ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	CASE NO.: 2009-0330
PLAINTIFF-APPELLANT,	:	ON APPEAL FROM OTTAWA COUNTY COURT OF APPEALS, SIXTH APPELLATE DISTRICT
V.	:	
SCOTT A. SPEER,	:	COURT OF APPEALS CASE NO.: OT-07-046
DEFENDANT-APPELLEE.	:	

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STATEMENT OF THE FACTS

On August 6, 2002, James Barnett drowned during a boating trip. Three and a half years later, Scott Speer was indicted for involuntary manslaughter and aggravated vehicular homicide. Over a year later, murder and aggravated murder charges were added. On October 15, 2007 a jury trial commenced.

Contrary to Appellant's assertion, the statement of facts of the Amicus Curiae Ohio Attorney General is not "comprehensive." It failed to include critical information regarding the scope of Juror Leow-Johannsen's hearing impairment and trial court's knowledge of the expected evidence. The Voir Dire record reveals the following:

The Assistant Prosecuting Attorney Lorrain Croy asked Juror Leow-Johannsen, "if there is an audio tape, then...". Juror Leow-Johannsen answered unambiguously "**then I will have a problem.**" (Tr. 145-46).

The trial court specifically knew that an audio tape would be played before he ruled on the challenge for cause. Defense counsel, Davidson indicated, "and I know Ms. Croy got into this a little bit. I am sure some of the evidence is going to be tape recorded...". (Tr. P. 154) More specifically, the trial judge court acknowledged that the Government would use audio recordings before opening statements. Consider the following statement by the court:

> Ms. Johannsen, we want to assist you in every way that we can. I think we could start having you trade places with Ms. Elliott, if you would not mind. This way, if at any time, you have difficulty, raise your hand. **Where there is material that is only on audio tape**, we will have you come down and sit next to the Court Reporter who is writing it on a screen, and you will be able to read what she writes on a screen (Court Reporter indicating). We are now ready for opening statements.

(Tr.197) (emphasis added).

The extent of Juror Leow-Johannsen hearing impairment was evident. At times Juror Leow-Johannsen did not understand voir dire questions posed by the Court. Consider the following:

> The Court: The next one was Ms. Leow. We have not had a chance to chat, you and I.
>
> The Court: When did that happen?
>
> Ms. Leow-Johannsen: Over the summer, over the summer.
>
> The Court: Over the summer?
>
> Ms. Leow-Johannsen: Yes.
>
> The Court: Did they find the person who did it?
>
> Ms. Leow-Johannsen: I am not, but somehow they found my name and asked me to be here in the court at the end of this month.
>
> The Court: Do you think that will affect you somehow here?
>
> Ms. Leow-Johannsen: I can't read your lips. **Move your files.**
>
> The Court: Let me move over so you can see me. Will that affect you in this case?
>
> Ms. Leow-Johannsen: No.
>
> The Court: I notice, Ms. Leow, that you and I have some problems communicating, and I want to make sure that you can hear or understand or listen to and see whatever it was that you need to see to get the evidence. Do you think you can do that?
>
> Ms. Leow-Johannsen: Yeah.
>
> The Court: Good. If you are selected as a juror, and you have any problems, you have trouble knowing what the witness is saying, you tell me, and **I will make sure that you get a chance to see it**. Okay?
>
> Ms. Leow-Johannsen: No problem.

(Tr. 64-66) (emphasis added).

Juror Leow-Johanssen specifically explained that her ability to read lips on TV was limited and that close captioning was necessary. She further explained that she would be at risk to miss information if counsel was not facing her. Consider the following:

Ms. Croy: One question for Ms. Johannsen. Are you familiar with – you read lips?

Ms. Leow-Johannsen: Yes, yes.

Ms. Croy: If I am standing this way and the witness - -

Ms. Leow-Johannsen: I can't read then if you look that way. I don't know what you said, but this way, I am okay.

Ms. Croy: Is there any other assistance that the Court could give you in understanding what is going on, someone who does sign language?

Ms. Leow-Johannsen: I read lips.

Ms. Croy: As long as someone is facing this way, you can?

Ms. Leow-Johannsen: I can see. Yes.

