

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,  
Plaintiff-Appellee,

Supreme Court Case No. 2012-0121

vs.

On Appeal from the Greene County  
Court of Appeals, Second District

HITESH PATEL,  
Defendant-Appellant.

Court of Appeals Case No. 2010-CA-27

\*\*\*\*\*

**MEMORANDUM OF APPELLEE - STATE OF OHIO IN OPPOSITION OF  
JURISDICTION**

\*\*\*\*\*

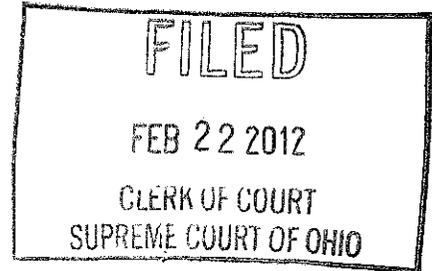
STEPHEN K. HALLER #0009172  
Greene County Prosecuting Attorney  
61 Greene Street, Suite 200  
Xenia, Ohio 45385

ELIZABETH A. ELLIS #0074332 (COUNSEL OF RECORD)  
Civil/Appellate Division Chief

TX: (937) 562-5250  
FX: (937) 562-5258

**COUNSEL FOR APPELLEE,  
STATE OF OHIO**

JON PAUL RION #0067020  
Po Box 10126  
130 W Second St, Suite 2150  
Dayton, OH 45402  
TX: (937) 223-9133



**COUNSEL FOR APPELLANT, HITESH PATEL**

**TABLE OF CONTENTS**

Page  
POSITION OF THE STAT OF OHIO ON JURISDICTION..... 1  
STATEMENT OF THE CASE..... 1  
STATEMENT OF THE FACTS..... 2  
ARGUMENT:  
PROPOSITION OF LAW NO. 1:  
THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING  
APPELANT’S MOTION FOR MISTRIAL..... 4  
CONCLUSION..... 10  
CERTIFICATE OF SERVICE..... 11

## POSITION OF THE STATE OF OHIO ON JURISDICTION

This case is not a case involving a substantial constitutional question, nor is it one of public or great general interest. The issues presented for this Court's review is whether the trial court abused its discretion in its factual determinations in overruling the Appellant's motion for mistrial. As more fully set forth below, the evidence presented of the Defendant's guilt is overwhelming. Moreover, the juror clearly testified that he could remain fair and impartial in light of the conversation that he had with the detective and the conversation was clearly unrelated to the case. There is simply no foundation to presume that the juror was biased. The Court of Appeals of Ohio for the Second Appellate District carefully reviewed the Appellants's claims, held an oral argument, and determined that the Appellant's claims are without merit. Thus, leave to appeal this felony case should not be granted.

## STATEMENT OF THE CASE

On April 30, 2010, Appellant, Hitesh Patel, was indicted by the Greene County Grand Jury for the following: Counts 1, 2, & 7, Abduction, in violation of R.C. 2905.02(A)(2); Counts 3 - 5 & 9 - 20, Sexual Imposition, in violation of R.C. 2907.06(A); Count 6, Rape, in violation of R.C. 2907.02(A)(2); and Count 8, Gross Sexual Imposition, in violation of R.C. 2907.05(A)(1). The defendant appeared and entered a plea of 'not guilty' to all charges. On May 19, 2010, Appellant filed a motion to suppress statements made to a Fairborn police detective. The trial court overruled that motion after a hearing on July 14, 2010.

Appellant proceeded to trial on Counts 1 - 13 on September 27, 2010. Pursuant to a Crim.R.29 motion, counts 1 - 3, 7 and 13 were dismissed. During deliberations,

Appellant sought a mistrial based on juror/prosecutorial misconduct, which the trial court denied. The jury returned a verdict of guilty on all remaining counts. Following the verdict, Appellant renewed his motion for a mistrial, which was again denied after a hearing on October 20, 2010 and November 2, 2010. As a result, Appellant was sentenced to six years in prison.

