

NO.

09-0113

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
CA 89986

STATE OF OHIO,

Plaintiff-Appellee

-vs-

NICHOLAS ROBINSON,

Defendant-Appellant

MEMORANDUM IN SUPPORT OF JURISDICTION

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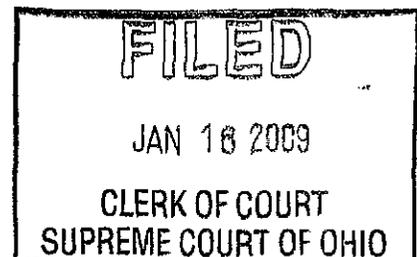


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EXPLANATION OF WHY LEAVE TO APPEAL SHOULD BE GRANTED IN THIS FELONY CASE

This is a case which presents significant issues to this Court regarding the proper role of a trial court when the State accidentally presents erroneous information to a jury, the limits on a trial court in instructing the jury regarding that erroneous testimony, and the circumstances under which a trial court may properly close a courtroom to the public during trial. The case involves the following Propositions of Law:

Proposition of Law No. I: A trial court should grant a mistrial when extensive, erroneous, and potentially confusing testimony is presented to a jury about the wrong drugs, and a trial court may not step out of its neutral role and explain the mistake to the jury rather than requiring the State to explain its own mistake through the testimony of witnesses.

Proposition of Law No. II: A trial court may not close a courtroom to the public in violation of a defendant's constitutional rights in order to protect the identity of an informant when the identity of the informant is already known, and therefore no overriding interest is served by the closure.

With respect to the first issue, a mistrial should be granted where the first witness in a trial accidentally testifies about something completely in error, and which would potentially confuse the jury. A failure to grant the motion for mistrial violates a defendant's Due Process rights. In the case at bar, the first witness for the State testified about analyzing drugs that the prosecutor later realized had nothing to do with the case in trial. The case at trial was also a drug case. The defense, fearing the jury would be confused, moved for a mistrial.

Rather than granting the motion, and instead of permitting the State to attempt to rectify its own error through witness testimony, the trial court chose to instruct the jury for page after page in the transcript, explaining the State's mistake at great length, and, in essence, vouching for the integrity, competence, and general reliability of the State's witnesses. This is the proper role of the

State in such a situation, not that of the trial court. In so doing, the trial court abandoned its proper role of neutrality and assisted the State. The defense concern about potential confusion was shown to be legitimate when even the trial court erroneously named the wrong drug while instructing the jury.

This case would allow this Honorable Court the opportunity to stress to the trial courts of Ohio that a mistrial should be granted where there is a great danger of jury confusion due to such an unusual circumstance arising. Petitioner-Appellant submits that a trial court must remain neutral at all times. When the State presents testimony that it then realizes is erroneous, it is the role of the State to attempt to correct its own error, not that of the trial court.

It must be emphasized to the trial courts of the State of Ohio that strict neutrality, in fact and in appearance, is paramount, especially in a jury trial. The jury in the case at bar saw the trial court assist the State by explaining the State's mistake in terms that assisted the state and minimized Petitioner's ability to question the competence, reliability, and /or integrity of the State and its agents. There is no case law directly on point with this issue in Ohio, as the Eighth District correctly pointed out in its opinion. Even if the trial court was correct in overruling the motion for mistrial, it greatly overreached and abandoned its proper role of neutrality by instructing the jury to disregard the testimony in its entirety, to not hold the mistake against the State or its witnesses, and to not consider the testimony for any purpose.

At oral argument in the Eighth District, the question arose as to the source for any authority for a trial court to provide such an explanation to the jury, and no determinative answer was forthcoming from the State. The Eighth District's opinion does not provide any answer either. In fact, the opinion acknowledges the issue, but does not directly address it. This case provides the

Ohio Supreme Court the opportunity to outline the limits on a trial judge in addressing the jury in such situations.

With respect to the second issue, Petitioner submits that the concept of open, public trials is a fundamental and essential part of the fabric of the American system of justice. There has to be a compelling reason for such an extraordinary measure, and such a basis does not exist where the information purportedly being protected by the closure is already known. In an age where the United States Supreme Court must grapple with the idea of non-public trials in the context of national security, it is incumbent upon our judicial system to hold the line and prevent the erosion of our precious constitutional rights. In the case herein, in what one might characterize as a common, run-of-the-mill drug and gun case, there was no compelling reason to justify the court's actions in excluding the public from even a portion of the testimony, yet it chose to do so. This Court's resources will be well invested in the instant case.

STATEMENT OF THE CASE AND OF THE FACTS

Petitioner-Appellant Nicholas Robinson (hereinafter "Petitioner") was indicted by a Cuyahoga County Grand Jury on a number of drug offenses and a weapons offense. There were duplicate counts, and several of the counts were renumbered when some counts were dismissed.

