

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

State of Ohio

Court of Appeals No. E-03-054

Appellee

Trial Court No. 2001-CR-337

v.

Douglas Wright

DECISION AND JUDGMENT ENTRY

Appellant

Decided: September 30, 2004

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, and
Mary Ann Barylski, Assistant Prosecuting Attorney, for appellee.

William H. Smith, for appellant.

* * * * *

LANZINGER, J.

{¶ 1} Douglas Wright appeals his conviction from the Erie County Court of Common Pleas on three counts of theft and one count of engaging in a pattern of corrupt activity. Because the trial court did not err in allowing the state to use other act evidence and there was sufficient evidence of Wright’s intent, we affirm.

{¶ 2} Beginning in late 1999, Wright joined his father Harry’s cabinet business, Firelands Kitchen Company, Inc. (“Firelands Kitchen”), as a salesman. After the business was closed, Wright was indicted in August 2001 on three counts of theft,

concerning three customers who entered into contracts and paid substantial deposits but had not received their cabinets. Wright was also indicted on November 13, 2001, on one count of engaging in a pattern of corrupt activity. This count contained seven separate incidents, also stemming from the same circumstances -- customers who paid substantial deposits under written contract but did not receive their cabinets. After jury trial, on July 3, 2002, Wright was convicted on all counts. The trial court sentenced Wright to 11 months of incarceration on Counts 1, 2, and 3 and 4 years on Count 4 to be served consecutively to the other counts, for a total prison term of 4 years and 11 months.¹

Wright now raises the following assignments of error on appeal:

{¶ 3} “I. The trial court erred in allowing the prosecution to use prior acts as evidence to show character and conformance therewith throughout the trial.

{¶ 4} “II. The prosecutor’s course of improper conduct of relying on prior crimes of defendant prohibited him from receiving a fair trial.

{¶ 5} “III. Defendant was denied effective assistance of counsel due to his counsel’s failure to call key employees of Firelands Kitchen Co. as witnesses.

{¶ 6} “IV. The trial court erred by not granting defendant’s criminal rule 29 motion for acquittal.

{¶ 7} “V. The jury’s verdict was against the manifest weight of the evidence.

¹The trial court also made the sentence in this case consecutive to the sentence imposed for community control violations in Case Number 99-CR-311.

{¶ 8} “VI. Defendant was denied effective assistance of counsel due to his counsel’s failure to immediately bring improper outside juror communication to the court’s attention.

{¶ 9} “VII. The trial court erred by not granting defendant’s motion for new trial.

{¶ 10} “VIII. Justice delayed is justice denied. The trial court abused defendant’s right to due process by failing to timely rule on his motion for new trial.”

First Assignment of Error – Other Act Evidence

{¶ 11} In the first assignment of error, Wright contends that the trial court erred when it allowed the state to introduce evidence of his previous convictions and other acts from previous victims to show he acted in accordance with his “bad” character. The admission or exclusion of relevant evidence is within the sound discretion of the trial court and its decision to admit or exclude such evidence cannot be reversed absent a showing of an abuse of that discretion. *State v. Ahmed*, 103 Ohio St.3d 27, 2004-Ohio-4190, at ¶79. The term “abuse of discretion” connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157. When applying the abuse of discretion standard, a reviewing court is not free to substitute its judgment for that of the trial court.

{¶ 12} Evidence of prior criminal acts which are wholly independent of the crime charged are generally inadmissible. *State v. Thompson* (1981), 66 Ohio St.2d 496, 497. Evid.R. 404(B) provides: “Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It

may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”

{¶ 13} Although evidence of other crimes, wrongs or acts committed by the accused either before or after the crime charged is inadmissible to show propensity to commit crimes, it may be relevant and admissible to show motive or intent, the absence of mistake or accident, or a scheme, plan or system in committing the act in question. *State v. Broom* (1988), 40 Ohio St.3d 277, paragraph one of the syllabus. Evidence of an accused’s other acts is thus admissible only when it “tends to show” one of the material elements in the charged offense and only when it is relevant to the proof of the accused’s guilt for such offense. *State v. Curry* (1975), 43 Ohio St.2d 66, 68-69; *State v. Burson* (1974), 38 Ohio St.2d 157, 158.

