

In the
Supreme Court of Ohio

STATE OF OHIO,	:	Case No. 2009-0330
	:	
Plaintiff-Appellant,	:	
	:	On Appeal from the
v.	:	Ottawa County Court of Appeals,
	:	Sixth Appellate District
SCOTT A. SPEER,	:	
	:	Court of Appeals Case
Defendant-Appellee.	:	No. OT-07-04
	:	

APPELLANT'S BRIEF

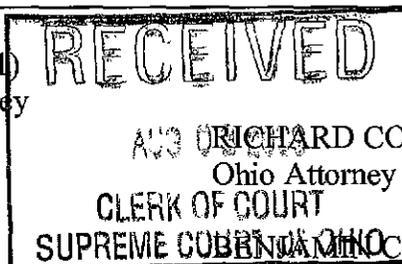
MARK E. MULLIGAN* (0024891)
 Ottawa County Prosecuting Attorney
**Counsel of Record*
 315 Madison Street, Room 205
 Port Clinton, Ohio 43452
 419-734-6845
 419-734-3862 fax
 prosecutor@co.ottawa.oh.us

Counsel for Plaintiff-Appellant

BRADLEY DAVIS BARBIN* (0070298)
**Counsel of Record*
 52 W. Whittier Square
 Columbus, Ohio 43216
 614-445-8416
 614-445-9487 fax
 bbarbin@barbinlaw.com

MARK R. METERKO (0080992)
 250 Civic Center Drive, Suite 500
 Columbus, Ohio 43215
 614-224-1222
 614-225-1236 fax

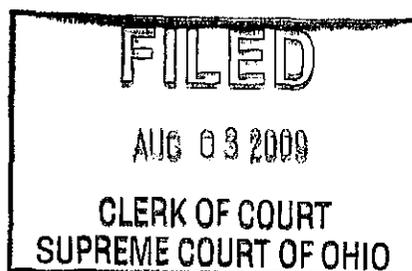
Counsel for Defendant-Appellee



RICHARD CORDRAY (0038034)
 Ohio Attorney General
 CLERK OF COURT
 SUPREME COURT OF OHIO

BENJAMIN MIZER* (0083089)
 Solicitor General
**Counsel of Record*
 ELISABETH A. LONG (0084128)
 Deputy Solicitor
 SAMUEL PETERSON (0081432)
 Assistant Solicitor
 30 East Broad Street, 17th Floor
 Columbus, Ohio 43215
 614-466-8980
 614-466-5087 fax
 benjamin.mizer@ohioattorneygeneral.gov

Counsel for *Amicus Curiae*
 Ohio Attorney General Richard Cordray



JANE P. PERRY (0029698)
Ohio Legal Rights Service
50 W. Broad Street, Suite 1400
Columbus, Ohio 43215
614-466-7264
614-644-1888 fax
jlperry@olrs.state.oh.us

Counsel for *Amicus Curiae*
Ohio Legal Rights Service

THOMAS J. ZRAIK (0023099)
2523 Secor Rd.
P.O. Box 2627
Toledo, Ohio 43606
419-724-9811
419-724-9812 fax
zraiklaw@bex.net

Counsel for *Amicus Curiae*,
Ability Center of Greater Toledo

MARC P. CHARMATZ*
**Counsel of Record*
ROSALINE CRAWFORD
BARBARA RAIMONDO
MICHAEL S. STEIN
National Association of the Deaf Law and
Advocacy Center
8630 Fenton Street, Suite 820
Silver Spring, Maryland 20910
301-587-7732
301-587-1791 fax

Counsel for *Amicus Curiae*
National Association of the Deaf Law and
Advocacy Center

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	Error! Bookmark not defined.
STATEMENT OF THE CASE AND FACTS	1
ARGUMENT	2
<u>Proposition of Law:</u>	
During voir dire, a trial court does not abuse its discretion by 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.	
CONCLUSION.....	10
CERTIFICATE OF SERVICE	unnumbered
APPENDIX	
Notice of Appeal of Appellant State of Ohio	A-1
Decision and Judgment Entry, decided December 31, 2009, <i>State v. Scott A. Speer</i> , Sixth District Court of Appeals, Case No. OT-07-046.....	A-2
Opinion and Order Denying Defendant’s Post-Trial Motions and Objections, filed December 17, 2009, <i>State v. Scott Speer</i> , Ottawa County Court of Common Pleas, Case Nos. 06-CR-028 & 07-CR-051.....	A-3