Ms. Croy: All right. Thank you. If there is an audio tape, then - -

Ms. Leow-Johannsen: - - then I will have a problem.

(Tr. 145).

****

Juror Leow-Johannsen: I can hear you, but I have to read lips.

Mr. Davidson: So if I were to turn the wrong way to pick something up, you could miss a question.

Juror Leow-Johannsen: Right.

(Tr. 154).

As voir dire continued, Juror Leow-Johannsen demonstrated additional hearing problems:

Trial Court: "And you drive the boat yourself?"

Juror Leow-Johannsen: "I am sorry what?" (Tr. 79).

Because of her hearing impairment, Appellant Speer properly requested that Juror Leow-Johannsen be stricken from the jury for cause. (Tr. 176). The Trial Court, however, promptly rejected the challenge for cause. Consider the following:

> Mr. Davidson: I am concerned about Linda Leow.
>
> Trial 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 given, that she maybe - - I am sure she misses about five percent of everything in her life and fills the rest in.
>
> Trial Court: What is the state's position?
>
> Ms. Croy: I think that is not a challenge for cause. The State does not consent to a challenge for cause theory. It is not one of the bases.
>
> Trial Court: It is not a statutory basis, and the Courts have made accommodation for persons with various kind of impairment. I am going to deny the challenge for cause,.. You can exercise a peremptory challenge.[1] (Tr. 176).

---

[1] Defense counsel identified and used each of its four peremptory challenges on Juror Rodenhauser, Juror Mary Elum, Juror William Crawford, and Juror Jeffrey Wilson.

Juror Rodenhauser, indicated he knew Prosecutor Mulligan, their respective families grew up together and was a personal friend of Mulligan (Tr. 29). He had a son-in-law with twenty three (23) years of service as a police officer (Tr. 74). Rodenhauser knew investigator Don St. Clair and the investigator swam in Rodenhauser's pool with the Rodenhauser children (Tr. 107). He indicated he wouldn't be "impartial" relating to St. Clair, but would be fair (Tr. 107). He indicated, "whatever he has to say, I would listen to it" (Tr. 107). He further indicated we boated right side of Mark's parents (Mulligan) for years and back and for the to Put In Bay..." (Tr. 124). The defense challenged Rodenhauser for cause but the Court denied the request.

Juror Mary Elum Kessler, indicated she read about the case in three newspapers (Tr. 42). When asked whether she could be fair, she answered, "I don't know honestly...my father is a retired police chief in Cuyahoga Falls." (Tr. 42). She also indicated, "No I heard a lot about this case and I have heard...I don't know that I can be unbiased. Q. Where did you hear from? A. Community members here and in Akron and the Fairlawn area." (Tr. 42) [The Appellee is from Fairlawn, a suburb of Akron]. The defense requested she be excused for cause but the Court denied the challenge for cause (Tr. 177).

Juror William Crawford, indicated he belonged to the Port Clinton Power Squadron and taught boating safety classes (Tr. 76), owned a 35 foot Power Boat (Tr. 76) but did not believe it was safe to operate boat at night because of lack of lights and markings (Tr. 117). Mr. Crawford also read about the case in the local newspaper (Tr. 39) and had been the victim of a house burglary (Tr. 64).

Juror Leow-Johannsen was empanelled as a member of the jury (Tr. 183). The Trial Court then attempted to make some accommodations for Juror Leow-Johannsen, which included having her move her seat within the jury box so she could sit closer to witnesses (Tr. 186). In addition, the court indicated the following:

> Trial Court: Where there is material that is only on an audio tape, we will have you come down and sit next to the court reporter who is writing it on a screen, and you will be able to read what she writes on a screen (Court Reporter indicating.)...

(Tr. 197).

The first piece of evidence offered by the State was an audio recording of a 911 call made by Speer on the night in question from aboard his boat. (Tr. 230). During the jury's deliberations, the jurors submitted the following note to the trial court, "Can we have the written transcript of the 911 call for juror number one [Juror Leow-Johannsen]? Thanks. (Tr. 1301).

The jury acquitted Speer on the murder and aggravated murder charges but convicted Speer of involuntary manslaughter and aggravated vehicular homicide charge. Speer received a four year sentence, the maximum $10,000.00 fine and a suspended license for five years.