Petitioner was convicted on May 8, 2007, following a jury trial. He was convicted in the first count with possession of 100 or more grams of crack cocaine. In Counts 2 and 3 he was convicted of Drug Trafficking, the drug involved being 100 or more grams of crack cocaine. Counts 1, 2, and 3 each contained a major drug offender specification and a one year firearm specification. Counts 2 and 3 also contained a juvenile specification. These three counts concern a transaction between

Petitioner and an informant on December 19, 2006.

Counts 4 and 5 concern items allegedly found in Petitioner's vehicle on the same date. In Count 4 he was convicted of drug trafficking of 10 to 25 grams of crack cocaine with a juvenile specification and a one year firearm specification. In Count 5 he was convicted of possession of crack cocaine in an amount between 10 and 25 grams. In Count 6 he was convicted of having a weapon while under disability with one and three year firearm specifications.

Petitioner was immediately sentenced to an aggregate sentence of 33 years.

The first witness called by the State at trial was Scott Miller, a scientific examiner for the Cleveland Police Department's forensic laboratory. He testified that he tested several items in relation to this case: he found one substance to be 1.24 grams of heroin, another to be .71 grams of marijuana, and found white powder residue on a portable scale to be positive for cocaine.

The next morning, it developed that, due to the Cleveland Police Department assigning the same report number to two different cases' reports, Miller's testimony had been about the wrong drugs. The drugs he had testified about pertained to an entirely unrelated case. Only the scale was related to the instant case. The State requested that Miller's testimony be stricken and the jurors be given a curative instruction.

The defense moved for a mistrial because of the unfair prejudice to Petitioner this situation presents and the danger of the jury being confused when told that most of the testimony it had heard to that point in the trial was about a different case. The defense also renewed its motion for mistrial based on the State's placing a burden on the defense to disprove the lab results. The trial court denied the motion.

The trial court instructed the jury that the testimony about the heroin and the marijuana was

stricken from the record. The court also explained in detail to the jury how the mistake had been made. The explanation went on for approximately five pages of the transcript.

Kristin Koeth, a drug analyst from the Cleveland Police Department's forensic laboratory, testified that she had analyzed and weighed 4 bags of suspected narcotics (State's Exhibit 7) and found them to be crack cocaine with a total weight of 23.74 grams. She did the same with State's Exhibit 8 and found it to be 124.84 grams of crack cocaine. The bags were not tested for fingerprints.

Detective Marc Bottone of the Cuyahoga County Sheriff's Department Narcotics Unit testified that he had been assigned to work with the Cleveland Police Department's Narcotics Unit. On December 19, 2006, he and his partner, Detective Nguyen, met with Detective Frey of the Brooklyn Police Department to plan a controlled purchase of 4½ ounces of crack cocaine. The informant wore a digital recorder/transmitter and was given buy money; the officers monitored on a receiver. A recording was then played for the jury of the telephone conversation between the informant and a male setting up a drug deal. Bottone identified the voices heard in the ensuing phone conversation as being those of the informant and Petitioner. A controlled purchase of drugs then took place at a predetermined location in a gray SUV, but the police could not observe what happened inside the vehicle because the windows were tinted. The informant got out of the vehicle and eventually turned over drugs to the officers.

The vehicle's license plate came back to a Nicholas Robinson. Bottone and other officers followed the vehicle to 2041 West 93rd Street. The gray SUV pulled into the driveway; marked units attempted to surround it, but the driver ran through the back yard and was not apprehended. A female juvenile was in the SUV. A loaded handgun was found in the backyard. Another loaded

handgun (State's Exhibit 4) on the person of the juvenile female passenger.

Bottone and his partner met with Petitioner a couple of weeks later after he was arrested. He denied having been in the vehicle on December 19th. He said that his car had been stolen and that his mother had reported it stolen. In photos it was apparent that the radio had been ripped from the dashboard. Bottone was unable to locate such a theft report. The police made no effort to ascertain the owner of the phone called by the informant.

A hearing was then held as to whether the courtroom should be closed to the public during the informant's testimony; the court elected to close the courtroom.

The informant was referred to as "Jamal." He had several prior convictions and had been to prison three times. He also had a number of pending charges, and therefore elected to work with the police in exchange for consideration on his cases, although he initially testified that he was doing it to be a good citizen. On December 19, 2006, he made recorded phone calls to Petitioner, and then met with him while wearing a recorder/transmitter. The transaction took place in Petitioner's SUV. "Jamal" claimed that during the transaction, Petitioner put the black handgun on his lap. He got out of the vehicle and turned the purchased drugs over to the police. The informant was permitted to testify over objection to what his relatives had allegedly told him about people looking for him at his home.