TABLE OF AUTHORITIES

CASES:	Page
<i>Berk v. Matthews</i> (1990), 53 Ohio St. 3d 161, 168, 559 N.E. 2d 1301.....	3
<i>Irvin v. Dowd</i> (1961), 366 U.S. 717, 81 S.Ct.1639; 6 L.Ed.2d 751.....	3
<i>New York v. Falkenstein</i> , (N.Y. App. Div. 4 th Dept. 2001), 732 N.Y.S.2d 817, 818, 288 A.D.2d 922.....	8
<i>People v. Guzman</i> (1990), 76 N.Y.2d 1, 6, N.Y.S.2d 7.....	6
<i>Powers v. Ohio</i> (1991), 499 U.S. 400, 407.....	7
<i>State v. Adams</i> (1980), 62 Ohio St. 2d 151, 157, 16 Ohio Op. 3d 169, 404 N.E.2d 144.....	4
<i>State v. Johnson</i> (1972), 31 Ohio St.2d 106, 114, 60 O.O.2d 85, 285 N.E.2d 751.....	9
<i>State v. Sanders</i> (2001), 92 Ohio St. 3d 245, 252, 2001-Ohio-189, 750 N.E.2d 90.....	7,8
<i>State v. Speer</i> , 2008-Ohio-6947.....	1,2,3,6
<i>State v. Strodes</i> (1976), 48 Ohio St.2d 113, 115, 2 O.O.3d 271, 357 N.E.2d 375.....	8
<i>Taylor v. Louisiana</i> (1975), 419 U.S. 522, 530, 95 S.Ct. 692, 42 L.Ed. 2d 690.....	8
<i>Tennessee v. Lane</i> (2004), 541 U.S. 509, 523, 124 S. Ct. 1978, 158 L. Ed. 2d 820, 15 Am. Disabilities Cas. (BNA) 865.....	8,9
<i>Thiel v. Southern Pacific Co.</i> (1946), 328 U.S. 217, 220. 66 S.Ct. 984, 166 A.L.R. 1412, 90 L.Ed. 1181.....	8,9
<i>U.S. v. Dempsey</i> , (C.A. 10, 1987), 830 F.2d 1084, 1088.....	5,6
 STATUTES AND RULES:	
Ohio Sup. R., Standard 1, § A.....	4,9
R.C. 2945.25(O).....	3,5
R.C. 2945.26.....	3
R.C. 2945.29.....	7
United States Constitution.....	3

STATEMENT OF THE FACTS

On August 6, 2002, Jim Barnett drowned during an evening boating trip from Put-in-Bay to the mainland. *Speer*, 2008-Ohio-6947 at ¶ 4. At the time, Barnett was a passenger on a boat owned and operated by Scott Speer. Speer was indicted for one count of involuntary manslaughter and one count of aggravated vehicular manslaughter. *Id.* at ¶ 2. After evidence came to light indicating that Speer had pushed Barnett from the boat, Speer was also indicted for murder and aggravated murder. *Id.*

During voir dire, Speer challenged a juror, Linda Leow-Johannsen, for cause on the basis of her hearing impairment. (Tr. 176-77.) Leow-Johannsen was not completely deaf; she could hear voices, but needed to read lips to understand what was being said. (Tr. 154) (“I can hear you, but I have to read the lips.”). Leow-Johannsen testified that her hearing impairment would not prevent her from participating as a member of the jury, (Tr. 66) and she explained that she did not require a sign language interpreter because of her residual hearing, (Tr. 145.) Speer, on the other hand, argued that Leow-Johannsen “misses about five percent of everything in her life and fills the rest in.” (Tr. 176.)

The trial court denied Speer’s challenge, finding that Leow-Johannsen’s disability could be accommodated and that “courts have made accommodation for persons with various kinds of impairment.” (Tr. 177.) Speer did not use any of his four available peremptory challenges to remove Leow-Johannsen. (Tr. 181-82.)

During trial, the court seated Leow-Johannsen in the front of the jury box, (Tr. 186, 197) and instructed her to say something if the witnesses or lawyers turned their heads and she was unable to read their lips. (Tr. 66.) When a tape recording of Speer’s 911 call was played at trial, Leow-Johannsen sat next to the court reporter and observed a real-time transcript of the

recording. (Tr. 197, 230.) Speer did not specifically challenge the adequacy of these accommodations or raise any concerns at trial regarding Leow-Johannsen's ability to perceive or evaluate the 911 tape.

Speer was convicted of involuntary manslaughter and aggravated vehicular homicide, but was acquitted of the murder charges. He appealed to the Sixth District Court of Appeals, raising three assignments of error. *Speer*, 2008-Ohio-6947 at ¶¶ 11-14. The appeals court held that the trial court abused its discretion by denying Speer's for cause challenge, and that the court's error prejudiced Speer's ability to receive a fair trial. Specifically, the court reasoned:

[T]he 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.

Id. at ¶ 34. Concluding that Speer's other assignments of error were moot, the Sixth District reversed Speer's conviction and remanded the case to the trial court. *Id.* at ¶¶ 35-36.

The State now appeals the Sixth District's decision.¹

¹ This is the Statement of the Case and Facts included with the Merit Brief of Amicus Curiae Ohio Attorney General Richard Cordray. It is well written and comprehensive. It is reprinted here as State's Statement of Facts.

ARGUMENT

Appellant's Proposition of Law:

During voir dire, a trial court does not abuse its discretion by 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*, 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 accommodation made in compliance with the standards 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.* Commentary to standard I states 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 record is entirely devoid of evidence which would indicate the trial court was unreasonable, arbitrary, or unconscionable.

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). Upon this record, the trial court, therefore, had a good faith belief it could accommodate Juror Leow-Johannsen.

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). "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 10th 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.

In this trial, the State used an argument about tonal inflection and voice quality to emphasize defendant's peculiar demeanor in order to show the defendant lied to the 911 operator. During closing arguments, the state asked the jury to consider the "demeanor on the tape". *State v. Speer*, 2008-Ohio-6947, ¶ 32. "[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.

