

**IN THE SUPREME COURT OF OHIO**

**12-0121**

**STATE OF OHIO**

Plaintiff-Appellee,

vs.

**HITESH PATEL**

Defendant-Appellant.

CASE NO.

C.A. No. 2010 CA 0077

T.C. No. 10 CR 223

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**ON APPEAL FROM THE COURT OF APPEALS  
FOR THE SECOND APPELLATE DISTRICT OF OHIO  
GREENE COUNTY, OHIO**

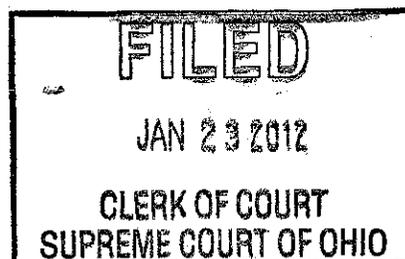
**APPELLANT'S MEMORANDUM IN SUPPORT  
OF SUPREME COURT JURISDICTION**

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**TABLE OF CONTENTS**

<b>CITES</b>	<b>PAGE(S)</b>
<b>TABLE OF CONTENTS</b> .....	<b>i-ii</b>
<b>JURISDICTIONAL STATEMENT</b> .....	<b>1</b>
<u>Authorities cited (in the order in which they appear in the brief):</u>	
Dustin Smith, <i>The Importance of a Wink</i> , by Dustin Smith, (Oct. 30, 2010) ..... <a href="http://web.media.mit.edu/~dustin/papers/the_importance_of_the_wink/the_importance_of_the_wink.pdf">http://web.media.mit.edu/~dustin/papers/the_importance_of_the_wink/the_importance_of_the_wink.pdf</a> (accessed January 19, 2012)	1
Crim.R.33 .....	3
<i>State v. Ahmed</i> ..... 103 Ohio St.3d 27, 2004-Ohio-9190, (2004)	3
<i>State v. Brinkley</i> ..... 105 Ohio St.3d 231, 2005-Ohio-1507, (2005)	3-4
<b>STATEMENT OF THE CASE AND FACTS</b> .....	<b>4</b>
<b>PROPOSITION OF LAW</b> .....	<b>11</b>
<b>EVIDENCE OF AN AFFINITY BETWEEN A JUROR AND A PARTY OR WITNESS CREATES A PRESUMPTION OF JUROR BIAS, DESPITE A JUROR'S TESTIMONY THAT NO BIAS EXISTS, WHICH REQUIRES A MISTRIAL IF NOT REBUTTED</b>	
Crim.R.24(C)(9) .....	12,13
<i>State v. Jackson</i> ..... 107 Ohio St.3d 53, 2005-Ohio-5981, (2005)	12
<i>Duncan v. Louisiana</i> ..... 391 U.S. 145, 88 S.Ct.1444, 20 L.Ed.2d 491 (1968)	12
<i>State v. Hopfer</i> ..... 112 Ohio App.3d 521, 679 N.E.2d 321 (2 <sup>nd</sup> Dist. 1996)	12, 13
<i>State v. Gunnell</i> ..... 2 <sup>nd</sup> Dist. No. 09 CA 0013, 2010-Ohio-4415	12, 13

<i>Remmer v. United States</i> .....	13
347 U.S. 227, 74 S.Ct.450, 98 L.Ed.654 (1954)	
<i>United States v. Lawhorne</i> .....	13, 14
29 F.Supp.2d 292, (E.D.Va.1998)	
<i>United States v. Cheek</i> .....	13-14
94 F.3d 136 (4 <sup>th</sup> Cir.1996)	
<i>McDonough Power Equipment, Inc. v. Greenwood</i> .....	14
464 U.S. 548, 104 S.Ct.845, 78 L.Ed.2d 663 (1984)	
<i>United States v. Delaney</i> .....	15
732 F.2d 639 (8 <sup>th</sup> Cir.1984)	
<i>United States v. Rattenni</i> .....	15
480 F.2d 195 (2 <sup>nd</sup> Cir.1973)	
<b>CONCLUSION</b> .....	<b>15</b>
<b>CERTIFICATE OF SERVICE</b> .....	<b>16</b>

## WHY THIS COURT SHOULD ACCEPT JURISDICTION

To wink is to give a signal of affinity and secret. A wink has been defined as “an extra bit appended to a message...enticing the listener to delve deeper into the meaning of [the] message. It may not mean what it seems to mean, the wink implies.”<sup>1</sup> This internationally-known and recognized gesture, which symbolizes kinship, was used by a juror towards the lead detective in the criminal case of Hitesh Patel moments after the verdict was read. It is hard to imagine a place more inappropriate for such a gesture than a courtroom, especially amongst a juror and the state’s witness. This country believes in the right to a fair trial, with an impartial jury. How can such a strong signal still be considered impartial?

In this case, the juror displayed this brazen signal intentionally, and in the presence of a full courtroom. This same juror denied he was biased towards the state, despite his grand gesture otherwise. The detective, who was the recipient of the wink, then lied as to why the juror winked at him. He did admit, however, that he had also a conversation with that juror during the trial, before the wink. Despite all of that, the court felt the trial and the verdict were proper and denied the request for a mistrial. The issue before this court is whether prejudice of a juror can be presumed. Can it be presumed when the state’s witness, the lead detective, has a conversation with a juror during trial? What if that conversation is never disclosed to the court? Can it be

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<sup>1</sup> Dustin Smith, *The Importance of a Wink*, by Dustin Smith, (Oct. 30, 2010) [http://web.media.mit.edu/~dustin/papers/the\\_importance\\_of\\_the\\_wink/the\\_importance\\_of\\_the\\_wink.pdf](http://web.media.mit.edu/~dustin/papers/the_importance_of_the_wink/the_importance_of_the_wink.pdf) (accessed January 19, 2012).

presumed when that same detective felt so strongly tied to the juror, even calling the juror cop-friendly, that he predicted that the case is already won for the state? What if that same juror then winks at the detective after the verdict was read? What if that detective lied about why that juror winked at him? And can all of these facts be negated by the juror's single, self-serving statement that he was not biased for the state? These are not questions, but acts that occurred during this trial. However, simply because the juror denied an actual affinity for the detective, despite gesturing otherwise, Appellant was denied a new trial. And while he denied Mr. Patel's motion for a mistrial, the trial judge stated it best: "I agree with counsel's statement that the perception of justice has taken a misstep in this case, and I look squarely at the agent of the State as creating this problem" (Motion for Mistrial, pg. 160).

Mr. Patel contends the only perception in that courtroom was injustice. He sought a new trial based upon the actions of the juror and state's representative, Detective Cyr. Counsel argued these parties engaged in improper communication during the trial, starting with a conversation they had on the morning of the last day of trial. After they conversed about a mutual acquaintance, they parted ways; however the conversation was not disclosed. After deliberations, the detective was bragging to the prosecutor's office that he was confident they won because the juror was "cop-friendly." At that time, and only after being confronted about that statement did he disclose the conversation, which the prosecutor immediately reported to the court and defense counsel. A mistrial was denied. After the verdict was announced, the same

juror winked at the detective. This was witnessed by several people in the court room. Thereafter the court inquired of the detective and juror. The detective gave two conflicting stories as to why the juror winked at him, and the juror provided a different story. Despite the inconsistencies, the juror's denial of bias was sufficient for the court to deny the mistrial.

Appellant contends he is entitled to a new trial based upon Ohio Crim.R.33(1), (2), (3) and (5). Crim.R.33 allows for a new trial when any of the following causes deprive the defendant of a fair trial.

- (1) irregularity in the proceedings, or in any order or ruling of the court, or abuse of discretion by the court, because of which the defendant was prevented from having a fair trial;
- (2) misconduct of the jury, prosecuting attorney, or the witness for the state;
- (3) accident or surprise which ordinary prudence could not have guarded against;
- (5) error of law occurring at the trial;

Appellant argues he is entitled to a new trial based upon an irregularity in the proceedings, which prevented him from having a fair trial, namely the communication between the juror and state's witness. The trial court abused its discretion in denying that motion. Second, he is entitled to a new trial, based upon misconduct of the jury and a witness for the state. Third, because of this communication, the trial court issued a decision overruling the motion, which was an error of law. The grant of a mistrial lies within the discretion of the trial court. *State v. Ahmed*, 103 Ohio St.3d 27, 2004-Ohio-9190, (2004). However, mistrials are to be granted when a substantial right of a party has been adversely affected, where the ends of justice require, or where a fair

trial is no longer possible under the circumstances. *State v. Brinkley*, 105 Ohio St.3d 231, 2005-Ohio-1507, (2005).

The trial court felt compelled to deny the motion because the defendant must prove bias by the juror. The appellate court, again bound by the current case law, affirmed the decision of the trial court on the basis of a lack of proof of bias. The second district held:

[w]e are unpersuaded that these communications created a presumption of prejudice. In the absence of demonstrable prejudice to Patel, which does not exist in light of the trial court's findings, we cannot say the trial court abused its discretion in denying the motion for a mistrial and refusing to grant Patel a new trial.

(Decision, 2<sup>nd</sup> Dist., filed 12/9/2011, pg. 8-9).

The trial and appellate court both held, in essence, that bias cannot be presumed, despite evidence otherwise that it exists. Appellant contends this is improper and the facts of this case support a presumption of bias. If there can never be a presumption of prejudice by a juror, then *any* act illustrating bias is acceptable, so long as there is a denial of bias. Thus, any juror harboring a bias towards the defendant who acts on that will ultimately get what they want; to continue service on the jury, granting them the opportunity to spoil the rest of the panel with their position. Juror misconduct of this nature should carry a presumption of prejudice, which can be rebutted by the government. When addressing such important rights – the right to a fair trial and impartial jury -- shouldn't the law err on the side of caution?

### **STATEMENT OF THE CASE AND FACTS**

#### **A) Procedural Posture**

Appellant was charged with Abduction, Sexual Imposition, Rape, and Gross

Sexual Imposition. A motion to suppress hearing was held, challenging statements made by Appellant after his arrest. That motion was overruled. On September 27, 2010, Appellant proceeded to trial on several indicted counts.<sup>2</sup> Pursuant to a Crim.R. 29 motion, counts I, II, III, XII and XIII were dismissed. The jury then began deliberations. Shortly thereafter, Appellant's counsel sought a mis-trial based upon misconduct of a juror and the lead detective, which was denied. The jury continued deliberations and returned a verdict of guilty. After the verdict, the same juror winked at the detective, and Appellant's counsel renewed his motion for a mistrial. A hearing on the second motion for a mistrial was held. The court overruled the motion and Appellant was sentenced to a total term of incarceration of six years.

