstrate that Finnell was prejudiced by alleged juror misconduct, we affirm the trial court's judgments.

Procedural and Factual History

{¶2} In 2014, following a jury trial on the charges set forth in the indictments under the cases numbered B-1305265B and B-1306715, a jury found Finnell guilty of aggravated burglary with an accompanying gun specification, kidnapping, two counts of having a weapon while under a disability, intimidation of a witness, and receiving stolen property. Prior to being sentenced for these offenses, Finnell filed Crim.R. 33 motions for a new trial under each case number. In support, Finnell alleged that two jurors had committed misconduct by failing to immediately report to the court that they believed Finnell had followed them after the first day of deliberations to intimidate them. He argued that because the jurors did not report this incident until after the verdict had been read and accepted in open court by the trial judge, the court was unable to conduct the required hearing and determine whether this perceived threat had biased the jurors.

{¶3} The trial judge recused himself from considering the new-trial motions. But despite that recusal, the court denied Finnell's motions at the sentencing hearing. On direct appeal, this court affirmed Finnell's convictions but vacated the order denying the new-trial motions and remanded the matter to the presiding judge of the trial court. *State v. Finnell*, 1st Dist. Hamilton Nos. C-140547 and C-140548, 2015-Ohio-4842, *appeal not accepted*, 145 Ohio St.3d 1445, 2016-Ohio-1596, 48 N.E.3d 583.

{¶4} On remand, Finnell moved to release juror information under seal. The trial court denied that motion but held an evidentiary hearing on the new-trial motions. At the hearing, Finnell testified that as he was leaving the courthouse after the first day of deliberations, he had been standing in the small area by the side door waiting for someone with a security badge to allow him to exit. At the time, he was talking on the phone. When the door was opened, he walked to the front of the courthouse, and waited for his ride. He did not remember seeing any jurors while he was talking on the phone or waiting for his ride home. He further testified that he did not attempt to intimidate, influence, or threaten any of the jurors during the trial. The trial court denied the new-trial motions, and Finnell appealed.

{¶5} We reversed the denial of Finnell’s motion to release juror information under seal because his trial counsel had been ineffective in presenting that motion to the court, and we vacated the denial of the new-trial motions and remanded the cause to the trial court. *See State v. Finnell*, 2018-Ohio-564, 106 N.E.3d 285 (1st Dist.). On remand, the juror information was released under seal to counsel only, and eventually, two hearings were held on Finnell’s new-trial motions at which 11 of the 12 jurors testified. Finnell was unable to attend these hearings due to health reasons, and defense counsel waived his presence.

{¶6} The first hearing occurred January 19, 2022, where nine jurors testified. Juror A.L. testified about two incidents with Finnell. In the first incident, she and Juror B.C.,¹ had been waiting to pass through courthouse security one morning during trial when Juror A.L. heard someone talking on a cell phone and loudly say, “these F’n bitches.” Juror A.L. testified that it made her uncomfortable

¹ Juror B.C. could not be located at the time of the post-trial evidentiary hearing on Finnell’s new-trial motion. Juror A.L. testified that another female juror had been with her both times she had contact with Finnell outside the courtroom. The parties presume this was Juror B.C. because the other ten jurors that testified all confirmed that they had not been with Juror A.L. when she had contact with Finnell.

when she had turned around and realized it was Finnell talking on the phone. She testified that Finnell seemed upset about having to attend court and believed that Finnell could have either been referring to her and the other juror or court personnel when he had said “these F’n bitches.” Juror A.L. testified that she reported this incident to the bailiff, and that she began to arrive at the courthouse earlier in the day to avoid Finnell.

{¶7} Next, Juror A.L. testified that she and Juror B.C. had been waiting outside the front of the courthouse after the first day of deliberations for their respective rides home. Juror A.L. was waiting for her daughter and Juror B.C. was waiting for the bus. At that time, Juror A.L. became nervous when she saw Finnell staring at them. Juror A.L. then recalled that Juror B.C. had said that she did not want to return to court for jury duty, but Juror A.L. had encouraged her to do so. Juror A.L. then testified that she called her daughter and instructed her to keep driving and not stop in front of the courthouse. Juror A.L. then began to walk towards the public library, and she testified that Finnell followed her. She recalled entering the library and waiting until Finnell had left the area before instructing her daughter to meet her at the library.

