

**ORIGINAL**

**IN THE SUPREME COURT OF OHIO  
2010**

STATE OF OHIO,

Plaintiff-Appellee,

-vs-

MATTHEW W. SANDERS,

Defendant-Appellant.

Case No. 2010-1568

On Appeal from the  
Franklin County Court  
of Appeals, Tenth  
Appellate District

Court of Appeals  
Case No. 09AP-983

**MEMORANDUM OF PLAINTIFF-APPELLEE OPPOSING JURISDICTION**

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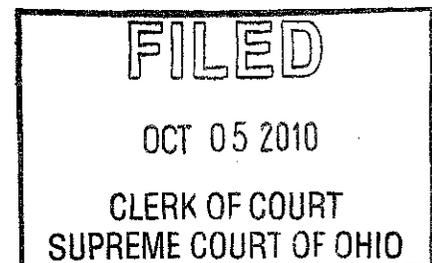
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## EXPLANATION OF WHY THIS COURT SHOULD DECLINE JURISDICTION

The instant case does not present questions of such constitutional substance nor of such great public interest as would warrant further review by this Court. In both of his propositions of law, defendant acknowledges settled precedent from this Court but merely seeks to reapply that precedent to the narrow facts of his case.

For instance, defendant's first proposition of law raises the same argument that this Court rejected in *State v. Lomax*, 114 Ohio St.3d 350, 2007-Ohio-4277. He contends that, to satisfy the "in open court" requirement of R.C. 2945.05, the trial court must engage in an oral colloquy and determine whether the waiver was knowing, intelligent, and voluntary; however, this Court has consistently stated that "there is no requirement in Ohio for the trial court to interrogate a defendant in order to determine whether he or she is fully apprised of the right to a jury trial." *Lomax* at ¶ 21, quoting *State v. Jells* (1990), 53 Ohio St.3d 22, at 25-26. Instead, "[t]o satisfy the 'in open court' requirement in R.C. 2945.05, there must be some evidence in the record that the defendant while in the courtroom and in the presence of counsel, if any, acknowledged the jury waiver to the trial court." *Id.* at ¶49. Given the open-court "acknowledgment" in this case, defendant's first proposition does not present any question that would benefit the bench or bar.

Likewise, defendant's second proposition of law presents a poor vehicle for review in this Court. Although the prosecution sent an email to defense counsel and the trial court's bailiff *simultaneously*, defendant asks this Court to declare such a message to be an ex parte communication with the court. As explained below, this argument misinterprets the definition of ex parte but it also comes without any evidence of prejudice—a prerequisite for any new trial under Crim.R. 33.

As defendant presents no compelling reason for why this Court should expend its scarce judicial resources to review his case, it is respectfully submitted that jurisdiction be declined.

## STATEMENT OF THE CASE AND FACTS

The State incorporates the factual and procedural summary set forth in *State v. Sanders*, 10th Dist. No. 09AP-983, 2010-Ohio-3433, at ¶1-7.

### ARGUMENT

#### RESPONSE TO FIRST PROPOSITION OF LAW:

TO SATISFY THE "IN OPEN COURT" REQUIREMENT OF R.C. 2945.05, THERE MUST BE SOME EVIDENCE IN THE RECORD THAT THE DEFENDANT WHILE IN THE COURTROOM AND IN THE PRESENCE OF COUNSEL, IF ANY, ACKNOWLEDGED THE JURY WAIVER TO THE TRIAL COURT

As this Court has held, "[t]o satisfy the 'in open court' requirement in R.C. 2945.05, there must be some evidence in the record that the defendant while in the courtroom and in the presence of counsel, if any, acknowledged the jury waiver to the trial court." *State v. Lomax*, 114 Ohio St.3d 350, 2007-Ohio-4277, paragraph two of the syllabus. "[A] defendant need not have a complete or technical understanding of the jury trial right in order to knowingly and intelligently waive it." *Lomax*, at ¶ 40, quoting *State v. Bays* (1999), 87 Ohio St.3d 15, 20; see, also, *State v. Thomas*, 97 Ohio St.3d 309, 2002-Ohio-6624, ¶ 26-27. "[I]f the record shows a jury waiver, the verdict will not be set aside except on a plain showing that the waiver was not freely and intelligently made." *Bays*, at 19.