Appellant timely appealed to the Second District Court of Appeals. The Second District affirmed the denial of the mistrial, as well as other matters on appeal, but did reverse the conviction for a hearing on whether some of the offenses are allied offenses of similar import, requiring merger. This hearing has not yet been scheduled.

#### B) Statement of Facts

Appellant was the manager of Motel 6 in Fairborn (Trial, pg. 155). Appellant was married and lived on the second floor of the hotel with his wife and child (Trial, pg. 157-158). His wife also worked at the hotel doing the laundry (Trial, pg. 83). The hotel had several employees, including Crystal Benson and Dawn Haile (Trial, pg. 35, 155). Crystal Benson was a hotel housekeeper (Trial, pg. 33). Dawn Haile worked at

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The court issued a decision on September 1, 2010 granting Appellant's motion to sever, in part, and counts XIV - XX were not set for trial with this case. They were transferred to the Fairborn Municipal Court, but were ultimately dismissed.

the front desk (Trial, pg. 151, 153).

“Pizza Day”

On September 16, 2009, Ms. Benson arrived at the hotel at 7:00 am, one hour before her shift began (Trial, pg. 35, 36, 66). Prior to beginning her work, she sat on a bench outside the hotel, smoking a cigarette, talking to Appellant (Trial, pg. 38-39). Out of the blue, she asked him if he had “a lot of wives” (Trial, pg. 41). Ms. Benson then engaged in a discussion of her beliefs of sexual relationships, and told Appellant that she did not believe in adultery, one-night stands, or “friends with benefits” (Trial, pg. 41). When the conversation ended, Ms. Benson began her shift.

Ms. Benson was cleaning one guest room when Appellant approached her and offered her lunch (Trial, pg. 47). She accepted, then began scrubbing the toilet (Trial, pg. 51). She alleged Appellant then reached inside her pants and told her she had “pretty, nice silk underwear” (Trial, pg. 51). She claimed “he rammed his hand down my pants, touching the bottom of my butt” (Trial, pg. 51). She alleged he grabbed her and put his finger in her vagina (Trial, pg. 52). He kissed her, embracing her neck (Trial, pg. 52-53). She pushed him away and told him to stop (Trial, pg. 56). Appellant left and she continued cleaning (Trial, pg. 58). She worked at the hotel for nearly six months after these incidents (Trial, pg. 70). She reported she eventually quit because her hours were decreased, however she testified at trial that she was fired for not showing up for work (Trial, pg. 76, 103-104). Ms. Benson never called the police to report any incident.

“Playful wrestling”

Dawn Haile was hired as the front desk clerk at the hotel (Trial, pg. 153).

Throughout her employment, Ms. Haile and Appellant were, in her words, “playful” and often discussed personal matters, including sex (Trial, pg. 160, 187-188). In 2009, Dawn and Appellant were checking the heater in a room, and afterward Appellant “tapped” her bottom very lightly (Trial, 172, 174, 198). On February 12, 2010, Dawn argued with Appellant about a mistake she had made (Trial, pg. 178). After they resolved the issue, he apologized, even hugging her for a brief second (Trial, pg. 183, 179, 182). On March 29, 2010, they were playing around and wrestling (Trial, pg. 160). While this was happening, he kissed her cheek (Trial, pg. 161). They laughed while this was going on and at no time did she try to leave (Trial, pg. 194).

Ms. Haile never called the police regarding any of these encounters, her ex-husband did (Trial, pg. 158). In fact, she was mad that he did (Trial, pg. 159). She admitted she was criticized at work for poor performance on occasion (Trial, pg. 183). In March, she was told to improve her performance or she may be fired (Trial, pg. 191). While her hours eventually decreased, she continued to work at the hotel (Trial, pg. 184-185).

#### Rule 29

After resting, the State and Defense presented Rule 29 arguments. After arguments, the Court granted the motion on Counts I and II (Trial, pg. 246-247). The state agreed to dismiss Count III (Trial, pg. 229), XII and XIII (Trial, pg. 228-229).

#### The conversation...and the wink

After jury instructions and deliberations began, it came to the attention of the prosecution that Detective Cyr, State’s representative, had a conversation with a juror during trial (Trial, pg. 296). It had occurred seven hours earlier, as the Detective

entered the courthouse at 8:15 am (Trial, pg. 297). They discussed a mutual friend (Id). When the Detective realized he was speaking with a juror, he walked away (Id). The juror was identified as Juror #10, who had been seated five feet from the detective throughout the entire trial (Trial, pg. 298, 300). Despite sitting only a few feet from the juror during the entire trial, Detective Cyr "forgot" about the conversation until seven hours later, at the commencement of deliberations. He did not report the conversation directly to the prosecution, and it was only discovered when he was overheard bragging to another prosecutor that he felt good about the case because juror #10 was such a nice guy (Trial, pg. 299, Motion for Mistrial, pg. 118-119). This was overheard by prosecutor Tornichio, who reported it to the court and counsel (Id). Detective Cyr claimed he did not know he could not converse with a juror about non-trial related matters, despite his actions to the contrary, i.e. immediately terminating the conversation upon realizing it was a juror (Trial, pg. 300).

The juror was questioned in-chambers. He confirmed they discussed a mutual friend, a former Fairborn police officer (Trial, pg. 304). The juror admitted he too failed to report this discussion (Trial, pg. 306). Defense counsel moved for a mistrial (Trial, pg. 309). He argued this was prosecutorial misconduct as the state's representative had communicated with a juror and failed to report it (Trial, pg. 309). Counsel also argued a mistrial was necessary as the alternate juror had been excused (Trial, pg. 311). The court denied the motion (Trial, pg. 318).

The jury continued deliberations and reached a verdict the next afternoon, convicting Appellant on all counts (Trial, pgs. 325-327). After releasing the jurors, juror #10 winked at Detective Cyr as he left the courtroom. This was witnessed by

defense counsel, the Detective, and others in the courtroom (Trial, pg. 330-331, 333). The defense again requested a mistrial. A hearing was held on the second motion for a mistrial on October 20, 2010 and November 2, 2010. Attorney Steven Elliott, who was in the courtroom at the time of the wink, testified (Motion for Mistrial, pg. 13). He confirmed he saw the wink (Id). He said it appeared to be a friendly gesture (Motion for Mistrial, pg. 16).

Defense counsel Kevin Lennen testified as a witness. He testified the court went to great lengths to segregate the jurors with other the parties, including taking extensive precautions to minimize contact between jurors and parties. He stated the court even posted a sign designating one area of the floor for "jurors only" (Motion for Mistrial, pg. 24). He also recalled Juror #10 never disclosed during voir dire he knew anyone in law enforcement, nor that he knew any officers from the Fairborn Police Department (Motion for Mistrial, pg. 31). He also saw the wink.

Detective Cyr testified next. He confirmed he was designated the State's witness, and possessed sixteen years of experience in law enforcement, including experience in trial (Motion for Mistrial, pg. 48-49, 50). He confirmed he knew the jurors were physically separated from all other parties in the courthouse (Motion for Mistrial, pg. 53). He confirmed he had a discussion with the juror one morning of trial, but that once he recalled it that afternoon, he disclosed it to his prosecution team (Motion for Mistrial, pg. 63).<sup>3</sup> He said the juror did wink at him after the verdict. He

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Again, recall he did not directly disclose it but a prosecutor overheard him talking about it and disclosed it.

testified he told Prosecutor Nicole Burke the juror winked at him because he told another juror to “have a nice day” but admitted this statement to her was a lie (Motion for mistrial, pg. 66). He admitted the wink was prompted by him wishing juror #10 “happy birthday” (Motion for Mistrial, pg. 86).<sup>4</sup> He said prosecutor Adolfo Tornichio told him to wish the juror a happy birthday (Motion for Mistrial, pg. 92).

Prosecutor Adolfo Tornichio testified. He never told the Detective to wish the juror a happy birthday (Motion for Mistrial, pg. 117). He became aware of the initial conversation between the juror and the detective when the detective was talking to other members of the prosecution staff during deliberations. He overheard him say that juror #10 was likely on their side (Motion for Mistrial, pg. 118-119). He confirmed the Detective did not actually report that conversation (Id). He confirmed Detective Cyr also gave him and Prosecutor Burke two different stories as to what prompted the wink (Motion for Mistrial, pg. 121). Prosecutor Nicole Burke testified, confirming Detective Cyr told her the juror winked at him because he told another juror to have a nice day (Motion for Mistrial, pg. 134).

Juror #10 testified. He confirmed they have a mutual friend whom they discussed at the courthouse (Motion for Mistrial, pg. 98-100). He denied winking at the detective after trial, and said he nodded his head at the detective in response to the detective wishing him happy birthday (Motion for Mistrial, pg. 104).

After a brief recess, the Court denied the motion for mistrial. The court found

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The Detective was aware it was the juror’s birthday as it was also defense counsel’s birthday, which had been discussed by the parties (Motion for mistrial, pg. 91)

the conversation between the juror and detective was not related to the case (Motion for Mistrial, pg. 156). The court felt it could not find the juror was prejudiced by the communication, as needed to declare a mistrial (Motion for Mistrial, pg. 158). The court found the juror said he would remain open-minded after the conversation, and had no evidence that he was not (Motion for Mistrial, pg. 158). The court found the defendant did not suffer any prejudice as a result of the communications (Motion for Mistrial, pg. 160). The court did state: "I agree with counsel's statement that the perception of justice has taken a misstep in this case, and I look squarely at the agent of the State as creating this problem" (Motion for Mistrial, pg. 160).

#### Sentencing

On November 17, 2010, Appellant was sentenced to a total term of incarceration of six years.

### ARGUMENT

#### **PROPOSITION OF LAW EVIDENCE OF AN AFFINITY BETWEEN A JUROR AND A PARTY OR WITNESS CREATES A PRESUMPTION OF JUROR BIAS, DESPITE A JUROR'S TESTIMONY THAT NO BIAS EXISTS, WHICH REQUIRES A MISTRIAL IF NOT REBUTTED**

Appellant contends a presumption of bias should arise when there is misconduct by a juror or evidence of an affinity between a juror and a party or witness. If this presumption is not rebutted, and all alternate jurors dismissed, then a mistrial must be declared. In support of this contention, Appellant believes the law should err on the side of protecting a defendant's constitutional rights to a fair trial and impartial

jury. The right to a fair trial and impartial jury is of the utmost importance in this country. The United States Constitution guarantees a defendant the right to a fair trial and impartial jury, not comprised of individuals carrying a bias. See Crim.R.24(C)(9) and *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, (2005). The Due Process Clause of the Fourteenth Amendment requires a person accused of a criminal violation to be tried before a panel of fair and impartial jurors. *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct.1444, 20 L.Ed.2d 491 (1968).