A Motion for New Trial was filed specifically raising the improper empanelling of a hearing impaired juror. The Court denied the Motion for New Trial. Speer filed a timely Notice of Appeal. The Sixth District Court of Appeals unanimously reversed the judgment of the trial court on grounds that the court had abused its discretion in permitting a hearing impaired juror to remain on a jury that required evaluation of a critical 911 call. The Government appealed and the Ohio Supreme Court granted jurisdiction.

Juror Wilson knew Prosecutor Mulligan (Tr. 25), put on boating seminars with the investigator Sam DeWalt (Tr. 104), was a special deputy sheriff who worked on the dive recovery team (Tr. 152), knew Sheriff Randy Reidmaier for over twenty (20) years (Tr. 160) and read about case in the local newspaper and heard general conversations about this case in the boating industry (Tr. 42).

ARGUMENT

Appellee's response to Appellant's proposition of law:

> If a potential juror's responses to voir dire questions leaves doubt as to whether that juror can adequately perceive and evaluate the evidence, a trial court must excuse that juror for cause.

The question of whether Juror Leow-Johannsen should have been stricken for cause places Juror Leow-Johannsen's interest in serving on the jury against Speer's right to receive a fair trial. By failing to strike Juror Leow-Johannsen for cause, the trial court placed her interest in becoming a juror above Speer's right to a fair trial. The Court of Appeals correctly concluded that this was an abuse of discretion.

The standard of review in determining the propriety of a trial court's decision not to disqualify a juror on a challenge for cause is abuse of discretion. *Berk v. Matthews* (1990), 53 Ohio St. 3d 161, 169. An abuse of discretion is more than an error of law or judgment and implies that the trial court's attitude was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St. 3d 217, 219. A potential juror may be challenged for cause because "he is otherwise unsuitable for any other cause to serve as a juror." R.C. § 2945.25(O); Ohio Crim. R. 24(C)(14). For example, a juror's suitability to serve is always limited by a criminal defendant's right to a fair trial. *Irvin v. Dowd*, 366 U.S. 717 (1961).

Contrary to the State's suggestion, what the trial court did not know at the time of the challenge for cause is not as critical as *what it did know*. Based on her testimony, the trial court knew Juror Leow-Johannsen had a hearing impairment and relied upon reading lips. (Tr. 65, 145, 154).. Indeed, the trial court knew Juror Leow-Johannsen could only understand what someone was saying if they were facing her. (Tr. 145, 154). Based on her testimony, the trial court knew that her hearing impairment prevented her from hearing audio recordings. (Tr. 145).

The record is also clear that the trial court knew audio evidence would be presented. (Tr. 154, 197).

Juror Leow-Johannsen's admissions that she could not hear audio evidence or understand someone not facing her rendered her unsuitable to serve and jeopardized the fairness of Speer's trial. Other jurisdictions have already recognized the inherent unfairness to a criminal defendant when a juror may miss material testimony and/or be unable to perceive and evaluate the evidence as a result of a hearing impairment.

In Commonwealth v. Brown, 231 Pa. Super. 431 (1974), after the jury rendered its verdict convicting the defendant of various crimes, it was discovered that a particular juror suffered from difficulty hearing. Id. at 434-35. On appeal, the defendant argued that the hearing difficulties of the juror denied him a fair, impartial and competent jury, resulting in less than a unanimous verdict. *Id.* The appellate court agreed and reversed the judgment and remanded the case for a new trial. *Id.* In doing so the appellate court stated the following:

> We recognize that it is quite difficult to determine the amount of prejudice suffered by the appellant because of the juror's hearing difficulties. However, the record substantiates that the juror had difficulty in hearing. He admitted inability to hear questions and his responses were inconclusive as to whether he had heard all the testimony. Thus, we are confronted with a situation where, in order to insure fairness and to alleviate any possibility of prejudice caused by the deaf juror, we must assume prejudice for the sake of insured fairness.