Lynda Kimble, a fingerprint examiner for the Cleveland Police Department, examined the 9mm handgun (State's Exhibit 5), the clip, and the ammunition and did not locate any fingerprints on it. She likewise failed to locate any fingerprints on the scale (State's Exhibit 3).

Detective Chris Frey of the Brookpark Police Department testified that he had arrested Jamal for drug trafficking in December of 2006. Jamal agreed to assist the police in exchange for some

consideration on his pending cases, although there was no specific promises made. Frey testified about what the informant had told him about the drug-related activities of Petitioner. They took Jamal to a location and dropped him off, picking him up at a predetermined location after the deal was made. Jamal turned a bag of crack cocaine over to him. The detective was then permitted to testify as to what the informant had told him during debriefing.

The gray SUV in which the transaction had taken place had pulled into the driveway at 2041 W. 93rd when the driver bailed out. Petitioner was listed as a black male 6 foot 3 inches tall and 177 pounds. The two black males arrested that night in the house at that address were Rayshawn Robinson, who was 6 foot 2 and 175 pounds, and Ward Fisher, who was 6 foot 1 and 181 pounds. There were also drugs found in the house.

The juvenile female in the SUV had indicated through counsel that she would invoke her Fifth Amendment rights should she be called upon to testify. The State therefore requested and the court granted her transactional immunity and ordered her to testify.

She testified that she understood that subsequent to her testimony, all charges against her would be dropped. On December 19, 2006, she was riding around with Petitioner. The only firearm in the vehicle was a small chrome gun. She had seen the other gun, State's Exhibit 5, in Petitioner's possession once before. He got a call from a guy named George and they went to the West side to conduct a transaction. The transaction took place in the vehicle, but she did not pay attention to it, other than to say that there was an exchange of money for crack and that the money was counted. There was unsold crack in the armrest under the cup holder. She was shown a photo of a jacket in the back seat of the vehicle and identified it as Petitioner's jacket. After George got out of the vehicle, Petitioner drove off around the corner. They pulled into a driveway and Petitioner got out

and ran. She had the .25 caliber chrome gun in her pocket when she was arrested. The black 9mm was not in the SUV that night.

Detective Vu Nguyen of the Cleveland Police Department's Narcotics Unit outlined the procedure for setting up the controlled purchase of crack cocaine. He testified that, after the transaction, the suspect vehicle drove past him in the opposite direction and he was able to identify Petitioner as the driver. Nguyen checked the suspect vehicle after it was abandoned by the driver and saw money all over the floor on the passenger side, drugs on the passenger seat, and drugs in the console under the cup holder. The money was not copied, photographed, or checked for prints after it was recovered. A coat was found in the back yard, and another coat was found in the back seat of the vehicle. The detective was then permitted to testify that the female had identified photos of the males in the house.

At the close of the State's case a stipulation was placed on the record as to journal entries indicating that Petitioner had prior convictions for felonies. The State then rested. The State moved to dismiss Counts 4 and 5, which pertained to heroin and a number of counts were then renumbered. Petitioner moved for a judgment of acquittal pursuant to Crim.R.29; the motion was denied.

The first witness called by the defense was Latiha Davis. She lives at 2041 W. 93rd, and is the mother of Petitioner's children, although they are no longer together as a couple. On December 19, 2006, she had borrowed his SUV to go shopping. When she was finished she left the keys in her unlocked house and the SUV in the driveway. She left the house unlocked because her cousin, Rayshawn Robinson, was coming to get some things from the house. When she arrived home later that night there were a number of police cars there. The juvenile female had been at the house before with Rayshawn Robinson and Ward Fisher.

Petitioner testified in his own defense. He was arrested on January 22, 2007, when he reported to his parole officer. He had not known there was an outstanding warrant. He had two vehicles at the time, but rarely drove the gray Suburban. He was planning on giving it to his children's mother. On the morning of December 19 he had let Latiha use the Suburban. He did not see the vehicle again.

Petitioner denied being part of any drug transaction on December 19. He knew the informant from having been in jail together. They had argued in jail, and once both were out of jail they had a disagreement over a common girlfriend. Petitioner stated that he had been on the east side at his mother's house, where he lived, all day. He has never owned a black coat with fur trim, nor owned either of the firearms presented at trial. He had no connection to any of the drugs, and had never used the cell phone presented by the State. Petitioner denied that it was his voice on the tape.

Petitioner testified that he had tried to report his vehicle as stolen on December 20, but did not have the VIN or the plate number. Latiha Davis had told him that the police had taken the vehicle, but he did not believe her and therefore tried to report it as stolen. Petitioner denied telling the detectives that he could potentially make large drug buys for them to help himself out.

Petitioner's renewed motion for acquittal pursuant to Crim.R.29 was overruled.