{¶8} Juror A.L. testified that she reported the incident the next day and was instructed not to discuss it with the other jurors until after the verdict. Juror A.L. testified that she followed that instruction. Finally, when asked whether these two incidents influenced her decision to find Finnell guilty, she testified “No,” and explained that if the incidents had influenced her in any way, it was only to the extent that she felt she must continue to report for jury duty.

{¶9} The other eight jurors each testified that they did not know about the incidents involving Juror A.L. until after the guilty verdict had been announced in court. Two of these eight jurors also testified as to their own observations of Finnell outside the courtroom: One juror recalled observing Finnell standing in a restaurant

near the courthouse “watch[ing]” out the window and another juror testified that he had remembered seeing Finnell outside the courthouse the day Juror B.C. had been waiting for the bus. But both of those jurors testified that they had not shared their observations with others.

{¶10} The second hearing occurred in March 2022, where the remaining two jurors testified. Juror M.B. and Juror R.F. both testified that they remembered hearing about the second incident involving Juror A.L. and Finnell. Juror R.F. stated that he believed that he learned of the incident during deliberations, and Juror M.B. was unsure of when she learned about it but testified that, “I don’t think [Juror A.L.] told us after [deliberations].” Juror M.B. also recalled seeing Finnell outside on a lunch break during the trial and thought he might have been staring at her. She testified that she was surprised to see him outside but when she discussed this with the bailiff, she learned that Finnell had been released on bond. She did not tell the other jurors about seeing Finnell during the lunch break and testified that this encounter did not influence her decision to find him guilty of the charged offenses.

{¶11} Finally, both Juror M.B. and Juror R.F. testified that learning about Finnell following Juror A.L. had not influenced their decisions and that each had based his or her decision finding Finnell guilty of the charged offenses solely on the evidence presented at trial.

{¶12} After the hearings, the trial court denied Finnell’s new-trial motions, finding that, “The jurors made their findings and decision only on the evidence presented at Defendant’s trial.” Finnell now appeals.

Law and Analysis

{¶13} In his single assignment of error, he asserts that the trial court erred by denying his motions for a new trial. We are unpersuaded.

{¶14} This court reviews a lower court’s decision to grant or deny a motion for a new trial for an abuse of discretion. *State v. Schiebel*, 55 Ohio St.3d 71, 564

N.E.2d 54 (1990), paragraph one of the syllabus. To constitute an abuse of discretion, a trial court's decision must be unreasonable, unconscionable, or arbitrary. *State v. Adams*, 62 Ohio St.2d 151, 404 N.E.2d 144 (1980). When applying an abuse-of-discretion standard, "an appellate court is not free to substitute its judgment for that of the trial judge." *State v. Herring*, 94 Ohio St.3d 246, 255, 762 N.E.2d 940 (2002), citing *Berk v. Matthews*, 53 Ohio St.3d 161, 169, 559 N.E.2d 1301 (1990).

{¶15} Under Crim.R. 33(A)(2), a new trial may be granted based on misconduct of the jury that materially affected the defendant's substantial rights. Finnell argues that the jurors committed misconduct by failing to inform the trial court, in a timely fashion, of their experiences with Finnell outside of the courtroom. He focuses on the two incidents involving Juror A.L. where she had overheard Finnell complaining about having to be at court and where she had perceived Finnell was following her after the first day of deliberations.

{¶16} When reviewing a motion for new trial based on juror misconduct, an appellate court must conduct a two-tier analysis: (1) determine whether there was juror misconduct and (2) if juror misconduct is found, determine whether it materially affected the defendant's substantial rights. *State v. McGail*, 2021-Ohio-231, 167 N.E.3d 70, ¶ 27 (2d Dist.). Contrary to Finnell's argument, the burden is on the party alleging juror misconduct to establish prejudice. *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, 817 N.E.2d 29, ¶ 42, citing *Smith v. Phillips*, 455 U.S. 209, 215, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982) ("The remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias.").

