

ORIGINAL

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-07-046
	:	

REPLY BRIEF OF *AMICUS CURIAE*
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IN SUPPORT OF PLAINTIFF-APPELLANT STATE OF OHIO

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INTRODUCTION

A trial court has great discretion when deciding whether to dismiss a juror for cause at voir dire. *Berk v. Matthews* (1990), 53 Ohio St. 3d 161, 168-69. This discretion exists even when the basis of a for-cause challenge is a potential juror's hearing impairment or other disability. If a trial court reasonably determines that a juror can be reasonably accommodated, that decision can be overturned only for an abuse of discretion.

Defendant-appellee Scott A. Speer asks this Court to curtail severely a trial court's discretion over matters of jury selection by adopting the following proposition of law: "If a potential juror's responses to voir dire questions leaves [sic] doubt as to whether that juror can adequately perceive and evaluate the evidence, a trial court must excuse that juror for cause." Merit Br. of Appellee Scott A. Speer ("Speer Br.") at 6. In other words, according to Speer, a trial court *must* excuse a juror if it is *unclear* whether the juror "can adequately perceive and evaluate the evidence." *Id.* But this argument is problematic for several reasons. First, Speer disregards well-established case law confirming a trial court's discretion over jury selection. Second, Speer's overbroad proposition of law extends far beyond the legal issue raised here—whether the trial court erred by deciding to accommodate a hearing-impaired juror. And, third, this standard is unworkable because, even as it attempts to limit a trial court's discretion, it highlights the discretion inherent in deciding whether to seat a particular juror.

Speer actually raises more questions than he answers. For example, how much doubt is needed to require dismissal? How is "adequately" defined for purposes of a juror's ability to perceive and evaluate evidence? And how should a court assess a juror's ability to perceive and evaluate evidence before the evidence has been introduced? Speer cannot articulate a workable standard because, short of completely eliminating discretion, it is impossible effectively to limit

discretion in an inherently fact-specific inquiry. For these reasons, the Court should reject Speer's overbroad claim and confirm a trial court's broad discretion over jury selection.

Speer's more narrow claim—that the trial court abused its discretion by accommodating a hearing-impaired juror in a case involving tape-recorded evidence—similarly fails. According to Speer, “Juror [Linda] 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.” *Id.* at 7. But Speer does not account for a trial court’s ability to make reasonable accommodations or the effect of such accommodations on Leow-Johannsen’s suitability as a juror. Contrary to Speer’s suggestion, a trial court does not abuse its discretion by declining to dismiss a disabled juror for cause if the court reasonably decides, in light of the challenge made and the information available to the court, that a juror can be accommodated without affecting a defendant’s right to a fair trial.

Although a physically impaired citizen’s interest in serving on a jury does not trump a defendant’s constitutional right to a fair trial, state and federal policy encourages courts to make reasonable accommodations for physically impaired jurors. Here, the trial court’s decision to accommodate Linda Leow-Johannsen both protected Speer’s right to a fair trial and advanced Leow-Johannsen’s interest in serving on a jury. Accordingly, the Court should defer to the trial court’s reasonable exercise of discretion, reverse the Sixth District’s decision, and remand for further proceedings.

ARGUMENT

- A. A trial court does not abuse its discretion when it reasonably evaluates a for-cause challenge of a hearing-impaired juror and concludes that reasonable accommodations will ensure the juror can adequately perceive and evaluate evidence at trial.**

Speer acknowledges that the decision to deny a challenge for cause is within a trial court’s sound discretion, see *State v. Wilson* (1972), 29 Ohio St. 2d 203, 211, then advocates a rule that

would improperly divest trial courts of discretion in situations like this one. But categorical rules do not govern the resolution of challenges for cause. Rather, a trial court must evaluate each challenge on a case-by-case basis, assessing a juror’s “individual qualifications and ability impartially to consider evidence presented at a trial.” *Batson v. Kentucky* (1986), 476 U.S. 79, 87. When deciding whether a physical impairment will affect a juror’s ability to serve, a court must also consider whether reasonable accommodations would render moot any concern that the juror’s disability would prevent the defendant from receiving a fair trial. Accordingly, a trial court is not required to dismiss a hearing-impaired juror like Leow-Johannsen for cause unless it determines that no possible accommodation would adequately protect the defendant’s rights.

