

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Appellant,

vs.

TO NEISHA GUNNELL

Appellee.

**SUPREME COURT CASE
NO. 2010-1636**

**ON APPEAL FROM THE
COURT OF APPEALS,
SECOND APPELLATE
DISTRICT 09-CA-0013**

**CLARK COUNTY
COMMON PLEAS COURT
CASE NO. 05-CR-502**

RECEIVED
MAR 25 2011
CLERK OF COURT
SUPREME COURT OF OHIO

**PERIT BRIEF OF AMICUS CURIAE, OHIO PROSECUTING ATTORNEYS
ASSOCIATION**

D. ANDREW WILSON, #0073767
Clark County Prosecuting Attorney
Clark County, Ohio
50 East Columbia Street
P.O. Box 1608
Springfield, Ohio 45501
(937) 521-1770

JAMES N. GRIFFIN, #0015917
8 North Limestone Street
Suite D
Springfield, Ohio, 45502
(937) 322-5242

FILED
MAR 25 2011
CLERK OF COURT
SUPREME COURT OF OHIO

BY: ANDREW R. PICEK, # 0082121
Assistant Prosecuting Attorney

COUNSEL FOR APPELLANT

COUNSEL FOR APPELLEE

DENNIS P. WILL, # 0038129
Lorain County Prosecuting Attorney

CHARLES M. BLUE, #0074329
Murr, Compton, Claypoole & Macbeth
401 E. Stroop Road
Kettering, Ohio 45429
(937) 298-1054

BY: BILLIE JO BELCHER, # 0072337
Lorain County Prosecutor's Office
225 Court Street, 3rd Floor
Elyria, Ohio 44035
(440) 329-5393

**COUNSEL FOR AMICUS CURIAE,
OHIO PROSECUTING ATTORNEYS
ASSOCIATION**

**COUNSEL FOR AMICUS CURIAE,
ALICIA McALMONT**

TABLE OF CONTENTS

Table of Contents i

Table of Authorities..... ii

State of Interest of Amicus Curiae 1

State of the Case and Facts 3

LAW & ARGUMENT

ARGUMENT IN SUPPORT OF APPELLANT'S FIRST PROPOSITION OF LAW

 1. The appellate court unreasonably narrowed the law by requiring that the
 trial court perform specific and identifiable tasks before declaring a mistrial 3

Conclusion..... 15

Proof of Service 15

TABLE OF AUTHORITIES

CASES:

AAAA Enters., Inc. v. River Place Cmty. Urban Redev. Corp. (1990)
50 Ohio St.3d 157, 1613, 10, 12

Arizona v. Washington (1978), 434 U.S. 497.....5, 6, 7

Berk v. Matthews (1990), 53 Ohio St.3d 161, 169.....4, 11

Blakemore v. Blakemore (1983), 5 Ohio St.3d 217, 219.....3

Dennis v. United States (1950), 339 U.S. 162, 17113

Gori v. United States (1961), 367 U.S. 364, 368.....14

Oregon v. Kentucky (1982), 456 U.S. 667, 67714

Richardson v. United States (1984), 468 U.S. 317, 325.....5, 6

Ross v. Petro (6th Cir. 2008), 515 F.3d 6534, 9, 10

Seasons Coal Co., Inc. v. City of Cleveland (1984), 10 Ohio St.3d 77, 80,
461 N.E.2d 127314