The State called Detective Mark Bottone as a rebuttal witness. He testified that, shortly after he was arrested, Petitioner had stated that he had major drug connections. In another conversation a month or two before trial, Petitioner had provided the first names of some individuals, a phone number, and descriptions of vehicles.

Detective Nguyen was then recalled to the stand. He testified that the Cleveland Police Department will accept a stolen car report even if the owner does not know the VIN.

Following his conviction and sentence, Petitioner appealed to the Eighth District Court of Appeals, raising, among others, the issues presented herein. The Eighth District overruled Petitioner's Assignments of Error and affirmed his conviction in *State v. Robinson* (Nov. 13, 2008), Cuyahoga County App. No. 89986, unreported.

ARGUMENT

Proposition of Law No. I: A trial court should grant a mistrial when extensive, erroneous, and potentially confusing testimony is presented to a jury about the wrong drugs, and a trial court may not step out of its neutral role and explain the mistake to the jury rather than requiring the State to explain its own mistake through the testimony of witnesses.

As to Proposition of Law No. I, the trial court erred and abused its discretion in denying Petitioner's motion for a mistrial after the State's first witness testified at length about the wrong drugs, violating Petitioner's Due Process rights under the Fifth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution. The trial court further erred and violated Petitioner's Due Process rights in explaining the State's mistake to the jury. The first witness for the State testified as to analysis and weights of heroin and marijuana, as well as about testing a portable scale. The following day, the State announced that the heroin and marijuana were actually part of an unrelated case. The defense moved for a mistrial, but the court denied that motion, and instead instructed the jury to disregard most, but not all, of the testimony. In the process, the trial court explained to the jury about the clerical mistake made within the police department leading to the mixup.

The trial court usurped the role of the prosecutor in delivering the explanation. The State's agents caused the mixup, the State put the witness on the stand, asked about the wrong drugs, marked the wrong drugs and lab reports as exhibits, and let the witness complete his testimony.

Once the mistake was discovered, it was the State's role to explain this to the jury through witnesses, not the court's role. In trying to clear this up for the State, the court did its best to minimize any negative impact to the State. In so doing, the court stepped out of its proper impartial role and assisted the prosecution to the detriment of the defense.

It is not the court's role to clear up mistakes by the State. The defense could not now question the competence, reliability, and credibility of the State's witnesses and the evidence presented. Once the trial court intervenes, explains to the jury at great length that mistakes are uncommon in the police department but do occur, and that the jurors should disregard the testimony, any questioning by the defense on this subject matter (to the extent it is even permitted) is completely undermined and deprives the defendant of a fair trial.

If a witness for the State makes a mistake in his testimony, it is the job of the prosecutor to correct it by recalling that witness to explain or by calling other witnesses to explain. It is not the court's proper role to intervene and fix the State's mistake.

A mistrial should have been declared once the mixup was discovered, thereby obviating any need for the State to clear anything up. Telling a jury to disregard most, but not all, of the testimony of the very first witness is not realistic. This can only engender confusion in a trial such as this, where there was this erroneous testimony about heroin and marijuana, there was testimony about drugs being sold, testimony about drugs in the vehicle, and testimony about drugs, including heroin, being found in a house. Even the court wound up being somewhat confused, as evidenced by an error (apparently not caught by counsel) in instructing the jury. The trial court referred to the drugs in Count 4 as being heroin, when crack cocaine was in fact the proper drug on that count.

It is apparent that a mistake was made on the part of the police department that was not

caught by the officers or by the prosecutor until after the mistaken testimony was in front of the jury. A mistrial should have been declared at that time, rather than proceeding with trial with the inherent confusion caused by the State's mistake. The trial court stepped out of its proper role in explaining the mistaken testimony to the jury; that was the State's job. This case should have been remanded for a new trial. Instead, the Eighth District simply affirmed with little discussion, stating that granting or denying a motion for mistrial is within the trial court's discretion, and failed to address the impropriety of the trial court's comments to the jury about the situation and how those lengthy comments and instructions to the jury affected the progress and outcome of the trial.

Proposition of Law No. II: A trial court may not close a courtroom to the public in violation of a defendant's constitutional rights in order to protect the identity of an informant when the identity of the informant is already known, and therefore no overriding interest is served by the closure.

As to Proposition of Law No. II, the trial court erred and abused its discretion in closing the courtroom to the public during the testimony of the informant. By so doing, the trial court violated Petitioner's rights under the Sixth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, as well as his rights under the Ohio Constitution, Section 10, Article I, both of which provide for an open, public trial.

A hearing was held during which a police officer was permitted to testify to what amounted to hearsay as to threats made to the informant by unknown parties. The officer testified that the informant told him that some family members had told the informant that some possibly armed people had been looking for him. There had also allegedly been a threatening phone call from a female.