In this case, the trial court satisfied the in-open-court requirement of R.C. 2945.05 when defendant acknowledged that he signed the written jury waiver. The record confirms an open-court acknowledgment:

The Court: This matter is set for trial today. Mr. Sanders, it is my understanding that you have waived your right to a jury trial and would like to have the court decide this case.

Mr. Sanders: Yes.

(Vol. I, p. 3) Although defendant was represented by two attorneys, he chose to answer the court *himself*, thereby personally acknowledging that he waived his right to a jury trial and “would like to have the court decide” the case.

This satisfied *Lomax*’s acknowledgement standard. The trial court was not required to redundantly ask defendant whether he also signed the written jury waiver when the record proves that defendant signed the written waiver. (R. 127) How else would defendant have “waived” his right to a jury trial? All jury waivers “shall” be in writing and signed by the defendant. R.C. 2945.05. Thus, after the court asked whether defendant had “waived” (past tense) his right to a jury trial, defendant sufficiently acknowledged that he already signed the written waiver.

Defendant argues that the trial court was required to “inquire as to whether he signed the form knowingly, intelligently and voluntarily” (Memo., p.10); however, “[t]here is no requirement in Ohio for the trial court to interrogate a defendant in order to determine whether he or she is fully apprised of the right to a jury trial. The Criminal Rules and the Revised Code are satisfied by a written waiver, signed by the defendant, filed with the court, and made in open court, after arraignment and opportunity to consult with counsel.” *Lomax*, at ¶ 21, quoting *State v. Jells* (1990), 53 Ohio St.3d 22, at 25-26.

The written jury waiver in this case also defeats defendant’s argument. By signing the waiver, defendant affirmed:

I, Mathew W. Sanders, Defendant in the above captioned case hereby voluntarily waive and relinquish my right to a trial by jury as to Count 1 of the Indictment, Felonious Assault, a Felony of the Second Degree, and elect to be tried by a judge of the court in which said cause may be pending. I fully understand that under the laws of this State, I have a constitutional right to a trial by jury.

(R. 127) The waiver was also signed by defendant’s two attorneys, the prosecutor, and the trial court. (Id.)

“[A] written waiver is presumptively voluntary, knowing, and intelligent.” *Thomas*, 97 Ohio St.3d at 19. “[I]f the record shows a jury waiver, the verdict will not be set aside except on a plain showing that the waiver was not freely and intelligently made.” *Id.* Here, the written jury waiver was filed, and it is presumed that defendant signed that waiver in a knowing, voluntary, intelligent way. Since the trial court confirmed that defendant signed the waiver in open court, defendant has not made a plain showing that the waiver was not voluntarily and intelligently made.

The trial court was not required to question defendant about whether he realized what constitutional rights he was giving up. Ohio law is “satisfied by a writing signed by the defendant himself and filed with the court. Unlike some jurisdictions, Ohio does not require that the court personally inform the defendant of this right or make direct inquiry of the defendant as to the voluntariness of his waiver.” *State v. Morris* (1982), 8 Ohio App.3d 12, 14.

Defendant does not dispute here the validity of the signature, nor could the defense legitimately do so. The defense never disputed the signature in the trial court. Moreover, defendant orally said he wished to waive jury, and the trial court recognized that *defendant* had waived jury. (Vol. I, p. 3) The written waiver bears a signature on the line for “defendant,” and this signature matches other documents in the court file bearing defendant’s signature. (R. 8, 9, 10, 11, 31, 32, 127). There is simply no doubt that defendant signed the waiver and that the waiver was knowing, voluntary, and intelligent. As such, the Tenth District properly overruled defendant’s assignment of error.

Therefore, defendant’s first proposition of law warrants no further review.