Smith v. Phillips (1982), 455 U.S. 209, 217.....9, 13

State v. Calhoun (1985), 18 Ohio St.3d 373, 376.....5, 11

State v. Franklin (1991), 62 Ohio St.3d 118, 127.....3, 5, 11

State v. Glover (1988), 35 Ohio St.3d 18, 193, 4, 6, 11, 13

State v. Gunnell, 2010 Ohio 4415.....4, 8, 10, 11, 12, 13

State v. King (1983), 10 Ohio App.3d 161, 1659

State v. Lovejoy, 79 Ohio St.3d 440, 445, 1997 Ohio 3715, 13

State v. Reed (Nov. 27, 1991), 9th Dist. No. 26437, 14

State v. Sage (1987), 31 Ohio St.3d 173, 182.....3

State v. Schmidt (6th Dist. 1979), 65 Ohio App.2d 239, 244-454

State v. Treesh (1990), 90 Ohio St.3d 460, 4803, 13

State v. Widner (1981), 68 Ohio St.2d 188, 1903, 4, 6

United States v. Davis (4th Cir. 1995), 53 F.3d 638, 6427, 14

United States v. Jorn (1971), 400 U.S. 4704, 11

United States v. Martin Linen Supply Co. (1977), 430 U.S. 564, 571.....13

United States v. Morena (3d Cir. 2008), 547 F.3d 191, 197.....11

United States v. Scott (1978), 437 U.S. 82, 92.....5, 11, 13

United States v. Washington (6th Cir. 1998), 147 F.3d 490, 4917

Wade v. Hunter (1949), 336 U.S. 684, 688-896

RULES & STATUTES:

R.C. 2945.039, 11

R.C. 2953.0213

STATEMENT OF INTEREST OF AMICUS CURIAE

The Ohio Prosecuting Attorneys Association (OPAA) is a private, non-profit membership organization founded in 1937 for the benefit of the eighty eight (88) elected county prosecutors. The founding attorneys developed the original mission statement, which is still adhered to, and reads:

To increase the efficiency of its members in the pursuit of their profession; to broaden their interest in government; to provide cooperation and concerted action on policies which affect the office of Prosecuting Attorney, and to aid in the furtherance of justice.

Further, the association promotes the study of law, the diffusion of knowledge, and the continuing education of its members.

In this matter, the OPAA supports Appellant's Merit Brief and urges this Honorable Court to reverse the decision of the appellate court and remand the matter for a new trial. This case is of public and great general interest in that the appellate court unreasonably narrowed the scope of the standard of review when a trial court grants a mistrial, insofar as the appellate court required the trial court to perform specific, identifiable tasks to support its discretionary finding that a mistrial is manifestly necessary. Just as the legislature can enact laws which impermissibly constrain a trial court's discretion, it is equally egregious when a court of appeals action produces the same result.

This new standard of review undermines a trial court's discretion and alters the balance of power between trial courts and the courts of appeals; specifically, the appellate court reversed Appellee's conviction because the trial court did not ask the juror who committed misconduct certain specific questions and because the record did not disclose that the trial court considered certain specific alternatives to the declaration of a mistrial.

The trial court was not required to ask specific questions and merely had to determine whether reasonable alternatives existed which would protect each party's right to a fair trial. The trial court satisfied itself that misconduct occurred and was of a nature that the reasonable alternatives it considered would not sufficiently protect the State's right to a fair trial and granted a mistrial.

It is well settled that the decision to grant a mistrial rests in the sound discretion of the trial court and that its decision will not be disturbed absent a finding of an abuse of discretion. The appellate court ruled that because the trial court did not ask specific questions to ascertain information on certain, specified subjects, the trial court lacked a sufficient basis to exercise its sound discretion in declaring a mistrial. Rather than examining the entire record to determine whether the trial court had *any* basis on which to make a reasoned judgment, the appellate court artificially narrowed the scope of review thereby restricting the trial court's discretion impermissibly. In so doing, the appellate court's holding requires a trial court to utter a talismanic phrase or otherwise pass a litmus test to ensure affirmation of its decision on appeal.

The decision of the appellate court in this case dictates to trial courts a litany of specific questions to pose when a juror commits misconduct, regardless of the nature of the misconduct. Failing to ask these questions a certain way is, according to the court below, equivalent to an abuse of discretion. The decision of the appellate court in this case artificially constrains a trial court's discretion by requiring a trial court to proceed in a rote fashion not required by this Court and its longstanding precedent. Therefore, the OPAA strongly urges this Honorable Court to reverse the appellate court and remand for a new trial or, in the alternative, remand the case for reconsideration in light of its opinion

clarifying the standard of review for abuse of discretion as it relates to the declaration of a mistrial.

STATEMENT OF THE CASE AND FACTS

Amicus Curiae, the OPAA, agrees with the Statement of the Case and Facts as presented by Appellant, the State of Ohio, in this matter.

