

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Appellant,

vs.

SCOTT A. SPEER

Appellee

: Supreme Court  
: Case No.:

**09-0330**

: Court of Appeals

: Case No.: 07-OT-046

: Trial Court

: Case No.: 06-CR-028

: 07-CR-051

Appeal from the Ottawa County Common Pleas and  
The Sixth District Court of Appeals, County of Ottawa,  
State of Ohio

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**APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION**

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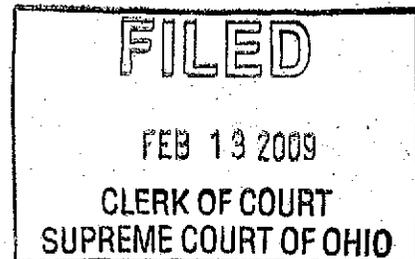
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**TABLE CONTENTS**

	Page
<b>EXPLANATION OF WHY THIS CASE IS A CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION AND MATTERS GREAT PUBLIC OR GENERAL INTEREST .....</b>	<b>1</b>
<b>STATEMENT THE CASE AND FACTS .....</b>	<b>2</b>
<b>ARGUMENT IN SUPPORT OF THE PROPOSITION OF LAW .....</b>	<b>5</b>
<u>Proposition of Law No. I:</u> During voir dire, a trial court does not abuse its discretion for declining to remove a hearing impaired or otherwise disabled potential juror for cause if evidence available to the trial court supports its good faith belief that the potential juror's hearing impairment or physical disability can be reasonably accommodated.	
<b>CONCLUSION .....</b>	<b>14</b>
<b>PROOF OF SERVICE .....</b>	<b>15</b>
<b>ATTACHMENT .....</b>	<b>16</b>

**EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR  
GREAT GENERAL INTEREST AND DOES INVOLVE A  
SUBSTANTIAL CONSTITUTIONAL QUESTION**

The questions presented by this case impact jury service which is the core of a criminal defendant's constitutional right to a fair trial and the basis of a citizen's right to serve as a juror. Specifically, does a juror's hearing impairment or similar disability preclude her from jury service? And does the trial court abuse its discretion for its failure to remove a hearing impaired juror during voir dire?

These questions present a case of first impression for this Court. Indeed, the issues present a perfect opportunity for this Court to set statewide precedent.

The Sixth District Court of Appeals broadly stated in its decision that "when *any doubt* exists that a juror can adequately and completely perceive and *evaluate all the evidence*, whether because of physical impairment, mental capabilities, or other reason that would interfere with the performance of a juror's duties, the trial court *must excuse* that juror for cause." (Emphasis added). *State v. Speer*, 6<sup>th</sup> Dist. No. OT-07-046, 2008-Ohio-6947, ¶ 34. This decision fails to recognize that virtually all jurors are limited to some extent in their abilities to perceive and evaluate evidence, and this decision seemingly eliminates jury service for potential jurors if a juror in any way seems unable to perceive and evaluate all evidence.

One must wonder where this rationale ends. Can a blind juror serve if a photograph is introduced as evidence? If a juror appears exhausted will her fatigue make her ineligible? What about the elderly juror who uses a hearing aid, but is as mentally clear as a more youthful juror? Can a dyslexic juror adequately evaluate written evidence? As it stands, the appellate court's decision gravely affects disabled or impaired citizens (particularly the hearing impaired) and their opportunity and duty to participate in jury service, thereby hindering their ability to

access one of the most basic democratic governmental processes. See *Powers v. Ohio* (1991), 499 U.S. 400, 407, 111 S. Ct. 1364, 113 L. Ed. 2d 411.

Moreover, this case is also of great public interest because it limits a vital discretionary function of the trial court. This Court has long held that the “decision to remove a juror for cause is a discretionary function of the trial court.” *Berk v. Matthews* (1990), 53 Ohio St. 3d 161, 168, 559 N.E. 2d 1301. However, despite this longstanding rule, here the appellate court states that a trial court “must” dismiss a juror for cause if “any doubt” exists that a juror can evaluate “all evidence” due to mental capabilities, a disability, or any other reason that would interfere with the juror’s duties. Surely it cannot be said that the trial court retains its discretionary function if it “must” remove a juror for cause upon “any doubt.” As a result of this reasoning trial courts will justifiably be fearful to include any disabled juror based on the threat of a mistrial if the Sixth District’s decision stands.

This Court must accept jurisdiction in this matter to clarify who may and who may not satisfactorily fulfill their duties as a criminal juror and to clarify whether a trial court may or must remove a physically disabled or similarly compromised juror for cause.

### **STATEMENT THE CASE AND FACTS**

On August 6, 2002, on a relatively moonless night, Jim Barnett died after drowning during a 2:00 a.m. boating trip from Put-in-Bay to the mainland. The small boat was owned and piloted by defendant, Scott A. Speer. On that night winds exceeded 20 miles per hour, causing dangerous conditions including three to six foot waves. Small craft advisories warned against any boating operation. Despite these conditions, Scott Speer navigated his 24-foot boat at the rate of 30 miles per hour after he had consumed alcohol. Scott Speer did not require Jim Barnett to wear a life jacket. After the drowning, Scott Speer called 911 while still on his boat.