{¶ 14} Here, the critical issue at trial was proof of Wright’s “purposeful” intent to commit theft. Since there was no direct evidence of such specific intent, it was necessary for the state to establish Wright’s intent through circumstantial evidence. Wright argues that the circumstances surrounding his convictions in 1999 are different than the circumstances from the charges in this case. Other than the fact that Wright was operating a sole proprietorship in 1999 when he worked as a salesman for Firelands Kitchen in this matter, the circumstances surrounding the charges are similar in nature. In both the prior convictions and in the current charges, it was alleged that Wright contracted to do jobs, took a deposit, failed to produce the work, and avoided or misrepresented facts to his customers. Although Wright maintains the difference of his

status between sole proprietor and employee is enough to make the other act evidence inadmissible, the 1999 convictions do not need to be identical to the current offenses to be admissible. See *State v. Jamison* (1990), 49 Ohio St.3d 182, 187. (Admissibility is not adversely affected simply because the other act evidence differed in some details.) Differences in the circumstances “* * * do affect the relative probative value of these events but not their admissibility. The weight to be given to this evidence is for the jury to determine.” Id. We, therefore, find the first assignment of error not well-taken.

Second Assignment of Error - Prosecutorial Misconduct

{¶ 15} The second assignment of error alleges that Wright was denied a fair trial because of prosecutorial misconduct. He argues that the prosecutor’s continuous violation of Evid.R. 404(B) during voir dire, opening statements, presentation of evidence, and closing arguments prejudiced him. He also contends that the prosecutor violated his right to due process when he commented during closing argument on Wright’s failure to call a witness to testify.

{¶ 16} We have already concluded that the trial court did not err when it allowed the state to present other act evidence to show Wright’s intent and absence of mistake; therefore, it was not prosecutorial misconduct to refer to Wright’s prior convictions and to call the previous victims to show the similarity of the prior offenses. Wright also complains that the prosecutor should not have referred to “a pattern of activity.” This argument lacks merit since Count 4 of the indictment charged Wright with engaging in a pattern of corrupt activity, in violation of R.C. 2923.32.

{¶ 17} With regard to the alleged misconduct during the prosecutor’s closing argument, the prosecution has wide latitude during opening and closing arguments. Questions over the propriety of these arguments are generally left to the trial court’s discretion. See *State v. Loza* (1994), 71 Ohio St.3d 61, 78. The test for prosecutorial misconduct is whether the prosecutor’s conduct at trial was improper and prejudicially affected the substantial rights of the defendant. *State v. Lott* (1990), 51 Ohio St.3d 160, 165. A prosecutor’s conduct during trial cannot be grounds for error unless the conduct deprives the defendant of a fair trial. *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 24. To determine if the alleged misconduct resulted in prejudice, an appellate court should consider the following factors: “(1) the nature of the remarks, (2) whether an objection was made by counsel, (3) whether corrective instructions were given by the court, and (4) the strength of the evidence against the defendant.” *State v. Braxton* (1995), 102 Ohio App.3d 28, 41. Additionally, the appellate court should consider whether the alleged misconduct was “an isolated incident in an otherwise properly tried case.” *Id.* A reversal for prosecutorial misconduct is not warranted if it is clear beyond a reasonable doubt that the outcome of the trial would have been the same absent the misconduct. *State v. Smith* (1984), 14 Ohio St.3d 13, 15; *State v. Vallejo* (Oct. 18, 1999), 6th Dist. No. L-98-1090.

{¶ 18} Wright complains that the prosecutor should not have referred to the fact that Don Lindsley did not testify at trial during his rebuttal argument. In the defense’s closing argument, Wright’s counsel mentioned Lindsley and other Firelands Kitchen employees several times and alleged that Wright was being singled out because of his

earlier convictions. At one point, defense counsel stated “And alls – and – but because of that history that somehow [Wright’s] the one out of Oscar Acevedo, Dennis Feltner, Don Lindsley, who certainly knows more than anybody else in the whole business what’s going on. Why would Don Lindsley allow a penny of any of this money to go in if he was involved in some scheme?” In rebuttal, the prosecutor responded “Why aren’t we getting the full picture here? We keep hearing about Don Lindsley. We didn’t hear from Don Lindsley. We heard from Harry Wright and Doug Wright.”