Any allegations of threats were uncorroborated. The court closed the courtroom ostensibly

to protect the informant's identity. Of course, the informant's identity was already known to whomever wanted to threaten him. If people were looking for him and calling him, then they obviously know who he is. And, of course, if Petitioner really had been present and participating at the transaction, as the State maintains, then he already knew the informant's identity.

A defendant has a right to an open, public trial. This right can only be set aside when compelling conditions mandate. In this case the trial court deprived Petitioner of his Sixth Amendment right to a public trial by closing the courtroom during the testimony of the state's confidential informant. The Eighth District Court of Appeals has previously addressed this issue in *State v. Washington* (2001), 142 Ohio App.3d 268, reversing a conviction notwithstanding the overwhelming evidence of Washington's guilt because of the violation of the defendant's right to a public trial.

The Sixth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, guarantees the right of the accused to a public trial. This protection is also contained in the Ohio Constitution, Section 10, Article I. In *Waller v. Georgia* (1984), 467 U.S. 39, 45, the United States Supreme Court set forth the following four-prong test which courts must use to determine whether closure of the courtroom is necessary:

“(1) the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, (2) the closure must be no broader than necessary to protect that interest, (3) the trial court must consider reasonable alternatives to closing the proceeding, and (4) it must make findings adequate to support the closure.” *Id.*, 467 U.S. at 48, 104 S.Ct. at 2216, 81 L.Ed.2d at 39.

Open trials are strongly favored and, in order to justify closure, a trial court must “require persuasive evidence of serious risk to an important interest.” *Bowden v. Keane* (C.A.2, 2001), 237 F.3d 125, 129 (emphasis added), quoting *Ayala v. Speckard* (C.A.2, 1997), 131 F.3d 62, 70 (*Ayala*

III). "The mere possibility of prejudice, however, even when such important interests are at stake, is not tantamount to a substantial probability of likely prejudice and cannot justify abridging * * * [the defendant's] constitutional protections in the case at hand." *Ayala v. Speckard* (C.A.2, 1996), 89 F.3d 91, 95 (*Ayala* I). As the Second Circuit Court of Appeals stated in *Ayala* I:

"The first prong of the *Waller* test requires that before a courtroom be closed to the public, the party seeking the closure must present evidence of an 'overriding interest that is likely to be prejudiced.' Id. Such a closure may not, however, be predicated upon the mere possibility that an interest will be prejudiced, see *United States v. Doe*, 63 F.3d 121, 130 (2d Cir.1995); rather, the Supreme Court has made clear that there must be a 'substantial probability' that the interest in question will be prejudiced by open testimony, see *Press-Enterprise Co. v. Superior Court* [of California], 478 U.S. 1, 14, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986) ('*Press-Enterprise I*'). Moreover, the burden is upon the party seeking closure to establish the existence of a substantial probability of prejudice. See *Doe*, 63 F.3d at 130." (Emphasis added.) Id. at 94.

The state bears a heavy burden when seeking to exclude relatives of a defendant from trial. See *Vidal v. Williams* (C.A.2, 1994) 31 F.3d 67 (the trial court committed reversible error when it excluded the defendant's parents). See, also, *Brown v. Kuhlmann* (C.A.2, 1998), 142 F.3d 529, 538 ('the Supreme Court has demonstrated a 'special concern for assuring the attendance of family members of the accused' "), quoting *Vidal*, 31 F.3d at 69, citing *In re Oliver* (1948), 333 U.S. 257, 271-272, 68 S.Ct. 499, 506-507, 92 L.Ed. 682, 693-694, and fn. 29

Further, "[t]he violation of the constitutional right to a public trial is a structural error, not subject to harmless error analysis." *Bell v. Jarvis* (C.A.4, 2000), 236 F.3d 149, 165, citing *Neder v. United States* (1999), 527 U.S. 1, 8; *Waller*, supra, 467 U.S. at 49-50.

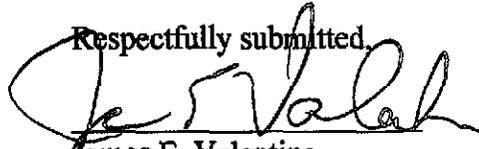
One must also consider the effect closing the courtroom will have upon a jury. Jurors cannot help viewing a defendant as a potentially dangerous figure when such an extraordinary measure is taken.

Based upon the foregoing, it is clear that the trial court abused its discretion and violated Petitioner's rights when it ordered the closure of the courtroom during the informant's testimony. The informant's identity was already known to those who cared, thus there was no overriding interest that was likely to be prejudiced. In essence, the horse was already out of the barn. The informant's identity was known, so there was no point to closing the courtroom to protect his identity. This case should have been remanded to the trial court for a new trial.