A grand jury returned an indictment for one count of involuntary manslaughter, and one count of aggravated vehicular manslaughter. After evidence surfaced that defendant pushed Barnett into the lake, a grand jury returned two more indictments, one for aggravated murder and the other for murder. These four charges were consolidated for trial. The trial jury acquitted on the aggravated murder and murder charges, but found Speer guilty of involuntary manslaughter and aggravated vehicular homicide.

Juror Leow-Johannsen was a member of the jury panel. Ms. Leow-Johannsen has a hearing impairment but is not completely deaf. (Tr., 154) In her everyday life she supplements her limited hearing by reading lips. (Id). During voir dire, she avowed that her hearing impairment would not be problematic. (Tr., 65). Moreover, she indicated that due to some residual hearing she did not need a sign language interpreter, but she required the speaking parties to face her. (Tr., 145).

Once given an opportunity to examine Ms. Leow-Johannsen, the defendant, through counsel, asked what accommodations would be necessary if evidence of an audio recording was presented. (Tr., 155). Ms. Leow-Johannsen requested the court "type it down for me." (Id).

The defendant challenged Ms. Leow-Johannsen for cause, arguing "she misses about five percent of everything in her life and fills the rest in." (Tr. 176). At this time defense counsel raised no concerns regarding the 911 recording. The trial court denied the challenge for cause, concluding her hearing impairment was "not a statutory basis, and courts have made accommodations for various kinds of impairment." (Tr. 177). Despite four available peremptory challenges, the defendant subsequently chose not to excuse Ms. Leow-Johannsen.

At the conclusion of voir dire, Juror Leow-Johannsen was empanelled, and the trial court reserved two alternate jurors. (Tr. 188).

In order to accommodate Juror Leow-Johannsen, the trial court moved her seat directly next to the witness box. When the state offered an audio recording of the defendant's 911 emergency call as evidence, the trial court allowed Juror Leow-Johannsen to sit next to the court reporter in order to watch the "real time" display. Both counsel and witnesses alike were instructed to face Juror Leow-Johannsen. If any speaking party did not face Juror Leow-Johannsen, she simply reminded them to face her and the speaker complied. During the trial, neither counsel requested an interpreter nor did either counsel complain that Juror Leow-Johannsen missed testimony. (Dec. 17, 2007, Court Order and Opinion, p. 7). Defense counsel never renewed its challenge during testimony, when the 911 recording was played, or during the prosecution's closing arguments.

The defendant appealed based on three assignments of error. The Sixth District Court of Appeals found the first assignment of error well taken and declined to consider the remaining two as moot. The appellate court concluded that trial court abused its discretion for declining to remove Juror Leow-Johannsen, and found the error prejudicial to the defendant's right to fair trial. The appellate court found an abuse of discretion primarily due to Juror Leow-Johannsen's inability to perceive tonal inflection and voice quality in the 911 recording.

## ARGUMENT IN SUPPORT OF APPELLANT'S PROPOSITION OF LAW

Proposition of Law: During voir dire, a trial court does not abuse its discretion for declining to remove a hearing impaired or otherwise disabled potential juror for cause if evidence available to the trial court supports its good faith belief that the potential juror's hearing impairment or physical disability can be reasonably accommodated.

In this case, the appellate court concluded: "when *any doubt* exists that a juror can adequately and completely *perceive and evaluate all the evidence*, whether because of physical impairment, mental capabilities, or other reason that would interfere with the performance of a juror's duties, the trial court *must excuse* that juror for cause." (Emphasis added). *State v. Speer*, 6<sup>th</sup> Dist. No. OT-07-046, 2008-Ohio-6947, ¶ 34.

"Challenges for cause shall be tried by the court on the oath of the person challenged, or other evidence, and shall be made before the jury is sworn." R.C. 2945.26. A potential juror in a criminal case may be challenged for cause if "he otherwise is unsuitable for any other cause to serve as a juror." R.C. 2945.25(O). A juror's suitability is always limited by a criminal defendant's Sixth Amendment right to a fair trial. *Irvin v. Dowd* (1961), 366 U.S. 717, 81 S. Ct. 1639; 6 L. Ed. 2d 751; United States Constitution.

The decision to remove a juror for cause is a long-standing discretionary function of the trial court. *Berk v. Matthews* (1990), 53 Ohio St. 3d 161, 168, 559 N.E. 2d 1301. During voir dire, the trial court must decide whether to remove a disabled juror for cause based on (1) the juror's oath, or (2) other evidence available. R.C. 2945.26. The trial court does not have the advantage of knowing whether a proposed accommodation will fully accommodate the potential juror, it cannot see how evidence will play out, which evidence will be critical to either party's case in chief, how evidence will be used, or even if potential evidence will be used. The trial court, therefore, cannot be said to abuse its discretion for declining to remove a

hearing impaired juror for cause if it, in good faith, believes that a potential juror's disability can be reasonably accommodated or otherwise will not violate the defendant's Sixth Amendment right a fair trial.