{¶17} Although Juror A.L. testified that she had reported these incidents to court personnel, Finnell argues that the trial judge was unaware of any outside communication until after the jury verdict had been announced. But even if we

presume that there was juror misconduct with respect to the reporting of these incidents, Finnell has not demonstrated that the alleged misconduct prejudicially affected his substantial rights. *See id.*; *see also State v. Phillips*, 74 Ohio St.3d 72, 88-89, 656 N.E.2d 643 (1995) (“In cases of improper outside juror communication, the defense must establish that the communication biased the juror.”).

{¶18} Based on the record before us, Finnell has not demonstrated that the incidents involving Juror A.L., or any other alleged misconduct, biased the jurors such that they were unable to base their decisions to find him guilty of the charged offenses on anything other than the evidence presented at trial. Juror A.L. testified that she had not told the other jurors about the two incidents involving Finnell and that those incidents had not influenced her decision to find Finnell guilty of the charged offenses. The two jurors who claimed to know during deliberations about Finnell following Juror A.L. testified that learning of that incident did not influence their verdicts, and specifically testified that they had based their decisions to find Finnell guilty of the charged offenses only on the evidence presented at trial. Finally, the remaining jurors who had testified confirmed that they were unaware of any incidents involving other jurors and Finnell until after the verdict had been announced.

{¶19} “A trial court may rely upon a juror’s testimony as a basis for finding that her impartiality was not affected.” *See Herring*, 94 Ohio St.3d at 259, 762 N.E.2d 940. Here, the trial court relied on the testimony of the jurors in finding that they had based their guilty findings solely on the evidence presented at trial, and thus, that each juror’s impartiality had not been affected by any outside contact with or observation of Finnell. Because the court’s determination is supported by competent, credible evidence in the record, we cannot say that the trial court’s denial of Finnell’s new-trial motions was unreasonable.

{¶20} In reaching our holding, we keep in mind the Ohio Supreme Court’s admonition that “ ‘ * * * [t]he determination of juror bias necessarily involves a judgment on credibility, the basis of which often will not be apparent from an appellate record. *Wainwright v. Witt*, 469 U.S. 412, 421, [105 S.Ct. 844, 83 L.Ed.2d 841] (1985). For this reason, ‘ * * * deference must be paid to the trial judge who sees and hears the juror. *Id.* at 426.’ ” *State v. Huertas*, 51 Ohio St.3d 22, 29, 553 N.E.2d 1058 (1990), quoting *State v. DePew*, 38 Ohio St.3d 275, 280, 528 N.E.2d 542 (1988).

{¶21} Additionally, Finnell argues that the length of time it took for the trial court to hold a hearing where the jurors’ testimony was considered was in and of itself prejudicial and denied him a fair trial. But Finnell did not raise this argument below, and we may not consider it for the first time on appeal. *See In re B.C.*, 4th Dist. Washington No. 21CA18, 2022-Ohio-1298, ¶ 18 (party may not raise new issues or legal theories for the first time on appeal); *see also State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900, ¶ 21 (explaining that defendant forfeited his constitutional challenge by failing to raise it during the trial court proceedings). To the extent that Finnell is also arguing that a post-trial evidentiary hearing is insufficient to determine juror bias, an issue that was raised below, we find that argument unpersuasive. A post-trial evidentiary hearing has been found to be an appropriate remedy in situations like this to determine juror bias or partiality. *See Smith*, 455 U.S. at 218, 102 S.Ct. 940, 71 L.Ed.2d 78 (a post-trial hearing is sufficient to decide juror partiality in both the state and federal courts); *see also McGail*, 2021-Ohio-231, 167 N.E.3d 70 (reviewing a post-verdict evidentiary hearing on juror misconduct).

{¶22} Because we have concluded that the trial court did not abuse its discretion in denying Finnell’s new-trial motions, we overrule the single assignment of error. The judgments of the common pleas court are affirmed.

Judgments affirmed.

BERGERON, P.J., concurs.
KINSLEY, J., dissents.