The trial court cannot be said to abuse its discretion based on the mere fact a 911 recording would foreseeably be introduced as evidence. During voir dire, Juror Leow-Johannsen demonstrated that she could reasonably and capably perform all the duties required of a juror. Based on the totality of the evidence, 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 appellate court considered no such balance. An absolute rule of exclusion is not necessary to protect the defendant's right to a fair trial and could foreseeably cause an exclusionary mentality. Rather than run the risk of reversal, future litigants and trial judges might exclude all jurors with disabilities.

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. Had the defendant failed to anticipate how the 911 recording would be used, 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.

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. 4th 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 constitutes a waiver of the objection. In *State v. Sanders*, defense counsel alleged that a juror had fallen asleep while the prosecution was playing an audio recording of a phone conversation. *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 about 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 rational, the defendant waived any error because he failed to ask the trial court to replace the hearing impaired juror with an alternate.

Rather than error, this juror's inclusion is required by due process. Hearing impaired and other physically disabled citizens constitute a significant part of any community's makeup. "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. 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. Many issues can cause distraction that could impact a juror's ability to perceive evidence. Accommodations for those with known impairments can prevent or minimize the possibility of offending due process. The trial court, therefore, cannot be said to abuse its discretion if it believes in good faith that a potential juror can be effectively accommodated. Accordingly, this court should reverse the decision of the Sixth District Court of Appeals and remand for further proceedings consistent with the holding.

Respectfully submitted,



MARK E. MULLIGAN* (0024891)

Ottawa County Prosecuting Attorney

**Counsel of Record*

315 Madison Street, Room 205

Port Clinton, Ohio 43452

419-734-6845

419-734-3862 fax

Counsel for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Attorney General Richard Cordray in Support of Plaintiff-Appellant State of Ohio was served by U.S. mail this 3rd day of July, 2009, upon the following counsel:

Bradley Davis Barbin
52 W. Whittier Square
Columbus, Ohio 43216

Mark R. Meterko
250 Civic Center Drive, Suite 500
Columbus, Ohio 43215

Counsel for Defendant-Appellee
Scott A. Speer

Jane P. Perry
Ohio Legal Rights Service
50 W. Broad Street, Suite 1400
Columbus, Ohio 43215

Counsel for *Amicus Curiae*
Ohio Legal Rights Service

Marc P. Charmatz
National Association of the Deaf Law and
Advocacy Center
8630 Fenton Street, Suite 820
Silver Spring, MD 20910

Counsel for *Amicus Curiae*
National Association of the Deaf Law and
Advocacy Center

Thomas J. Zraik
2523 Secor Rd.
P.O. Box 2627
Toledo, Ohio 43606

Counsel for *Amicus Curiae*
Ability Center of Greater Toledo

BENJAMIN MIZER* (0083089)
Solicitor General
**Counsel of Record*

ELISABETH A. LONG (0084128)
Deputy Solicitor
SAMUEL PETERSON (0081432)
Assistant Solicitor
30 East Broad Street, 17th Floor
Columbus, Ohio 43215

Counsel for *Amicus Curiae*
Ohio Attorney General Richard Cordray


MARK E. MULLIGAN* (0024891)
Ottawa County Prosecuting Attorney

Counsel for Plaintiff-Appellant

IN THE SUPREME COURT OF OHIO

State of Ohio,

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v.

SCOTT A. SPEER,

Appellee.

09-0330On Appeal from the Ottawa
County Court of Appeals,
Sixth Appellate DistrictCourt of Appeals
Case No. OT-07-046

NOTICE OF APPEAL OF APPELLANT STATE OF OHIO

Mark E. Mulligan (0024891) (Counsel of Record)
Prosecuting Attorney
315 Madison Street – Room 205
Port Clinton, Ohio 43452
(419) 734-6845
Fax No. (419) 734-3862

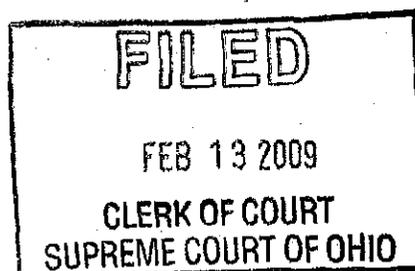
COUNSEL FOR APPELLANT, STATE OF OHIO

Brad Barbin (0070298) (Counsel of Record)
52 W. Whittier Street
Columbus, Ohio 43216
(614) 445-8416
Fax No. (614) 445-9487

Tim Young, Director
Ohio Public Defender's Office
8 E. Long Street, 11th Floor
Columbus, Ohio 43215
(614) 466-5393
Fax (614) 644-9972

Mark R. Meterko (0080992)(Counsel of Record)
250 Civic Center Dr., Suite 500
Columbus, Ohio 43215
(614) 224-1222
Fax No. (614) 224-1236

COUNSEL FOR APPELLEE, SCOTT A. SPEER



Notice of Appeal of Appellant State of Ohio

Appellant State of Ohio hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Ottawa County Court of Appeals, Sixth Appellate District, entered in Court of Appeals case No. OT-07-046 on December 31, 2008.

This case involves a felony and is one of public or great general interest.