The State's view is consistent with the Ohio Trial Court Jury Use and Management Standards. Accordingly, a trial court cannot be said to abuse its discretion for an accommodating attitude in compliance with the rules set forth by this Court. The Ohio Jury Use and Management Standards maintain the "opportunity for jury service should not be denied or limited on the basis of \* \* \* disability." Ohio. Sup. R., Standard 1, § A. The commentary clarifying Standard 1 provides that "[s]upport agencies and advancing technologies exist to aid courts in accommodating the special needs of hearing impaired and visually impaired jurors, for example." *Id.* The commentary also says the "obligation of jury service falls on all citizens; it is vitally important that the legal system open its doors to each person who desires to serve on a jury." *Id.* Presumably, this standard was written to encourage a trial court's open and accommodating attitude when dealing with physical disabilities and jury service.

Moreover, in this case, the trial court's attitude must be judged as opposed to the outcome of its decision. After all, "abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Adams* (1980), 62 Ohio St. 2d 151, 157, 16 Ohio Op. 3d 169, 404 N.E.2d 144. The appellate court, however, seems to reverse the trial court's decision based on what it subjectively believes to be a bad outcome. The appellate court went as far as to support its legal conclusion by calling attention to the State's closing arguments. The attitude of the trial court, not the result of its good faith judgment, should be under scrutiny. *Id.*

Consider the evidence before the trial court when it overruled the defendant's challenge for cause. When questioned by the trial court during voir dire, Juror Leow-Johannsen responded that her hearing impairment would not affect her ability to serve as a juror. (Tr. 65). She indicated that a sign language interpreter was unnecessary and she only required the speaking parties to face her. (Tr. 145) It was apparent she had residual hearing when she stated, "I can hear you, but I have to read lips." (Tr. 154). Defendant's counsel had a copy of the 911 tape from discovery. When defendant's counsel asked what accommodations would be necessary if the state introduced an audio recording as evidence, she responded by saying "type it down for me." (Tr. 155).

Based on those exchanges and counsel's observations, the defendant challenged Juror Leow-Johannsen for cause. Defense counsel expressed his concern that Juror Leow-Johannsen would not be able to read lips if any speaking party turned their back. (Tr. 176) Defense counsel further argued his belief that Juror Leow-Johannsen "misses about five percent of everything in her life and fills the rest in." (Tr. 176). Notably, defense counsel failed to mention the 911 recording in support of his challenge for cause. The trial court, therefore, had a good faith belief it could accommodate Juror Leow-Johannsen by moving her in the jury box immediately next to the witness and allowing Juror Leow-Johannsen to view the real time display of the 911 recording.

Moreover, the foreseeable inclusion of an audio recording as evidence does not justify classifying a hearing impaired juror as "unsuitable." R.C. 2945.25(O). Even if Juror Leow-Johannsen could not hear tonal inflection, voice quality or background sounds the defendant's constitutional right to fair trial was not in jeopardy. "Many jurors have somewhat less than perfect hearing or vision, or have other limitations on their abilities to assimilate or evaluate

testimony and evidence. A defendant is not entitled to a perfect trial, but only a fair one.” *U.S. v. Dempsey*, (C.A. 10, 1987), 830 F.2d 1084, 1088 (the court did not abuse its discretion allowing a hearing impaired person, with the aid of an interpreter, to consider evidence at trial).

*U.S. v. Dempsey* involved a juror who required an interpreter to translate the spoken word into sign language. Naturally, the juror watched the interpreter rather than the speaking parties. A major issue in *Dempsey* involved the juror’s ability to accurately evaluate the credibility of witnesses due to an inability to hear voice quality and tonal inflections, or to see the witness’s demeanor. Generally demeanor, tonal inflections and voice quality are the primary methods to discern a witness’s credibility. But in refusing to find an abuse of discretion, the 10<sup>th</sup> Circuit Court of Appeals reasoned the juror’s “ability to perceive and weigh the evidence is best evaluated by the trial judge. [The juror] was both literate and articulate; her ability to speak and read lips mitigated the effects of her hearing loss. She was an active and willing participant in the trial process.” *U.S. v. Dempsey*, 830 F.2d 1084, 1089.

The State argues that the 10<sup>th</sup> Circuit Court of Appeals’ reasoning is appropriate for this case. Tonal inflections and the voice quality of a speaking witness and an audio recording are admittedly distinguishable. The bottom line remains, tonal inflections and voice quality of a speaking witness go directly to the credibility of the witness and have a direct and intimate impact in the juror’s evaluation of evidence relevant to each statutory element. The issues presented by this case, therefore, are very similar to the issues in *Dempsey*. In this case, the prosecution essentially urged the jurors to consider the tonal inflection and voice quality as methods to gauge the defendant’s credibility beyond the spoken word/written text of the 911 recording.