LAW & ARGUMENT

ARGUMENT IN SUPPORT OF APPELLANT'S FIRST PROPOSITION OF LAW

I. **THE APPELLATE COURT UNREASONABLY NARROWED THE LAW BY REQUIRING THAT THE TRIAL COURT PERFORM SPECIFIC AND IDENTIFIABLE TASKS BEFORE DECLARING A MISTRIAL.**

A trial court need only declare a mistrial when the ends of justice so require and a fair trial is no longer possible. State v. Franklin (1991), 62 Ohio St. 3d 118, 127. It is within the trial court's discretion to grant or deny a motion for mistrial. State v. Sage (1987), 31 Ohio St. 3d 173, 182. Appellate courts must defer to the judgment of trial courts because the trial court is in the best position to determine whether the circumstances warrant granting a motion for mistrial. State v. Glover (1988), 35 Ohio St. 3d 18, 19 (citing State v. Widner (1981), 68 Ohio St. 2d 188, 190).

An appellate court should not disturb a trial court's decision granting or denying a mistrial unless it constitutes an abuse of discretion. State v. Treesh (1990), 90 Ohio St. 3d 460, 480. An abuse of discretion is more than an error of judgment, it connotes a decision that is unreasonable, arbitrary, or unconscionable. Blakemore v. Blakemore (1983), 5 Ohio St. 3d 217, 219. Most instances of abuse of discretion result from decisions which are simply unreasonable rather than arbitrary or unconscionable. AAAA Enters., Inc. v. River Place Cmty. Urban Redev. Corp. (1990) 50 Ohio St. 3d 157, 161.

“A decision is unreasonable if there is no sound reasoning process that would support that decision. It is not enough that the reviewing court, were it deciding the issue *de novo*, would not have found that reasoning process to be persuasive, perhaps in view of countervailing reasoning processes that would support a contrary result.” Id.

As the court noted in State v. Schmidt (6th Dist. 1979), 65 Ohio App. 2d 239, 244-45, citing United States v. Jorn, 400 U.S. 470 (1971):

an order of the trial judge declaring a mistrial during the course of a criminal trial, on the motion of the state, is error and contrary to law, constituting a failure to exercise sound discretion, where, taking all of the circumstances under consideration, there is no manifest necessity for the mistrial, no extraordinary and striking circumstances and no end of public justice is served by a mistrial, and where the judge has not made a scrupulous search for alternatives to deal with the problem.

Hallmarks of the exercise of sound discretion include the trial court allowing the parties to state their respective positions, considering seriously the competing interests and making a searching inquiry into reasonable alternatives to declaring a mistrial. Gunnell, 2010 Ohio 4415, at ¶ 74, citing Ross v. Petro (6th Cir. 2008), 515 F.3d 653. In applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. Berk v. Matthews (1990), 53 Ohio St. 3d 161, 169. The fact that other judges might have resorted to alternative means of dealing with the situation portrayed in a record is not dispositive. Glover, 35 Ohio St. 3d at 19-20.

In evaluating whether the declaration of a mistrial was proper in a particular case, this Honorable Court has declined to apply inflexible standards due to the infinite variety of circumstances in which a mistrial may arise. Id. at 19, quoting Widner, 68 Ohio St. 2d at 189. Instead, the Court has adopted an approach granting “great deference to the trial

court's discretion in this area, in recognition of the fact that the trial judge is in the best position to determine whether the situation in his courtroom warrants the declaration of a mistrial." Id. "In examining the trial judge's exercise of discretion in declaring a mistrial, a balancing test is utilized, in which the defendant's right to have the charges decided by a particular tribunal is weighed against society's interest in the efficient dispatch of justice." Id., citing State v. Calhoun (1985), 18 Ohio St. 3d 373, 376 and United States v. Scott (1978), 437 U.S. 82, 92. "Where the facts of the case do not reflect unfairness to the accused, the public interest in insuring that justice is served may take precedence." Id., citing Arizona v. Washington (1978), 434 U.S. 497.