In this case, there was ample evidence of bias by juror #10. There were two acts of misconduct, a conversation and a wink, and evidence of bias, the wink. All of these facts support Appellant's contention that the juror exhibited a bias towards the state. This should have been grounds for a mistrial, however the trial court felt compelled to deny that request simply because the juror denied any prejudice.

It is clear that the law currently requires a defendant seeking a mistrial based upon juror misconduct to prove bias. This trial judge in this case relied on *State v. Hopfer*, 112 Ohio App.3d 521, 679 N.E.2d 321 (2<sup>nd</sup> Dist. 1996), which adopted a two part test to determine if juror misconduct requires a mistrial (tr. Motion for Mistrial, pg. 152). The court must determine first if there is misconduct, and if so, whether it materially affected the defendant's rights. That court felt the juror's statements regarding having children, while serving as a juror for a homicide of a child, did not rise to the level of prejudice because the juror claimed she could remain impartial. *Id.*

The trial court also cited to *State v. Gunnell*, 2<sup>nd</sup> Dist. No. 09 CA 0013, 2010-

Ohio-4415, which also addressed the burden on the defense to establish prejudice as a result of juror misconduct. (Motion for Mistrial, pg. 157). When this matter was appealed, the second district, without specifically citing to *Hopfer* or *Gunnell*, affirmed the trial court on the basis that the trial court's finding that Defendant could not prove prejudice was not an abuse of discretion (Decision, pg. 8-9).

There are circumstances under which a juror is presumed to carry a bias, and Appellant is merely asking for it to be extended to all circumstances under which a juror engages in misconduct. For example, if a juror and a party or witness discuss the case during the juror's service, then prejudice to the defendant is presumed. See *Remmer v. United States*, 347 U.S. 227, 74 S.Ct.450, 98 L.Ed.654 (1954). Also, Crim.R.24(C) addresses the grounds for challenging a juror for cause and specifies circumstances under which a juror is nearly presumed to be partial. Thus, to allow for a presumption of bias, which can be rebutted, is consistent with need to protect the sanctity of the jury pool.

Further, while the exact facts of this case are rare, a similar situation was addressed in *United States v. Lawhorne*, 29 F.Supp.2d 292, (E.D.Va.1998). In that case, it was determined during voir dire a juror and the prosecutor previously had a business relationship. That juror remained, and during the trial, winked at the prosecutor. That court followed the two part test set out in *United States v. Cheek*, 94 F.3d 136 (4<sup>th</sup> Cir.1996), to determine the effect of the improper contact. Under *Cheek*, that a wink demonstrated an affinity of the juror with the prosecution "of the type

which should not exist at trial,” stating the gesture undercut the juror’s voir dire response that he could be impartial to the prosecution. The court further found the wink was more than an innocuous contact, and was presumptively prejudicial. The burden then shifted onto the government to establish there was no reasonable probability that the verdict was influenced by the gesture. *Id.*

The *Lawhorne* court went further and addressed juror misrepresentations during voir dire. *Lawhorne* applied the test of the United States Supreme Court in *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 104 S.Ct.845, 78 L.Ed.2d 663 (1984), for determining whether a defendant alleging juror dishonesty during voir dire is entitled to a new trial. The *McDonough* test states the party must demonstrate the juror failed to honestly answer a material question on voir dire and that a correct response would have provided a valid basis for a challenge for cause. *Id.*

*Lawhorne* shows a juror’s actions may be indicative of their feelings, recognizing human nature and the inability to set aside affinities. The same issue was prevalent here, however without any remedy. Again, juror #10 had an affinity-based conversation with Detective Cyr. After questioned about it, he claimed he could still be fair and impartial. However, actions speak louder than words. After the verdict, he winked at the detective. Appellant argues it is obvious this bond between the two was strong enough that the juror signaled to the detective “job well done” in reference to the conviction. This wink is prima facie evidence of bias on behalf of the juror.

Further, the juror had denied knowing any police officers during voir dire. This

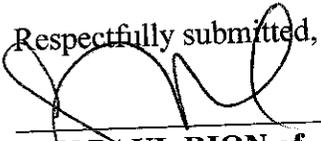
obviously was not true. The juror's lack of disclosure should have cast doubt over his assertion that he could remain fair and impartial. Without his statement that he could be impartial, the only evidence as to whether bias existed was his conversation and wink, which presumes prejudice. Again, using the rationale in *Lawhorne*, the wink undercuts his assertion that no prejudice exists, as it shows an affinity and bias between the juror and representative of the state.

Finally, juror bias must lead to a mistrial when the alternate jurors have been released. It is presumed that prejudice by one juror spills over to the rest of the jury. *United States v. Delaney*, 732 F.2d 639 (8<sup>th</sup> Cir.1984), and *United States v. Rattenni*, 480 F.2d 195 (2<sup>nd</sup> Cir.1973). Here, juror #10 was presumably spoiled the rest of the panel. Additionally, because deliberations had begun, there was no alternate juror to seat. The only option in this matter was a mistrial, which the court wrongfully denied.

### CONCLUSION

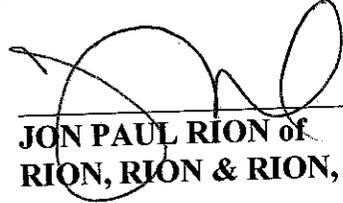
Wherefore Appellant respectfully requests this honorable court find a presumption of bias must arise with evidence of an affinity between a juror and a party or witness. Further, if this occurs, the state is given the opportunity to rebut the presumption. If the presumption is not rebutted, the juror is dismissed. Finally, if dismissal is after deliberations have begun, a mistrial must be declared.

Respectfully submitted,

  
\_\_\_\_\_  
**JON PAUL RION of  
RION, RION & RION, L.P.A., INC.**

**CERTIFICATE OF SERVICE**

I, the undersigned, do hereby certify that a copy of the foregoing was forwarded to the office of Attorney for the Appellee, on the same day of filing.



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**JON PAUL RION of  
RION, RION & RION, L.P.A., INC.**

IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
GREENE COUNTY

STATE OF OHIO

Plaintiff-Appellee

v.

HITESH PATEL

Defendant-Appellant

Appellate Case No. 2010-CA-77

Trial Court Case No. 10-CR-223

(Criminal Appeal from  
Common Pleas Court)

.....  
OPINION

Rendered on the 9<sup>th</sup> day of December, 2011.  
.....

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.....

HALL, J.

Hitesh Patel appeals from his conviction and sentence on charges of rape, abduction, gross sexual imposition, and sexual imposition (five counts).

Patel advances five assignments of error on appeal. First, he contends the trial court erred in denying his motion for a mistrial. Second, he challenges the legal sufficiency and manifest weight of the evidence to support any of his convictions. Third, he argues that the trial court erred in failing to suppress statements he made to police. Fourth, he claims the trial court erred in allowing him to be convicted and sentenced for allied offenses of similar import. Fifth, he contends the cumulative effect of the foregoing errors deprived him of his right to a fair trial.

The charges against Patel stemmed from allegations made by employees of a motel he managed in Fairborn, Ohio. One of the women, C.B., a housekeeper, described a "pizza day" incident in which Patel allegedly cornered her in a bathroom while she was cleaning it.<sup>1</sup> According to C.B., he reached inside the back of her pants and touched "the bottom of [her] butt." She alleged that he then reached inside the front of her pants and put his finger in her vagina. C.B. also claimed that Patel had touched her "butt" outside of her clothing on another occasion, touched her breast outside of her clothes, and pushed his pelvis against her backside. A second woman, D.H., who worked at the front desk, accused Patel of "tapp[ing]" her bottom on one occasion. She also alleged that he had hugged her, kissed her cheek, and kissed her chest on top of her clothes.

Patel was arrested as a result of the foregoing allegations and was interviewed at the Fairborn police department. At the outset of the interview, Patel signed a written waiver of his *Miranda* rights. During the interview, a detective lied to Patel about having video evidence to support the allegations against him. Patel eventually admitted to having

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<sup>1</sup>C.B. called the day in question "pizza day" because Patel had bought her a pizza for lunch that day.

touched C.B. and D.H. inappropriately. Based primarily on testimony from the two women and a recording of Patel's interview at the police station, which was played at trial, a jury found him guilty of the charges set forth above. The trial court imposed a six-year prison term for the rape conviction, which was based on Patel placing his finger inside C.B.'s vagina. Patel received shorter concurrent sentences for the other convictions, resulting in a total prison term of six years. This appeal followed.

In his first assignment of error, Patel challenges the trial court's denial of his motion for a mistrial and its failure to grant him a new trial. This argument concerns two communications between a juror and a prosecution witness who was the lead detective in the case: a brief courthouse conversation during trial and a wink after the jury's verdicts were read.

This court has recognized that a mistrial "need[s] to be declared only when the ends of justice so require, and a fair trial is no longer possible." *State v. Patterson*, 188 Ohio App.3d 292, 2010-Ohio-2012, ¶69. In other words, there must be a showing of prejudice. *State v. Gunnell*, Clark App. No. 09-CA-0013, 2010-Ohio-4415, ¶178. "The decision whether to grant a mistrial lies within the trial court's sound discretion." *Patterson*, ¶69. "In order to demonstrate that a trial court has abused its discretion in denying a motion for a mistrial, a criminal appellant must show that the trial court's decision was arbitrary, unreasonable, or unconscionable." *Id.*

With the foregoing standards in mind, we turn to the evidence before us. The record reflects that juror number ten approached detective Lee Cyr on the final day of trial as they were entering the courthouse. The juror inquired about a former Fairborn police officer. The detective, who initially did not recognize the juror, responded that the former officer no

longer worked for the police department. After exchanging a few innocuous comments about the former officer, the detective realized he was talking to a juror and walked away. The encounter came to light later that day, after the jury had begun its deliberations, when members of the prosecutor's office became aware of it.