{¶ 19} Wright cites *State v. Hannah* (1978), 54 Ohio St.2d 84, 90 for the proposition that a prosecutor may not comment on the failure of a witness to appear in court and testify without violating Crim.R. 16(C)(3). Crim.R. 16(C)(3) provides: “The fact that a witness’ name is on a list furnished under subsection (C)(1)(c), and that the witness is not called shall not be commented upon at the trial.” A review of the record shows that neither the state nor Wright specifically listed Lindsley as a potential witness.² Although the prosecutor did make a single, isolated reference to Lindsley, he did not state that Lindsley had been identified as a witness. In addition, defense counsel opened the door during his closing argument when he commented on what Lindsley knew about the business. Thus, the comment about Lindsley was not improper, and even if it was, it was

²It is arguable that Lindsley was identified as a witness because at the end of the state’s witness list in its discovery response dated November 26, 2001, the state included the statement: “Witnesses also include all named individuals in the attached discovery packet.” A report from the Huron Police Department dated March 8, 2001 was attached and mentioned Lindsley.

an isolated remark that does not amount to prosecutorial misconduct. Wright's second assignment of error is not well-taken.

Third and Sixth Assignments of Error - Ineffective Assistance of Counsel

{¶ 20} In the third and sixth assignments of error, Wright argues that his conviction should be overturned because of ineffective assistance of counsel. In *Strickland v. Washington* (1984), 466 U.S. 668, 687, the United States Supreme Court adopted a two-prong analysis to determine whether a defendant's conviction should be reversed on the basis of ineffective assistance of counsel. It requires a showing that (1) counsel's performance was so deficient as to not function as the counsel guaranteed by the Sixth Amendment, and (2) counsel's errors were prejudicial and deprived the defendant of a trial whose result was reliable. *Id.* To warrant reversal, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

{¶ 21} "Judicial scrutiny of counsel's performance is to be highly deferential, and reviewing courts must refrain from second-guessing the strategic decisions of trial counsel. To justify a finding of ineffective assistance of counsel, the appellant must overcome a strong presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Strickland* at 689, 104 S.Ct. at 2065, 80 L.Ed.2d at 694-695; *State v. Wickline* (1990), 50 Ohio St.3d 114, 126, 552 N.E.2d 913, 925. Prejudice from defective representation sufficient to justify reversal of a conviction exists only where the result of a trial was unreliable or the proceeding fundamentally

unfair because of the performance of trial counsel. *Lockhart v. Fretwell* (1993), 506 U.S. 364, 368-370, 113 S.Ct. 838, 842-843, 122 L.Ed.2d 180, 189-191.” *State v. Carter* (1995), 72 Ohio St.3d 545, 558. Even a questionable trial strategy does not compel a finding of ineffective assistance of counsel. *State v. Smith* (2000), 89 Ohio St.3d 323, 328; *State v. Clayton* (1980), 62 Ohio St.2d 45, 49.

{¶ 22} In the third assignment of error, Wright argues that his trial counsel’s performance was deficient because he did not call key witnesses from Firelands Kitchen. In *State v. Rodgers*, 6th Dist. No. L-02-1089, 2004-Ohio-3795, at ¶19, this court recently noted: “Ohio courts have generally held that, ‘counsel’s decisions regarding which witnesses to call fall within the realm of trial strategy and will not constitute ineffective assistance of counsel.’ *State v. Gaston* (Dec. 17, 2001), 7th App. No. 98-BA-52, citing *State v. Clayton* (1980), 62 Ohio St.2d 45, 49.” Wright contends that his counsel should have called Don Lindsley, the business manager; Betsy Wright, the bookkeeper; and/or Steve Wright, the product orderer, to corroborate his defense that he was not in charge of the company and also to explain the business records submitted into evidence. Both his father and Wright testified regarding the company structure and that Wright was simply a salesman. Wright’s counsel also explained in closing arguments that the business records were submitted to show that Firelands Kitchen was a legitimate business operation. Other than Wright’s assertions that these employees would corroborate his defense, however, there is no evidence as to how these other witnesses would have testified if subpoenaed. The jury could have also considered these witnesses to be biased since they

