

**THE STATE OF OHIO, APPELLANT, v. SPEER, APPELLEE.**

[Cite as *State v. Speer*, 124 Ohio St.3d 564, 2010-Ohio-649.]

*Trials — Criminal procedure — Jurors — Competence — Hearing-impaired juror not per se incompetent to serve — Hearing-impaired juror must be able to perceive and understand all evidence presented — Presence of juror who cannot perceive and understand all evidence deprives defendant of fair trial — In deciding challenge for cause to impaired juror, court must determine whether any reasonable accommodation can be made to enable juror to serve competently.*

(No. 2009-0330 — Submitted November 17, 2009 — Decided March 3, 2010.)

APPEAL from the Court of Appeals for Ottawa County, No. OT-07-046,  
180 Ohio App.3d 230, 2008-Ohio-6947.

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**SYLLABUS OF THE COURT**

1. In deciding a challenge for cause to a prospective juror on the basis of a physical impairment, the court must determine, in light of the specific evidence to be presented, whether any reasonable and effective accommodation can be made to enable the juror to serve. In making that determination, the court must balance the public interest in equal access to jury service against the right of the accused to a fair trial, the latter being the predominant concern of the court.
2. The right to a fair trial requires that all members of the jury have the ability to

instructed by the court. An accommodation made to enable a physically impaired individual to serve as a juror must afford the accused a fair trial.

3. A hearing impairment by itself does not render a prospective juror incompetent to serve on a jury, but when the accommodation afforded by the court fails to enable the juror to perceive and evaluate the evidence, the accused is deprived of a fair trial. To avoid such situations, a trial court must determine whether reasonable accommodations will enable an impaired juror to perceive and evaluate all relevant and material evidence, and when no such accommodation exists, the court must excuse the juror for cause.

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**O'DONNELL, J.**

{¶ 1} This case highlights the tension between an accused's right to a fair trial and the interest of the judicial system in providing equal access to the courts, not just for some, but for all citizens, including those with impairment or disability. Although this court has promoted access to the judicial system, including the opportunity for those with disabilities to serve as jurors, the superior right of an accused to receive a fair trial requires that each member of a jury be able to perceive and evaluate all of the evidence presented. Because the accommodation made in this case was insufficient to enable the hearing-impaired juror to consider all of the relevant and material evidence presented to the jury, the accused did not receive a fair trial. Accordingly, the judgment of the court of appeals is affirmed, but the rule of law promulgated by the appellate court does not accurately set forth the applicable principle of law and is disapproved.

#### **Facts and Procedural History**

{¶ 2} The evidence presented at trial reveals that in August 2002, Scott A. Speer and Jim Barnett worked for Repair Products Unlimited, a company that manufactures vinyl repair kits. Speer, the factory supervisor, and Barnett not only

had a working relationship, but the two were also close friends, often boating and travelling together.

{¶ 3} Nonetheless, Speer and Barnett occasionally had disagreements over money that Speer owed Barnett. On August 3, 2002, Speer had Barnett working on one of his boats at Bass Haven Marina. Ken Henning, who owned a mobile home at Bass Haven, heard Barnett complain that Speer owed him \$10,000 for work he had performed and that Barnett would not leave Lake Erie without this money. According to Henning, Speer stormed off the boat. Henning heard the men continuing to argue in the early morning hours the next day.

{¶ 4} On the evening of August 5, 2002, after Speer and Barnett had spent the day working on one of Speer's boats, they decided to travel to Put-in-Bay on South Bass Island. Although they had planned to spend the night on the island, Speer could not find a hotel room, and

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{¶ 7} The Coast Guard discontinued its search for Barnett. The next



however, was the fact that the state had relied on the 9-1-1 tape to prove an element of the crime; jurors were asked to consider Speer’s speech patterns and other audio clues in evaluating that evidence, which would have been meaningful only if actually heard: “mere written words would not have conveyed the nuance and inflection imparted by the spoken words.” Id. at ¶ 33.

{¶ 16} The appellate court promulgated the following rule of law in its opinion: “If any doubt exists that a juror can adequately and completely perceive and evaluate all the evidence, whether because of a physical impairment, mental capabilities, or other reason that would interfere with the performance of a juror’s duties, the trial court must excuse that juror for cause.” Id. at ¶ 34.