Specifically, the prosecution primarily used evidence of tonal inflection and voice quality to emphasize defendant's peculiar demeanor in order to prove the defendant lied to the 911 operator attempting to conceal his location from law enforcement. During closing arguments, the prosecution asked the jury to consider the "demeanor on the tape" and stated "[h]is reactions on the 911 tape say a lot of stuff, not just the words about him falling off the boat, not just about the missed location." *State v. Speer*, 2008-Ohio-6947, ¶ 32. The tonal inflections and voice quality were emphasized to call into question the veracity of the statements made to the 911 operator. "[T]here is no reason to suppose that perception of vocal inflections is a necessary part or a superior method of assessing credibility. Each juror is expected to bring to the courtroom his or her own method of sorting fact from fiction -- the same method the juror relies on in conducting everyday affairs." *People v. Guzman* (1990), 76 N.Y.2d 1, 6, N.Y.S.2d 7. After the trial ended, the trial court instructed the jury that they were to rely on their collective memories. So even if Juror Leow-Johannsen could not hear the audio recording, she could have relied on the collective memories of her peers. The audio recording represented only a miniscule portion of the prosecution's evidence in a trial that lasted almost a week. Lastly, because the prosecution used the 911 recording to prove the defendant was not credible, the defendant was in no way prejudiced by Juror Leow-Johannsen's inability to fully perceive the state's evidence.

The trial court cannot be said to abuse its discretion based on the mere fact a 911 recording would foreseeably be introduced as evidence. The trial court had no knowledge of how the 911 audio recording would be used as evidence, whether or not it would be critical evidence, or if it would be advantageous to the prosecution or the defense. During voir dire, Juror Leow-Johannsen proved that she would reasonably and capably perform all the duties

required of a juror and proved that she would be an intelligent, articulate, and willing participant in the trial proceedings. Moreover, the defendant failed to raise the 911 call in challenging Juror Leow-Johannsen for cause. Based on the totality of the evidence before the trial court, the trial court had a good faith belief that Juror Leow-Johannsen could be reasonably accommodated and correctly included Juror Leow-Johannsen in the jury panel.

The trial court struck a balance between the defendant's rights and the Juror's rights of citizenship. The Sixth District considered no such balance. The Sixth District's absolute rule of exclusion is not necessary to protect the defendant's right to a fair trial and could foreseeably cause an exclusionary mentality and slippery slope regarding citizens with disabilities and impairments and jury duty.

This decision opens the door to bias and an unfair burden for trial courts. What about the blind citizen? What about the elderly? What about dyslexic citizens? What of those with slight memory problems? "Must" they be dismissed upon "any doubt"? Given the Appellate Court's decision a plausible argument could be made. As a practical matter, this exclusionary mentality would perpetuate the common misconception throughout the legal community that physically disabled members of society are inferior or "not good enough" to be jurors. In effect, trial courts will most likely be hesitant to include a physically disabled person for fear that that her inclusion would give a criminal defendant an additional assignment of error and a second chance with the legal system if displeased with the original verdict. And this result would deny physically disabled citizens access to jury service, one of the most basic democratic elements of the law. See *Powers v. Ohio* (1991), 499 U.S. 400, 407

Moreover, this exclusionary reasoning is unnecessary due to safeguards inherent in Ohio's jury selection process. The defendant failed to challenge Juror Leow-Johannsen for

cause based on the 911 recording. Had the defendant failed to anticipate how the 911 recording would be used or did not feel the 911 recording would be critical evidence during voir dire, he had the right to renew his challenge for cause and request that an alternate juror replace Juror Leow-Johannsen. The Revised Code allows a trial judge to replace a juror who becomes "unable to perform his duty" with an alternate. R.C. 2945.29. To the contrary, the speaking parties complied whenever Juror Leow-Johannsen requested they face her, neither party complained that Juror Leow-Johannsen missed testimony, nor argued that she missed critical evidence based on the 911 recording.

Additionally, despite four peremptory challenges, the defendant subsequently chose not to excuse Juror Leow-Johannsen. While the defendant's ultimate decision to use a peremptory challenge on a hearing impaired juror is irrelevant to whether the trial court's decision was or was not an abuse of discretion, the defendant's failure to do so underscores another opportunity for the defendant to proactively protect his own rights if he believes they are in jeopardy. Like the defendant's right to renew his challenge for cause, peremptory challenges are another way for a defendant to safeguard his rights if he feels prejudiced. While a hearing impairment might not warrant a dismissal for cause, concerns about a hearing impaired juror provide a legitimate basis for the exercise of a peremptory challenge. See *New York v. Falkenstein*, (N.Y. App. Div. 4<sup>th</sup> Dept. 2001), 732 N.Y.S.2d 817, 818, 288 A.D.2d 922.