When it learned about the conversation, the trial court had the detective and the juror separately brought into chambers and questioned. (Trial transcript, Vol. II at 296-322). The trial court then denied Patel's motion for a mistrial based on the incident. In support, it reasoned:

"Well, the Court will find that Detective Cyr and Juror No. 10 were entering the Courtroom this morning. As they were going through security the Juror engaged the Detective in a conversation. The Detective indicated the nature of the conversation. The Juror independently confirmed the nature of the conversation. I find that the extent of the conversation has been noted for the record.

"At the conclusion of that conversation they parted, went their separate ways.

"The Court has previously admonished the Jury not to discuss the case with anyone and the Juror was of the opinion that he was following that rule by not discussing the case with anyone else.

"It was his statement that he was carrying on a conversation with the Officer on matters totally unrelated to the nature of this case or anything dealing with this case.

"Now, the next question is, as raised by Counsel, what impact does this have upon that Juror's ability to remain on the Jury?

"The first concern the Court has is has the Juror shared his conversation or the fact that he even spoke to the Officer with other members of the Jury? And the record reflects

by the statement of the Juror that he did not. And so to that extent the Jury has not been advised of the nature of this conversation.

“The Juror also went on to indicate that this conversation would not affect his ability to consider this case and, further, that he could remain to be fair and impartial in regard to weighing the evidence and deciding the case, and, most importantly, the testimony of the Detective based upon solely what occurred outside the Courtroom which is the subject of this matter.

“It is the Court’s opinion that the Defendant is not prejudiced by the nature of this conversation by the fact that it has not been involved in any way with the case itself. I do not find anything in that regard that would bear upon this Juror’s ability to continue in this case.

“Now, with that determination, and I guess inherently is that I’m going to accept what [defense counsel] said earlier as a motion to dismiss and I’m going to deny the motion to dismiss. That’s for the record.” (Id. at 316-318).

Following that ruling, the jury deliberated further and ultimately found Patel guilty. After the verdicts were read and the jury departed the courtroom, defense counsel told the trial court that he had just seen juror number ten wink at the lead detective as the jury was dismissed. As a result, defense counsel again requested a mistrial. (Id. at 331). The trial court held an October 20, 2010 evidentiary hearing on the “wink” issue. During the hearing, the detective testified that he told juror number ten “happy birthday” and that the juror winked at him in response. (Hearing transcript at 69-70). The detective added that one of the prosecutors, Aldolfo Tornichio, earlier had told him to be sure and wish juror number ten a happy birthday. (Id. at 92).

Juror number ten also testified at the hearing. He agreed that the detective had wished him a happy birthday. Juror number ten testified that he “nodded” in response but could not recall whether he also winked. (Id. at 104-105). Juror number ten denied that the communication by him was “any type of signal” about being on the prosecutor’s “team.” (Id. at 106).

The next witness was prosecutor Tornichio. He denied having told the detective to be sure and wish juror number ten a happy birthday. (Id. at 117). He admitted, however, having mentioned to the detective that it was juror number ten’s birthday. (Id. at 126). Another prosecutor, Nichole Burke, also testified during the hearing. Burke testified that the detective had called her after the trial to explain the winking incident. (Id. at 134). Burke stated that the detective told her he had told a female juror to “have a nice day.” According to Burke, the detective told her that juror number ten had winked at him in response. (Id.). Burke also explained how the prosecution had become aware of the courthouse conversation between juror number ten and the detective during trial. She testified that, while the jury was deliberating, the detective had mentioned to her that juror number ten was “cop-friendly.” According to Burke, the detective proceeded to describe his conversation with juror number ten on the morning of the second day of trial. (Id. at 140).

After hearing all of the testimony and arguments from counsel, the trial court declined to grant a mistrial and order a new trial. In support of its ruling, the trial court provided a lengthy analysis complete with factual findings and legal conclusions. (Id. at 151-161). The trial court’s factual findings concerned both the courthouse conversation during trial and the wink. In short, the trial court found no misconduct by anyone sufficient to require a mistrial and no prejudice to Patel.

On appeal, Patel contends he should have been granted a new trial based on the two incidents of communication between the detective and juror number ten. Patel argues that the communication constituted an irregularity in the proceedings and misconduct that prejudiced his right to a fair trial. In support of his assignment of error, Patel contends juror number ten's wink was presumptively prejudicial. He further contends the wink belied the juror's earlier claim in chambers that he could be impartial. Finally, Patel claims the wink established an affinity between the detective and juror number ten that should not exist.

We review the trial court's denial of a mistrial and refusal to grant a new trial for an abuse of discretion. The trial court credited the testimony of the detective and juror number ten that the courthouse conversation during trial did not concern Patel's case. The trial court also credited the juror's assurance that the conversation had not been shared with other jurors. Finally, the trial court accepted juror number ten's assurance that he could remain fair and impartial despite the brief conversation. Therefore, we agree with the trial court's finding that the conversation in no way prejudiced Patel's right to a fair trial.

We reach the same conclusion with regard to the wink. The trial court appears to have found as a matter of fact that juror number ten did wink at the detective, apparently in response to the detective wishing him a happy birthday. Once again, this communication between the detective and juror number ten had nothing to do with Patel's case. Notably, the wink incident took place after the verdict was announced and the jury was leaving. Consequently, the wink incident itself could not have impacted the verdict already reached. The only import of the wink incident is whether it provides new or different evidence that the first incident, about the conversation at the security station, was something more, in substance or result, than originally determined to be. The trial court rejected that argument

and we find no abuse of discretion in that conclusion. Even if we assume that the wink occurred after juror number ten saw the detective tell a female juror to have a nice day, it still had nothing to do with Patel's case. By overruling Patel's motion for a mistrial, the trial court plainly rejected his theory, which was denied by juror number ten, that the wink revealed some affinity between juror number ten and the detective and indicated that the juror was biased for the prosecution.

In finding no prejudice to Patel, we reject his argument that prejudice must be presumed in this case. In support, Patel relies on *United States v. Lawhorne* (E.D.Va. 1998), 29 F.Supp.2d 292. There a federal district court concluded that when communications between a prosecutor and a juror during trial "cannot be characterized as innocuous, there arises a presumption of prejudice." *Id.* at 308. In such a case, the government bears the burden to establish the absence of prejudice. *Id.* In Patel's case, however, the record reflects that the two communications at issue were innocuous. The first involved a brief conversation that had nothing to do with Patel's trial. The second involved a juror's wink in response to a detective either wishing the juror happy birthday or telling another juror to have a nice day after the jury had been released from service. We are unpersuaded that these communications created a presumption of prejudice. In the absence of demonstrable prejudice to Patel, which does not exist in light of the trial court's findings, we cannot say the trial court abused its discretion in denying the motion for a mistrial and refusing to grant Patel a new trial. Accordingly, the first assignment of error is overruled.

In his second assignment of error, Patel challenges the legal sufficiency and manifest weight of the evidence to support his convictions. With regard to the rape

conviction, Patel contends the State presented no evidence that he used or threatened to use force when he placed his finger in C.B.'s vagina. Likewise, with regard to the gross sexual imposition conviction, which involved his reaching inside the back of C.B.'s pants, Patel claims the State presented no evidence of force. He also contends the State presented no evidence that he reached inside the back of C.B.'s pants for the purpose of sexual arousal or sexual gratification.

Patel also challenges the weight and sufficiency of the evidence to support his conviction on five counts of sexual imposition. These convictions involved Patel patting D.H. on the buttocks, kissing D.H.'s chest on top of her clothes, grabbing C.B.'s buttocks outside of her clothes, grabbing C.B.'s breast outside of her clothes, and pushing his pelvis into C.B.'s backside. With regard to D.H., Patel claims the record is devoid of evidence that his conduct was offensive to her or that he believed it would be offensive. He also claims he kissed her "chest," not her "breast." As for the touching of C.B., Patel insists the State presented no evidence that his actions were offensive to her or that he believed they would be offensive. He also argues that pushing his pelvis against C.B.'s "back" was not unlawful because her back is not an erogenous zone.

Finally, Patel challenges the weight and sufficiency of the evidence to support his conviction for abduction. He contends the record lacks evidence that he restrained C.B.'s liberty in any way when he placed his hand down her pants in a bathroom. He also claims the State presented no evidence that he restrained C.B.'s liberty on that occasion by force or threat of force. He additionally claims the State presented no evidence that any restraint created a risk of physical harm or placed C.B. in fear. In connection with each of his arguments under this assignment of error, Patel challenges the credibility of C.B. and D.H..

When a defendant challenges the sufficiency of the evidence, he is arguing that the State presented inadequate evidence on each element of the offense to sustain the verdict as a matter of law. *State v. Hawn* (2000), 138 Ohio App.3d 449, 471. "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

Our analysis is somewhat different when reviewing a manifest-weight argument. When a conviction is challenged on appeal as being against the weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider witness credibility, and determine whether, in resolving conflicts in the evidence, the trier of fact "clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52 (citations omitted). A judgment should be reversed as being against the manifest weight of the evidence "only in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

Having reviewed the record, we conclude that Patel's convictions are based on legally sufficient evidence and are not against the manifest weight of the evidence. With

regard to the rape conviction, C.B.'s testimony established the disputed element of force. C.B. testified as follows about the incident, which took place while she was trying to clean a bathroom:

"Q. All right. So what happened when [defendant] Tish came in?

"A. After we had the discussion, after he asked me if I was hungry and everything, I thought he had left, but apparently he had shut the door and that's when he had reached in the back of my underwear and liner of my pants and told me that I had pretty, nice silk underwear.

"Q. What kind of pants were you wearing on pizza day, if you remember?

"A. They were scrub pants.

"Q. And when Tish makes a comment about your underwear, what happens next?

"A. He rammed his hand down my pants, touching the bottom of my butt.

"Q. So his hand is touching the flesh of your butt at this point?

"A. Yes.

"Q. What was your reaction when you felt Tish's hand on the flesh of your buttocks on this day, on pizza day.?

"A. I hurried and stood up and turned around.

"Q. Why did you hurriedly stand up and turn around?

"A. Because I was shocked and I wasn't expecting that.

"Q. Did you say anything to him when you turned around?

"A. No. By then he had done grabbed me and his hand by then was in the front of me and he had his finger in my vagina.

"Q. How did you know his finger is inside your vagina, ma'am?

"A. Because I felt it.

"Q. And when Tish's finger was inside your vagina was he compelling you to submit to his finger inside your vagina by force?