In reviewing the trial court’s decision to seat Leow-Johannsen, it is proper to focus—as Speer urges—on what the trial court knew when it ruled on the for-cause challenge.¹ Speer Br. at 6. Speer identifies four key facts known by the trial court at the time of the for-cause challenge: (1) Leow-Johannsen had a hearing impairment and relied on lip-reading to understand oral communication; (2) because Leow-Johannsen relied on lip-reading, she could only understand speech when a speaker was facing her; (3) Leow-Johannsen could not hear audio recordings; and (4) audio evidence would be admitted in Speer’s trial. *Id.* at 6-7. In light of these facts, the trial court reasonably determined that Leow-Johannsen could be reasonably accommodated by ensuring that she had a good view of the attorneys and witnesses (to allow for lip-reading), Trial Transcript (“Tr.”) 186, 197, instructing her to notify the court if she missed

¹ See Merits Br. of *Amicus Curiae* Ohio Attorney General Richard Cordray at 9-10 & n. 1 (critiquing the appeals court’s focus on what happened *after* voir dire when evaluating the trial court’s ruling on a for-cause challenge *during* voir dire). As the Ohio Attorney General’s opening brief explained, Speer does not raise the separate question of whether the trial court erred by failing to remove Leow-Johannsen from the jury *during* trial. *Id.*

anything, Tr. 66, and allowing her to view real-time transcripts of any audio-recorded evidence introduced at trial, Tr. 197.

By contrast, Speer erroneously concludes from the same facts that Leow-Johannsen was “unsuitable to serve.” Speer Br. at 7. According to Speer, “[a]n 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.” *Id.* at 9. But no amount of accommodation can eliminate the possibility of a hearing-impaired juror’s missing any critical testimony or evidence. See *State v. Speer*, 180 Ohio App. 3d 230, 2008-Ohio-6947, ¶¶ 30, 34. This is true not only of a hearing-impaired juror who reads lips, but also of any juror who needs a sign-language interpreter. A juror who lip-reads would miss testimony if a speaker turned away for a moment; a juror who reads sign language would miss testimony if an obstruction temporarily blocked her view of a sign-language interpreter. Thus, Speer’s argument would effectively render Leow-Johannsen or any other hearing-impaired juror unsuitable to serve, regardless of accommodations made.

Speer mistakenly relies on three cases, all from lower courts in other states, as support for 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.” Speer Br. at 7. Two of these cases are inapposite because they involve situations in which courts first became aware of a juror’s hearing impairment when polling a jury *after* conviction. *Pennsylvania v. Brown* (Pa. Super. 1974), 332 A.2d 828, 830; *Rhode Island v. Berberian* (R.I. 1977), 374 A.2d 778, 779. Because the impairment was discovered so late, those courts had no opportunity to assess the scope of the disability or craft reasonable accommodations for the impaired jurors. By contrast, the trial court here both explored Leow-Johannsen’s disability *and*

made reasonable accommodations. The third case, *Wisconsin v. Turner* (Wis. App. 1994), 521 N.W.2d 148, involved a situation in which the *entire courtroom* had difficulty hearing two young girls who testified about the defendant's alleged assaults. *Id.* at 150. The court asked the witnesses to speak up, tried to eliminate background noises, brought in a speaker system, and considered having jurors read a real-time transcript of the testimony. *Id.* at 149-50. On appeal, the Wisconsin Court of Appeals held that the defendant'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 the testimony of material witnesses." *Id.* at 151. But, unlike *Turner*, in which at least one juror entirely missed the testimony of the only two eyewitnesses to the alleged crimes, no one suggests here that Leow-Johannsen entirely missed the 911 call or any other testimony.