are Wright's uncle, sister, and brother. Furthermore, trial counsel did call William Krennan who had been employed by Firelands Kitchen for 17 years to corroborate Wright's position as a salesman. Unfortunately for Wright, Krennan also agreed on cross-examination that Wright did run the company. We, therefore, conclude that Wright's third assignment of error is not well taken.

{¶ 23} In the sixth assignment of error, Wright argues that he was denied effective assistance of counsel due to his trial counsel's failure to immediately notify the trial court of improper juror communication. Wright's trial began on June 25, 2002, and the jury returned guilty verdicts on July 3, 2002. On July 17, 2002, trial counsel filed a motion for new trial, alleging in part juror misconduct. On August 15, 2002, trial counsel supplemented the motion for new trial with the affidavit of Wright's wife, which detailed an event that allegedly occurred on July 1, 2002, while the jury was on a break. In her affidavit, Wright's wife states that one or more of the jurors overheard a person angrily confront her about when Wright would complete a contract he had entered into with her. There is nothing in the record that indicates when Wright's trial counsel first became aware of the alleged improper juror communication. The motion for new trial indicates that trial counsel needed more time to investigate the allegation of juror misconduct; therefore, it appears that trial counsel had just learned of the incident. Given these representations and the strong presumption that trial counsel acts in a competent manner, we find that Wright has failed to demonstrate that he was denied effective assistance of counsel. Wright's sixth assignment of error is not well-taken.

Fourth Assignment of Error - Sufficiency of the Evidence

{¶ 24} Wright contends in the fourth assignment of error that the trial court erred when it denied his Crim.R. 29 motion for judgment of acquittal. When reviewing the denial of a Crim. R. 29(A) motion, an appellate court must evaluate whether, “the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proven beyond a reasonable doubt.” See *State v. Bridgeman* (1978), 55 Ohio St.2d 261, syllabus. An appellate court reviews a denial of a Crim.R. 29 motion for acquittal using the same standard that is used to review a sufficiency of the evidence claim. See *Carter*, 72 Ohio St.3d at 553. “Sufficiency” of the evidence is a question of law on whether the evidence is legally adequate to support a jury verdict as to all elements of a crime. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. When reviewing the sufficiency of the evidence to support a criminal conviction, an appellate court must examine “the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The 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.” *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶ 25} Wright was convicted of three counts of theft, a violation of R.C. 2913.02(A)(3), and one count of engaging in a pattern of corrupt behavior, a violation of R.C. 2923.32. R.C. 2913.02(A) provides in pertinent part:

{¶ 26} “(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways:

{¶ 27} “* * *

{¶ 28} “(3) By deception.”

{¶ 29} R.C. 2923.32(A)(1) provides:

{¶ 30} “(A)(1) No person employed by, or associated with, any enterprise shall conduct or participate in, directly or indirectly, the affairs of the enterprise through a pattern of corrupt activity or the collection of an unlawful debt.” The indictment alleges that Wright engaged in an illicit enterprise with his father and brother to commit theft.

{¶ 31} At trial, Dr. Michael Felter testified that he and his wife contacted Firelands Kitchen about renovations to their master bedroom and bath and were referred to Wright by his father. Dr. Felter stated that Wright informed him that he and his brother were running the business following his father’s stroke in 1999 and that Wright met with him several times to discuss the design. According to Dr. Felter, in July 2000, he signed a contract and gave Wright a 60 percent down payment of \$9,800. Wright then became increasingly difficult to reach, and the renovations were not proceeding. In December 2000, Dr. Felter went to Firelands Kitchen and insisted that Harry Wright, Oscar Acevedo, and Tom Wright look into the situation. Dr. Felter then learned that there was no copy or record of his contract. While he did not have a copy of the original contract, Dr. Felter had copies of the schematics. When a new contract was drawn on the basis of

the schematics in January 2001, the total cost of the job was determined to be only \$8,260.65. Dr. Felter was given a credit for the difference in the contract price and an additional credit for work Wright was supposed to have done. On February 14, 2001, Dr. Felter learned that Firelands Kitchen had closed for business. Dr. Felter testified that the agreed upon work was never done by Firelands Kitchen and that he did not receive any money back or materials.