"A. Yes, it was by force.

"Q. Why do you say yes? \* \* \*

"A. Because it was not willingly. I was not willingly participating in that.

"Q. Did you say anything to him when he had his finger inside your vagina?

"A. Yeah. 'Stop.'

"Q. And did he?

"A. No. Then he goes and reaches for a kiss and rams his tongue down my throat.

"Q. At this point are you facing the hotel room bathroom door or not?

"A. Yeah, my face is toward the door.

"Q. Is that door opened or closed?

"A. No, it was locked.

"Q. Did you try to escape from Tish's clutching at this point?

"A. I was pushing him, but his back was against the door."

(Trial transcript, Vol. I at 51-53).

The foregoing testimony is sufficient to establish the force element of rape. "Force" includes any compulsion or constraint physically exerted against a person. R.C. 2901.01(A)(1). Here the jury reasonably could have found force based on C.B.'s testimony that Patel held her in a locked bathroom and inserted his finger in her vagina against her will and while ignoring her plea to stop. The same testimony supports a finding that Patel used force to commit gross sexual imposition by "ramm[ing] his hand down [C.B.'s] pants"

and touching her buttocks. Under the circumstances, the jury also reasonably could have inferred that Patel acted with the purpose of sexual gratification.

We reach the same conclusion with regard to Patel's five sexual imposition convictions. D.H. testified that Patel patted her on the buttocks and once kissed her chest on top of her clothes. According to D.H., the first incident occurred when she and Patel were checking the heater in a room. D.H. did not like Patel touching her buttocks and did not ask him to do so. As for the kissing incident, D.H. testified that Patel placed his head on the "top part of [her] breast and the chest area" and kissed her "chest." She again testified that his conduct was unwanted and uninvited. Although Patel suggests that his actions constituted non-offensive playfulness, the jury reasonably could have concluded that he knew otherwise. We are equally unpersuaded by Patel's attempt to distinguish D.H.'s "breast" from her "chest." Seizing on D.H.'s testimony that he kissed her "chest," Patel asserts that a chest is not an erogenous zone. We reject this argument for at least two reasons. First, D.H. testified that Patel placed his head partially on her "breast." Second, his act of kissing her "chest" was sufficient to establish the contact necessary for a sexual imposition conviction. See *State v. Harrell* (Jan. 3, 2000), Delaware App. No. 99CAA03013 (finding that the "female chest area" is an erogenous zone).

The other three sexual imposition convictions involved Patel grabbing C.B.'s buttocks outside of her clothes, grabbing C.B.'s breast outside of her clothes, and pushing his pelvis into C.B.'s backside. Specifically, just days after "pizza day," Patel "grabbed" C.B.'s buttocks despite her earlier complaints in the bathroom. Not long after that, he "copped a feel" by grabbing C.B.'s breasts. She responded by telling him to leave her alone—just as she had done on other occasions. According to C.B., the third incident

occurred when Patel bent her over a sink, placed his hands on her hips, and "ramm[ed]" his pelvis against her hips. C.B. told Patel to stop, but he explained to her that he was trying to see if they "were a perfect fit." Based on C.B.'s testimony, the jury reasonably could have found that Patel knew his actions were offensive. Moreover, C.B.'s testimony refutes Patel's claim that he merely placed his pelvis against her "back." She testified that he pressed against her with his hands on her hips "like [they] were about to do it doggie style."

Finally, the evidence supports Patel's abduction conviction. C.B.'s trial testimony establishes that Patel forcibly restrained her liberty by holding her in a locked bathroom and reaching down her pants against her will. She testified that she tried to escape but could not because he had his back against the door and had a hand around part of her neck. C.B. further testified that she was afraid and did not know what else was going to happen.

To the extent that Patel's appellate argument challenges the credibility of C.B. and D.H., we note that credibility determinations "are primarily for the trier of fact." *State v. Goldwire*, Montgomery App. No. 19659, 2003-Ohio-6066, ¶13. "Because the factfinder \* \* \* has the opportunity to see and hear the witnesses, the cautious exercise of the discretionary power of a court of appeals to find that a judgment is against the manifest weight of the evidence requires that substantial deference be extended to the factfinder's determinations of credibility. The decision whether, and to what extent, to credit the testimony of particular witnesses is within the peculiar competence of the factfinder, who has seen and heard the witness." *Id.* at ¶ 14, quoting *State v. Lawson* (Aug. 22, 1997), Montgomery App. No. 16288. Having reviewed the record, we believe the jury acted well within its discretion in crediting the victims' testimony and finding their allegations to be

true. A rational trier of fact could have found Patel guilty of rape, gross sexual imposition, abduction, and five counts of sexual imposition. The evidence does not weigh heavily against those convictions. Accordingly, the second assignment of error is overruled.

In his third assignment of error, Patel argues that the trial court erred in failing to suppress statements he made to police. In support, Patel asserts that his *Miranda* waiver was invalid and that his subsequent statements were involuntary because the detective who questioned following his arrest him lied about the evidence, promised leniency, threatened him, and allowed him to talk despite knowing that he did not fully understand the process. Patel also claims the investigator refused to honor his request for counsel.

Having reviewed an audio-video recording of Patel's interview, we find no merit in the foregoing arguments. The waiver of Patel's *Miranda* rights occurred at the outset of the interview. The detective explained each particular right to Patel, who indicated that he understood. Patel also initialed a rights form indicating that he understood his rights. Patel also acknowledged that he had completed approximately fifteen years of education. Patel then expressly waived his *Miranda* rights by signing a written waiver and agreeing to talk to the detective. Nothing in the record suggests that Patel's *Miranda* waiver was anything other than knowing, intelligent, and voluntary. Moreover, we see no evidence to support Patel's claim that the detective tricked or coerced him into waiving his *Miranda* rights.

During the interview that followed the *Miranda* waiver, Patel made certain incriminating statements. In order to obtain the statements, the detective lied about having video evidence that corroborated the allegations against Patel. Specifically, the detective told Patel that C.B. and D.H. had recorded his actions using hidden "key fob cameras." No such evidence existed. The detective also told Patel that it would be "better" for him if he

confessed and "worse" if he lied. At various times, the detective added that denying the allegations would "not look good," that the allegations against Patel were "not all that bad," that it would be helpful for Patel to explain what happened, and that things would "go easier" if Patel would "take ownership" for what he did. At one point, the detective also warned Patel that lying would "force us to make an example out of you, legally speaking."

This court discussed the voluntariness of a confession in *State v. Moore*, Greene App. No. 07CA93, 2008-Ohio-6238, at ¶¶12-13, as follows:

"The Due Process Clause requires an inquiry separate from custody considerations and compliance with *Miranda* regarding whether a suspect's will was overborne by the circumstances surrounding the giving of a confession. *Dickerson v. United States* (2000), 530 U.S. 428, 120 S.Ct. 2326, 147 L.Ed.2d 405. Voluntariness of a confession and compliance with *Miranda* are analytically separate inquiries. *State v. Pettijean* (2000), 140 Ohio App.3d 517, 748 N.E.2d 133. Even if *Miranda* warnings are not required, a confession may be involuntary if the defendant's will was overborne by the totality of the facts and circumstances surrounding the giving of his confession. *Dickerson; Pettijean*.

"The due process test takes into consideration both the characteristics of the accused and the details surrounding the interrogation. *Id.* Factors to be considered include the age, mentality, and prior criminal experience of the accused; the length, intensity and frequency of the interrogation, the existence of physical deprivation or mistreatment, and the existence of threats or inducements. *State v. Edwards* (1976), 49 Ohio St.2d 31, 358 N.E.2d 1051. A defendant's statement to police is considered voluntary in the absence of evidence that his will was overborne and his capacity for self-determination was critically impaired due to coercive police conduct. *Colorado v. Spring* (1987), 479 U.S. 564, 107

S.Ct. 851, 93 L.Ed.2d 954; *State v. Otte*, 74 Ohio St.3d 555, 660 N.E.2d 711, 1996-Ohio-108.”

The circumstances surrounding Patel's incriminating statements fail to demonstrate that his will was overborne. The recording of Patel's interview shows that he understood the English language and responded appropriately to the detective's questions. At the time of his arrest, 42-year-old Patel had three years of college education and worked as the manager of a Fairborn motel. Whenever Patel sought clarification about a question or issue, the detective provided it. The detective also gave Patel water and took a break during the interview.

Although the detective lied about having video evidence of Patel committing crimes, this misrepresentation did not render Patel's confession involuntary under the totality of the circumstances. *State v. Reeves*, Greene App. No. 2002-CA-9, 2002-Ohio-4810, ¶13 (citing cases). Nor did the detective make any impermissible threats or promises. As set forth above, the detective made various general statements suggesting that it would be better for Patel to tell the truth. Such admonitions do not render a confession involuntary. *State v. Dobbs*, Greene App. No. 2009CA70, 2010-Ohio-3649, ¶62. Even the detective's warning that Patel might be "made an example of" was essentially an admonition to tell the truth. The statement implied that things would be better for Patel, legally speaking, if he told the truth, which is not enough to render a confession involuntary. Notably absent from the present case are any specific threats or inducements of the type that we have found to invalidate a defendant's confession. See, e.g., *State v. Jenkins*, 192 Ohio App.3d 276, 2011-Ohio-754 (involving a promise to recommend drug treatment, which statutorily was unavailable, in exchange for confession); *State v. Kerby*, Clark App. No. 03-CA-55, 2007-

Ohio-187 (holding that a false threat of a death-penalty prosecution undermined the defendant's ability to confess voluntarily); *State v. Petitjean* (2000), 140 Ohio App.3d 517 (involving an assurance that the defendant probably would get probation if he confessed to murder).

Finally, we find no merit in Patel's claim that the detective who interviewed him refused to honor his request for counsel. Near the end of his interview, Patel broached the subject of obtaining counsel. The detective responded by opining that it would be a good idea and encouraging Patel to do so "sooner rather than later."

"A request for an attorney must be clear and unambiguous such that a reasonable police officer in the circumstances would understand the statement to be an invocation of the right to counsel." *State v. Hatten*, 186 Ohio App.3d 286, 2010-Ohio-499, ¶157. "Moreover, when a suspect's mention of counsel does not amount to an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him." *Id.* In the present case, Patel never clearly and unequivocally invoked his right to counsel. We note, too, that the discussion about counsel occurred near the end of the interview, after Patel already had made his incriminating statements. For the foregoing reasons, we find no error in the trial court's refusal to suppress the statements. The third assignment of error is overruled.