Not only does Speer cite no cases to support his claim that any doubt mandates a juror's dismissal, but courts have repeatedly recognized that a trial is not inherently unfair simply because a trial court cannot completely foreclose the possibility that a juror might miss critical testimony or evidence. Courts have no way to ensure that *any* juror, even one who is not hearing impaired, will be aware of everything that happens at trial. "We cannot . . . be sure of what any juror has seen or heard or understood or interpreted." *New York v. Guzman* (1984), 478 N.Y.S.2d 455, 466, *aff'd* by *New York v. Guzman* (1990), 555 N.E.2d 259. "Many jurors have somewhat less than perfect hearing or vision, or have other limitations on their abilities to assimilate or evaluate testimony and evidence." *United States v. Dempsey* (10th Cir. 1987), 830 F.2d 1084, 1088 (finding that defendant's trial was fair although trial court allowed a hearing-impaired person, with an interpreter, to consider evidence at trial). And any juror may temporarily be distracted or let his or her mind wander. In fact, this Court has held that a defendant's right to a fair trial is not violated *per se* even where a juror closed his eyes for 75

minutes and remained motionless for 30 minutes during trial, strongly suggesting that the juror may have missed portions of the trial. *State v. Sanders*, 92 Ohio St. 3d 245, 253, 2001-Ohio-189. If this Court did not override a jury verdict when a likely sleeping juror almost surely missed significant parts of a trial, then it certainly should not do so when there is a mere possibility that a juror was not aware of *everything* at trial.

Speer's narrower argument that it is not possible to accommodate a hearing-impaired juror in cases involving recorded evidence is similarly incorrect. See Speer Br. at 7 ("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."). According to Speer, "the trial court's attempted accommodation left substantial doubt as to whether Leow-Johannsen would be able to perceive and evaluate the audio evidence." *Id.* at 9. Speer is correct that "communicative speech" includes "tonal quality, speech pattern, volume, emphasis, evasion, faltering, speech, emotion [and] background sounds," *id.*, and that Leow-Johannsen could not perceive these aspects of speech from a real-time transcript. However, words themselves are certainly a crucial component—arguably *the* most crucial component—of communicative speech, and the trial court's accommodation here undoubtedly ensured that Leow-Johannsen could understand the meaning of the recorded speech. Further, the mere existence of any recorded evidence in a trial cannot justify automatic dismissal, and Speer does not cite any cases suggesting otherwise. As here, the presence of recorded evidence is one of many factors a court should consider when deciding whether it can reasonably accommodate a juror.

Moreover, even if the trial court had erred by denying Speer's for-cause challenge—and it did not—that error would have been harmless because it "[did] not affect the essential fairness of the trial." *McDonough Power Equip., Inc. v. Greenwood* (1984), 464 U.S. 548, 553. Only a

“defect affecting the framework within which the trial proceeds” amounts to a structural error requiring automatic reversal. *Johnson v. United States* (1997), 520 U.S. 461, 468 (internal quotation and citation omitted). The United States Supreme Court has “found structural errors only in a very limited class of cases,” *id.*, which do not include the error alleged here. To the extent that the tape-recorded evidence was essential, it was essential to the prosecution’s case, not to Speer’s defense. Speer, and the appeals court below, emphasize that “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.” *Speer*, 2008-Ohio-6947 at ¶ 33; see also *Speer Br.* at 9-10. However, the defense never argued that any of these factors supported Speer’s acquittal. It was *the prosecution* that asked the jury to listen to tone, pauses, and inflection in the 911 tape in an effort to bolster its proof of Speer’s guilt. See Tr. 1215 (prosecutor asked jury to consider Speer’s “demeanor on the 911 tape”). Leow-Johannsen obviously felt that the words of the 911 call, in conjunction with other evidence at trial, were sufficient to prove Speer’s guilt beyond a reasonable doubt. The prosecution’s burden of proof was in no way lowered by Leow-Johannsen’s presence on the jury.