{¶ 32} Fred Landis testified he initially gave Wright and his brother a check to refinish his kitchen cabinets. When the work was lagging, Landis sent Wright a certified letter asking for his money back. Wright contacted Landis, and they talked about putting in new cabinets. Landis testified that he signed a contract with Firelands Kitchens for new cabinetry and gave Wright a 60 percent down payment of \$7,440 on October 11, 2000. The cabinets were to be delivered in four weeks. The next month, Landis testified that he received a phone call that made him concerned about whether Wright was going to finish the job. Landis then went to see Wright at Firelands Kitchens and was told there were no problems and that Wright would take care of everything. Landis never received his cabinets or a refund of money.

{¶ 33} Gerald Burton testified that in January 2001, Harry Wright recommended that the Burtons talk to Wright about their kitchen renovations. Wright met with the Burtons several times in January. On February 4, 2001, Wright called the Burtons to see what they had decided and about a week later, the Burtons met with Wright at Firelands Kitchen to sign a contract. Burton refused to make a personal check out to Wright

personally but delivered a bank check payable to Firelands Kitchen on February 12, 2001. Burton testified that he made an appointment with Wright to deliver samples two days later. After Wright failed to show, Burton made several phone calls and stopped by the store twice. The Burtons did not receive their cabinets and their money was not returned.

{¶ 34} Melvin Bird testified that on February 9, 2001, he went to Firelands Kitchen to get his deposit back. He stated that he talked with the father, Harry Wright, who informed him that the business was in bad shape and that there was no money to make a refund and no materials to give him.

{¶ 35} David Ehlert testified that he contacted Firelands Kitchen about new countertops for his kitchen. After Ehlert initially rejected the price quoted, Wright called and said that they could do the work for less money. Ehlert entered into a contract on December 29, 2000, and delivered two checks for a total deposit of \$6,220. Ehlert testified that he repeatedly asked Wright when the countertops would be installed and was always told in a week or two. According to Ehlert, after four months had gone by and Wright had missed about 20 appointments, he went to Firelands Kitchen. Wright told him that Valore Builders was going to buy the business but that he would have Cameo Countertop in Toledo, Ohio do the job. In May 2001, Ehlert called Cameo Countertop and asked when his countertop was going to be delivered. Ehlert was informed that someone had been at his house that day and that Wright was supposed to be there, but had not shown up. Ehlert persuaded Cameo Countertop to return to his house.

Ehlert testified that he then learned that the countertop order was C.O.D. He went to confront Wright, who said he would take care of the bill. On July 10, 2001, a mechanic's lien was placed on the Ehlert residence by Cameo Countertop because Wright had not paid the bill.

{¶ 36} Chuck Kistner, the former owner of Cameo Countertops, testified that Wright came into his store and ordered a Corian countertop for the Ehlert residence. The contract Wright signed stated that the project was being done by Valore Builders and that Wright was one of their designers. The phone number and address on the contract were for Valore Builders. After the countertop was installed in the Ehlert residence, Kistner testified he sent an invoice for payment to Valore Builders. He then talked with someone at Valore Builders and learned that Wright had no relationship with Valore Builders.

{¶ 37} Wright argues that the trial court should have granted his Crim.R. 29 motion for judgment of acquittal because the state did not present any evidence that he personally benefited from the failed contracts and that he had any criminal intent. Wright contends that he was merely doing his job as a salesman, that he turned over the contracts and checks for others to process, and that the only money he took was his salary. According to Wright, the only evidence of criminal intent was the inference that if he had committed theft before as an independent contractor, he must have done so again while employed by Firelands Kitchen.