In his fourth assignment of error, Patel claims the trial court erred in allowing him to be convicted and sentenced for allied offenses of similar import. Specifically, Patel contends his abduction conviction should have been merged into his gross sexual imposition and rape convictions.

The record reflects that the abduction conviction involved Patel's act of restraining C.B. in a bathroom while he stuck his hand inside the back of her pants, constituting gross sexual imposition, and placed a finger in her vagina, constituting rape. Patel argues that his restraint of C.B. was merely incidental to the gross sexual imposition and rape and involved no separate animus. Therefore, he argues that abduction was an allied offense of similar import to the gross sexual imposition and rape.<sup>2</sup>

In *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, the Ohio Supreme Court announced a new test for determining when offenses are allied offenses of similar import that must be merged pursuant to R.C. 2941.25. *Johnson* held: "When determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25, the conduct of the accused must be considered." *Id.* at syllabus. It further explained:

"Under R.C. 2941.25, the court must determine prior to sentencing whether the offenses were committed by the same conduct. Thus, the court need not perform any hypothetical or abstract comparison of the offenses at issue in order to conclude that the offenses are subject to merger.

"In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), the question is whether it is possible to commit one offense and commit the other with the same conduct, not whether it is possible to commit one without committing the other. \* \* \* If the offenses correspond to such a degree that the conduct of the defendant constituting commission of one offense constitutes commission of the other,

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<sup>2</sup>The parties' briefs do not make clear whether Patel raised an allied-offense argument below with regard to his abduction conviction. In any event, imposing multiple sentences for allied offenses of similar import constitutes plain error. See, e.g., *State v. Wright*, Montgomery App. No. 24276, 2011-Ohio-4874, ¶155. Therefore, we will proceed to address the issue.

then the offenses are of similar import.

"If the multiple offenses can be committed by the same conduct, then the court must determine whether the offenses were committed by the same conduct, i.e., 'a single act, committed with a single state of mind.' \* \* \*

"If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged.

"Conversely, if the court determines that the commission of one offense will never result in the commission of the other, or if the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge." *Id.* at ¶¶47-51 (citations and quotations omitted).

In the present case, the State concedes that abduction and rape or gross sexual imposition can be committed by the same conduct. In light of that admission, we must determine whether abduction and the two sexual offenses were committed by the same conduct and with the same animus.

"When a course of conduct involves two or more acts or omissions undifferentiated by time, place, or circumstance, merger of multiple criminal offenses arising from that course of conduct is required because the offenses involve the 'same conduct.'" *State v. Johnson*, Montgomery App. No. 24031, 2011-Ohio-2825, ¶25. "As it is used in R.C. 2941.25(B), 'animus' means *animus malus* or evil intent." *State v. Parker*, 193 Ohio App.3d 506, 2011-Ohio-1418, ¶110.

Here we conclude that Patel's restraint of C.B.'s liberty in the bathroom, an element of his abduction conviction, was part of a single course of conduct that included rape and gross sexual imposition. C.B. testified that Patel entered a bathroom where she was

cleaning, locked the door, and proceeded to place a hand down the back of her pants and a finger inside her vagina. Patel's restraint of C.B. in the bathroom was incidental to Patel's commission of the sex offenses and had no independent significance. The restraint and the sexual acts were undifferentiated by time, place, or circumstance.

Under these circumstances, we are unpersuaded by the State's argument that Patel completed one act, abduction, when he locked the bathroom door and then proceeded to commit separate sexual acts. Indeed, virtually every sexual offense upon another involves some degree of restraint. But here we see no independent significance in his act of locking the door immediately before committing the offenses. The evidence also demonstrates that Patel acted with the same animus or evil intent when he committed abduction, rape, and gross sexual imposition. Patel's immediate intent was to commit the sex offenses. He committed abduction by restraining C.B.'s liberty solely to facilitate the sex acts that he intended to perform. Therefore, he acted with the same animus when he committed abduction and the sex offenses.

The Twelfth District Court of Appeals recently reached the same conclusion in *State v. Hernandez*, Warren App. No. CA2010-10-098, 2011-Ohio-3765, which involved abduction and rape in a motel room. The Twelfth District reasoned:

"Hernandez was charged in the indictment with abducting K.B. with a motive to violate her sexually. Testimony indicated that Hernandez grabbed K.B. around the waist and pushed her into his motel room. Hernandez then locked the door, pushed K.B. onto the bed and then raped her. The force used to compel K.B. into the sexual acts, such as forcing her into the room, pinning her against the bed and knocking her backwards when she tried to leave, was a single course of action, committed with a single state of mind. \*

\*\*

"Hernandez's restraint of K.B. was incidental to the underlying sexual crimes, and had no significance independent of those sexual crimes. Instead, K.B.'s movement from the motel's outside corridor into Hernandez's room was slight, and the detention was no longer than the time necessary to complete the underlying sexual offenses." *Id.* at ¶52-53 (citation omitted).

If presented with the same facts as those related in Hernandez we may or may not adopt the holding of the Twelfth district. But the evidence in the present case establishes even more compelling reasons to conclude that Patel's restraint of C.B. was part of a single course of conduct, committed with a single animus, that culminated in completed acts of rape and gross sexual imposition. Therefore, we conclude that in this case, abduction was an allied offense of similar import to both the rape and gross sexual imposition, although those offenses are separate from each other. As a result, we "must reverse the judgment of conviction and remand for a new sentencing hearing at which the state must elect which allied offense it will pursue against the defendant. *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, ¶24."<sup>3</sup> Patel's fourth assignment of error is sustained.

In his fifth assignment of error, Patel contends the cumulative effect of the errors alleged in his first four assignments of error deprived him of his right to a fair trial. This argument lacks merit. It is true that separately harmless errors may violate a defendant's right to a fair trial when the errors are considered together. *State v. Madrigal*, 87 Ohio St.3d

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<sup>3</sup>"Because R.C. 2941.25(A) protects a defendant only from being punished for allied offenses, the determination of the defendant's guilt for committing allied offenses remains intact, both before and after the merger of allied offenses for sentencing. Thus, the trial court should not vacate or dismiss the guilt determination." *Whitfield*, at ¶27.

378, 397, 2000-Ohio-448. To find cumulative error present, we first must find multiple errors committed at trial. *Id.* at 398. We then must find a reasonable probability that the outcome below would have been different but for the combination of separately harmless errors. *State v. Thomas*, Clark App. No.2000-CA-43, 2001-Ohio-1353. In our review of Patel's other arguments, however, we found no errors. Therefore, we find no cumulative error. The fifth assignment of error is overruled.

The judgment of the Greene County Common Pleas Court is affirmed in part and reversed in part, and the cause is remanded for resentencing on allied offenses of similar import as set forth in our analysis of the fourth assignment of error.

.....

DONOVAN and FROELICH, JJ., concur.

Copies mailed to:

Stephen K. Haller  
Elizabeth A. Ellis  
Jon Paul Rion  
Nicole Rutter-Hirth  
Hon. Stephen Wolaver

IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
GREENE COUNTY

STATE OF OHIO

Plaintiff-Appellee

v.

HITESH PATEL

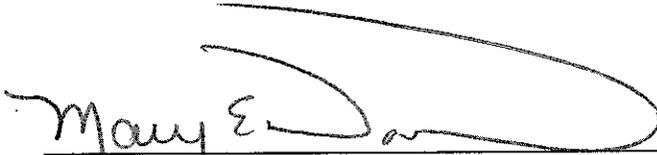
Defendant-Appellant

:  
: Appellate Case No. 2010-CA-77  
:  
: Trial Court Case No. 10-CR-223  
:  
: (Criminal Appeal from  
: Common Pleas Court)  
:  
: **FINAL ENTRY**

.....

Pursuant to the opinion of this court rendered on the 9<sup>th</sup> day  
of December, 2011, the judgment of the trial court is affirmed in part, reversed in  
part, and this cause is remanded for further proceedings consistent with the opinion.

Costs to be paid as follows: 50% by appellant and 50% by appellee.

  
\_\_\_\_\_  
MARY E. DONOVAN, Judge

  
\_\_\_\_\_  
JEFFREY E. FROELICH, Judge

  
\_\_\_\_\_  
MICHAEL T. HALL, Judge

Copies mailed to:

Stephen K. Haller  
Elizabeth A. Ellis  
Greene County Prosecutor's Office  
61 Greene Street  
Xenia, OH 45385

Jon Paul Rion  
Nicole Rutter-Hirth  
Rion, Rion & Rion, L.P.A., Inc.  
130 W. Second Street, Suite 2150  
P.O. Box 1262  
Dayton, OH 45402

Hon. Stephen Wolaver  
Greene County Common Pleas Court  
45 N. Detroit Street  
Xenia, OH 45385-2998

FILED

2010 NOV 17 PM 4: 00

TERRI A. MAZUR, CLERK  
COMMON PLEAS COURT  
GREENE COUNTY, OHIO

IN THE COMMON PLEAS COURT OF GREENE COUNTY, OHIO

STATE OF OHIO,  
Plaintiff

CASE NO. 2010-CR-223

-vs-

JUDGMENT ENTRY  
(Sentencing)

HITESH H. PATEL,  
Defendant

On the 17<sup>th</sup> day of November, 2010, the Defendant, HITESH H. PATEL was present in open Court with his counsel Jon Rion and Associates, with Adolfo Tornichio / Nicole Burke representing the State of Ohio, for sentencing pursuant to O.R.C. §2929.19.

The Court finds the Defendant has been found GUILTY of:

- Count 4: a violation of O.R.C. §2907.06(A), Sexual Imposition, a misdemeanor of the third degree;
- Count 5: a violation of O.R.C. §2907.06(A), Sexual Imposition, a misdemeanor of the third degree;
- Count 6: a violation of O.R.C. §2907.02(A)(2), Rape, a felony of the first degree;
- Count 7: a violation of O.R.C. §2905.02(A)(2), Abduction, a felony of the third degree;
- Count 8: a violation of O.R.C. §2907.05(A)(1), Gross Sexual Imposition, a felony of the fourth degree;
- Count 9: a violation of O.R.C. §2907.06(A), Sexual Imposition, a misdemeanor of the third degree;
- Count 10: a violation of O.R.C. §2907.06(A), Sexual Imposition, a misdemeanor of the third degree;
- Count 11: a violation of O.R.C. §2907.06(A), Sexual Imposition, a misdemeanor of the third degree;

10-11-2550

subject to a presumption in favor of prison under division (D) of §2929.13 of the Ohio Revised Code, having

- pled guilty
- been found guilty by Jury Verdict
- pled no contest having been found guilty
- been found guilty by the Court

on the 29<sup>th</sup> day of September, 2010. Counts 9-20 to be disposed of on a later date.