{¶ 17} The state appealed to this court, contending that a trial court does not abuse its discretion by impaneling a hearing-impaired juror when the court reasonably and in good faith believes that it can accommodate the juror’s disability. Moreover, it emphasizes that the Ohio Trial Court Jury Use and Management Standards set forth in the Rules of Superintendence provide that jury service should not be denied or limited on the basis of disability.

{¶ 18} Speer contends that the right of an accused to a fair trial outweighs the public interest in accommodating a juror with a disability to serve on a jury, and he further asserts that the trial court’s accommodation in this case did not enable her to evaluate all the evidence presented at trial.

{¶ 19} Accordingly, we are called on to weigh an accused’s right to a fair trial against the public interest in equal access of all persons to jury service, regardless of disability.

#### **Public Access to Courts**

{¶ 20} This court has led efforts to ensure that all persons, including the disabled, have access to the courts and the opportunity to serve on juries. The Rules of Superintendence for the Courts of Ohio promulgated by this court provide that “[t]he opportunity for jury service should not be denied or limited on



{¶ 24} Despite the efforts of the trial court to accommodate Leow-Johannsen, Speer did not receive a fair trial. Regrettably, the accommodation made by the trial court in this instance could not help Leow-Johannsen to effectively perceive or evaluate Speer’s demeanor, detect any slurred speech or the lack of it, or consider the loudness or softness of his voice, the patterns of his speech, his tone – whether excited, calm, or passive – or the inflections of the voices on the 9-1-1 tape.

{¶ 25} The right to a fair trial requires that all members of the jury have the ability to understand all of the evidence presented, to evaluate that evidence in a rational manner, to communicate effectively with other jurors during deliberations, and to comprehend the applicable legal principles as instructed by the court. An accommodation made to enable a physically impaired individual to serve as a juror must afford a fair trial to the accused. See generally *United States v. Dempsey* (C.A.10, 1987), 830 F.2d 1084, 1088-1089; *Woodard v. Commonwealth* (Ky.2004), 147 S.W.3d 63, 69; *People v. Guzman* (1990), 76 N.Y.2d 1, 6, 556 N.Y.S.2d 7, 555 N.E.2d 259.

{¶ 26} A hearing impairment by itself does not render a prospective juror incompetent to serve on a jury, but when the accommodation afforded by the court fails to enable the juror to perceive and evaluate the evidence, an accused cannot receive a fair trial. To avoid such situations, a trial court must determine whether reasonable accommodations will enable an impaired juror to perceive and evaluate all relevant and material evidence, and when no such accommodation exists, the court must excuse the juror for cause.

{¶ 27} Here, both the state and the defense relied on the 9-1-1 tape as evidence relevant to whether Speer had committed the charged offenses. The state suggested that Speer’s “calm tone” and his “demeanor on the 9-1-1 tape” provided evidence of his guilt. Speer’s defense counsel denied the state’s contention that Speer had operated his craft under the influence of alcohol by



pointing out that the 9-1-1 tape did not show Speer slurring his speech at the time of the call. Leow-Johannsen's hearing impairment directly affected her ability to perceive and evaluate that evidence because she only read the colloquy from a real-time transcription.

{¶ 28} Further, the accommodation made by the trial court in this case of allowing Leow-Johannsen to read the court reporter's transcript did not provide her any means to effectively discern the demeanor, speech patterns, voice inflections, or excitement or lack of it as reflected in the voice modulations or other audio clues on the 9-1-1 tape. Because she could not perceive whether there was urgency in Speer's voice, whether he slurred his speech, or whether he sounded deceptive or hesitant, she could not include such evaluations in rendering her verdict.

{¶ 29} Therefore, the trial court abused its discretion in denying Speer's challenge of her for cause. Her impairment directly prevented her from completely evaluating the specific evidence from the 9-1-1 recording presented in this case and relied on by both the state and the defense. Although promoting access to the courts is and should be a primary concern for the judiciary, the trial court's paramount duty is to ensure that the accused is afforded a fair trial.