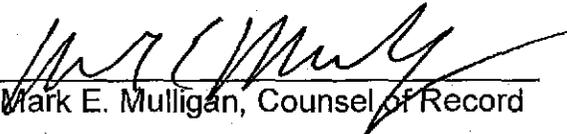
Respectfully submitted,


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 18th 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, 11th Floor, Columbus, Ohio, 43215.


Mark E. Mulligan, Counsel of Record

COUNSEL FOR APPELLANT,
STATE OF OHIO

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JENNIFER L. WILKINS, CLERK
OTTAWA COUNTY, OHIO

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

* * * * *

Mark E. Mulligan, Ottawa County Prosecuting Attorney,
Lorrain R. Croy and Mary Ann Barylski, Assistant Prosecuting Attorneys,
for appellee.

Bradley Davis Barbin and Mark R. Meterko, for appellant.

* * * * *

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.

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{¶ 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.

YOL 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.¹

{¶ 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

¹The 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).²

{¶ 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.

²Although 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.

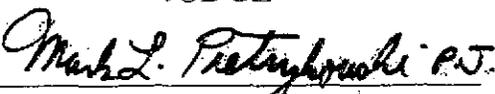
JUDGMENT REVERSED.

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

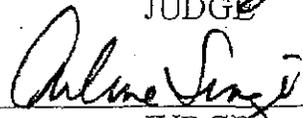
Peter M. Handwork, J.


JUDGE

Mark L. Pietrykowski, P.J.


JUDGE

Arlene Singer, J.
CONCUR.


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>.

2007 DEC 17 AM 10 24

IN THE COURT OF COMMON PLEAS
FOR OTTAWA COUNTY

JENNIFER L. WILKINS
CLERK OF COURTS
OTTAWA COUNTY, OHIO

STATE OF OHIO,)	CASE NOS. 06-CR-028 and 07-CR-051
)	
Plaintiff)	JUDGE RICHARD M. MARKUS
)	
vs.)	OPINION AND ORDER DENYING
)	DEFENDANT'S POST-TRIAL
SCOTT A. SPEER)	MOTIONS AND OBJECTION
)	
Defendant)	

On October 24, 2007, the jury found the defendant guilty of aggravated vehicular homicide and involuntary manslaughter of James Barnett, but not guilty of aggravated murder or murder of James Barnett. On October 31, 2007, this court ruled that the conviction for involuntary manslaughter merged into the conviction for aggravated vehicular homicide, pursuant to R.C. 2941.25. The court then sentenced the defendant to four years in prison and other sanctions for the resulting conviction.

On November 6, 2007, the defendant filed (a) a Motion for Acquittal pursuant to Crim. R. 29(C), which challenges the sufficiency of the evidence to support his conviction, and (b) a Motion for New Trial, which complains about [1] a hearing impaired juror's participation in the case and [2] "bad acts or character evidence of the defendant." On November 16, 2007, the defendant amended his Motion for Acquittal to reassert a contention that the court previously rejected in a pretrial ruling. On December 3, 2007, the defendant served an Objection to Sentencing, which argues that the court should not have considered conviction records that were not trial evidence when it sentenced the defendant.

The state responded to the defendant's motions and objection on December 14, 2007. After carefully considering each of those contentions, the court denies the defendant's post-trial motions and overrules his objection to his sentence.

I. DEFENDANT'S MOTION FOR ACQUITTAL

A. Sufficiency of the Evidence

The jury found the defendant guilty of aggravated vehicular homicide for the drowning death of James Barnett after he fell off the defendant's boat. Relevant language in R.C. 2903.06(A)(2)(a) and 2901.22 define aggravated vehicular homicide for this conviction:

2903.06.(A). No person, while operating or participating in the operation of a . . . watercraft . . . shall cause the death of another . . .

* * * *

(2) In one of the following ways:

(a) Recklessly;

2901.22. Culpable mental states

* * * *

(C) A person acts recklessly when, with heedless indifference to the consequences, he 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.

"In reviewing a challenge to the sufficiency of the evidence, the relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Elmore* (2006), 111 Ohio St.3d 515, 522, 857 N.E.2d 547, 2006 -Ohio- 6207, ¶ 43.

In this case, the evidence strongly supports the jury's guilty verdicts. Essentially undisputed evidence established that the defendant operated his 24 foot outboard motor boat from Put-In-Bay on South Bass Island toward a Sandusky Bay marina (a) after midnight on a dark, relatively moonless night, (b) with winds exceeding 20 m.p.h., (c) with 3 to 6 foot waves, (d) when "small craft advisories" cautioned against the trip, (e) at 30 m.p.h., according to his sworn testimony in another proceeding,¹ (f) after he consumed some alcohol,² and (g) without requiring his passenger to wear a readily available life jacket. In his 911 emergency call from his boat, the defendant told the Coast Guard it was too dangerous to remain where he lost his passenger, in order to assist their rescue efforts.

Reasonable jurors could find that the state proved each essential element of aggravated vehicular homicide beyond a reasonable doubt. Accordingly, the court denies the defendant's motion to acquit that challenges the sufficiency of the evidence.

B. Pre-Indictment Delay

The defendant's Amended Motion for Acquittal adds a contention that pre-indictment delay denied him due process. The grand jury separately indicted the defendant (a) for

¹ The state presented two expert witnesses who used the defendant's statement to a law enforcement officer about his motor speed for this trip (i.e., r.p.m.) to calculate the boat's speed at significantly more than 30 m.p.h.. However, the jury could easily find that the defendant operated his boat recklessly by traveling at his admitted speed of 30 m.p.h.