Although the state does not believe Juror Leow-Johannsen missed evidence during the course of the trial, the defendant failed to raise that issue with the court. This Court has held a failure to object to missed evidence constitutes a waiver of the objection. In *State v. Sanders*, defense counsel alleged to the trial court that a juror had fallen asleep while the prosecution was playing an audio recording of a phone conversation between inmate negotiators and DRC

negotiators. *State v. Sanders* (2001), 92 Ohio St. 3d 245, 252, 2001-Ohio-189, 750 N.E.2d 90. The juror's eyes were shut for about an hour and fifteen minutes and he stayed motionless for around a half hour. *Id.* Defense counsel, however, did not argue that the sleeping juror denied him of due process, nor request the court replace the juror with an alternate. *Id.*, 92 Ohio St. 3d 245, 253. This Court determined the claim was waived absent plain error. *Id.* Under this reasoning, the defendant waived his right to appeal based on the 911 recording because he failed to address the matter during voir dire, never renewed his challenge for cause, and failed to ask the trial court to replace the hearing impaired juror with an alternate.

What is more, the trial court's inclusion of Juror Leow-Johannsen provided representation of a vital segment of our community. Hearing impaired and other physically disabled citizens constitute a significant part of any community's makeup, and Ottawa County is no exception. "The Sixth Amendment guarantees to criminal defendants the right to trial by a jury composed of a fair cross section of the community, noting that the exclusion of 'identifiable segments playing major roles in the community cannot be squared with constitutional concept of jury trial.'" *Tennessee v. Lane* (2004), 541 U.S. 509, 523, 124 S. Ct. 1978, 158 L. Ed. 2d 820, 15 Am. Disabilities Cas. (BNA) 865; quoting *Taylor v. Louisiana* (1975), 419 U.S. 522, 530, 95 S.Ct. 692, 42 L.Ed. 2d 690. "The right to trial by an impartial jury means that prospective jurors must be selected by officials without the systematic and intentional exclusion of any cognizable group." *State v. Strodes* (1976), 48 Ohio St.2d 113, 115, 2 O.O.3d 271, 357 N.E.2d 375; citing *State v. Johnson* (1972), 31 Ohio St.2d 106, 114, 60 O.O.2d 85, 285 N.E.2d 751.

Physically disabled citizens represent a cognizable group playing major roles within Ottawa County's cross-section of citizenry and should not be intentionally excluded because of

their disability. To exclude physically disabled citizens from jury service “is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury.” *Thiel v. Southern Pacific Co.* (1946), 328 U.S. 217, 220. 66 S.Ct. 984, 166 A.L.R. 1412, 90 L.Ed. 1181

Whether it is unlawful or lawful to exclude a member of the community’s cross-section of citizens is within the sound discretion of the trial court and guided by state law. “The choice of the means by which unlawful distinctions and discriminations are to be avoided rests largely in the sound discretion of the trial courts and their officers. This discretion, of course, must be guided by pertinent statutory provisions.” *Thiel v. Southern Pacific Co.* (1946), 328 U.S. 217, 220-221. The Revised Code is silent on whether the exclusion of physically impaired citizens is lawful or unlawful under Ohio law. However, the Ohio Jury Use and Management Standards set forth guidance that jury service should not be declined on the basis of disability. Ohio. Sup. R., Standard 1, § A.

Lastly, the United States Supreme Court’s dicta in *Tennessee v. Lane* indicates the irrational discrimination of the physically disabled jurors is the type of harm that Title II of the Americans with Disabilities Act is designed to address. See 541 U.S. 509, 524. “Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights.” *Id.* As an example the Supreme Court noted “a number of States have prohibited and continue to prohibit persons with disabilities from engaging in activities such as marrying and serving as jurors.” *Id.*

## CONCLUSION

The basic and sound reasoning behind a 12-juror panel is that there is no one perfect juror. Indeed, if that were the case, one juror would be enough to provide the impartial and fair trial every criminal defendant deserves. Instead, 12 jurors collectively reason through the evidence, impressions and judgments, and through collaboration, come to a conclusion. In fact, there is no such thing as a perfect juror; each and every juror runs the risk of missing testimony during a criminal trial for one reason or another. Will jurors with color blindness become ineligible to serve? What about jurors who have uncorrected vision problems, hearing aids with fallible components, chronic pain, bladder issues, or problems at home or work? All of these issues can cause distraction that could impact a juror's ability to be "perfect". Accommodations for those with known impairments can prevent the likelihood of missed testimony. The trial court, therefore, cannot be said to abuse its discretion if it believes in good faith that a potential juror can effectively serve based on her suggestions for accommodations and other evidence during voir dire. Accordingly, the Sixth District erred by finding that the trial court abused its discretion. For these reasons, this Court should accept jurisdiction over this matter.

Respectfully submitted,

  
Mark E. Mulligan, Counsel of Record

COUNSEL FOR APPELLANT,  
STATE OF OHIO

Certificate of Service

I certify that a copy of this Notice of Appeal was sent this 16<sup>th</sup> day of February, 2009 by ordinary U.S. mail to Brad Barbin, counsel of record for Appellee, 52 W. Whittier Street, Columbus, Ohio, 43216; Mark R. Meterko, counsel of record for Appellee, 250 Civic Center Dr., Suite 500, Columbus, Ohio, 43215 and Larry Young Director, Ohio Public Defender's Office, 8 E. Long Street, 11<sup>th</sup> Floor, Columbus, Ohio, 43215.