## RESPONSE TO SECOND PROPOSITION OF LAW:

A TRIAL COURT CANNOT ORDER A NEW TRIAL UNDER CRIM.R. 33 UNLESS IT AFFIRMATIVELY APPEARS THAT AN ERROR MATERIALLY AFFECTS A DEFENDANT'S SUBSTANTIAL RIGHTS.

In his second proposition of law, defendant challenges the trial court's denial of his motion for a new trial, in which he argued that an email sent by the prosecution to both defense counsel and the court's bailiff during the court's deliberations was an *ex parte* communication. As explained below, however, the Tenth District properly rejected this argument given defendant's misinterpretation of *ex parte* and the lack of any prejudicial error.

A trial court cannot order a new trial under Crim.R. 33 unless it affirmatively appears that an error materially affects a defendant's substantial rights. Crim.R. 33(E)(5); R.C. 2945.83(E); Crim.R. 52(B). There is no constitutional right to an "error-free, perfect trial." *State v. Green* (2000), 90 Ohio St.3d 352, 373, citing *United States v. Hasting* (1983), 461 U.S. 499, 508. Even constitutional errors can be harmless. *Chapman v. California* (1967), 386 U.S. 18.

The decision to deny a motion for a new trial under Crim.R. 33 rests within the sound discretion of the trial court. *State v. Schiebel* (1990), 55 Ohio St.3d 71. An abuse of discretion implies a decision that is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

As explained below, defendant cannot show an abuse of discretion for three reasons. First, the State's email was not an *ex parte* communication since it was delivered to opposing counsel and the court's bailiff. Second, if supplemental instructions are permissible—and often required—in jury deliberations, they are not "per se prejudicial" in bench trial deliberations, especially judges are presumed to know the law and apply it accordingly. Third, defendant did

not make an affirmative showing of prejudice since there was no evidence that the court considered the instruction and the State already argued complicity at trial.

First, the email was not an ex parte communication. An “ex parte communication” must occur “at the instance and for the benefit of one party only, and *without notice to or contestation of any person adversely interested.*” *State v. Cox* (1913), 87 Ohio St. 313, at paragraph five of the syllabus (emphasis added). “Thus, an ex parte proceeding is one that is usually held without notice to the opposing side.” *In re Swader* (2001), 12 Dist. No. CA200-04-036, citing *Dutton v. Dutton* (1998), 127 Ohio App.3d 348, 352-353; *State v. Jenkins* (1984), 15 Ohio St.3d 164, 236-37. Here, the State sent one email to both defense counsel and the court’s bailiff, simultaneously. This proves that the email was not “forwarded” to counsel after the fact, as defendant suggested in his motion. (R. 132, p. 2) In fact, the prosecution delivered the email to everyone at the same exact time. Thus, the trial court did not abuse its discretion by denying defendant’s motion. See *In re Marriage of Huffman* (Kan. App. 2007), 157 P.3d 670 (“The communications were obviously not ex parte, as Respondent insists, because she was copied on both emails.”).

Besides, to justify a new trial, “the record must affirmatively indicate the absence of a defendant or his counsel during a particular stage of the trial.” *State v. Wade*, 10th Dist. No. 03AP-774, 2004-Ohio-3974, ¶24, citing *State v. Chinn* (1999), 85 Ohio St.3d 548, 568. Here, not only did counsel receive the email, he replied to it the same evening. By replying, counsel actively participated in the communication; he was not excluded from it. The record is equally silent as to when the court viewed the message, or whether it even considered the message during deliberations. If anything, the court stated that it did not see the cases that were attached to the email. Regardless, the State adequately notified defense counsel, as evidenced by the fact that co-defense counsel never lodged the same complaint.

The State's conduct was no different than filing supplemental briefing with the court and simultaneously delivering a courtesy copy to defense counsel. The prosecution did not communicate with any one recipient over another. In fact, the State's conduct was no different than if it requested a hearing on the matter. Both communications would be in the record, and defense counsel would have exhibited the same level of preparation. But out of courtesy, the prosecution sought to avoid having defense counsel travel 150 miles from his office when he could reply within minutes. With an email, defense counsel enjoyed the convenience of replying the same evening, after business hours. Therefore, since defendant failed to affirmatively show any irregularity in the proceedings or error of law, his motion was properly denied.