The Court addressed the defendant and asked him if he wished to make a statement in his own behalf or present any information in mitigation of punishment. The Court afforded counsel an opportunity to speak on behalf of the Defendant, as required by Criminal Rule 32(A)(1).

The Court has considered the record, oral statements, any victim impact statement, has not relied on any new material facts in the victim impact statement, and pre-sentence investigation report prepared, as well as the principles and purposes of sentencing under O.R.C. §2929.11, and has balanced the seriousness and recidivism factors pursuant to O.R.C. §2929.12.

The Court Finds under O.R.C § 2929.13 (B) the following factors are not necessary for a Felony of the First, Second or Third Degree.

The Court finds pursuant to O.R.C. §2929.13(B) (find one of the following):

- physical harm to person;
- attempt or threat with a weapon;
- attempt or threat of harm and previous conviction for physical harm;
- public trust, office or position;
- for hire, or organized crime;
- sex offense;
- previous prison term served;
- offender already under a community control (non-prison) sanction or on bond;
- offense committed while in possession of firearm;

and the Court further finds the defendant is not amenable to community control and prison is consistent with the purposes of O.R.C. §2929.11.

Therefore, IT IS THE ORDER OF THE COURT the defendant be sentenced to the Ohio Department of Rehabilitation and Correction (CORRECTIONAL RECEPTION CENTER) accordingly:

Count 4: for a definite period of 60 <sup>days</sup>/<sub>years</sub> for violation of O.R.C. §2907.06(A), Sexual Imposition, a misdemeanor of the third degree;

Count 5: for a definite period of 60 <sup>days</sup>/<sub>years</sub> for violation of O.R.C. §2907.06(A), Sexual Imposition, a misdemeanor of the third degree;

10-11-2551

Count 6: for a definite period of 6 years for violation of O.R.C. §2907.02(A)(2), Rape, a felony of the first degree;

Count 7: for a definite period of 4 years for violation of O.R.C. §2905.02(A)(2), Abduction, a felony of the third degree;

Count 8: for a definite period of 18 months for violation of O.R.C. §2907.05(A)(1), Gross Sexual Imposition, a felony of the fourth degree;

Count 9: for a definite period of 60 days for violation of O.R.C. §2907.06(A), Sexual Imposition, a misdemeanor of the third degree;

Count 10: for a definite period of 60 days for violation of O.R.C. §2907.06(A), Sexual Imposition, a misdemeanor of the third degree;

Count 11: for a definite period of 60 days for violation of O.R.C. §2907.06(A), Sexual Imposition, a misdemeanor of the third degree;

Said sentences to be served concurrently for a total sentence of 6 years of which 0 years is a mandatory term pursuant to O.R.C. §2929.13(F), 2929.14(D), or Chapter 2925; and pay a fine in the sum of \$-0-, after considering O.R.C. §2929.18.

The defendant is entitled to jail time credit of 51 days as of this date along with future custody days while Defendant awaits transportation to the state institution. Jail time credit is governed by O.R.C 2967.191, which requires that when multiple terms are imposed consecutively, the credit for each stated term is to be applied to the total term. If defendant is sentenced to concurrent terms, credit must be applied against all terms, because the sentences are to be served simultaneously.

The Court has further notified the defendant post release control is Mandatory; 5 years for:

Count 6: a violation of O.R.C. §2907.02(A)(2), Rape, a felony of the first degree;

Count 7: a violation of O.R.C. §2905.02(A)(2), Abduction, a felony of the third degree;

Count 8: a violation of O.R.C. §2907.05(A)(1), Gross Sexual Imposition, a felony of the fourth degree;

as well as the consequences for violating conditions of post release control imposed by the Parole Board under O.R.C. §2967.28. The defendant is ordered to serve as part of this sentence any term of post release control imposed by the Parole Board, and any prison term for violation of post release control.

Pursuant to Criminal Rule 32 the Defendant is hereby notified of his/her right to appeal. If the Defendant is unable to pay the cost of an appeal, the Defendant has the right to appeal without payment. If the Defendant is unable to obtain counsel for an appeal, counsel will be appointed without cost. If the Defendant is unable to pay the costs of documents necessary to an appeal, the documents will be provided without cost. The defendant has a right to have a notice of appeal timely filed on his / her behalf.

The Court has considered the defendant's present and future ability to pay financial sanctions. Pursuant to O.R.C. §2929.18(D) the Court imposes a financial sanction of restitution as an Order in favor of the victim(s) of the offender's criminal act in the amount of \$ -0- that can be collected through execution as described in division (D)(1) of O.R.C. §2929.18. The offender shall be considered for purposes of the collection as a Judgment Debtor. The Defendant is ordered to pay restitution of \$ -0- , all costs of prosecution (Court costs etc.), and any fees permitted pursuant to O.R.C. §2929.18(A)(4). Pursuant to O.R.C. 2929.18(A)(1), the Defendant is ordered to pay a 5% surcharge on the amount of restitution, payable to the Clerk of Courts for the collecting and processing of restitution payments. Costs of proceedings are assessed against the Defendant for which execution is hereby awarded. All bonds posted in this matter are Ordered released in accordance with O.R.C. §2947.23 and O.R.C. §2937.40.

Pursuant to O.R.C. §2947.23, if the defendant fails to pay or fails to pay in a timely manner, the costs of prosecution under a payment schedule approved by the Court, the Court may order the defendant to perform community service until the costs of prosecution have been paid or the Court is satisfied the defendant is in compliance with the payment schedule. Said community service will not exceed 40 hours per month, and the defendant will receive credit towards the costs of prosecution at an hourly rate equal to the established Federal Minimum Wage.

Pursuant to O.R.C. §2901.07, the Defendant is ordered to submit to the collection of a DNA specimen.

The Defendant is to register as a Tier III Sexual Offender.

The Defendant HAS HAS NOT been fingerprinted in this case.

According to §2929.19(B)(3)(f) of the O.R.C. the defendant is required not to ingest nor be injected with a drug of abuse. You are on notice that you are subject to random drug testing; and the results of said testing shall be made a part of your record.

The Defendant is REMANDED to the custody of the Sheriff of Greene County, Ohio, for transportation to the Institution, according to law.

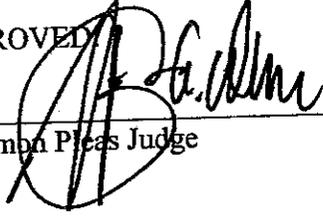
IPP is ~~approved~~ not approved sentence given is appropriate.

Transfer to Transitional control is ~~approved~~ not approved.

PAGE 5  
RE: HITESH H. PATEL  
CASE NO: 2010-CR-223

JUDGMENT ENTRY  
(SENTENCING)

APPROVED

  
Common Pleas Judge

10-11-2554

FILED

2010 JUL 22 PM 3:55

TERRI A. MAZUR, CLERK  
COMMON PLEAS COURT  
GREENE COUNTY, OHIO

IN THE GREENE COUNTY COURT OF COMMON PLEAS

STATE of OHIO

\*

2010 CR 223

Plaintiff,

\*

Judge Stephen Wolaver

Vs.

\*

HITESH PATEL

\*

JUDGMENT ENTRY FOR  
DEFENSE MOTION IN  
LIMINE

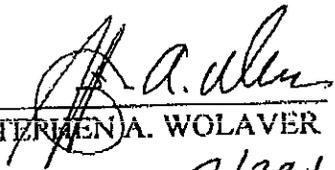
Defendant.

\*

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For the reasons set forth on the record at the Motion to Suppress hearing on July 14, 2010, the defendant's motion in limine is overruled.

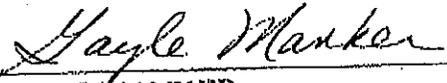
IT IS SO ORDERED

  
JUDGE STEPHEN A. WOLAVER

7/22/10

SERVICE OF COPY: A copy hereof was served upon:

Kevin Lennen (Via Fax: 937-223-7540)  
Greene County Prosecutor, 61 Greene St., Xenia, OH 45385

  
GAYLE MANKER  
Assignment Commissioner

FILED

2010 JUL 22 PM 3:55

TERRI A. MAZUR, CLERK  
COMMON PLEAS COURT  
GREENE COUNTY, OHIO

IN THE GREENE COUNTY COURT OF COMMON PLEAS

STATE of OHIO

\*

2010 CR 223

Plaintiff,

\*

Judge Stephen Wolaver

Vs.

\*

HITESH PATEL

\*

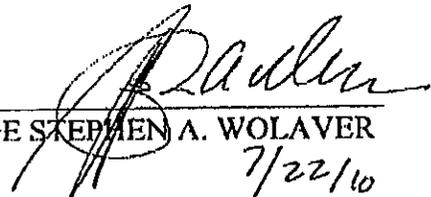
JUDGMENT ENTRY FOR  
DEFENSE MOTION FOR  
CHANGE OF VENUE

Defendant.

\*

For the reasons set forth on the record at the Motion to Suppress hearing on July 14, 2010 the defendant's motion for change of venue is overruled pending the empanelling of a fair and impartial jury.

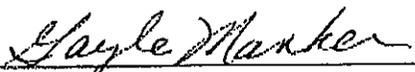
IT IS SO ORDERED.

  
JUDGE STEPHEN A. WOLAVER

7/22/10

SERVICE OF COPY: A copy hereof was served upon:

Kevin Lennen (Via Fax: 937-223-7540)  
Greene County Prosecutor, 61 Greene St., Xenia, OH 45385

  
GAYLE MANKER  
Assignment Commissioner

IN THE COMMON PLEAS COURT OF GREENE COUNTY, OHIO  
CRIMINAL DIVISION

STATE OF OHIO

Plaintiff

2010 AUG 23 PM 2: 16

REGINA A. MAZUR, CLERK  
COMMON PLEAS COURT  
GREENE COUNTY, OHIO

Case No. 2010 CR 0223

(Judge Stephen A. Wolaver)

-vs-

HITESH PATEL

Defendant

JUDGMENT ENTRY

\*\*\*\*\*

This matter is before the Court upon a Motion to Suppress filed by the Defendant and upon a hearing in which evidence was received by the Court on July 14, 2010. The Court received testimony from two police officers who testified on behalf of the State and received two exhibits a copy of a Pre-Interview form as Exhibit 1 and a disk of an electronic recording of the custodial interview identified as Exhibit 2. At the conclusion of the hearing the parties requested the opportunity to submit written briefs. The Court has received a brief from both the State and the defense and has reviewed those briefs in rendering its decision.