  
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ATTACHMENT

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

State of Ohio

Court of Appeals No. OT-07-046

Appellee

Trial Court Nos. 06-CR-028  
07-CR-051

v.

Scott A. Speer

DECISION AND JUDGMENT

Appellant

Decided: DEC 31 2008

\* \* \* \* \*

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\* \* \* \* \*

SINGER, J.

{¶ 1} This appeal comes to us from a decision issued by the Ottawa County Court of Common Pleas following a jury verdict finding appellant guilty of aggravated vehicular homicide and involuntary manslaughter. Because we conclude that the trial court abused its discretion in denying appellant's challenge for cause as it related to a hearing impaired juror, we reverse.

VOL 030 PG 203

{¶ 2} In two separate indictments based upon the same facts, appellant, Scott A. Speer, was indicted by the Ottawa County Grand Jury on four counts: one count of aggravated vehicular homicide, in violation of R.C. 2903.06(A)(2)(a); one count of involuntary manslaughter, in violation of R.C. 2903.04(B); one count of aggravated murder, in violation of R.C. 2903.01(A); and one count of murder, in violation of R.C. 2903.02(A). The indictments stemmed from the death of Jim Barnett when he fell from appellant's boat while out on Lake Erie.

{¶ 3} The two cases were consolidated and a jury trial was held. During jury selection, one of the jurors revealed that she was hearing impaired to such a degree that she needed to read lips of any speakers in order to know what was being said. Appellant requested that she be excused "for cause," which, over appellant's objection, was denied by the trial court. At the end of voir dire, appellant used all four peremptory challenges on other jurors. The hearing impaired juror was then included in the jury panel.

{¶ 4} At trial, the following evidence and testimony was presented which is relevant to the issues decided in this appeal. Testimony was presented that, early on August 6, 2002, just before 2:00 a.m., appellant and a friend, Jim Barnett, were returning to East Harbor, Lake Erie, from Put-In-Bay in appellant's 24 foot power boat. According to appellant's prior statements, the wind increased, creating three to six foot waves, and Barnett, who refused to sit down, fell off the boat near Mouse Island, just off Catawba Point.

{¶ 5} Appellant called 911 from his cell phone. The call was recorded and the tape was played for the jury. The tape revealed that appellant said he attempted to throw a line and a life ring to Barnett, but was unable to reach him. When appellant called 911 for help, he could not see Barnett and said he was still at the spot where Barnett had fallen in the water. Appellant at first said he was located off "Johnson's Island" near Catawba Point. The Coast Guard noted to appellant that Johnson's Island was not located off Catawba Point. Appellant again responded that he was off Catawba Point and asked for the name of the little island near there. When the Coast Guard stated that it was called "Mouse Island," appellant said that was where he was and Barnett had fallen.

{¶ 6} While talking with the 911 operator and Coast Guard, appellant said his boat was drifting into shallow water. Appellant noted several times that the water was rough and the wind was blowing hard. He left the phone once to move his boat into deeper water. He then returned to the phone and continued answering questions. After about 15 minutes, appellant stated that his cell phone was about to lose power and he could not wait any longer because of the rough water. The recording on the 911 tape then ended.

{¶ 7} Later, appellant told police that he then drove his boat back to his marina and carefully tied up at the dock. Appellant went to his nearby 31 foot power boat to allegedly change out of his wet clothing. At approximately 2:35 a.m., appellant placed a second 911 call. This call was erased and, consequently, was not available as evidence for review.

VOL 030 PG 205

JOURNALIZED  
COURT OF APPEALS

{¶ 8} Police officers soon arrived at the marina to interview appellant about the incident and to determine whether he was under the influence of alcohol. Testimony by police officers was also presented regarding appellant's performance of sobriety tests, his demeanor, state of mind, and other alleged indications of impairment due to alcohol. The day after the incident, appellant and a friend found Barnett's body washed up on the shore of Mouse Island, near where the incident allegedly took place.

{¶ 9} Testimony was presented that indicated appellant and Barnett had been long-time friends, but had recently had an argument over money allegedly owed by appellant to Barnett for work on a boat. In addition, Barnett's cousin testified that appellant and he had attended a social event some months after Barnett's death. The cousin was high on drugs at that time, but recalled that appellant had been drinking, had become upset, and said that he had pushed Barnett on the night of the incident. Other witness testimony and evidence was also then presented, which is not relevant for the purposes of our decision on this appeal.<sup>1</sup>

{¶ 10} The jury found appellant not guilty as to the aggravated murder and murder counts, but found him guilty as to the aggravated vehicular homicide and involuntary manslaughter counts. The trial court determined that the two convictions were allied offenses of similar import and sentenced appellant as to the aggravated vehicular homicide count. Appellant was sentenced to four years incarceration, \$10,000 fine, and a

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<sup>1</sup>The coroner and her findings, and expert witness testimony was offered by both sides as to the probable speed of the boat, the effects of the weather on the boat, the effects of being on a boat would have on standard sobriety testing, and other issues not germane to our discussion.

suspended driver's license for five years. Appellant's motions for new trial and judgment of acquittal were denied.