Id. at 437-38. The Court went on to state that "...[t]he presence of a juror with a physical impairment of such magnitude as to interfere with the juror's ability to hear and understand the presented testimony and evidence precludes a verdict by all jurors. Such a disability would render the juror incompetent to serve and would deny (the defendant's) right to an impartial verdict." *Id.* at 436.

The Rhode Island Supreme Court reached a similar conclusion as Brown in ruling on a petition for habeas corpus. In State v. Berberian, 118 R.I. 413 (1977), the defendant had been convicted of reckless driving. Id. at 415. In the course of polling the jury, it appeared that one of the jurors suffered from a hearing impairment. *Id.* During examination of the juror, he indicated that he had difficulty in hearing, particularly when someone was not facing him. *Id.* at 419-420. Nevertheless, the trial judge determined that the juror's hearing restriction was not severe enough to prevent him from properly discharging his duties as a juror. Id. at 415. The Rhode Island Supreme Court disagreed and found an abuse of discretion, opining that "since the juror's deafness may have adversely affected his ability to decide the case intelligently," the juror "had a hearing impairment sufficient to deny the petitioner's right to a fair, impartial trial and unanimous verdict." Id. at 419-21.

In State of Wisconsin v. Turner, 186 Wisc. App. 2d 277, the court determined that the appellant's federal and state constitutional rights to an impartial jury and due process were infringed when either one or two jurors were unable to hear some of the testimony of material witnesses. Id. at 285. Accordingly, the court ordered a new trial. *Id.* In reaching this conclusion, the court was quick to point out that the jurors' inability to hear tonal quality, volume and speech patterns may have had an impact of the credibility determinations reached by the hearing impaired jurors. Id.

Despite Juror Leow-Johannsen's candid admissions, the trial court determined it could accommodate her hearing impairment by moving her juror seat to the front and by allowing her to view the court reporter's real time recording of any audio evidence. (Tr. 186, 197). The attempted accommodations, however, did not remove important doubts as to whether Juror

Leow-Johannsen would hear all material testimony nor did it change the fact that she would be unable to perceive and evaluate any audio evidence.

Moving Juror Leow-Johannsen to the front row did not guarantee that speakers would always be facing her during trial. Even the trial court acknowledged that it could not "guarantee that [it would] always be successful" in accommodating Juror Leow-Johannsen. (Tr. 177). An accommodation should not be deemed sufficient when it fails to foreclose the possibility that a juror would miss critical testimony or evidence, particularly when a criminal defendant's right to a fair trial hangs in the balance.

The trial court's attempted accommodation relating to audio evidence was even more unreasonable. The trial court knew its accommodation would do nothing to change the fact that Juror Leow-Johannsen would be unable to hear any of the critical 911 audio evidence. As such, the trial court knew or should have known that she would be unable to evaluate and perceive the audio cues contained within the 911 audio tape. Communicative speech is not the mere sum of word choices. The court reporter's real time display could not convey any tonal quality, speech pattern, volume, emphasis, evasion, faltering, speech, emotion or background sounds evident from any audio recordings. *See Harleysville Mut. Ins. Co. v. Santora* (1982), 3 Ohio App. 3d 257, 261 (recognizing that a transcript alone could not capture or preserve nuance, voice tone, emphasis, evasion, faltering or emotion as an audio recording could). The trial court's attempted accommodation left substantial doubt as to whether Juror Leow-Johannsen would be able to perceive and evaluate the audio evidence.

In fact, Juror Leow-Johannsen's empanelment on the jury did prejudice Speer's right to a fair trial. Most importantly, there is no dispute that Juror Leow-Johannsen was unable to perceive and evaluate all material aspects of the 911 tape. The 911 recording was a critical piece of

evidence, which was highlighted in the State's opening, the first exhibit offered into evidenced and further highlighted, in the state's closing argument, as part of "the beef" of the State's case. Particularly important were the audio sounds present on the tape. (Tr. 203-04, 230, 1208). Indeed, the State encouraged the jury to listen to the "calm tone" of Speer's voice, and further directed the jury to consider the "demeanor on the 911 tape." (Tr. 204, 1215). The State went on to state that "[h]is 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." (Tr. 1216). In addition, the 911 tape was critical in the jury's evaluation of whether Speer's speech was slurred, and the witness credibility determinations arising therefrom. (Tr. 545-46, 1275).