For these reasons, the trial court reasonably evaluated the basis of Speer’s for-cause challenge of Leow-Johannsen in light of the information available at voir dire and concluded that she could be reasonably accommodated.

B. Speer’s overbroad proposition of law is not necessary to preserve a defendant’s right to a fair trial and would undermine state and federal policy favoring reasonable accommodation of jurors.

As the Ohio Attorney General’s opening brief explained, jury service is “a privilege of citizenship,” *Thiel v. S. Pac. Co.* (1946), 328 U.S. 217, 224, and “with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process,” *Powers v. Ohio* (1991), 499 U.S. 400, 407. In fact, this

Court has adopted rules specifically to encourage Ohio courts to accommodate a juror's disability rather than dismissing him or her for cause. Rules of Superintendence of the Courts of Ohio, App. B, Standard 1; see also *Tennessee v. Lane* (2004), 541 U.S. 509, 524 (recognizing that jury service is a common area where discrimination against persons with disabilities occurs and stating that Congress intended Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq., to address this type of discrimination).

The Attorney General agrees with Speer that a defendant's right to a fair trial cannot be trumped by a policy goal of accommodating disabled jurors, see *Eckstein v. Kirby* (E.D. Ark. 1978), 452 F. Supp. 1235, 1242-43, but that is not what happened here. Speer claims the court improperly "placed Juror Leow-Johannsen's interest in serving on the jury ahead of Speer's right to fair trial." Speer Br. at 11. But the record shows that the trial court did not subordinate Speer's rights. Instead, the trial court honored the primary objective of jury selection: to ensure that a defendant receives a fair trial. *Irvin v. Dowd* (1961), 366 U.S. 717, 722. To protect this right to a fair trial, Ohio gives defendants the power to challenge any juror for cause if they believe the juror would not be able to be fair and impartial. R.C. 2945.25; Crim. R. 24(C). However, Ohio also vests trial courts with the authority to resolve for-cause challenges. See *Berk*, 53 Ohio St. 3d at 168. Where a trial court exercises its broad discretion to resolve a for-cause challenge by making reasonable accommodations for a hearing-impaired juror, a defendant's right to a fair trial is not compromised.

Speer's proposition of law undermines this state's public policy and the spirit and intent of the ADA by effectively making it more difficult for persons with disabilities to serve on Ohio juries, even when a defendant's right to a fair trial is not compromised. If adopted, Speer's proposition would, at the very least, have a chilling effect on the willingness of trial courts to

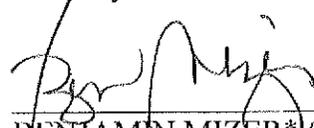
accommodate disabled jurors: A court would always risk reversal if it chose to accommodate a disabled juror because it would never have a guarantee that the juror could adequately perceive and evaluate *all* the evidence in a case. But, contrary to Speer's assertions, trial courts do have considerable discretion at voir dire and should exercise that discretion to further state and federal policy in favor of reasonably accommodating disabled jurors, when doing so does not infringe on a defendant's right to a fair trial.

CONCLUSION

For the foregoing reasons, this court should reverse the decision of the Sixth District Court of Appeals and remand for further proceedings consistent with that holding.

Respectfully submitted,

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I certify that a copy of the foregoing Reply Brief of *Amicus Curiae* Ohio Attorney General Richard Cordray in Support of Plaintiff-Appellant State of Ohio was served by U.S. mail this 14th day of September, 2009, upon the following counsel:

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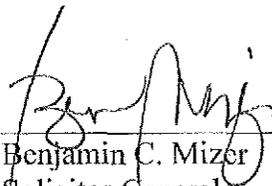
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