² The evidence failed to show the quantity of alcohol he consumed, but law enforcement officers observed a strong odor of alcohol, slurred speech, and a failed horizontal nystagmus test. The defendant admittedly accompanied the victim before they left Put-In-Bay, and the victim's autopsy showed a .13 blood alcohol condition. The jury could also infer that the defendant deceptively attempted to cover his alcohol consumption by claiming that he consumed two beers in the two minutes after he reached the marina and before a law enforcement officer arrived, where the condition of the beer cans and other circumstances denied that claim.

involuntary manslaughter and aggravated vehicular homicide on March 1, 2006; and (b) for aggravated murder and murder on February 27, 2007. Both indictments related to the defendant's activity on August 6, 2002. In a pretrial motion to dismiss both indictments, the defendant asserted that pre-indictment delay for each indictment denied him due process.

To the extent that the defendant's pretrial motion or his current motion relates to the second indictment for aggravated murder and murder, the jury's "not guilty" verdict for those charges moots that issue.

The defendant contends that his indictment 3 years and 7 months after the alleged offenses (aggravated vehicular homicide and involuntary manslaughter) denied him due process, even though he was defending a civil wrongful death claim for the same event during most of that interval. After conducting extended evidentiary hearings on that pretrial motion, the court denied it with an opinion filed on May 21, 2007. As the court explained there: (a) the defendant relied on the mere passage time, (b) which was less than the statute of limitations allowed, (c) without showing how the delay prejudiced him, (d) without claiming that the state sought to prejudice him by the delay, (e) when the state's continuing investigation provided a reasonable explanation for the delay. The defendant's Amended Motion for Acquittal reasserts that claim, without any further support.

For the reasons stated in its previous opinion, the court denies the motion to acquit on the same ground. Accordingly, this Court denies the defendant's Motion for Acquittal as amended.

II. DEFENDANT'S MOTION FOR A NEW TRIAL

A. The Hearing Impaired Juror

The Ohio Trial Court Jury Use and Management Standards, Appendix B for the Rules of Superintendence for the Courts of Ohio, provides in pertinent part:

STANDARD 1. OPPORTUNITY FOR SERVICE.

A. The opportunity for jury service should not be denied or limited on the basis of race, national origin, gender, age, religious belief, income, occupation, disability, or any other factor that discriminates against a cognizable group in the jurisdiction.

B. Jury service is an obligation of all qualified citizens.

COMMENTARY

Standard 1 is essentially identical to the ABA Standard.

It is the obligation of every court to reasonably accommodate the special needs of physically handicapped jurors. While physically handicapped jurors may pose special issues for courts and their personnel, these issues are manageable.

Support agencies and advancing technologies exist to aid courts in accommodating the special needs of hearing impaired and visually impaired jurors, for example.

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.

Reference is made to the ADA

STANDARD 6. EXEMPTION, EXCUSE, AND DEFERRAL.

* * *

B. Eligible persons who are summoned may be excused from jury service only if:

1. Their ability to receive and evaluate information is so impaired that they are unable to perform their duties as jurors and they are excused for this reason by a judge . . .

Defendant's counsel argues that the court denied him due process by permitting a hearing impaired juror to participate in the trial and the verdict. That juror reported that she could understand others if she could see the fronts or sides of their faces. No one inquired about the extent of her hearing disability, or the extent to which she relied on lip reading to supplement any residual hearing. The court and counsel observed that she readily responded to their questions during voir dire.

After the voir dire questioning concluded, the court met with counsel and the defendant on the record to consider any challenges for cause or any peremptory challenges for the prospective jurors. The court first addressed challenges for cause. It denied the defendant's challenge of that juror for cause, concluding that there was no statutory basis for that challenge:³

THE COURT: Any other juror for cause?

MR. DAVIDSON (defense co-counsel): Mr. Cerbus and Bolyard already. Keep going. I am concerned about Linda Leow.

THE COURT: Is that the juror who has a hearing impairment?

MR. DAVIDSON: Yes, Your Honor. My position on that subject is that if any of us turn our backs on her in asking our questions, she will be able to read the lips of whatever witness is there, but if we happen to turn around or do anything where she misses something, I am concerned that she is not going to hear all the evidence. And she is a nice, friendly lady, and I am concerned that given, that she maybe -- am sure she misses about five percent of everything in her life and fills the rest in.

THE COURT: What is the State's position?

MS. CROY (prosecutor): I think that is not a challenge for cause. The State does not consent to a challenge for cause. It is not one of the bases.

³ See R.C. 2313.43; and Crim. R.24(B).

THE COURT: It is not a statutory basis, and the Courts have made accommodation for persons with various kinds of impairment. I am going to deny the challenge for cause. You can exercise a peremptory challenge.

MR. DAVIDSON: I understand.

MR. BUZZELLI (defendant's lead counsel): While we are on the subject, is it possible to get her some type of accommodation?

THE COURT: We will try in every way we can, but I can't guarantee that we will always be successful.

Defendant's counsel subsequently exercised his four peremptory challenges, without excusing that juror.