The Eighth District reviewed the trial court's findings, and simply stated that because there were escalating threats, the trial court did not abuse its discretion. The appellate court did not even mention the question of what purpose or interest was being served by closing a courtroom ostensibly to protect the identity of an informant whose identity is already known. It simply makes no sense and serves no purpose to close a courtroom to conceal that which is already known. The testimony of the officer regarding threats to the informant, that people had been at his home threatening him and calling him with threats, all of which was hearsay, made clear that the informant's identity was already known to those who might wish to harm him if one assumes that these events had actually happened, as the prosecutor and the trial court did. This begs the question: why is the courtroom then being closed to the public? Isn't the horse already out of the barn? Why then must the defendant's right to an open, public trial be violated?

The trial court did indeed abuse its discretion in ordering the closure of the courtroom for the testimony of the informant, and the case law, the Ohio and United States Constitutions, and common sense all mandate that this case be reversed for a new trial. This Honorable Court can send a message to the trial courts of Ohio and to the public that a defendant's right to an open and public trial should only be obviated in rare circumstances, which was not the case here.

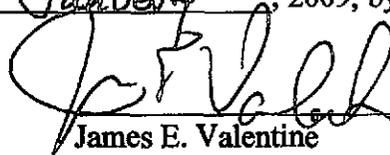
Respectfully submitted,



James E. Valentine
Counsel for Petitioner-Appellant

SERVICE

A copy of the foregoing Memorandum in Support of Jurisdiction was served upon William D. Mason, Cuyahoga County Prosecutor, The Justice Center, Ninth Floor, 1200 Ontario Street, Cleveland, Ohio 44113 this 15th day of January, 2009, by hand delivery.



James E. Valentine

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 89986

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

NICHOLAS ROBINSON

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-490664

BEFORE: Calabrese, J., Cooney, P.J., and Boyle, J.

RELEASED: November 13, 2008

JOURNALIZED: DEC - 2 2008

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**FILED AND JOURNALIZED
PER APP. R. 22(E)**

DEC 2 - 2008

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY *[Signature]* DEP.

**ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED**

NOV 13 2008

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY *[Signature]* DEP.

CA07089986

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED

ANTHONY O. CALABRESE, JR., J.:

Defendant Nicholas Robinson (appellant) appeals his convictions for various drug related offenses and his accompanying 33-year prison sentence. After reviewing the facts of the case and pertinent law, we affirm.

I.

On December 19, 2006, Cuyahoga County sheriff department detective Marc Bottone and Cleveland police detective Vu Nguyen worked with Brooklyn police detective Chris Frey to plan a controlled purchase of 4.5 ounces, or one eighth of a kilogram, of crack cocaine from appellant. The officers were also working with a confidential informant "Jamal" who was given \$3,300 of marked buy money and wired with a digital surveillance device. A cell phone conversation was recorded between Jamal and appellant during which they set up the transaction.

Shortly after the phone call, Jamal waited near West 95th and Macon streets in Cleveland, and appellant arrived in his gray SUV with Ohio license plate number DVS 9854. Jamal got in the rear seat of the SUV behind the driver. Although the officers were clandestinely watching Jamal, they could not see into the back of the SUV because it had tinted windows.

According to Jamal, appellant was in the driver's seat of the SUV. Jamal and appellant negotiated a \$3,250 price for the drugs, which was \$50 less than

the police anticipated. Appellant took chunks of crack cocaine from a compartment in the center console of the vehicle, weighed 4.5 ounces of the drug using a scale, and put it in a plastic grocery bag. Jamal noted that appellant had a black 9 mm handgun on his lap during the transaction. Jamal also saw a flash of a silver gun on the female passenger. After Jamal got out of the vehicle, he gave a brownish plastic bag with 124.84 grams of crack cocaine in it and the \$50 left over from the buy money to the officers.

The officers followed the SUV to 2041 West 93rd Street in Cleveland. Officer Nguyen, who was parked in an unmarked car, testified that he identified appellant driving the vehicle immediately after the transaction took place. The driver fled before the police surrounded the vehicle; however, a female juvenile, F.G., was in the front passenger seat. A loaded .25-caliber chrome handgun was found in F.G.'s front pocket, and four small baggies containing 23.74 grams of crack cocaine were found on the front seat and in the center console of the vehicle. Officer Nguyen recovered the buy money scattered on the passenger floor of the vehicle. There was also a scale and an envelope with the words "money makers" and several numbers on it. Police recovered a loaded 9 mm Hipoint firearm in the backyard of the 2041 West 93rd Street property. Police did not apprehend appellant that night.

According to F.G., on December 19, 2006, she was riding with appellant in his SUV when appellant sold approximately four ounces of crack cocaine to the informant for approximately \$3,200. F.G. testified that appellant kept the drugs in the armrest area between the driver's and passenger's seat. F.G. identified the scale and the plastic bag that were used during the transaction that night. F.G. also identified the envelope found in the vehicle, stating that she wrote names and numbers on it to keep track of how much money appellant made from selling crack cocaine.