FACTS

The evidence reveals the following: on April 23, 2010 the Defendant was served with an arrest warrant that had been obtained from the Greene County Prosecuting Attorney's office charging him with certain sexually oriented offenses. He was taken to the Fairborn Police Department by Officer Helman who indicated the Defendant made no statements during the transportation and did not request an attorney. He indicated that in any conversation with the Defendant he spoke English without difficulty.

Detective Cyr of the Fairborn Police Department testified that he advised the Defendant of the warrant and spoke to him in English receiving appropriate responses from the Defendant. The Defendant called his wife to ask her to come down to the hotel where he was working. He spoke to his wife in a language other than English. The Defendant was taken to the Fairborn Police Department to an interview room. In this room a recording was made of the interview from beginning to end. The officer testified as to the particulars of the interview however the Court has reviewed the disk identified as Exhibit 2 upon which the Court relies in the determination of the facts that occurred during the course of the custodial interview captured electronically. The interview at the Fairborn Police Department took less than an hour. The first question posed to the Defendant is if he is comfortable speaking the English language and he indicated that he was. The officer then proceeded to discuss the constitutional rights outlined in the Miranda decision and did so in writing. This written copy is noted as Exhibit 1. The Defendant indicated that this was his first experience and exposure to the legal system and he asked Detective Cyr questions from time to time which the Detective responded. During the course of the discussion of the Defendant's constitutional rights the Defendant asked the officer essentially what it meant regarding the right to remain silent and Detective Cyr responded that he did not have to talk to him and had the right to stop at any time that he wished. The Defendant acknowledged that he understood that response. From a review of the tape the Court does not find any mental disability on the part of the Defendant and the Detective testified he was not under the influence of any substances. However the Court finds that during the interview Detective Cyr caused the Defendant to believe that the events that occurred as were discussed by the Detective had been captured on camera which were carried by the individual complainants. The Defendant was shown what was identified as a key fob that carried one of these miniature

cameras but the Defendant was never shown any film from any of the cameras or anything that indicated that cameras were actually used. The Court finds no cameras were employed at the time the alleged offense took place. During the interview the Defendant discussed an attorney with the Detective and how to contact an attorney but he did not make an unequivocal request to have an attorney present and stop the interview. The Court finds that the Defendant is the general manager of a hotel in Fairborn and correspondingly has contact with the public.

### ARGUMENT

It is the position of the Defendant that the statements should be suppressed for the following reasons: (1) the Defendant did not knowingly, intelligently, and voluntarily waive his constitutional rights under the Miranda decision. (2) The Defendant waived his right to remain silent and make statement based upon promises of leniency and blatant lies about the evidence against the Defendant. (3) The Defendant's invocation of his right to counsel was ignored. (4) The officer put himself in the same plight with the Defendant inducing him to talk. (5) Based on the totality of the circumstances Defendant's waiver of his rights was improper.

### LEGAL ANALYSIS

The parties do not dispute the fact that the subject matter of this motion was a custodial interview. A custodial interview requires that the defendant be advised of certain constitutional rights and that he make a voluntary intelligent and knowing waiver of those rights before any statement can be made. Miranda v. Arizona (1966), 384 U.S. 436. It is the burden upon the prosecution to establish that the accused knowingly, voluntarily, and intelligently waived his Fifth Amendment right against self-incrimination. State v. Edwards (1976), 49 Ohio St.2d 31.

In this case it took approximately four minutes for the Defendant and the officer to discuss and complete State's Exhibit 2, the Pre-Interview rights form. The officer began by asking the Defendant if he understood English which he said he did and together they proceeded to complete the form. The document which is part of the record reflects all the constitutional rights required by Miranda and additionally indicates that he can stop talking at any time that he wishes. The Court notes that the Defendant inquired of the officer what if he did not want to speak to him and the officer's response was that he did not have to talk to him but he could tell him now and if he wished he could stop talking at any time. At the completion of that statement and answer the Defendant finished the rights document and the interview began.

It is clear that the Defendant very easily completed the form in its written form as well as listened to the officer as he verbally advised him of his constitutional rights. At the conclusion of these rights the Defendant chose not to ask for an attorney nor chose to decline to speak. The record also reflects that the Defendant did not appear to be under the influence of any substances during this four minute period and no threats, promises, or trickery was used during the course of the discussion of his constitutional rights. The Court notes that the officer's response to two of his questions during this process were accurate and clear and fair in terms of providing the Defendant the option to not speak to him.

Based upon the totality of the circumstances the Court finds that the waiver of rights are voluntary, intelligent, and knowingly made and that there is no constitutional infirmity regarding this process.

In order for a statement made by a defendant following a waiver of his constitutional rights the statement must be voluntary and under the constitutional analysis the court must determine whether the accused's statement was the product of police overreaching or official

coercion. State v. Finley (June 19, 1998), Clark App. No. 96-CA-30 and Colorado v. Connelly (1986), 479 U.S. 157. In deciding whether a defendant's confession is voluntarily induced the court should consider the totality of the circumstances surrounding the statement including the age, mentality, prior criminal experience of the accused, the length, intensity, and frequency of interrogation, the existence of physical deprivation or mistreatment and the existence of threat or inducement. Edwards, 49 Ohio St.3d at paragraph 2 of the syllabus; State v. Patterson (March 24, 2006) Montgomery County App. Case No. 20977.

The Defendant was informed of his Miranda rights and he indicated an understanding of those rights and did so in writing. The Defendant did not at any time indicate he did not understand his rights, request to talk to an attorney or request to stop the interview. Nothing from the electronically recorded interview suggest that the environment was coercive. The Defendant was not denied the opportunity to eat, rest, or have something to drink. The officer affirmatively asked him if he wanted anything and also took a break during the course of the interview. The Defendant, the Court has pointed out, did not show any signs of being under the influence of any substances, he spoke clearly and appeared to appropriately respond to the questions and understood what was being asked. Again, the Court notes that the interview was of a relatively short duration.

The Defendant raises the issue of requesting counsel. It is the Court's finding that the Defendant and Detective Cyr discussed the issue of legal counsel and how to obtain legal counsel but the Defendant did not request counsel at that time before the interview proceeded any further. The Court finds that the Defendant's conversation regarding counsel was prospective only and was not a request for counsel.

The Defendant claims that the officer's lying to him that he had additional evidence that he did not have makes his statement involuntary. Trickery by an officer during the course of an interview does not make a statement in and of itself involuntary even if the suspect is misled by the nature of the statements made by the officer. State v. Loza (1994) 71 Ohio St.3d 61 and State v. Wiles (1991) 59 Ohio St.3d 71. The court in Edwards, supra, pointed out that deception is a factor but standing alone likewise is not enough official coercion to make a statement involuntary. The court must continue to look at the totality of the circumstances to determine whether there is official police coercion and whether the statement is voluntarily made.

The Court finds in this case that there is no evidence that the Defendant's statements are anything other than voluntary remarks. The officer clearly was making statements and asking questions designed to get the Defendant to speak to him. However the law is clear that admonitions to tell the truth are not considered threats or promises nor will they make an otherwise voluntary statement involuntary. Wiles, supra, and State v. Knight Clark County CA 2008-Ohio-4926.

It's clear that Detective Cyr suggested to the Defendant that he had more evidence than he really did, by suggesting that the events had been surreptitiously recorded. However the Defendant was aware that several complainants had made official complaints against him and he was in part advised as to what those complaints were. The Defendant was clearly aware that there were witnesses who were stating the allegations that the officer suggested had been captured on film. The Defendant does not present any case law that would suggest that any trickery is improper and in light of the Court's findings, the statements made by Detective Cyr do not equate to the level of official coercion which would have overcome the will of the Defendant.

It is clear that Detective Cyr approached the interview by employing a certain model or litany designed to create an environment in which the Defendant would be willing to make statements. But the Court notes the absence of any threats or promises or any deprivation as well as the relative short duration of the interview as well as the Defendant's age and education level being three years of college the statement is otherwise under the totality of the circumstances voluntary and not constitutionally infirm.

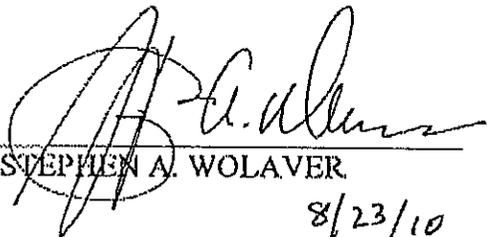
The Defendant's argument that English is not the Defendant's first language compels the Court to consider that issue carefully. The evidence taken at the motion to suppress is uncontroverted that the Defendant did indeed understand the discussion which took place. And a review of the tape does not show difficulty in the Defendant's understanding of the statements that were made. Indeed, the Defendant in many instances denies the allegations presented by the officer. This coupled with the Defendant's education level being three years post high school and the fact that he as a general manager of a hotel must work with the general public of which nearly all if not all speak English results in this Court making a finding based on the evidence presented at the motion hearing that the fact that the Defendant is bilingual was not an impediment to a knowing, intelligent, and voluntary waiver of rights and voluntary statement.

### CONCLUSION

The Court finds based on totality of the circumstances that the Defendant while during a custodial interrogation was fully advised of his constitutional rights and that after a discussion voluntarily waived those rights and agreed to speak to the officer with full knowledge that he could stop talking at any time that he wished. The Court further finds that at no time during the waiver of rights process or during the interview that the Defendant requested an attorney.

Finally the Court finds that the Defendant's statement was voluntarily made and that there was no official police coercion. The Court finds that the Defendant's motion is not well-taken and is overruled in its entirety. Any statements made by the Defendant may be offered in any future proceedings of this case.

IT IS SO ORDERED.

  
JUDGE STEPHEN A. WOLAVER  
8/23/10

Copy provided to:

John H. Rion, Attorney for Defendant, Fax: (937) 223-7540

Greene County Prosecutor, 61 Greene Street, Xenia, Ohio 45385

On the date stamped hereon.

  
RONALD L. MELLOTTÉ, Bailiff