To accommodate that juror's disability the court moved her seat in the jury box, so she sat immediately next to the witness chair. Each witness faced that juror, unless counsel requested the witness to leave the witness stand and face another direction. More specifically, defense counsel and every witness faced that juror during defense counsel's examination of witnesses, unless defense counsel caused himself or the witness to face elsewhere. On a few of those occasions, the juror reminded counsel or a witness to face her, and the participants promptly complied. When the state offered an audiotape of the defendant's 911 emergency call, the juror left the jury box and sat next to the court reporter where she could watch the "real time" display of the reporter's record.

At no time during the trial, did any counsel complain that the juror was missing any testimony. Neither the juror nor any counsel requested that she have a "signing interpreter" or any other accommodation for her disability. At no time during the trial, did defendant's counsel ask the court to replace that juror with either of the two alternates that remained available throughout the trial. At no time during the trial, did defendant's counsel request a mistrial on the

ground that the juror was unable to understand or appreciate any evidence.

After the jury began deliberations, the foreman requested a transcript of the defendant's 911 emergency call, at least in part to assist that juror. All the other jurors could report the tape's contents to that juror, because the tape and a tape player accompanied the jurors during their deliberations. There was no transcript of the 911 tape then, but the parties agreed to provide a transcript when it could be prepared. However, counsel for both parties rejected the transcript which the court reporter prepared, and the court directed them to resolve any differences. They finally agreed on a transcript approximately one-half hour after the jury reported that they reached a verdict, sealed it for delivery on the following morning, and left the courthouse.

Before the court accepted or viewed the jury's sealed verdict, the judge asked the jurors in open court and on the record whether any of them wished to review the transcript before the court received their verdict. No juror requested the court to delay its acceptance of the verdict while he or she reviewed the transcript. At defendant's request, the court then asked the hearing impaired juror individually whether she wished to review the transcript before the court accepted the sealed verdict. She promptly responded that she did not wish to see the transcript. The court then opened the sealed verdict.

After reading the jury's verdict, the court asked whether any party requested anything further before the court discharged the jury. At defense counsel's request, the court polled the jurors to confirm that each juror approved that verdict. Each juror, including the hearing impaired juror, separately affirmed the verdict. Neither party made any further request.

The Court of Appeals for this district makes clear that a party cannot complain about a juror's inability to hear some testimony, unless the party can demonstrate how that situation

prejudiced him. *State v. Mierzejewski* (Oct. 13, 2000), Lucas App. No. L-98-1434 (sleeping juror). Indeed in virtually every case, momentary inattention or other circumstances cause one or more jurors to miss some testimony. That reality caused the court to instruct this jury: "There is no transcript of the testimony, so you must rely on your collective memories about the testimony." (See written jury instructions in this case, page 12)

Aside from general speculation that the hearing impaired juror might have missed some testimony or might have missed the full content of the 911 recording, the defendant fails to show how that juror's disability prejudiced him. Therefore, the court denies this first branch of his new trial motion.

B. Bad Acts or Character Evidence

Apparently anticipating that the state would offer evidence of the defendant's prior misconduct, defendant's counsel filed a pretrial motion *in limine* regarding such evidence. In response, the state filed a motion to permit testimony from an informant whose attached email message alleged defendant's reckless and threatening acts and propensities. After hearing oral argument on these pretrial motions, the court filed a responsive order on September 27, 2007:

To the extent that the state seeks to show the defendant's propensity to commit any alleged offense with evidence of his character trait or his prior acts, the court denies the state's motion for permission to use evidence pursuant to Evidence Rule 404. The court will permit otherwise admissible evidence to show the relationship between the defendant and the alleged victim, his motive for any alleged offense, the absence of mistake, or any other relevant factor listed in Evid. R. 404(B). If the defendant offers evidence of his character trait inconsistent with any alleged offense, the state may present otherwise admissible evidence to rebut it. If the defendant testifies, the state may use otherwise admissible evidence to impeach his testimony pursuant to Evid. R. 607, 608, or 609.

In his new trial motion, the defendant contends that the prosecutor violated this order and that resulting testimony denied him a fair trial because: (a) witness William Seese testified the defendant came to Seese's home to use cocaine, when he reportedly confessed that he pushed James Barnett off his boat;⁴ and (b) witness Kenneth Henning testified that he heard James Barnett angrily complain to the defendant less than two days before the fatal trip that the defendant owed him \$10,000 but spent money for other purposes, including a Porsche automobile he wrecked.⁵

⁴ Q. Do you remember the circumstances of meeting him? A. Yes.

Q. What were those circumstances? A. We used drugs.

Q. Okay. Where was that? A. At my house.

MR. BUZZELLI: Objection. Move to side bar? [Sidebar conference not recorded]

THE COURT: Objection is overruled.

Q. You were doing what at your house? A. Using drugs.

Q. What kind of drugs? A. Cocaine.

⁵ Q. Thank you, Your Honor. What was Jim's attitude or demeanor like at that point?

A. He was outraged.

Q. What did he say? A. He kept, he repeated himself --

MR. BUZZELLI: Objection.

THE COURT: Overruled.

Q. Go ahead. A. He repeated himself numerous times that he wasn't leaving Lake Erie until he got his money. He made a statement, that Scott had money to buy a new Denali, another boat. He even brought up a Porsche that he had wrecked weeks before that, which I had, you know, it is nothing to me, but Jim was like getting this off his chest. He was just -- he was mad. He was upset. He was talking.