Patel appealed his convictions to the Second Appellate District. The Second District Court affirmed the jury's verdicts of guilty, but remanded the matter to the trial court for further determination on some of the offenses being allied, in light of this Court's decision in *State v. Johnson*, 128 Ohio St. 3d 153, 2010-Ohio-6314.

#### STATEMENT OF THE FACTS

Hitesh Patel was the manager of Motel 6 in Fairborn, Ohio where Crystol Benson and Dawn Haile worked as housekeepers. (Tr. 33,153).

#### Crystol Benson

On September 16, 2009, Ms. Benson was the only housekeeper working. (Tr. 45). As she cleaned one of the bathrooms, Patel asked her if she were hungry. (Tr. 47). Ms. Benson replied that she did not have time to eat, but Appellant offered to buy her pizza. (Tr. 47). Concentrating on her work, Ms. Benson thought Patel had left, however he had locked the door. (Tr. 51, 53). Still in the bathroom, Patel "rammed" his hand down Ms. Benson's pants, grabbing her buttocks. (Tr. 51, 55). Ms. Benson immediately stood up and turned around, at which point Patel inserted his finger into her vagina. (Tr. 51-52).

Ms. Benson repeatedly told him to stop, but Appellant did not. (Tr. 52, 55-56). Appellant had his hand around Ms. Benson's neck and started kissing her. (52-53). In an attempt to resist Appellant, Ms. Benson kept pushing him, but his back was against the door. (Tr. 53, 56). Finally, after some struggle, Ms. Benson was able to give Appellant

one last push into the door. (Tr. 57). At this point, Appellant released Ms. Benson and left the room. (Tr. 57). Later, Appellant approached Ms. Benson with a pizza and said, "Here's your pizza. Now what do I get for it?" (Tr. 61-62). In order to memorialize this date in her memory, Ms. Benson removed the tag from the pizza box and kept it. (Tr. 63-64).

Following that day, there were other occasions where Appellant had inappropriate contact with Ms. Benson. On one occasion, Appellant gave Ms. Benson a hug and grabbed Ms. Benson's butt. (Tr. 68). Another time, Appellant trapped Ms. Benson in a corner and felt her breasts. (Tr. 71). Finally, on a separate occasion, Appellant bent Ms. Benson over, grabbed her hips, and simulated a sexual position by ramming his pelvis into her hips. (Tr. 72). On each occasion Ms. Benson told Appellant that his advances were unwanted. (Tr. 71).

#### Dawn Haile

Appellant also had inappropriate contact with Ms. Haile. On one occasion, Ms. Haile came into his office to deliver some paperwork. (Tr. 166). Once in his office, Appellant placed Ms. Haile against the wall and kissed her cheek. (Tr. 166). He then laid his head on the top of her breasts and kissed her chest. (Tr. 167-68). Another time, Ms. Haile and Patel went to adjust a heater. (Tr. 171). Upon finishing Appellant tapped Ms. Haile on the butt with his hand. (Tr. 174).

Upon arrest, Appellant was taken to the Fairborn Police Department and questioned by Detective Lee Cyr. Det. Cyr's first question was whether he understood English and the Appellant said he did. Before asking anymore questions, Det. Cyr went over a *Miranda* waiver form, which Appellant signed. During the interview, Patel admitted to touching Dawn Haile inappropriately and having to apologize to her.

Furthermore, Appellant admitted to touching Crystol Benson inappropriately. He also admitted that it was wrong to touch employees in that manner. After Appellant made these statements, he engaged in a discussion about how to obtain an attorney, but never asked for counsel.

#### Contact with Juror

Appellant's trial began on September 27, 2010. The following day the Prosecutor became aware of a conversation between Det. Cyr and a juror. It was established that the conversation was about the employment status of Lawrence Marshall, a former Fairborn Police Officer. Once Det. Cyr determined that he was talking with a juror he terminated that conversation immediately. Upon questioning, the Juror informed the trial court that he could perform his duty impartially and that he had not disclosed the conversation to the other jurors.