F.G. further testified that after the transaction, appellant pulled the SUV into the nearby driveway of Latiha Davis, who is the mother of appellant's children, and ran, "[b]ecause he knew he got set up." Immediately after this, the police arrived and arrested F.G.

On January 22, 2007, police arrested appellant when he reported to his parole officer. On February 1, 2007, appellant was charged with possession of crack cocaine exceeding 100 grams, in violation of R.C. 2925.11; two counts of trafficking in crack cocaine exceeding 100 grams, in violation of R.C. 2925.03; two counts of trafficking in crack cocaine 10 to 25 grams, in violation of R.C. 2925.03; and having a weapon while under disability, in violation of R.C. 2923.13. He was also charged with major drug offender, firearm, and committing-an-offense-within-100-feet-of-a-juvenile specifications.

On May 8, 2007, a jury found appellant guilty of all counts, and the court sentenced him to 33 years in prison.

II.

In his first assignment of error, appellant argues that "the trial court erred and abused its discretion in denying appellant's motion for a mistrial after extensive testimony was offered about the wrong drugs and erred in explaining the mistake to the jury."

In the instant case, the state's first witness was Cleveland police officer Scott Miller, who testified about evidence bags of heroin and marijuana found as evidence at the scene of a crime. Subsequent to Miller's testimony, however, the prosecutor realized that this was evidence from a different case and had nothing to do with appellant. The mistake was traced to the Cleveland Police Department, who inadvertently used the same report number for these drugs as the crack cocaine that appellant is charged with possessing and trafficking.

The prosecutor requested that the court strike the testimony and give the jury a curative instruction. Defense counsel, on the other hand, requested a mistrial, arguing that appellant was prejudiced by testimony relating to drugs that were not evidence in the instant case. The court denied defense counsel's request for a mistrial, struck the testimony regarding the wrong drugs,

explained the mistake to the jury, and gave them instructions to disregard that evidence and testimony.

“The granting or denial of a motion for mistrial rests in the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion.” *State v. Treesh* (2001), 90 Ohio St.3d 460, 480. It is only necessary to grant a mistrial when a fair trial is no longer possible. *State v. Franklin* (1991), 62 Ohio St.3d 118, 127. “Curative instructions have been recognized as an effective means of remedying errors or irregularities which occur during trial.” *State v. West*, Cuyahoga App. No. 82579, 2003-Ohio-7067. Additionally, a jury is presumed to follow the court’s cautionary or curative instructions. *State v. Loza* (1994), 71 Ohio St.3d 61.

In the instant case, appellant argues that “[t]he trial court usurped the role of the prosecutor” by explaining the mistake to the jury. Appellant further argues that the state should have corrected its own mistake by calling witnesses to explain the mixup, and the jury should have been allowed to consider all the testimony. Appellant cites no legal authority to support this argument. A careful review of Ohio case law shows no cases directly on point with this issue. Given the evidence against appellant, which will be analyzed thoroughly infra, we cannot say that a fair trial was not possible after the state’s mistake. Nor can we say that the court abused its discretion by instructing the jury to

disregard the incorrect evidence. Appellant's first assignment of error is overruled.

III.

In his second assignment of error, appellant argues that "the trial court erred and abused its discretion in closing the courtroom to the public during the testimony of the informant in violation of appellant's Sixth Amendment rights."

An accused has a constitutional right to a public trial. Sixth Amendment to the United States Constitution; Section 10, Article I, Ohio Constitution. "[T]he right to a public trial is not absolute and an order barring spectators from observing a portion of an otherwise public trial does not necessarily introduce error of constitutional dimension. *** On appeal from such order, the reviewing court is to determine whether the lower court abused its discretion." *State v. Brown* (Nov. 25, 1998), Cuyahoga App. No. 73060 (internal citations omitted). Courtrooms may be closed if there is "persuasive evidence of serious risk to an important interest ***." *State v. Washington* (2001), 142 Ohio App.3d 268, 271 (citations omitted).

In *Waller v. Georgia* (1984), 467 U.S. 39, 46, the United States Supreme Court set forth the following factors to determine the necessity of courtroom closure: "[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than

necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.”

In the instant case, the court conducted a *Waller* hearing, and made the following findings: 1) The informant was referred to by a false first name; no last name and no contact, employment or residency information was known; the informant and/or his family had been threatened via phone calls from unidentified females to not testify against appellant; the informant's demeanor had changed since receiving these calls; and the informant was hiding in the courthouse when he was scheduled to meet with one of the police officers prior to testifying; 2) The closure would be limited to the informant's testimony; 3) “[T]he only reasonable alternative that the Court could consider in this case would be having the informant testify outside of the presence of anyone,” however, that was not feasible because appellant did not waive his right to confront his witnesses; and 4) “There is an overriding concern to protect the safety of an informant testifying in court”; and the informant's “safety is indeed in peril,” as shown by the correlation between the escalated threats against him and his changing demeanor.