This Honorable Court addressed manifest necessity for a mistrial in State v. Lovejoy, 79 Ohio St. 3d 440, 445, 1997 Ohio 371. Reviewing a mistrial declared after a jury returned inconsistent verdicts, the Lovejoy Court cited Richardson v. United States (1984), 468 U.S. 317, 325, for the proposition that the Fifth Amendment's prohibition against Double Jeopardy does not mean that every time a jury fails to reach a verdict or a court declares a mistrial the defendant is entitled to go free. Lovejoy, 79 Ohio St. 3d at 445. Such a rule, this Court held, "would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy provision is aimed." Id., quoting Richardson, 468 U.S. at 324-25. This Court explicitly noted that there may be unforeseeable circumstances which arise during a trial making its completion impossible. Id.; *see also, e.g.*, Franklin, 62 Ohio St. 3d at 127. In those events, the purpose of law to protect society from those guilty of crimes would be frequently frustrated by denying courts power to put the defendant to trial again. Lovejoy, 79 Ohio St. 3d at 445, quoting

Richardson, 468 U.S. at 324-25. Therefore, even though a defendant has a “valued right to have his trial completed by a particular tribunal,” that right must “be subordinated to the public’s interest in fair trials designed to end in just judgments.” Id. As the United States Supreme Court observed in Arizona v. Washington, 434 U.S. at 505:

Unlike the situation in which the trial has ended in an acquittal or conviction, retrial is not automatically barred when a criminal proceeding is terminated without finally resolving the merits of the charges against the accused. Because of the variety of circumstances that may make it necessary to discharge a jury before a trial is concluded, and because those circumstances do not invariably create unfairness to the accused, his valued right to have the trial concluded by a particular tribunal is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury.

The Richardson Court specifically held that declaration of a mistrial following a hung jury was not such an instance of unfairness. 468 U.S. at 325; *see also* Wade v. Hunter (1949), 336 U.S. 684, 688-89. This Honorable Court in Glover held that a mistrial declared by the court after aggressive (but legal) cross-examination of a prosecution witness did not bar a retrial. 35 Ohio St. 3d at 20-21. Moreover this Court in Widner held that a retrial was not barred by Double Jeopardy because the case there was not one where intentional prosecutorial conduct caused the mistrial and that Court saw no justice in denying the prosecution an opportunity to present its case-in-chief when the real dispute centered on the impasse concerning the defendant, his defense counsel, and the trial court. This Court noted that “[o]ur society still retains a genuine interest in making certain that the guilty are punished.” Widner, 68 Ohio St. 2d at 192.

Amicus Curiae, the OPAA, contends that the appellate court unreasonably narrowed the discretion of the trial court and altered the balance of power between the trial courts and the courts of appeal in Ohio. Appellate courts requiring trial courts to proceed in a particular way when confronted with a variety of scenarios constrains the discretion the law provides. In deciding whether to grant a mistrial, a factually-dependent inquiry, the trial court must have wide latitude to weigh the facts and decide whether any possibility of a fair trial remains for either the State of Ohio or the defense.

The appellate court's opinion in this case narrows the trial court's ability to make that determination and thus constrains a trial court's discretion. In so doing, it requires a trial court utter a "talismanic phrase" or engage in a "ritualistic incantation" of questions and findings. See State v. Reed (Nov. 27, 1991), 9th Dist. No. 2643 (holding that the "failure to utter the talismanic phrase "presumed innocent" did not deny Reed either a fair trial or due process"); United States v. Davis (4th Cir. 1995), 53 F.3d 638, 642 (federal district court in sentencing a defendant under the federal sentencing statute "need not engage in a ritualistic incantation in order to establish its consideration of a legal issue[;] [c]onsideration is implicit in the court's ultimate ruling"); United States v. Washington (6th Cir. 1998), 147 F.3d 490, 491 (adopting Davis standard in Sixth Circuit). Instead of deferring appropriately under the abuse of discretion standard to the reasoned judgment of the trial court on matters relating to the credibility of a juror to decide whether the possibility of a fair trial still existed, the appellate court substituted its judgment for that of the trial court. Conducting its own exacting review, the appellate court narrowed the scope of the abuse of discretion standard and constrained the discretion of trial courts.

Constraint of a trial court's discretion was specifically proscribed by the very case upon which the appellate court relies for its assertion that existing case law requires a more searching review. See Gunnell, 2010 Ohio 4415 at ¶¶ 72-73, citing Arizona v. Washington (1978), 434 U.S. 497. In Arizona v. Washington, the trial court granted a mistrial after defense counsel told the jury during opening arguments that they would hear that the prosecutor had suppressed evidence and that this misconduct caused the Arizona Supreme Court to grant a new trial. Rejecting the lower federal courts' holdings insisting on explicit findings as to manifest necessity, the United States Supreme Court held that the basis for the trial judge's ruling was adequately disclosed by the record and provided sufficient justification for the mistrial ruling. Id. at 517. The decision of a trial court is not subject to constitutional attack because the trial court failed to find manifest necessity in those explicit words or failed to articulate on the record all the factors which informed the deliberate exercise of its discretion. Id.