On September 29, 2010 the jury found Appellant guilty and Det. Cyr learned that it was the Juror's birthday. After the trial and the Court had released the jury, Det. Cyr told the Juror a happy birthday and the juror responded with a wink, which Det. Cyr took as a thank you for the birthday wishes.

#### Argument

##### PROPOSITION OF LAW NO. 1:

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR A MISTRIAL.

A defendant is entitled to a "fair trial, albeit not a perfect one," for there are no perfect trials. *Grandy v. Dhillon* (2008), 120 Ohio St.3d 415, 422 (quoting *McDonough Power Equip., Inc. v. Greenwood* (1984), 464 U.S. 548, 553. With regards to juror misconduct, a new trial may be granted only "where the substantial rights of the

defendant have been materially affected.” Crim.R. 33(A)(2); R.C. 2945.79. Appellant contends that the trial and appellate courts abused their discretion in denying his motion for a mistrial for three reasons: juror/prosecutorial misconduct, juror bias, and juror dishonesty during voir dire. For the reasons stated below, Appellant has failed to demonstrate the existence of those three allegations and the verdict in this case must stand.

A. THE VERDICT MUST STAND BECAUSE THE COMMUNICATION BETWEEN DETECTIVE CYR AND THE JUROR DID NOT CONSTITUTE PROSECUTORIAL AND/OR JUROR MISCONDUCT.

Not every instance of juror misconduct requires reversal. The misconduct must be prejudicial. *State v. Kehn* (1977) Ohio St.2d 11, 19. In cases involving outside juror communication, the burden rests on the defense to establish that the communication constitutes juror misconduct. *State v. Taylor* (1991), 73 Ohio App.3d 827, 833. If juror misconduct is found, the defense must establish that the communication biased the juror. *State v. Keith* (1997), 79 Ohio St.3d 514, 526 (citing *State v. Phillips* (1995), 74 Ohio St.3d 72, 88-89).

In order to constitute juror misconduct, the private communication with a juror must be related to the matter pending before the jury. *State v. King* (1983), 10 Ohio App.3d 161, 165. When there is nothing in the record to demonstrate that the private communication with a juror during the progress of a trial might have influenced the jury’s decision, the refusal of the trial court to grant a new trial will not be disturbed. *State. V. Higgins* (1942), 70 Ohio App. 383. For instance, in *State v. Taylor*, 73 Ohio App.3d at 833, the court held that two jurors who spoke to the defense witness about her current and former employment did not commit juror misconduct because the conversation did not involve matters related to the proceedings and there was no

indication that the verdict was influenced by the juror's brief conversation with the defense witness.

Similarly, in the case at bar, Det. Cyr and the Juror each testified that they only had a brief conversation only in regards to the employment history of Lawrence Marshall, it did not concern the case. Moreover, Det. Cyr testified that the conversation took place early in the morning as they were entering the Courthouse, and Det. Cyr was initially unaware he was speaking with a juror. Further, once he was aware, he ended the conversation. The Juror also testified that he did not discuss the conversation with other jury members. When reviewing allegations of juror misconduct, a deference must be shown to the trial judge who sees and hears the events and thus is in a better position to accurately evaluate the situation and determine the appropriate scope of the inquiry. *State v. Hessler* (2000), 90 Ohio St.3d 108, 115-16. Consequently, deference to the judge's finding must be shown and the Defendant's allegations of juror and prosecutorial misconduct must fail. Furthermore, because the communication between the Juror and Detective Cyr did not concern the matter pending before the jury, the Defendant could not have been prejudiced.

