

IN THE SUPREME COURT OF OHIO  
COLUMBUS, OHIO

**COPY**

STATE OF OHIO, ) Case No. 08-0045  
)  
Plaintiff-Appellant, ) On Appeal from the Ashtabula  
-vs- ) County Court of Appeals,  
) Eleventh Appellate District  
SONNY HATFIELD, )  
) Ashtabula County Court of Appeals  
Defendant-Appellee. ) Case No. 2006-A-0033

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**MEMORANDUM IN RESPONSE TO APPELLEE'S CROSS-APPEAL**

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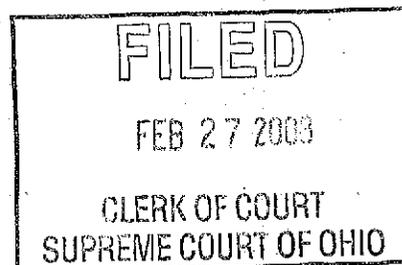


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PROPOSITION OF LAW

A SPECIAL JURY INSTRUCTION WAS DELIVERED IMMEDIATELY AFTER THE DEFENSE RESTED ITS CASE THAT INFORMED A JURY THAT THE ADVOCATE WHO USES AN EXPERT WITNESS MUST ESTABLISH THE UNDERLYING FACTS THAT HE BASES HIS OPINION ON BY A PREPONDERANCE OF THE EVIDENCE VIOLATES AN ACCUSED'S FIFTH AMENDMENT RIGHTS WHEN AN EXPERT WITNESS WHO TESTIFIES ON HIS BEHALF BASES HIS OPINION UPON A CONVERSATION THAT HE HAD WITH HIM AND THE ACCUSED EXERCISES HIS CONSTITUTIONAL RIGHT NOT TO TESTIFY.

"For purposes of appellate review, 'the decision to issue a particular jury instruction is within the sound discretion of the trial court.'" *State v. Nichols*, 11<sup>th</sup> Dist. App. No. 2005-L-017 at ¶28, 2006-Ohio-2934 citing *State v. Huckabee*, 11<sup>th</sup> Dist. App. No. 99-G-2252. A trial court's decision to provide the jury with a specific instruction will not be reversed absent an abuse of discretion. *Id.* "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." *Id.* quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

This Honorable Court has "observed that a court's jury instructions must be considered in context of the instructions as a whole." *Id.* citing *State v. Price* (1979), 60 Ohio St.2d 136, 141. A single sentence or phrase contained in the jury instruction should not be looked at in isolation. *State v. Shaffer*, 11<sup>th</sup> Dist. App. No. 2001-T-0036 at ¶52, 2003-Ohio-6701 citing *State v. Norwood*, 11<sup>th</sup> Dist. App. No. 2000-L-146. Jury instructions are viewed in their entirety to determine if they contain prejudicial error. *Id.* Reversal may not be warranted by an inappropriate jury instruction where it did not materially affect the outcome of the case. *Id.*

Appellant argued on appeal that the trial court abused its discretion when instructing the jury that “in evaluating the opinion of any expert witness, you must consider whether the facts on which the expert based their opinion have been established by, at least a preponderance of the evidence.” (T.p. 524.) Before giving the disputed instruction, the trial court informed the jury that more instructions would be given after closing arguments. (T.p. 524.) The jury was first made aware of a defendant’s constitutional right not to testify and the fact that guilt cannot be inferred from a defendant’s failure to testify. (T.p. 524.) The court explained that the defense expert based his opinions on statements from defendant that were not in evidence, which is an appropriate instruction as Evid. R. 703 provides that an expert cannot rely on evidence not admitted at the hearing. (T.p. 524.) The court further explained that the jury must decide what weight to give to the expert opinion and, once again, told the jury that they must not consider this as an inference of guilt on the defendant. (T.p. 525.) The court clearly instructed the jury of the standard of reasonable doubt. (T.p. 556-557.) The court even explained the constitutional right of a defendant not to testify for a third time. (T.p. 561.)

The Eleventh District Court of Appeals found no error, stating that “[t]his language, by itself, would seem to indicate that the trial court erred by including an instruction that may cause ‘the jury to confuse the burden of proof necessary for defendant’s conviction.’ However, the statement on which appellant’s expert relied, was not a fact ‘necessary for his conviction.’” *State v. Hatfield*, 11<sup>th</sup> Dist. No. 2006-A-0033 at ¶130.

Viewed in totality, the jury instructions were sufficient, “notwithstanding the potentially problematic directive relating to the expert’s testimony.” *Id.* at ¶131. The trial court did not abuse its discretion, as the court’s attitude was not unreasonable, arbitrary or unconscionable.

The Eleventh District Court of Appeals properly decided this issue. Accordingly, appellee's proposition of law is without merit.



**CONCLUSION**

For the foregoing reasons, the State of Ohio respectfully requests this Honorable Court to decline jurisdiction over this issue and affirm the decision of the Eleventh District Court of Appeals with respect to this issue.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true copy of the foregoing Memorandum in Support of Jurisdiction has been served via ordinary U.S. Mail, postage prepaid, this 26<sup>th</sup> day of February, 2008, upon Joseph A. Humpolick, Ashtabula County Public Defender, at 4817 State Road, suite 202, Ashtabula, Ohio 44004

**Shelley M. Pratt (0069721)**

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