Instead, the Arizona v. Washington Court opined that the overriding interest in the evenhanded administration of justice requires that courts afford the highest degree of respect to the trial judge's evaluation of the likelihood that the impartiality of one or more jurors may have been affected. *"The interest in orderly, impartial procedure would be impaired if [the trial court] were deterred from exercising [the power to declare a mistrial] by a concern that anytime a reviewing court disagreed with [its] assessment of the trial situation a retrial would be automatically barred."* Id. at 513 (emphasis added). Adoption by the appellate court of a narrower and more constraining standard of review, the Court held, would *"seriously impede the trial [courts] in the proper performance [of their duties]"* to protect the integrity of a trial. Id. (emphasis added).

In the case presented for review, a juror violated her oath and the jury instructions to consider only the evidence and arguments presented in court and the law as instructed by the judge. (Nov. 2007 Tr. 18-19). This violation prejudiced the State because the juror's misconduct would reasonably lead a rational person to construe the law of the State of Ohio differently than instructed by the judge and lead to conviction on the lesser included offense of involuntary manslaughter when there was legally sufficient evidence to support conviction on the charge of felony murder. (Nov. 2007 Tr. 16).

After Juror #6 violated her oath to consider only the evidence and arguments presented in court and the law as instructed by the court, State v. King (1983), 10 Ohio App. 3d 161, 165, the trial court conducted an examination of the juror to determine the extent of the damage done, *see id.* (misconduct must be prejudicial and the party complaining of misconduct must establish prejudice); R.C. 2945.03 (trial court must conduct the inquiry whether juror misconduct resulted in prejudice); Smith v. Phillips (1982), 455 U.S. 209, 217 ("Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial court ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen."). See Nov. 2007 Tr. 9-11. In the course of that examination, reproduced in the appellate court's opinion, it is clear that not only did the trial court have an informed basis for making a reasoned judgment about whether a fair trial was still possible but that the reasoning process the trial court employed was sound. *See Petro*, 515 F.3d at 662-63 (trial court did not abuse discretion when it gave parties an opportunity to consider ramifications of jury's action, opportunity to state their positions and proposals on the record and explicitly considered and rejected at least some alternatives to declaring a

mistrial). The fact that the appellate court found the trial court's reasoning unpersuasive and disagreed with the trial court's ultimate determination of the prejudicial effect is not a sufficient basis on which the appellate court could reverse when sufficient information existed in the record to the contrary. *See AAAA Enters., Inc.*, 50 Ohio St. 3d at 161.

Instead of retiring for the evening having been released from deliberations after midnight and expected to return by 10:00 a.m. that same day, Juror #6 went home to a computer and printed research. See Nov. 2007 Tr. 9-11. Juror #6 brought that research with her to the jury deliberation room that morning and admitted to the trial court on the record her intent to share it with the other jurors during deliberations. *Id.* The court bailiff observed Juror #6 with these materials and brought it to the attention of the trial court. See Nov. 2007 Tr. 2-3. After its examination of the juror and hearing arguments from both sides on whether to declare a mistrial, the court journalized its decision to grant a mistrial. In its journal entry, the trial court identified three (3) specific reasons why it felt a mistrial was manifestly necessary: 1) the juror had been irreparably tainted by the information she had acquired; 2) it was manifestly necessary because she would have tainted the other jurors with the outside information, corroborated by the fact that she brought the information in tangible form to the jury room; and 3) a curative instruction would be insufficient because a previous cautionary instruction had already been disregarded, even if not maliciously so. *See Gunnell*, 2010 Ohio 4415, at ¶¶ 153-156 (citing Journal Entry of Oct. 10, 2007). Ruling on Appellee's motion to dismiss the indictment on double jeopardy grounds, the trial court identified seven (7) factors in support of its reasoning it relied on in making its determination to grant the mistrial. *See id.* at ¶¶ 160-167.