**B. THE VERDICT MUST STAND BECAUSE APPELLANT HAS FAILED TO DEMONSTRATE JUROR BIAS.**

After a trial court gains knowledge of an "improper outside communication with a juror, it must hold a hearing to determine whether the communication biased the juror." *State v. Phillips*, 74 Ohio St.3d at 88. The burden of proof rests upon a defendant to demonstrate that the unauthorized communications with jurors resulted in actual juror partiality. *Smith v. Phillips* (1982), 455 U.S. 209, 215. Only in extreme situations may juror bias be inferred. *State v. Vasquez*, 10<sup>th</sup> Dist. No. 03AP-460, 2004-Ohio-

3880, ¶ 16. For example, a casual relationship of two jurors to law enforcement officers involved in a case was not the extreme case in which the court could assume bias. *Id.* at ¶19.

Additionally, the moving party must establish that the juror bias affected the juror's ability to impartially consider the evidence presented at trial. To assess such claims the court in *U.S. v. Zelinka* set forth a four part test. First, the trial court must hold a hearing to determine whether the improper contact tainted the trial. *U.S. v. Zelinka* (1988), 862 F.2d. 92, 95-96. Second, there must be no presumption that the contact prejudiced the defendant. *Id.* Third, the defendant has the burden of proving that the juror was actually biased. *Id.* Finally, the trial court may rely on the juror's assessment of his own feeling of bias. *Id.*

Applying this test to the case at bar, it is clear that the trial court did not abuse its discretion in denying defendant's motion for a mistrial. The trial court conducted a thorough and extensive voir dire of the Juror in which the Juror assured the Court that he could be fair and impartial despite the contact. Furthermore, the defendant has the burden of demonstrating actual bias or prejudice, which Appellant failed to do.

Appellant further contends that the Juror's wink after the verdict was rendered is prima facie evidence that the Juror was biased. In support of this assertion, Appellant relies on *United States v. Lawhorne* (1998), 29 F. Supp.2d 292. However, the case at hand is distinguishable from that in *Lawhorne* on several important points. First, in *Lawhorne* the juror had a business relationship with the prosecutor, whereas in the case at bar, the Juror merely knew one of Detective Cyr's ex-co-workers. *Id.* at 296. Second, in *Lawhorne* the juror admitted to the Court that he thought that he would have been excused considering this prior relationship, whereas the Juror in this case repeatedly

testified that whatever contact he had with Detective Cyr would not affect his impartiality. *Id.* at 300-01.

Third, the contacts between the Prosecutor and the juror in *Lawhorne* took place before the end of deliberations, while the wink in this case took place after the jury returned a verdict. *Id.* at 299-300. Finally, the Prosecutor in *Lawhorne* failed to bring the contacts to the attention of the court, while the Prosecutor in this case, brought the contact to the court's attention as soon as he learned of the encounter. *Id.* at 303.

Additionally, Appellant mischaracterizes the district court's decision in *Lawhorne* by stating that the non-verbal signals of the juror were more than innocuous conduct. The *Lawhorne* court found that the signals, coupled with the pervasive communications throughout the trial between the juror and the prosecutor demonstrated an affinity "the type of which should not exist in any trial." *Id.* at 307-08. The signals by themselves were not of the "type of which should not exist in any trial," rather given all of the communications between the juror and prosecutor, the conduct could not be characterized as "innocuous."

For these reasons, *Lawhorne* is not comparable to this case. Here, Detective Cyr and the Juror had a brief conversation in regards to a former employee of the Fairborn Police Department, not a series of communications throughout the entire proceedings. Moreover, the Juror's gesture came after the proceedings were concluded and was in response to Detective Cyr's birthday wishes. Consequently, the communication between the Juror and Detective Cyr can be characterized as "innocuous," and the juror's fairness and impartiality was unaffected by it.

**C. THE VERDICT MUST STAND BECAUSE NO EVIDENCE EXISTS THAT THE JUROR MADE MISREPRESENTATIONS DURING VOIR DIRE.**

In determining whether a defendant is entitled to a new trial as a result of a juror's dishonesty during voir dire the United States Supreme Court employs a two part test. First, the moving party must "demonstrate that a juror failed to answer honestly a material question on voir dire." *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. at 556. Second, the moving party must "further show that a correct response would have provided a valid basis for a challenge for cause." *Id.* Appellant argues that the Juror in this case was dishonest with regard to two questions: whether he had a relationship with a police officer and whether he could be impartial in this case.

