

Summary of SC93745, *State of Missouri v. Thomas A. Ess*

Appeal from the Monroe County circuit court, Judge Rachel L. Bringer
Argued and submitted May 7, 2014; opinion issued January 13, 2015

Attorneys: Ess was represented by Richard H. Sindel and Kathryn B. Parish of Sindel, Sindel & Noble PC in Clayton, (314) 721-6040; and the state was represented by Timothy A. Blackwell of the attorney general's office in Jefferson City, (573) 751-3321.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A man convicted of statutory sodomy and attempted child molestation of his stepsons appeals. In a decision written by Judge George W. Draper III, the Supreme Court of Missouri reverses the trial court's judgment and remands (sends back) the case. Joined by one other judge, Judge Paul C. Wilson wrote an opinion concurring in part and dissenting in part.

All seven judges agree that the trial court did not abuse its discretion in ruling the man's motion for a new trial was filed timely and that the evidence was sufficient to support the man's conviction for first-degree statutory sodomy. All seven judges also agree the state did not present sufficient evidence to support the man's conviction for attempted first-degree child molestation.

Five judges agree the trial court abused its discretion in overruling the man's motion for a new trial based on juror nondisclosure. The man was not required to present an affidavit or testimony from the juror in question. The record amply supports a finding that the juror committed misconduct through the intentional nondisclosure of the material fact that the juror formed an opinion about the man's guilt or innocence before deliberations in direct contravention of the trial court's instructions.

In his separate opinion, Judge Wilson would find the trial court did not abuse its discretion in overruling the man's motion for a new trial, in which the man claimed not juror nondisclosure but juror bias against him from the outset of the trial. He would find the trial court did not require the man to present an affidavit or testimony from the juror in question, would give deference to the trial court's superior ability to weigh evidence and find facts, and would find the record amply supports the trial court's conclusion that the man failed to prove his claim that the juror was biased against him at the outset.

Facts: The state charged Thomas Ess with various counts of statutory sodomy, attempted statutory sodomy and attempted child molestation for acts he allegedly committed against his stepsons at various times between 1995 and 2003. Both boys testified at trial, detailing various acts of sodomy. Ess testified, denying all allegations. The jury convicted Ess of two counts of first-degree statutory sodomy, two counts of second-degree statutory sodomy, and one count of attempted first-degree child molestation. Ess filed a motion for a new trial, alleging misconduct by one of the jurors entitled him to a new trial. During a hearing, one juror and one prospective juror testified, but not the juror accused of misconduct. The trial court overruled the motion, finding that Ess failed to present any evidence from the accused juror or any evidence regarding

the context of that juror's statement and that there was no evidence to show whether the juror favored the state or Ess. Ess appeals.

REVERSED AND REMANDED.

Court en banc holds: (1) The trial court abused its discretion in overruling Ess' motion for a new trial based on juror nondisclosure.

(a) The trial court did not abuse its discretion in ruling that Ess' motion for a new trial was timely filed. The circuit clerk was obligated to accept his filing absent some clear prohibition in law, court rule or specific court order. Because his motion for a new trial was timely filed, Ess' juror nondisclosure claim will be reviewed for abuse of discretion.

(b) The trial court misapplied the law when it relied at least in part on language – taken out of context – from this Court's 2001 holding in *State v. Mayes* to determine Ess was required to file an affidavit from juror 3 setting forth facts surrounding juror 3's alleged concealment to support his claim and prove prejudice. *Mayes* holds a defendant alleging juror misconduct must present evidence through testimony or affidavit of any juror or other witness. While juror 3's participation in the proceeding could have aided the circuit court in its fact-finding function and could have provided context to his comment, *Mayes* does not foreclose Ess from proving his claim in the absence of this evidence.

(c) The evidence presented at the hearing does not support the trial court's holding that juror 3 held no bias against Ess. Although prospective juror 26 testified first that juror 3 said one thing and then corrected himself, testifying juror 3 said something else, both phrases convey the same sentiment – that juror 3 believed there was no dispute about how the case should be resolved. Further, although juror 11 testified that he did not hear what juror 3 said, he knew it was related to the case, which is why juror 11 admonished juror 3 not to talk about the case. The state presented no evidence whatsoever and did not impeach either witness's credibility in any meaningful way. The circuit court did not find the witnesses not credible, nor did it find juror 3 did not make the "open and shut" comment. The judgment makes clear the circuit court instead based its decision on other findings – that there was no information about juror 3's mannerism, tone or gestures indicating an undisclosed bias or whether juror 3 favored the state or Ess.