As set forth by the Court of Appeals, in order to "evaluate the tape as evidence and determine its value in establishing the elements of the offenses, jurors had to be able to listen to Speer's speech patterns, the inflections in his voice, pauses in conversation and many other audio clues that would only be meaningful if actually heard." *State v. Speer* (2008), 180 Ohio App. 3d 230, 237.[2] By her own admission, Juror Leow-Johannsen's hearing impairment prevented her from perceiving these audio cues. Consequently, the trial court's unreasonable refusal to strike her for cause denied Speer a fair trial.

There is also no way to know whether Juror Leow-Johannsen heard all testimony of witnesses or arguments of counsel. Indeed, there were several instances in the voir dire where she was confused and/or needed a speaker to turn towards her. It is simply unknown whether she missed material testimony, evidence or arguments.

---

[2] The Court of Appeals had a lengthy analysis of why the audio recording of the 911 tape had a direct bearing and correlation as to whether Speer acted recklessly or wantonly, which are required elements for the offenses of involuntary manslaughter and aggravated vehicular homicide. For the sake of brevity, Speer will not repeat the Court of Appeals' analysis herein. *See Speer*, 180 Ohio App. 3d at 235-38.

Where an anticipated accommodation does not remove critical doubts as to whether a juror will be physically able to perceive and evaluate the evidence, the trial court must remove the juror for cause. *See Eckstein v. Kirby*, 452 F. Supp. 1235, 1242-42 (E.D. Ark. 1978) ("The interest of [a person] in becoming a juror must be secondary to the interest of the state in assuring a fair trial to the litigants in its court"). In *Eckstein*, the court concluded that a statute did not violate the Due Process and Equal Protection Clauses even though it disqualified persons from serving as jurors whose senses of hearing or seeing were substantially impaired. *Id.* at 1236. The court relied, in part, on the proposition that "physically qualified jurors are essential to any meaningful exercise of the Sixth Amendment's jury trial guarantee and to the fulfillment of the concept of a fair trial." *Id.* at 1243.

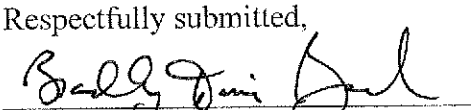
The duty of each juror was to determine whether the drowning of James Barnett was the fault of the skipper, the passenger or merely an accident for which fault and responsibility should be placed on neither. The factual analysis required by each juror demanded full evaluation of Appellee Speer's 911 call. Juror Leow-Johannsen specifically informed the court that this would be "a problem" for her. She did not say "I will do my best" or "I may need help". She was unequivocal.

By failing to exclude Juror Leow-Johannsen for cause and unreasonably attempting to accommodate her hearing impairment, the trial court allowed a juror to serve, knowing she would be unable to perceive and evaluate the audio evidence. This placed Juror Leow-Johannsen's interest in serving on the jury ahead of Speer's right to fair trial. The Court of Appeals correctly determined that this was an unreasonable decision and constituted an abuse of discretion.

CONCLUSION

Constitutional scholars have proclaimed that the right of a citizen to a fair trial by jury is the most indispensable device of the system of justice in a free society. Juror Leow-Johnnsen was plain and ambiguous in her comments about her inability to evaluate the 911 audio recording. The trial court acted unreasonably in refusing to strike her for cause. As a result, Speer did not receive a fair trial. A new trial must be held. For the reasons set forth above, Speer respectfully requests that the decision of the Court of Appeals be affirmed.

Respectfully submitted,



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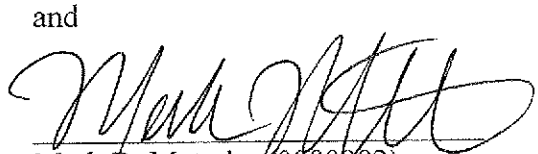

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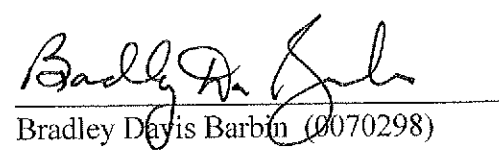

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