KINSLEY, J., dissenting.

{¶23} Kyle Finnell was convicted by jurors who had already concluded, before they issued their verdict, that he was the kind of person who intimidated people and should be in jail. They made this decision, at least in part, based on events that occurred outside of the courtroom and that were therefore never put through the truth-testing process of a trial. Because I believe this constitutes prejudice to Finnell, I dissent from the majority’s opinion denying him a new trial.

Extrajudicial Jury Contact

{¶24} Eleven of the twelve jurors testified at two recent hearings on Finnell’s new trial motion. Those jurors collectively described four extrajudicial encounters.

{¶25} First, Juror A.L. described a phone call she and Juror B.C. overheard while waiting to get into the courthouse. Finnell was behind them in line, and Juror A.L. believed Finnell was talking poorly about either her and Juror B.C. or courthouse personnel on the phone, referring to them as “these F’n b****es.” The call made Juror A.L. upset. She not only reported it to the judge’s bailiff, but she also started coming to court earlier in the morning to avoid encountering Finnell in line again.

{¶26} Second, Juror A.L. described an incident that occurred after court one afternoon. Juror A.L. saw Finnell outside and believed he was following her and Juror B.C. in an effort to intimidate them. She described trying to distance herself from Finnell by walking to the downtown library. There, she saw Finnell talking to someone and pointing, and she assumed he was asking where she went. Other jurors confirmed hearing about this incident involving Juror A.L., Juror B.C., and Finnell at or around the time of trial.

{¶27} Third, Juror M.B. saw Finnell outside the courthouse during a lunch break and believed he was staring at her while she was eating. She wondered why he was not in jail, despite the fact the trial was still going on, and Finnell had not yet been convicted.

{¶28} Fourth, after the lunchtime incident, Juror M.B. had an off-the-record discussion with the bailiff about why Finnell was not incarcerated. The bailiff informed her that Finnell had posted bond.

{¶29} These four incidents were discussed in detail at two hearings the trial court conducted following our remand in *Finnell*, 2018-Ohio-564, 106 N.E.3d 285.

{¶30} Nine of the 12 jurors from Finnell's trial appeared at the first hearing, including Juror A.L. The jurors were not individually sequestered during this proceeding. Rather, they testified openly in a group, apparently from the jury box. They described their memories of the trial in front of one another, and they were asked about their own ability to be fair in open court as well. This was not the best way to go about the hearing, as it created a danger that the jurors' testimony would be influenced by hearing what the other jurors recalled. *See State v. Jackson*, 4th Dist. Athens No. 18CA7, 2020-Ohio-7034, ¶ 37, citing *Perry v. Leeke*, 488 U.S. 272, 281-283, 109 S.Ct. 594, 102 L.Ed.2d 624 (1989); *see also State v. Gunnell*, 2d Dist. Clark No. 09-CA-0013, 2010-Ohio-4415, ¶ 172 (discussing trial court's responsibility to conduct fair hearing when faced with allegations of juror misconduct).

{¶31} A similar process took place in the second hearing, albeit with two rather than nine jurors. Juror M.B. testified at the second hearing. In addition to her own lunchtime encounter, she recalled having prior knowledge about the incident with Juror A.L. at the library.

{¶32} Many months earlier, Finnell testified under oath that none of these encounters with the jurors ever happened. But, as the trial court pointed out, Finnell

was not at the later juror hearings and thus did not personally respond to the jurors' recollections of events.

{¶33} The record therefore contains conflicting testimony as to what took place in the courthouse line, at the library, and at lunch.

{¶34} Regardless of whether the events the jurors described actually occurred, Jurors A.L. and M.B. both described forming perceptions about Finnell based on his conduct outside the courtroom. Juror A.L. formed a belief that Finnell spoke ill of her and her fellow juror on the phone and followed her in an effort to intimidate her. Juror M.B. formed a belief that Finnell should be incarcerated pending trial, before he was convicted of a crime, and sought out an explanation from court staff as to why this had not occurred. Underlying these beliefs was the perception that Finnell was a dangerous person, and the jurors were clearly afraid of him. This perception came from conduct that took place entirely outside the courtroom.

