

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-07-04
	:	

APPELLANT'S REPLY BRIEF

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ADDITIONAL STATEMENT OF THE FACTS

In its “Opinion and Order Denying Defendant’s Post-Trial Motions and Objections,” the trial court noted that Juror Leow-Johannsen was given an opportunity to fully participate in the trial and neither party objected to or complained about her involvement at any time during trial:

To accommodate [Juror Leow-Johannsen’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 the 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.

(Opinion and Order Denying Defendant’s Post-Trial Motions and Objections, Dec. 17, 2007, p. 7-8).

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.

REPLY ARGUMENT IN SUPPORT OF THE PROPOSITION OF LAW

Juror Leow-Johannsen's hearing impairment did not prejudice the defendant, Scott Speer's constitutional right to a fair trial.

Defendant, Scott Speer's Merit Brief argues that the trial court abused its discretion by placing Juror Leow-Johannsen's rights before Speer's. See Appellee's Merit Brief, p. 11. Speer argues that "Juror Leow-Johannsen's empanelment on the jury did prejudice Speer's right to a fair trial." *Id.*, at 9. Speer argues primarily that "Juror Leow-Jahannsen was unable to perceive and evaluate all material aspects of the 911 tape." *Id.* He also argues "[t]here is no way to know whether Juror Leow-Jahannsen heard all testimony of witnesses or arguments of counsel." *Id.*, at 10.

Contrary to Speer's arguments, the record does not contain any evidence of prejudice; rather, the record affirms that Speer was in no way prejudiced. As summed up by the trial court in its "Opinion and Order," Speer never suggested that Juror Leow-Johannsen required additional accommodations, he did not request that the trial court replace the hearing impaired juror with an alternate, and did not request a mistrial based on the hearing impaired juror's failure to understand or appreciate any evidence. The record, therefore, is evidence of the fact that Speer was not prejudiced by Juror Leow-Johannsen's empanelment.

The State of Ohio introduced the 911 tape as evidence because it tended to prove the defendant's guilt. The crux of Speer's argument rests on his belief that he suffered prejudice due to Juror Leow-Johannsen's failure to perceive the 911 tape in its entirety. Speer's argument is counter-intuitive because any failure to adequately perceive the State's evidence would necessarily inure to the benefit of the defendant. Regardless, the State of Ohio adamantly disagrees with Speer's factual contention, Juror Leow-Johannsen did not miss testimony because she supplemented her residual hearing by reading the court reporter's real time display; the same way she supplemented her residual hearing by reading lips.

Interestingly enough, any perceived prejudice stemming from the 911 tape was never raised during trial, Speer waited until after the jury found him guilty and chose to first argue prejudice in his post-conviction motions and objections.

Speer's argument that "[t]here is no way to know whether Juror Leow-Jahannsen heard all testimony of witnesses or arguments of counsel" is equally unpersuasive. The record makes it clear that the speaking parties faced Juror Leow-Johannsen. The record also makes it clear that all parties promptly complied with Juror Leow-Johannsen's request to face her if they failed initially to do so.

Had Speer felt Juror Leow-Johannsen's hearing impairment prejudiced his constitutional rights in any regard, he had the right to object, move for a mistrial, or request that Juror Leow-Johannsen be replaced with an alternate. Speer had ample opportunities to protect himself from perceived prejudice but failed to do so. Speer failed to even ask the trial court to voir dire Juror Leow-Johannsen after the State played the 911 tape. The trial court correctly concluded that Speer failed to demonstrate that Juror Leow-Johannsen's disability prejudiced him. (See Order and Opinion, p. 7). As argued in its Merit Brief, the State of

Ohio points out that this Court has previously held a failure to object based on missed evidence waives that claim absent plain error. See *State v. Sanders* (2001), 92 Ohio St. 3d 245, 253, 2001 Ohio-189, 750 N.E. 2d 90.

CONCLUSION

The record is entirely devoid of evidence tending to prove that defendant Scott Speer suffered the slightest iota of prejudice. Based primarily on Juror Leow-Johannsen's testimony the trial court provided her reasonable accommodations. The record reflects that, during trial, Speer failed to address any apprehension of prejudice whatsoever, which tends to indicate Speer did not feel prejudiced. The trial court afforded defendant Scott Speer a fair trial in accordance with his Sixth Amendment rights and a jury of his peers properly found him guilty of involuntary manslaughter and aggravated vehicular manslaughter.

Respectfully submitted,



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I certify that a copy of the foregoing was sent by U.S. mail this 16th day of September, 2009, upon the following counsel:

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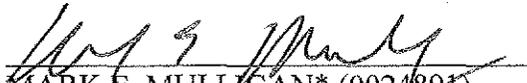
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