Taking into consideration that the informant received telephone threats immediately prior to his testimony, and the court closed the courtroom to the public for his testimony only, we cannot say that the court abused its discretion.

IV.

In his third assignment of error, appellant argues that "the trial court erred in permitting a police officer to testify as to oral statements made by appellant to the officer at the time of which appellant was represented by counsel and which statements were in connection with plea negotiations."

Evid.R. 410 governs the inadmissibility of plea statements, and it states that evidence of the following is inadmissible at trial:

- "(1) A plea of guilty that later was withdrawn;**
- (2) A plea of no contest or the equivalent plea from another jurisdiction;**
- (3) A plea of guilty in a violations bureau;**
- (4) Any statement made in the course of any proceedings under Rule 11 of the Rules of Criminal Procedure or equivalent procedure from another jurisdiction regarding the foregoing pleas;**
- (5) Any statement made in the course of plea discussions in which counsel for the prosecuting authority or for the defendant was a participant and that [does] not result in a plea of guilty or that result in a plea of guilty later withdrawn."**

In the instant case, appellant took the stand in his own defense and testified that he had been rehabilitated since he was released from prison. On rebuttal, the state introduced evidence to show that a month prior to trial, appellant initiated a conversation with Detective Bottone in which appellant provided first names, descriptions of vehicles, and a cell phone number for people who were involved in trafficking cocaine. Appellant requested that he be released from jail "to deal with those individuals" for him to be of further assistance to the police. Detective Bottone told appellant that, given his record, that would be impossible.

None of the Evid.R. 410 factors apply to the situation at hand. It is unclear which factor appellant argues the statements in question fall under, thus we address them all. First, evidence of a guilty or no contest plea was not brought up during Detective Bottone's testimony, therefore, factors one, two, and three do not apply. Next, evidence of Crim.R. 11 proceedings was not discussed during trial, therefore, factor four does not apply. Finally, neither the prosecutor nor defense counsel was a participant in the conversation, therefore, the fifth and final factor does not apply.

We rule that this conversation does not rise to the level of a plea discussion for the purpose of Evid.R. 410. As this testimony was offered in rebuttal after

appellant opened the door to his good character, we find no error with its admissibility, and appellant's third assignment of error is overruled.

V.

In his fourth assignment of error, appellant argues that his "convictions should be reversed due to the cumulative errors which occurred during trial." Specifically, appellant argues that the alleged errors outlined in his first three assignments of error trigger the cumulative error doctrine and are grounds for reversal.

In *State v. Garner* (1995), 74 Ohio St.3d 49, 64, the court held that pursuant to the cumulative error doctrine "a conviction will be reversed where the cumulative effect of errors in a trial deprives a defendant of the constitutional right to a fair trial even though each of numerous instances of trial court error does not individually constitute cause for reversal."

In the instant case, as discussed above, we do not find multiple instances of harmless error. Therefore, the cumulative error doctrine does not apply, and appellant's fourth assignment of error is overruled.

VI.

In his fifth and final assignment of error, appellant argues that "the trial court erred when it imposed an additional three year prison sentence in

accordance with R.C. 2941.145 for the firearm specification on the charge of having a weapon while under disability.”

Pursuant to R.C. 2929.14(D)(1)(e), the court shall not impose an additional prison term for a firearm specification for the offense of having a weapon under disability, unless the following applies:

“(i) The offender previously has been convicted of aggravated murder, murder, or any felony of the first or second degree.

(ii) Less than five years have passed since the offender was released from prison or post-release control, whichever is later, for the prior offense.”

See, also, R.C. 2941.145 (firearm specifications) and R.C. 2923.13 (having a weapon while under disability).

In the instant case, appellant was convicted of aggravated robbery with a one-year firearm specification, in violation of R.C. 2911.01(C), which is a first degree felony. Appellant served four years in prison for this conviction and was released in 2005. The instant trial took place in early May 2007, which is less than five years after appellant was released from prison.

Accordingly, the court did not err when it sentenced appellant, and his final assignment of error is overruled.

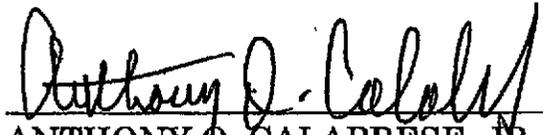
Judgment affirmed.

It is ordered that appellee recover from appellant the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



ANTHONY O. CALABRESE, JR., JUDGE

COLLEEN CONWAY COONEY, P.J., CONCURS;
MARY J. BOYLE, J., CONCURS IN JUDGMENT ONLY