



**ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY**



**STATE OF ARIZONA V. KNUTE ECKHARD KOLMANN
CR-15-0172-PR**

PARTIES:

Petitioner: Knute Eckhard Kolmann

Respondent: State of Arizona

FACTS:

In 2010, Kolmann was charged with and convicted by a jury of ten counts of sexual exploitation of a minor and one count of conspiracy to commit sexual exploitation of a minor. The convictions were based on Kolmann's possession of pictures of young children engaging in sexual acts and his agreement to meet with another person to view similar material. The trial court sentenced Kolmann to consecutive prison terms totaling 155 years. The convictions and sentences were affirmed on appeal.

Kolmann filed a petition for post-conviction relief. The claims arise out of the trial court's decision to excuse a juror during deliberations. After three hours of deliberations, the jury foreperson informed the trial court that one of the jurors needed to speak to the judge about a "personal matter." The judge met with the two defense counsel, the prosecutor, and the juror. Defense counsel waived Kolmann's presence. The juror stated that she felt unqualified "to be in this role." She said she felt she "can't judge anybody." The judge stated to the juror that this was not something that the juror conveyed to the court earlier. The juror replied, "I was wrong." Counsel indicated that they had no questions for the juror and the judge confirmed with the juror that she sought to be excused because she did not feel like she could make a judgment in this particular case.

After the juror left the room, the judge remarked to counsel that he did not know "what to make of" the juror's statement. The defense attorneys stated that they did not have any experience with this type of situation. After discussion with counsel, the court excused the juror. Neither party objected. The court then called the remaining jurors into the courtroom and advised them that an alternate was going to be called to replace the excused juror. The judge stated:

What that means members of the jury is that I am going to bring back the second named person when the alternates were chosen that is Juror No. 1. Essentially she hasn't had the benefit of the discussions with you of what has taken place already within the jury room. So to some extent you are going to have to start over again and involve her in discussions with regard to any individual and all of the counts, generally.

The jurors were released for the weekend and told to report the following Wednesday. The court further instructed the jury not to discuss the deliberations or start deliberating until all 12 jurors were present. The court then called the alternate juror and told her to report on Wednesday.

No additional instructions were given when the jury reconvened on Wednesday. The jury reached their verdicts after deliberating for just over one hour.

As part of the petition for post-conviction relief, Kolmann included an affidavit from the excused juror. She stated that she told the judge that she “did not feel competent to be a juror or to judge people.” While this statement was true, she avowed that she “especially did not want to stay on the jury because [she] was the only one that was not convinced that Mr. Kolmann was guilty. [She] did not want to be the only hold-out and did not want to be the one that ‘hung’ the jury.” The juror also related the following:

7. One of the other jurors gave me advice on what to say to the judge. I do not remember that juror’s name. He told me that if I told the judge that I wanted to get off the jury because I didn’t agree with the rest of them the judge wouldn’t let me go. He told me that if I told the judge that I didn’t feel competent to judge another human-being, the judge was more likely to let me go.

If the jury had taken a vote at the time she was to be excused, the juror stated that she would have voted “not-guilty.”

In the petition for post-conviction relief, Kolmann raised issues of ineffective assistance of counsel and juror misconduct. As to the ineffective assistance of trial counsel claims, Kolmann alleged that trial counsel (1) had failed to sufficiently voir-dire the juror about her reasons for claiming she could not render a verdict, or in the alternative, for failing to argue against her release or move for a mistrial; (2) did not request that the court properly instruct the reconstituted jury, including the requirement under Criminal Rule 18.5(h) that the jury was required to “begin deliberations anew”; and (3) should not have waived his presence during the juror substitution proceedings. With respect to juror misconduct, Kolmann alleged that the conduct of the excused juror and those of the juror who allegedly coached her on how to be excused from the jury raised a colorable claim of juror misconduct.

The trial court summarily denied relief. The trial court found that Kolmann had not raised a colorable claim of ineffective assistance of counsel. First, the court concluded that the decision of whether or not to question the juror or ask for a mistrial is “a pure question of strategy.” In any event, Kolmann had not shown any likelihood that the juror would have changed her answers. Second, the court found that the jury had been adequately instructed pursuant to Rule 18.5, thus the trial counsel or appellate counsel had no basis to raise that issue. In any event, Kolmann could not demonstrate that the result would have been different if a more detailed instruction had been given. Third, the court concluded that counsel’s waiver of Kolmann’s presence during the jury recomposition proceedings was not ineffective nor did Kolmann show any prejudice from the waiver.

As to the claims of juror misconduct, the court found that Kolmann had failed to show that

there was any juror misconduct. Many of the assertions in the juror's affidavit were unsupported by other evidence. The portions of the affidavit attributing statements to another juror were hearsay and could not be considered. Finally, the various allegations in the affidavit were "internally contradictory," thus calling into question the juror's credibility.

Kolmann filed a petition for review in the court of appeals.

The court of appeals granted review but denied relief. To state a colorable claim of ineffective assistance of counsel, Kolmann had to "show both that counsel's performance fell below objectively reasonable standards and that this deficiency prejudiced [him]." *State v. Bennett*, 213 Ariz. 562, 567 ¶ 21, 146 P.3d 63, 68 (2006). The court of appeals found that Kolmann had failed to rebut the presumption that counsel made a tactical decision not to further question the juror and failed to demonstrate prejudice. Further, Kolmann did not argue that trial counsel's failure to object to the jury instruction was without a tactical basis and, in any event, the instruction given by the trial court was adequate. Finally, the court of appeals recognized that it was not good practice for defense counsel to waive the client's presence during the juror substitution proceedings but found that Kolmann did not attempt to show that he was prejudiced by his absence.

With respect to the juror misconduct allegations, the court of appeals agreed with Kolmann that the trial court improperly characterized a portion of the juror's affidavit as hearsay and made premature credibility determinations about the juror's avowals. The court of appeals concluded, however, that Kolmann had not presented a colorable claim of juror misconduct. The juror's answer about why she needed to be excused was not incomplete because she had been instructed not to reveal anything about the deliberations. The court of appeals agreed that a juror's conduct in instructing another juror on what to say to get released from duty would amount to misconduct but Kolmann did not establish any prejudice from this conduct.

ISSUE:

Was it an abuse of discretion for the trial court to summarily dismiss defendant's petition for post-conviction relief?

RULE:

Criminal Rule 18.5(h) provides, in part:

In the event a deliberating juror is excused due to inability or disqualification to perform required duties, the court may substitute an alternate juror, choosing from among the alternates in the order previously designated, unless disqualified, to join in the deliberations. If an alternate joins the deliberations, the jury shall be instructed to begin deliberations anew.

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