The trial court here also searched for reasonable alternatives. *Accord Petro*, 515 F.3d at 662, applying *Jorn*, 400 U.S. 470. In the record reproduced by the appellate court, the trial court considered giving Juror #6 a curative instruction as well as seeking assurances that she would put the hypothetical out of her mind. *Gunnell*, 2010 Ohio 4415, at ¶ 129, 131, 138, 143. The trial court rejected these alternatives because it believed that Juror #6 was irreparably tainted and reasoned that it had “no other option” than to sustain the State’s motion for a mistrial. *Id.* at ¶ 152. After examining the juror in question, R.C. 2945.03, and having conducted a search for reasonable alternatives, *Jorn*, 400 U.S. 470, the trial court developed a reasoned basis on which it exercised its sound discretion. The trial court’s finding of manifest necessity for a mistrial is supported by more than enough to meet the standard of review. *Glover*, 35 Ohio St. 3d at 19, citing *Calhoun*, 18 Ohio St. 3d at 376 and *Scott*, 437 U.S. at 92.

As the appellate court itself noted in an assignment of error not before this Honorable Court, the courts will not “blindly assume that a jury is able to follow a . . . court’s instruction to ignore the elephant in the deliberation room.” *Gunnell*, 2010 Ohio 4415, at ¶ 28 (omission in original), citing *United States v. Morena* (3d Cir. 2008), 547 F.3d 191, 197. In this case, the elephant in the deliberation room was Juror #6’s research and her admitted intent to share it with the other jurors. Because the court could not “blindly assume” that an instruction would be sufficient to cure the taint of Juror #6’s misconduct, the trial court could reasonably infer from its examination of the juror, and having reviewed the research itself, that it was no longer possible for the juror to deliberate impartially. A fair trial was no longer possible. *Franklin*, 62 Ohio St. 3d at 127.

The trial court believed it impossible to contain the effect of Juror #6's misconduct. After examining the juror in chambers, the trial court found that the juror was unlikely to forego reliance on her research, especially when the research was important enough to the juror to stay up late into the night and print it off to bring to the jury room the next day. With Juror #6's violation of repeatedly urged jury instructions not to conduct outside research, and given that Juror #6 relied on an example of involuntary manslaughter from the internet to answer questions she had about the case rather than the trial court's instructions on what the law is in Ohio, it was not unreasonable or arbitrary or unconscionable for the trial court to find that the juror could not easily disregard the research and deliberate with that information completely out of her mind. See AAAA Enters., Inc., 50 Ohio St. 3d at 161 ("decision is unreasonable if there is *no sound reasoning process* that would support that decision") (emphasis added).

The appellate court avers in a lengthy discourse all the things the trial court could have done. Gunnell, 2010 Ohio 4415, at ¶¶ 168- 169, 178, 191. As the appellate court saw it, the trial court should have done any or all of these things. Apparently, the failure of the trial court to act in a way preferred by the appellate court was equivalent to the trial court abusing its discretion. This contradicts this Honorable Court's prior holdings declining to apply inflexible standards of review to the granting of a mistrial. See Berk, 53 Ohio St. 3d at 169 (appellate court may not substitute its judgment for that of the trial court); AAAA Enters., Inc., 50 Ohio St. 3d at 161 (it is not enough that the appellate court, were it deciding the issue *de novo*, would not have found the reasoning process employed to be persuasive). In fact, the opinion of the court of appeals requires an

exacting standard of review. This treatment by the appellate court unreasonably narrows existing case law from this Honorable Court regarding the discretion of the trial court.

Moreover, the appellate court's holding would require trial courts to engage in futile conversations with jurors. The trial court stated that he had no doubt that Juror #6 would, if called back into chambers, *say* that she could put the definition out of her head and deliberate impartially. *Id.* at ¶¶ 134, 137-38. The trial court reasoned, however, that because the juror had innocuously violated the instructions before, she was likely to at least innocuously if not purposefully violate her instructions again. Even assuming that her motives in violating repeatedly urged instructions were wholly innocent, the prejudice to the State from another violation during deliberations resulting in an acquittal is not reviewable or reversible. *See* R.C. 2953.02; *Scott*, 437 U.S. at 90 (“[a] verdict of acquittal . . . could not be reviewed, on error or otherwise, without putting [a defendant] twice in jeopardy, and thereby violating the Constitution.”), quoting *United States v. Martin Linen Supply Co.* (1977), 430 U.S. 564, 571; *see also Lovejoy*, 79 Ohio St. 3d at, 443, 1997 Ohio 371. It was not unreasonable, given all of the facts of this case, for the trial court to decide that in light of Juror #6's misconduct a fair trial was no longer possible.