(d) The record amply supports a finding that juror 3 committed misconduct through the intentional nondisclosure of a material fact related to the case – specifically that the juror formed an opinion about Ess' guilt or innocence before deliberations in direct contravention of the trial court's instructions. Whether juror 3 favored the state or the defendant is inconsequential because a predisposition toward either side is improper and grounds for being struck from jury service. Despite being instructed no fewer than three times that he was to be truthful and was prohibited from forming or expressing any opinion about the case, juror 3 disregarded those instructions. Given the extensive record, it is unreasonable that juror 3 might fail to understand from their questions that the parties were probing for prejudice any prospective juror might hold for or against either side. Neither party was aware of juror 3's statement, and both were deprived of the opportunity

to flesh out his thoughts so as to rehabilitate him sufficiently to enable him to serve on the jury. Because juror 3 made his “open and shut” comment after the state concluded its questioning of prospective jurors and defense counsel was about two-thirds through questioning, any purported forgetfulness by the juror of his comment and its implication are unreasonable. Because bias and prejudice are presumed when a juror intentionally withholds material information, a finding of intentional nondisclosure of a material issue is tantamount to a per se rule mandating a new trial.

(2) The state presented sufficient evidence from which a reasonable juror to find Ess committed first-degree statutory sodomy of one of his stepsons either when the boy was about 12 years old or during the four-month window before the boy turned 14. This time frame comported with that charged by the state.

(3) The trial court erred in overruling Ess’ motion for judgment of acquittal on the count of attempted first-degree child molestation because the state failed to present sufficient evidence that Ess attempted to commit this crime against his other stepson as alleged. To prove attempt, the person must take a “substantial step” toward committing the offense. At the time the alleged incident occurred, the offense of first-degree child molestation required skin-to-skin contact by touching underneath the clothing. The evidence adduced at trial, however, was only of touching over clothing. As such, the evidence did not show Ess took a substantial step toward committing first-degree child molestation as it then was defined.

(4) The Court need not review Ess’ remaining claims.

Opinion concurring in part and dissenting in part by Judge Wilson: (1) The author would hold the record amply supports the trial court’s conclusion that Ess failed to prove his juror bias claim. In his motion for new trial, Ess claimed that juror 3 was biased against Ess and failed to disclose this bias when asked. He did not claim juror 3 committed misconduct by drawing a premature conclusion about the case before deliberations. Juror bias and juror nondisclosure are distinct claims, and Ess is entitled to appellate review only of the claim he brought. The fact Ess claims was the subject of the intentional nondisclosure was juror 3’s bias at the outset of the trial. But juror 3 did not admit this fact, nor did Ess prove it. Only one of his two witnesses heard what juror 3 said, but that witness was inconsistent about what words juror 3 used. After a detailed analysis of the evidence, the trial court plainly found that this witness’s uncorroborated and inconsistent testimony was not sufficient to establish Ess’ claim. Even if juror 3 made the “open and shut” comment, there was no evidence as to what juror 3 meant or whether the comment demonstrated bias existing at the outset of the trial as Ess alleged. The principal opinion’s conclusion deprives the trial court of deference due to its superior ability to make factual findings. Further, the trial court did not rely on an incorrect reading of *Mayes* – which it mentions only once – or dismiss Ess’ claim for lack of an affidavit from juror 3; rather, it heard evidence and received written suggestions and argument from both parties before analyzing the evidence and determining it was insufficient to support Ess’ claim. The author would hold the trial court did not abuse its discretion in denying Ess’ claim.

(2) The author would hold the Court should reach – and reject – Ess’ claim that two instructions given to the jury violated his right to a unanimous jury verdict. Because Ess did not raise these

objections at trial or in his motion for a new trial, they should be reviewed – if at all – only for plain error. The two instructions are deficient in not describing particular acts of sodomy Ess allegedly committed against one of his stepsons in the separate time periods included in the charge and in failing to insist that the jury unanimously find that one or more of those acts occurred. But because Ess cannot show the erroneous instructions actually resulted in a miscarriage of justice or manifest injustice, he is not entitled to relief. At trial, neither the state nor Ess invited the jury to distinguish between the many acts described in the evidence. Ess defended the numerous acts collectively by arguing that inconsistencies in the boys' statements should lead the jury to conclude the children were lying and disregard their evidence completely. As such, there is no sound basis to conclude the trial would have ended differently had the instructions detailed the acts and required unanimity on one act per count.

(3) The author concurs in the principal opinion's conclusions that the trial court did not abuse its discretion in ruling that Ess' new trial motion was filed timely and that the evidence was sufficient to support Ess' conviction for first-degree statutory sodomy of one of his stepsons but insufficient to support his conviction for attempted child molestation of the other stepson.