{¶ 38} Although Wright maintains that the state did not show he had received any personal benefit, personal benefit is not an element of theft; intent is. When the evidence

is construed in a light most favorable to the state, we find that there was sufficient evidence that Wright acted with purpose to deprive Felter, Landis, and Burton of their money and that he engaged in a pattern of corrupt activity. Several witnesses testified that they were told that Wright was in charge of the company. In addition, after taking their money, Wright failed to return calls, missed appointments, and misrepresented when the jobs would be completed and the status of the business. The trial court, therefore, did not err in denying Wright's Crim.R. 29 motion. Wright's fourth assignment of error is not well-taken.

Fifth Assignment of Error - Manifest Weight of the Evidence

{¶ 39} In the fifth assignment of error, Wright challenges his convictions as being against the manifest weight of the evidence. The concept of manifest weight of the evidence differs from that of sufficiency of the evidence. Weight of the evidence indicates that the greater amount of credible evidence supports one side of an issue more than the other. *Thompkins*, 78 Ohio St.3d at 387 quoting Black's Law Dictionary (6 Ed. 1990) 1594. The Ohio Supreme Court has explained the standard to be applied to determine whether a criminal conviction is against the manifest weight of the evidence:

{¶ 40} "When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony." *Id.* citing *Tibbs v. Florida* (1982), 457 U.S. 21, 42.

{¶ 41} To determine whether this is an exceptional case where the evidence weighs heavily against conviction, an appellate court must review the record, weigh the evidence and all reasonable inferences, and consider the credibility of witnesses. *Id.* quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. Only if we conclude that the trier of fact clearly lost its way in resolving conflicts in evidence and created a manifest miscarriage of justice will we reverse the conviction and order a new trial. *Id.*

{¶ 42} In this assignment of error, Wright contends that the jury lost its way because of the prosecutor's use of bad character evidence and because the jury overlooked the fact that Wright was an employee of his father's company.

{¶ 43} The critical issue in this case was whether Wright acted with criminal intent. A person acts with purpose when it is his or her specific intention to cause a certain result. R.C. 2901.22(A). Because intent lies within the privacy of a person's own thoughts and is therefore not susceptible to objective proof, intent is determined from the surrounding facts and circumstances, and persons are presumed to have intended the natural, reasonable and probable consequences of their voluntary acts. *State v. Garner* (1995), 74 Ohio St.3d 49, 60. As defendant's exhibit 2 shows, the contracts for Felter, Landis, Burton, and Ehlert never entered into production, although their checks were cashed immediately. Wright also became difficult to reach after taking money from his supposed clients. He missed scheduled appointments and made a number of misrepresentations. All of this is evidence of his criminal intent and engaging in a pattern of corrupt activity.

{¶ 44} While Wright testified that he simply acted as a salesman and sent the checks and contracts for processing by others, the jury was not required to believe his testimony nor that of his father. Several witnesses, including a former Firelands Kitchen employee, testified that Wright was running the company. “The trier of fact who sees and hears the witnesses is particularly competent to decide ‘whether, and to what extent, to credit the testimony of particular witnesses,’ and thus we must show substantial deference to its determinations of credibility.” *State v. Blaich*, 2d Dist. No. 20007, 2004-Ohio-4259, at ¶12 citing *State v. Lawson* (Aug. 22, 1997), Montgomery App. No. 16288. The credibility of Wright and his father was impeached by their prior convictions. We, therefore, conclude that Wright’s conviction was not against the manifest weight of the evidence.

Seventh and Eighth Assignments of Error - New Trial Motion

{¶ 45} Wright’s seventh and eighth assignments of error concern the denial of his motion for a new trial. In the seventh assignment of error, Wright contends that the trial court erred when it denied his motion and failed to hold a hearing. The eighth assignment of error alleges that he was denied justice because the trial court did not timely rule on his motion.

{¶ 46} Wright moved for a new trial pursuant to Crim.R. 33(A)(1), (2), and (4) and (5) on July 17, 2002.³ In the motion, Wright asked for time to supplement the motion

³Crim.R. 33(A) provides: “A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights:

with affidavits and the trial court granted him until August 12, 2002 to do so. Wright filed the affidavit of his wife on August 15, 2002, and then filed a notice of appeal on August 16, 2002. This court dismissed Wright's appeal in *State v. Wright*, 6th Dist. No. E-02-034, 2003-Ohio-5255 for lack of jurisdiction. The trial court summarily denied the motion for new trial on October 15, 2003.