The Role of Prejudice

{¶35} Ohio law around extrajudicial contact with jurors is unique in that it both presumes prejudice, but then also requires a defendant to demonstrate prejudice. *See State v. Sheppard*, 84 Ohio St.3d 230, 233, 703 N.E.2d 286 (1998). Why require a defendant to prove something that is presumed?

{¶36} In this case, we need not worry with the answer to that perplexing question because Finnell has demonstrated actual prejudice.

{¶37} Prejudice occurs when a defendant's right to an impartial jury is compromised by extrajudicial conduct. *See id.* "Impartiality is not a technical conception. It is a state of mind." *State v. Lake*, 5th Dist. Richland No. 2009-CA-0011, 2010-Ohio-1113, ¶ 65, citing *Dennis v. United States*, 339 U.S. 162, 172, 70 S.Ct. 519, 94 L.Ed. 734 (1950). For a juror to be appropriately impartial, she must have what the United States Supreme Court has labeled a "mental attitude of appropriate indifference." *Dennis* at 172.

{¶38} That did not happen here. Despite what no one doubts were their best efforts, Jurors A.L. and M.B. stopped being impartial and started being biased against Finnell because of extrajudicial conduct. Before they issued a verdict in the case, they stopped seeing Finnell as a person entitled to the presumption of innocence and started perceiving him as a person who should be in jail, in the case of Juror M.B., and a person who followed and intimidated others, in the case of Juror A.L. This was particularly significant given that Finnell was charged with witness intimidation in the case Juror A.L. and Juror M.B. were considering.

{¶39} In concluding otherwise, the majority focuses, as did the trial court, on the jurors' testimony that the incidents did not affect their ability to be fair. But this is not how implicit biases work. *See* Implicit Bias, National Center for State Courts, Ohio Specialized Docket Conference, 13 (Nov. 22, 2019), available at [chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.supremecourt.ohio.gov/sites/specDockets/2019/materials/E6/E6-large.pdf](https://www.supremecourt.ohio.gov/sites/specDockets/2019/materials/E6/E6-large.pdf) (accessed July 6, 2023) (noting that everyone has implicit biases that operate outside our awareness). They blind us to our own perceptions, making it difficult for us to identify our own prejudices. *Id.*; *see also State v. Pike*, 712 P.2d 277, 280 (Utah 1985) (“improper contacts may influence a juror in ways he or she may not even be able to recognize”). But even hidden bias is actual bias.

{¶40} As a result, when confronting a claim of juror misconduct, we should focus on what the jurors describe about their deliberative process, not the conclusions they reach about their own fairness. Indeed, that is what the law requires. *See Smith v. Phillips*, 455 U.S. 209, 217, 102 S.Ct. 940, 71 L.Ed. 2d 78 (1982) (“Due process means a jury capable and willing to decide the case solely on the evidence before it * * *.”).

{¶41} Finnell was legally entitled to 12 jurors to decide his case based only the evidence presented in the courtroom, not 12 jurors who blindly professed impartiality. *See Lake*, 5th Dist. Richland No. 2009-CA-0011, 2010-Ohio-1113, at ¶ 62. But, based

on what Juror A.L. and Juror M.B. reported about their own mindsets, he did not receive such a jury because of the impact of encounters that took place outside of court.

{¶42} Serving on a jury is one of the most important roles a citizen can play in our democracy, and all of the jurors in Finnell's case served to the best of their human ability. To be sure, Juror A.L.'s and Juror M.B.'s reactions to what they believe they experienced outside the courtroom are psychologically understandable. *See* Implicit Bias at 13. But they are also prejudicial to Finnell, because the jury's verdict in his case was tainted by the perception that he is a dangerous person deserving of jail.

{¶43} For this reason, I believe the trial court abused its discretion and acted unreasonably in denying Finnell a new trial. I would reverse the trial court's judgments denying Finnell's motions for a new trial and remand the cause for a new trial. I therefore respectfully dissent.

Please note:

The court has recorded its own entry on the date of the release of this opinion.