{¶ 11} Appellant now appeals that decision, arguing the following three assignments of error:

{¶ 12} "I. The Trial Court erred by failing to disqualify a hearing impaired juror for cause.

{¶ 13} "II. The Trial Court erred in denying Appellant Speer's Motion for a New Trial where the participation of a hearing impaired juror denied Appellant Speer his right to a fair trial, impartial jury and unanimous verdict.

{¶ 14} "III. The Trial Court erred in relying upon facts, other information and conclusions, neither charged nor proven, thereby denying Appellant Speer his fundamental notice, comment and confrontation due process rights at sentencing."

{¶ 15} In his first assignment of error, appellant argues that the trial court abused its discretion in failing to excuse a hearing impaired juror for cause. We agree.

{¶ 16} R.C. 2945.25 and Crim.R. 24(C) list the particular causes for which a prospective juror may be challenged in a criminal case. R.C. 2945.25 states:

{¶ 17} "A person called as a juror in a criminal case may be challenged for the following causes:

{¶ 18} "\* \* \*

{¶ 19} "(O) That he otherwise is unsuitable for any other cause to serve as a juror."

Crim.R. 24(C)(14) states the same "catch-all" provision.

{¶ 20} Whether to disqualify a juror for cause is "a discretionary function of the trial court \* \* \* [not reversible] on appeal absent an abuse of discretion." *State v. Smith* (1997), 80 Ohio St.3d 89, 105, quoting *Berk v. Matthews* (1990), 53 Ohio St.3d 161, syllabus. Generally, the trial court's ruling will not be overturned on appeal "unless it is manifestly arbitrary and unsupported by substantial testimony, so as to constitute an abuse of discretion." *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, ¶ 38, quoting *State v. Williams* (1997), 79 Ohio St.3d 1, 8.

{¶ 21} "Satisfactory jury service" must at least meet the constitutional requirements of a fair trial. See *In re Murchison* (1955), 349 U.S. 133, 136 (a fair trial in a fair tribunal is a basic due process requirement). A deaf juror's inability to fully participate due to the unavailability of an interpreter to assist the juror at trial has been held to be sufficient to excuse that juror for cause. See *Burke v. Schaffner* (1996), 114 Ohio App.3d 655. See, also, *Fendrick v. PPL Service Corp.* (C.A.3 2006), 193 Fed. Appx. 138 (striking hearing impaired juror for cause was proper where accommodations could not assure juror's ability to hear proceedings during trial).

{¶ 22} Appellant was found guilty of both involuntary manslaughter and aggravated vehicular homicide. Therefore, in order to determine whether a hearing impaired juror could have properly evaluated the evidence presented, we must look at what elements must be proved to establish those offenses.

{¶ 23} R.C. 2903.04(B), which designates the elements for involuntary manslaughter, provides that:

{¶ 24} "No person shall cause the death of another \* \* \* as a proximate result of the offender's committing or attempting to commit a misdemeanor of any degree, a regulatory offense, or a minor misdemeanor \* \* \*." Involuntary manslaughter carries with it the culpable mental state of the underlying crime being committed, which in this case, was aggravated vehicular homicide.

{¶ 25} R.C. 2903.06(A)(2)(a), the aggravated vehicular homicide statute, provides that no person, in the operation of a watercraft shall recklessly cause the death of another. R.C. 2901.22(C) defines "recklessly" to be when a person "acts with heedless indifference to the consequences, \* \* \*[and] perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist."

{¶ 26} Proof of excessive speed in the operation of a motor vehicle under a charge of aggravated vehicular homicide, is generally not by itself sufficient to constitute wantonness or recklessness. *Akers v. Stirn* (1940), 136 Ohio St. 245, paragraph one of the syllabus, following *Morrow v. Hume* (1936), 131 Ohio St. 319, paragraph one of the syllabus. If accompanying facts show "an unusually dangerous situation and a consciousness on the part of the driver that his conduct will in common probability result in injury to another of whose dangerous position he is aware and he drives on without any care whatever, and without slackening his speed, in utter heedlessness of the other

person's jeopardy, speed plus such unusually dangerous surroundings and knowing disregard of another's safety may amount to wantonness." *Akers*, supra, at 249-250.

{¶ 27} On the other hand, the charge of vehicular homicide requires the offender to *negligently* cause the death of another. R.C. 2903.06(A)(3) and (C). "Negligently" is defined as follows:

{¶ 28} "(D) A person acts negligently when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that his conduct may cause a certain result or may be of a certain nature. A person is negligent with respect to circumstances when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that such circumstances may exist." R.C. 2901.22(D).