{¶ 47} In the present appeal, Wright argues that his motion for new trial should have been granted under R.C. 2945.79(B) and (D) which provides:

{¶ 48} “A new trial, after a verdict of conviction, may be granted on the application of the defendant for any of the following causes affecting materially his substantial rights:

{¶ 49} “* * *

{¶ 50} “(B) Misconduct of the jury, prosecuting attorney, or the witnesses for the state;

{¶ 51} “* * *

“(1) Irregularity in the proceedings, or in any order or ruling of the court, or abuse of discretion by the court, because of which the defendant was prevented from having a fair trial;

“(2) Misconduct of the jury, prosecuting attorney, or the witnesses for the state;

“* * *

“(4) That the verdict is not sustained by sufficient evidence or is contrary to law. * * *;

“(5) Error of law occurring at the trial; * * *.”

{¶ 52} “(D) That the verdict is not sustained by sufficient evidence or is contrary to law; * * *.”

{¶ 53} First, Wright contends that he is entitled to a new trial because of the misconduct by the prosecutor when the prosecutor referred to Wright’s pattern of conduct and repeatedly violated Evid.R. 404. Given our decision on Wright’s first and second assignments of error, these arguments fail. Second, Wright also claims he is entitled to a new trial because his conviction was based on insufficient evidence and contrary to law. Our decision on Wright’s first, fourth, and fifth assignments of error is dispositive of this argument.

{¶ 54} Finally, Wright contends that he is entitled to a new trial because of misconduct by the jury and that the trial court erred when it did not hold a hearing on his motion. He also maintains that his conviction should be reversed because he was denied due process since the trial court did not rule on his motion for a new trial for 15 months.

{¶ 55} The decision on whether to hold a hearing on a motion for new trial is within the trial court’s discretion. *State v. Smith* (1986), 30 Ohio App.3d 138, 139. Further, it is well settled that “neither the trial court’s ruling on the new trial motion nor its decision on whether to hold a hearing thereon, will be disturbed on appeal in the absence of a clear

{¶ 56} showing that the court abused its discretion.” *Toledo v. Stuart* (1983), 11 Ohio App.3d 292, paragraph two of the syllabus. “The term ‘abuse of discretion’ connotes more than an error of law or judgment; it implies that the court’s attitude is

unreasonable, arbitrary or unconscionable.” *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 57} Wright contends that his right to a fair trial was materially affected when, during a recess, one or more members of the jury overheard a customer complain that Wright had not finished a contracted job for her. This customer was not one of the victims identified in the current case. The affidavit of Wright’s wife was submitted as evidence of this improper juror communication. While other courts may have held a hearing, we cannot find that the trial court abused its discretion by not holding one under these circumstances. A trial court, when deciding to hold a hearing on a petition for post-conviction relief, may discount self-serving affidavits from the petitioner or his family members. See *State v. Nelson* (Sept. 21, 2000), 8th Dist. No. 77094; *State v. Moore* (1994), 99 Ohio App.3d 748. The affidavit makes conclusory statements that juror number 1 and another juror overheard the argument because they were on the first floor of the courthouse where the confrontation occurred. It also speculates that other members of the jury may have heard the customer complaining at other times during the trial. These bare allegations are not sufficient to show that Wright’s rights were materially affected. Although this court does not condone the substantial delay in ruling on the motion for new trial, Wright’s motion was properly denied and, therefore, Wright was not prejudiced by the delay. Wright’s seventh and eighth assignments of error are not well-taken.

{¶ 58} Having overruled all of Wright's assignments of error, the judgment of the Erie County Court of Common Pleas is hereby affirmed. Pursuant to App.R. 24, court costs are assessed to appellant.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4, amended 1/1/98.

Richard W. Knepper, J.

JUDGE

Judith Ann Lanzinger, J.

JUDGE

Arlene Singer, J.
CONCUR.

JUDGE