Even if the State's email was somehow improper, defendant cannot show prejudice since a judge can consider supplemental authority during bench-trial deliberations just as a jury can consider supplemental instructions during jury-trial deliberations. In a jury trial, courts are not only permitted to give supplemental instructions on the issue of complicity; "they may have an affirmative duty to provide such instructions if the jury so requests." *State v. Hicks* (1990), 2nd Dist. No. 11567, quoting *Cincinnati v. Epperson* (1969), 20 Ohio St.2d 59. The prosecution, just as much as the defense, is entitled to have the jury be given complete instructions so long as those instructions constitute a correct statement of the law supported by the evidence. See *State v. Campbell*, 10th Dist. No. 07AP-1001, 2008-Ohio-4831, ¶ 11. (citations omitted). "If from the entire charge it appears that a correct statement of the law was given in such a manner that the jury could not have been misled, no prejudicial error results." *State v. Spence*, 10th Dist. No. 05AP-891, 2006-Ohio-6257, ¶ 99, citing *State v. Hardy* (1971), 28 Ohio St.2d 89, 92.

Here, the court was not improperly misled by the State's email. "Judges, unlike juries, are presumed to know the law." *State v. Davis* (1992), 63 Ohio St.3d 44, 48. While the law is

“designed to protect jurors from the dangers of jury tampering and other outside influences,” the same protections are unnecessary in bench deliberations. *Id.* “Judges are trained and expected to disregard any extraneous influence in deliberations.” *Id.*; see, also, *State v. Green* (2000), 90 Ohio St.3d 352, 374. Even in capital cases, “it is apparent that *the rules pertaining to jury sequestration need not apply* to a three-judge panel which is presumed to consider only relevant, competent and admissible evidence in its deliberations.” *Id.* (emphasis added), citing *State v. Wickline* (1990), 50 Ohio St.3d 144, 122.

Even during jury deliberations, a “private communication outside the presence of the defendant does not \* \* \* create a conclusive presumption of prejudice.” *State v. Schiebel* (1990), 55 Ohio St.3d 71, 84. Instead, it must affirmatively appear from the record that the defendant was prejudiced thereby or was prevented from having a fair trial.” Crim. R. 33(E)(5); see, also, *Schiebel*, 55 Ohio St.3d at 84. Therefore, the court was free to entertain any supplemental authority so long as it constituted a correct statement of the law supported by the evidence. Here, the supplemental authority satisfied this requirement.

Again, to prevail under Crim. R. 33, prejudice must affirmatively appear in the record. In this case, however, nothing indicates that the court considered the State’s email or relied on it during deliberations. The trial court was presumed to know and apply the applicable law, and defendant did not present anything to rebut this presumption.

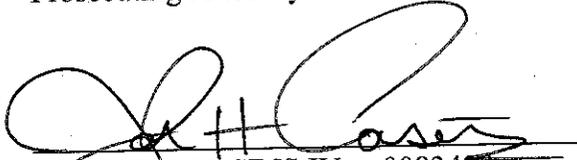
Accordingly, defendant’s second proposition of law warrants no further review.

### CONCLUSION

For the foregoing reasons, it is respectfully submitted that the within appeal does not present questions of such constitutional substance nor of such great public interest as would warrant further review by this Court. It is respectfully submitted that jurisdiction should be declined.

Respectfully submitted,

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Prosecuting Attorney

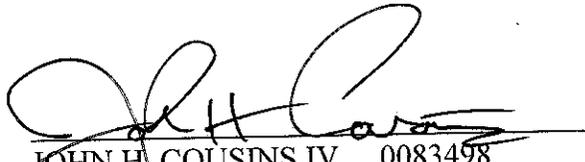


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**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing was sent by regular U.S. Mail, this day,  
October 5<sup>th</sup>, 2010, to MARK J. MILLER , 555 City Park Avenue, Columbus, OH 43215;  
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