THE COURT: Okay. I want to repeat what I said before. That is not evidence that everything that Mr. Barnett reportedly said has any basis in fact at all. We need direct evidence about any of those things from somebody who has personal knowledge. This witness does not have personal knowledge of that history, but it is evidence you may consider for whatever value you may determine of what was in Mr. Barnett's mind to the extent that that was communicated to Mr. Speer, whatever Mr. Speer knew about that was in Mr. Barnett's mind.

In the first instance (Seese's testimony), defendant's counsel objected and argued his contention at a side bar conference that the court reporter did not attend. During that side bar conference, the court asked defendant's counsel to suggest any cautionary or limiting instruction they would request the court to give the jury. Defense counsel declined to propose any cautionary instruction. The court then overruled that objection on the record because the circumstances surrounding the reported confession were relevant in determining its reliability.. Thereafter, defendant's counsel cross-examined Mr. Seese extensively about his drug use during his meeting with the defendant.

In the second instance (Henning's testimony), the witness volunteered the allegedly offending comment, which was not directly responsive to the prosecutor's question. The court promptly gave the jury a limiting instruction. Defense counsel made no contemporaneous objection or motion to strike, nor did they request any further cautionary instruction. This evidence was relevant to the state's claim that the defendant murdered James Barnett to resolve their money dispute. Evidence that the victim angrily accused the defendant of failing to pay him promised funds when he squandered money for other purposes supported the state's motive contention.

At the end of that court day, after the state's witnesses completed their testimony and after the jury left the courtroom, defense counsel moved for a mistrial. They argued (a) the state violated the court's pretrial order about character evidence and (b) those statements by Seese and Henning unfairly prejudiced the defendant. The court overruled the mistrial motion, noting that the state had not violated the court's pretrial order, that the challenged evidence was relevant, and that defense counsel declined to suggest any further cautionary instruction.

In any event, these two instances were harmless and would not deny the defendant a fair trial, in view of the overwhelming evidence of the defendant's reckless conduct that caused the victim's death. See Crim. R. 52(A). Therefore, the court denies the second branch of the defendant's new trial motion and the motion as a whole.

III. DEFENDANT'S OBJECTION TO SENTENCING

On December 3, 2007, thirty-three days after the court sentenced the defendant, his counsel served an "Objection to Sentencing." Without providing any further specificity or detail, his Objection asserts:

But when it appears from the record that the judge's discretion in imposing sentence has been determined by conclusions from his own investigation of a crime neither charged nor proven, the court abused its discretion. *State v. Longo* (1982), 4 Ohio App.3d 136, 446 N.E.2d 1145.

The Criminal Rules make no provision for this procedural challenge to a court's sentence. This Court may lack authority to address that challenge when the defendant first asserts it after the time allowed to file post-trial motions.

Perhaps Crim. R. 57(B) permits this Court to consider the Objection as a motion for relief from judgment pursuant to Civ. R. 60(B). Cf. *State v. Swiger* (1998), 125 Ohio App. 3d 456, 708 N.E.2d 1033 (a party who relies on Civ. R. 60 for a criminal case must satisfy its requirements to obtain any relief). If so, the defendant does not satisfy the requirements for Civ. R. 60(B), because he fails to show that he has contrary evidence that could produce a different result if the court reconsidered the challenged order. Cf. *GTE Automatic Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St. 2d 146, paragraph two of the syllabus. However, the court will address the merits of the defendant's Objection to the extent that the court can infer its meaning.

To support his Objection, defendant's counsel relies on *State v. Longo*, a case in which a judge accepted the defendant's no contest plea and sentenced him to prison for carrying a concealed weapon. In determining the sentence for that offense, the judge telephoned a witness who recounted hearsay observations by the witness's spouse. The record showed that the judge gave heavy weight to that telephone interview, from which the judge inferred that the defendant was also attempting to steal a car and was probably involved in an organized car theft ring.

The appellate court in *Longo* explains its reasons for permitting that defendant to withdraw his no contest plea and to proceed to trial on the carrying a concealed weapon charge:

Here, the trial judge's own investigation amplified by his own declarations, make it apparent that his sentencing discretion was heavily influenced by his conclusion (without charge or evidence) that the defendant was part of an organized auto theft ring. Thus, the court's persuasion, on matters not charged and not tried, shaped his judgment.

Even though the judge conducted his extramural investigation during the sentencing phase (when admittedly a court has more discretionary leeway), he exceeded his authority in telephoning the wife of the vehicle owner at all and, particularly, in determining what the husband "saw" through the wife's eyes. From this he drew conclusions obviously crucial to the sentencing decision. In this case the exact perimeters of sentencing discretion need not be determined. For here the actions of the court went beyond any defensible limit and, in effect, sentenced the defendant for acts neither charged nor proven. An abuse of discretion is clear.

It is also clear that a remand for resentencing will not cure the flaws in the process. The only correction of consequence is to grant the motion to vacate the previously entered plea of no contest and reinstate the plea of not guilty.