{¶ 29} Thus, in order to find a person guilty of aggravated vehicular homicide in the operation of a watercraft a jury must find behavior which goes beyond negligence and includes an additional factor showing wantonness, i.e., use of alcohol or drugs, a perverse and deliberate disregard for the safety of others, or some other aggravating circumstance which is beyond a mere lapse in judgment. See *State v. Whitaker* (1996), 111 Ohio app.3d 608. See, also, *State v. Caudill* (1983), 11 Ohio App.3d 252 (speed, erratic driving, driving under the influence); *State v. Stinson* (1984), 21 Ohio App.3d 14 (speed, wet pavement, curving road, car in disrepair, driving under the influence); *State v. Purdy* (Apr. 6, 1987), 12th Dist. No. CA86-06-078, (speed, erratic driving, driving under the influence); *State v. Thomas* (June 13, 1994), 12th Dist. No. 93-03-046, (motorist traveling

one hundred m.p.h., tailgating and bumping car ahead in a partially residential area with a hill crest preceding intersection where collision occurred).<sup>2</sup>

{¶ 30} In this case, the hearing impaired juror candidly acknowledged that she could only understand what someone was saying if she could see them, since she needed to read lips. She did not apparently read sign language, so an interpreter who could indicate to her when someone was speaking was not brought in by the court. Although she was moved to the front row and indicated a couple times that she needed counsel to turn toward her, there is no way to determine whether she was aware every time someone was speaking. As a result, it is unknown whether the juror received all the testimony. Use of a sign language interpreter would have ensured that the juror would have been alerted every time someone spoke. Moreover, even the trial court noted that although it would try to do everything it could to accommodate the juror, it could not "guarantee that we will always be successful."

{¶ 31} Even more troubling in this case, however, is the problem represented by the 911 tape which was played for the jury. The state introduced evidence to attempt to show that appellant had been traveling too fast in his boat for the conditions or that he allegedly knew the weather forecast was bad. Since these acts alone would not have sufficiently established the elements for aggravated vehicular homicide, some other aggravating circumstance or action had to be shown.

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<sup>2</sup>Although these cases involved the operation of motor vehicles, the rationale and requirements regarding "recklessness" are illustrative and would also apply to the operation of a watercraft.

{¶ 32} During closing arguments, the prosecution directed the jury to consider appellant's "demeanor on the 911 tape" and what that indicates. The prosecution also stated that, "His reactions on that 911 tape say a lot of stuff, not just the words about him falling off the boat, not just about his messed up location." Consequently, the taped 911 call was offered to provide evidence of whether appellant's speech and conversation with the 911 dispatcher and Coast Guard indicated elements of the crimes charged: purposefulness or recklessness, i.e., whether appellant showed signs of physical impairment, slurred or hesitant speech, lack of good judgment, total disregard for another's safety, or his state of mind and sincerity in his search for Barnett.

{¶ 33} To evaluate the tape as evidence and determine its value in establishing the elements of the offenses, the jury had to listen to appellant's speech patterns, the inflections in his voice, the pauses in the conversation, and many other audio clues that would only be meaningful if actually heard. Although the hearing impaired juror could read the words of the 911 tape as they were being transcribed, these are subject to the court reporter's ability to convey every word. Moreover, mere written words would not have conveyed the nuance and inflection imparted by the spoken words. Since, in this particular case, the 911 tape had a direct bearing and correlation as to whether appellant acted recklessly and went to the elements of involuntary manslaughter and aggravated vehicular homicide, we conclude that it is the kind of evidence that could not be adequately or effectively evaluated by a hearing impaired juror.

{¶ 34} We expressly note that in other cases, where the evidence involves only the bare meaning of the words, a juror's hearing impairment might have little or no prejudicial effect on his or her ability to effectively evaluate the evidence. As we have noted, however, the nature of the charges and evidence in this case required that all jurors be able to actually hear appellant's statements in order to fully evaluate that evidence. If any doubt exists that a juror can adequately and completely perceive and evaluate all the evidence, whether because of a physical impairment, mental capabilities, or other reason that would interfere with the performance of a juror's duties, the trial court must excuse that juror for cause. Therefore, we conclude that the trial court abused its discretion in denying appellant's challenge for cause, and that error was prejudicial to appellant's receiving a fair trial.

{¶ 35} Accordingly, appellant's first assignment of error is well-taken. In light of our disposition of appellant's first assignment of error, appellant's remaining assignments of error are moot.

{¶ 36} The judgment of the Ottawa County Court of Common Pleas is reversed and remanded for proceedings consistent with this decision. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Ottawa County.

JUDGMENT REVERSED.

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

Peter M. Handwork, J.

*Peter M. Handwork*  
JUDGE

Mark L. Pietrykowski, P.J.

*Mark L. Pietrykowski P.J.*  
JUDGE

Arlene Singer, J.  
CONCUR.

*Arlene Singer*  
JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:  
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.