The appellate court faulted the trial court for automatically dismissing the juror's credibility. *Gunnell*, 2010 Ohio 4415 at ¶¶ 87-88, quoting *Smith v. Phillips* (1982), 455 U.S. 209, 217 n.7, *Dennis v. United States* (1950), 339 U.S. 162, 171. The United States Supreme Court in *Phillips* merely cautioned against holding all such testimony “inherently unreliable.” 455 U.S. at 217 n.7. Although a juror may be “well qualified to say whether one has an unbiased mind in a certain matter,” *Dennis*, 339 U.S. at 171,

being “well qualified” is not the same thing as that testimony being dispositive of the question. Under Dennis and Phillips, trial courts retain the inherent ability to decide matters of credibility. As numerous cases have held, a trial court is uniquely situated to determine whether the juror is in fact unbiased and its determination, made while observing the juror’s voice inflection, gestures and demeanor, *see* Seasons Coal Co., Inc. v. City of Cleveland (1984), 10 Ohio St. 3d 77, 80, 461 N.E.2d 1273; Glover, 35 Ohio St. 3d at 19, is subject only to review for abuse of discretion, Treesh, 90 Ohio St. 3d at 480. *See also* Gori v. United States (1961), 367 U.S. 364, 368 (“Where, for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision, the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared without the defendant’s consent and even over his objection, and he may be retried consistently with the Fifth Amendment.”), *approved*, Oregon v. Kentucky (1982), 456 U.S. 667, 677 n.7

Instead of following the long-standing precedent of this Court and deferring appropriately under the abuse of discretion standard to the reasoned judgment of the trial court on matters relating to the credibility of a juror to decide whether the possibility of a fair trial still existed, the appellate court substituted its judgment here for that of the trial court. *See* Berk, 53 Ohio St. 3d at 169. Conducting its own exacting review, the appellate court’s decision would destroy the standard of review and require trial courts to utter a “talismanic phrase” or engage in a “ritualistic incantation” of questions and findings to support its decision declaring a mistrial or risk an appellate determination of abuse of discretion. *See* Reed, 9th Dist. No. 2643; Davis, 53 F.3d at 642.

The appellate court's decision reversing the decision of the trial court in this case unreasonably narrows the law in constraining the discretion of trial courts when deciding whether manifest necessity exists for a mistrial. For the aforementioned reasons, this Honorable Court should reverse the decision of the appellate court and remand for a new trial.

CONCLUSION

For the foregoing reasons, OPAA respectfully requests that this Honorable Court reverse the decision of the Second District Court of Appeals.

Respectfully Submitted,

DENNIS P. WILL, #0038129
Prosecuting Attorney
Lorain County, Ohio

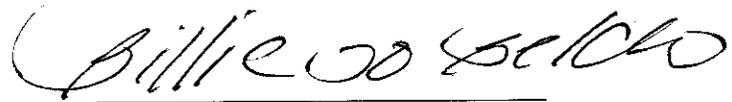
By:



BILLIE JO BELCHER, #0072337
Assistant Prosecuting Attorney
225 Court Street, 3rd Floor
Elyria, Ohio 44035
(440) 329-5393

PROOF OF SERVICE

A copy of the foregoing Brief of *Amicus Curiae* OPAA was sent by regular U.S. Mail to Andrew Picek, Esq., Clark County Prosecutor's Office, 50 East Columbia Street, P.O. Box 1608, Springfield, Ohio, 45501, Counsel for Appellant; and to James N. Griffin, 8 North Limestone Street, Suite D, Springfield, Ohio, 45502, Counsel for Appellee; and Charles Blue, Esq., 401 E. Stroop Road, Kettering, Ohio 45429, Counsel for *Amicus Curiae* Alicia McAlmont this 25th day of March, 2011.



Billie Jo Belcher, #0072337
Assistant Prosecuting Attorney
Counsel for *Amicus Curiae*, Ohio
Prosecuting Attorneys Association