With regards to the first question the Prosecutor asked whether any of the prospective jurors have friends or families that are police officers. The Juror answered that he had a son-in-law that is a parole officer in Toledo. Appellant contends that the failure of the Juror to include Lawrence Marshall in his answer was a misrepresentation. However, it has been determined that Mr. Marshall is no longer with the Fairborn Police Department and works at the Racquet Club, and thus the Juror's answer was in fact correct. The Juror's question to Detective Cyr about Mr. Marshall's employment history indicates that he was unaware whether he was still a police officer or not, and it follows that whatever relationship the Juror had with Mr. Marshall must not have been very close.

Even if the Court finds that the Juror made a misrepresentation during voir dire, including Mr. Marshall in his answer would not have been a basis for a challenge for cause. Crim.R. 24 sets forth the bases for which a prospective juror can be the subject of a challenge for cause. Crim.R. 24(C)(9) states that a juror may be the subject of a challenge for cause if he is "possessed of a state of mind evincing enmity or bias toward the defendant or the state; but no person summoned as a juror shall be disqualified...if

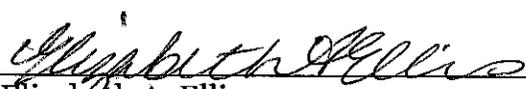
the court is satisfied...that the juror will render an impartial verdict according to the law and the evidence submitted." In this case the Court was satisfied of the Juror's impartiality during voir dire and during the Court's examination of the Juror after the contact with Detective Cyr came to the Court's attention.

With regards to the Juror's alleged misrepresentation as to his bias, Appellant contends that the wink was confirmation of his bias in favor of the state. However, the Juror unequivocally told the court that he could be fair and impartial and a juror's belief in his own impartiality is not inherently suspect and may be relied upon by the trial court. *State v. Phillips*, 74 Ohio St.3d at 89. Furthermore, the trial judge is in the best position to observe the juror and to make a first-hand evaluation of his ability to be fair. *State v. Fears* (1999), 86 Ohio St.3d 329, 337-38. Consequently, the trial court did not abuse its discretion in denying Appellant's motion for a mistrial because Appellant has failed to demonstrate that the Juror failed to answer honestly a material question on voir dire and because the Juror's conduct during the proceedings did not demonstrate that his statements during voir dire were false when made.

#### Conclusion

Appellant has failed to demonstrate that he was deprived his fair trial rights because of juror/prosecutorial misconduct, juror bias, or juror dishonesty. Accordingly, this Court need not accept jurisdiction to review this case.

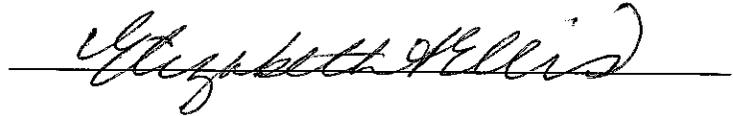
Respectfully submitted,  
OFFICE OF THE GREENE COUNTY  
PROSECUTING ATTORNEY

By:   
Elizabeth A. Ellis  
Reg. No. 0074332  
Civil Division Chief

55 Greene Street, First Floor  
Xenia, Ohio 45385  
Phone: (937) 562-5669  
Attorney for State of Ohio-Appellee

**PROOF OF SERVICE**

It is hereby certified that a copy of the foregoing Motion has been served upon Jon Paul Rion, Attorney for Defendant, 130 West Second Street, Suite 2150, PO Box 10126, Dayton, OH 45402 by regular U.S. Mail the date same was filed of record.

A handwritten signature in cursive script, reading "Elizabeth K. Ellis", is written over a solid horizontal line.