The *Longo* decision has no resemblance to the present case. Cf. *State v. Zimmerman* (Jan. 27, 2006), Ottawa App. No. OT-05-027, 26-Ohio-320. In this case, a duly empaneled jury found the defendant guilty of involuntary manslaughter and aggravated vehicular homicide. After ruling that the involuntary manslaughter conviction merged into the aggravated vehicular

homicide conviction for sentencing purposes, the judge sentenced the defendant for the resulting conviction.

In determining an appropriate sentence for this defendant, this judge sought to comply with sentencing guidelines in R.C. 2929.11, 2929.12, and 2929.13. Those guidelines necessarily require the judge to consider matters outside the trial evidence in determining the relative gravity of the offense and the defendant's propensity for recidivism. Those matters include a presentence investigation report that contains the investigating officer's hearsay information and recommendations, part of which the judge need not share with counsel or any party. R.C. 2951.03(B). At the sentencing hearing, the court must permit and consider unsworn statements by the prosecutor, the victim or the victim's representative, defense counsel, and the defendant. R.C. 2929.19. With the court's permission, "any other person may present information relevant to the imposition of sentence in the case." R.C. 2929.19(A)(1). The judge must also consider any unsworn victim's impact statement. R.C. 2947.51.

In this case, the judge obtained a presentence investigation report. Before the sentencing hearing, he shared the entire report, including the investigating officer's recommendation, with counsel for both sides. In that report, the officer recounted the defendant's convictions for other offenses and recommended that the court sentence him to a three year prison term. Defense counsel stated that he had no disagreement with the factual portions of that report.

Before the sentencing hearing, the judge received multiple letters and email communications from interested persons about the potential sentence, some of which the defendant or his counsel apparently encouraged. The court made them part of the sentencing hearing record. During the sentencing hearing, the judge permitted anyone present to express his

or her views regarding the prospective sentence, including the prosecutor, defense counsel, the defendant, and members of the victim's family.

The defendant's current Objection apparently complains that the judge added two matters at the sentencing hearing: (a) the trial evidence showed the defendant's apparent violation of a Coast Guard Regulation regarding life jacket use;⁶ and (b) specified public records showed the defendant's prior misdemeanor traffic convictions for reckless conduct. Defendant and his counsel had an opportunity to disagree with any of those matters, but they had no comment.

Unlike the trial court judge in the *Longo* case, this judge did not consider or rely on hearsay reports or inferences about any uncharged or unproven offense. On the contrary, this judge recognized a federal administrative regulation, concerning which this Court should take judicial notice,⁷ and public records of proven offenses for which other Ohio courts convicted and sentenced the defendant. The presentence investigation report included some of those convictions, but the reporting officer followed his usual practice by not including misdemeanor traffic offenses. This judge considered that some of those specific misdemeanor traffic offenses

⁶ 46 C.F.R. 122.508 provides: "(a) The master of a vessel shall require passengers to don life jackets when possible hazardous conditions exist, including, but no limited to ... (2) During severe weather ... (b) The master or crew shall assist passengers in obtaining a life jacket and donning it if necessary." See also, 1 U.S.C. 3: "The word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water;" and 46 C.F.R. 122.100: "A vessel must be operated in accordance with applicable laws and regulations and in such a manner as to afford adequate precaution against hazards that might endanger the vessel and the persons being transported"

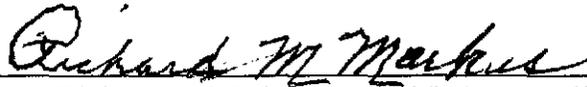
⁷ See 44 U.S.C. 1507; *Firestone v. Industrial Commission* (1945), 144 Ohio St. 398, 59 N.E.2d 147; *Boone v. State* (1923), 109 Ohio St. 1, 141 N.E. 841; Civ. R. 44.1(A)(3).

had possible relevance to the defendant's propensity for reckless conduct recidivism.

Unlike the judge in the *Longo* case, this judge drew no inference about uncharged or unproven offenses. Unlike the judge in the *Longo* case, this judge did not impose an unusual or "unreasonable" sentence. In *Longo*, the trial judge sentenced a first offender to a prison term for the lowest degree felony. In this case, a highly experienced probation officer recommended a three year prison sentence, which he reported as the "usual" sentence in that court for this offense. As a visiting judge, this judge gave that recommendation and that history some weight. In all the circumstances, this judge exercised his discretion by imposing a four year sentence on a defendant with a history of reckless conduct, for extremely reckless conduct that caused the victim's death. This judge also imposed a \$10,000 fine on a defendant with substantial assets who spent them liberally.

Finally, unlike the *Longo* case, a new trial would be a totally unacceptable remedy for any error the trial judge purportedly made during the sentencing hearing. A jury found the defendant guilty after a full and fair trial. This judge would have imposed the same sentence if he had not reported and considered the Coast Guard regulation or those misdemeanor traffic convictions.

The court overrules the defendant's Objection to Sentencing.



Judge Richard M. Markus, Retired Judge Recalled to Service pursuant to Ohio Constitution, Art. IV, §6(C) and R.C. 141.16 and assigned to the Ottawa County Common Pleas Court for this matter

THE CLERK SHALL MAIL TIME STAMPED COPIES OF THIS
OPINION AND ORDER TO ALL COUNSEL AND THE ASSIGNED JUDGE.

16
VOL 0538 PG 029
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