{¶ 30} Thus, the court of appeals correctly determined that the trial court abused its discretion in not excusing Leow-Johannsen and properly reversed the judgment of the trial court. However, the test the appellate court articulated for

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must balance the public interest in equal access to jury service against the right of

{¶ 35} “[The Court]: Do you think that [your car being stolen] will affect you somehow here?

{¶ 36} “[Leow-Johannsen]. I can’t read your lips. Move your files.

{¶ 37} “[The Court]. Let me move over so you can see me. Will that affect you in this case?

{¶ 38} “A. No.

{¶ 39}

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{¶ 51} “Q. One question for Ms. Johannsen. Are you familiar with – you read lips?

{¶ 52} “A. Yes, yes.

{¶ 53} “Q. If I am standing this way and the witness –

{¶ 54} “A. I can’t read them if you look that way. I don’t know what you

{¶ 71}

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{¶ 84} “THE COURT: What is the State’s position?”

{¶ 85} “MS. CROY: I think that is not a challenge for cause. The State does not consent to a challenge for cause. It is not one of the bases.

{¶ 86} “THE COURT: It is not a statutory basis, and the Courts have made accommodation for persons with various kinds of impairment. I am going to deny the challenge for cause. You can exercise a peremptory challenge.

{¶ 87} “MR. DAVIDSON: I understand.

{¶ 88} “MR. BUZZELLI [defense co-counsel]: While we are on the

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{¶ 97} The trial court denied Speer’s posttrial motion for new trial. The court first stated that neither the state nor the defense inquired about the extent of the juror’s hearing disability or the exact extent to which she relied upon lip reading to supplement any residual hearing. Second, the court noted that neither party complained during the trial that the juror was missing any testimony and that neither party requested any further accommodations for the juror’s disability. Finally, the court noted that the defense did not request that an alternate juror replace Leow-Johannsen or file a motion for a mistrial on grounds that the juror was unable to understand or appreciate evidence. The court thus dismissed the defendant’s argument that the juror’s hearing impairment might have caused her to miss some testimony or the full content of the 9-1-1 recording as “general speculation” and denied the motion.

{¶ 98} The court of appeals held that because the state had directed the jury during its closing argument to consider Speer’s “demeanor” on the 9-1-1 tape, the state was asking the jurors to listen for voice inflections or signs of insincerity during the taped call to show that Speer had acted with a mental state of purposefulness or recklessness. *State v. Speer*, 180 Ohio App.3d 230, 2008-Ohio-6947, 904 N.E.2d 956, at ¶ 32. It then concluded that since a hearing-impaired juror would be unable to fully perceive the nuances of the 9-1-1 tape, the tape is “the kind of evidence that could not be adequately or effectively evaluated by a hearing-impaired juror.” *Id.* at ¶ 33.

**II. No Abuse of Discretion**

{¶ 99} The determination of whether a prospective juror should be disqualified for cause is a discretionary function of the trial court, and the trial court’s determination will not be reversed on appeal unless there has been an abuse of discretion. *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 559 N.E.2d 1301, syllabus. “The opportunity for jury service should not be denied or limited on the basis of \* \* \* disability.” Rules of Superintendence for the Courts of Ohio,



Appendix B, Ohio Trial Court Jury Use and Management Standards, Standard 1(A). Thus, “[i]t is the obligation of every court to reasonably accommodate the special needs of physically handicapped jurors.” *Id.* at Commentary. While trial courts must accommodate disabled jurors to serve on juries whenever possible, this responsibility is subject to the defendant’s due process and fair-trial rights. Thus, R.C. 2313.43 provides that any juror may be challenged on any cause “that may render him at the time an unsuitable juror.”

{¶ 100} Based upon these principles and upon my review of the record, I would hold that the trial court did not abuse its discretion in refusing to dismiss Leow-Johannsen for cause. Although the majority is correct in stating that a court’s primary concern is ensuring that an accused has a fair trial, we cannot require trial courts to be clairvoyant. Instead, when faced with a challenge for cause, the trial court must have full discretion to analyze the salient facts and rule accordingly. Here, the trial court, prosecution, and defense all had opportunities to question the juror regarding the extent of her hearing disability. She indicated that she would be able to read lips to augment her hearing, and in response to a question by defense counsel stated that if a tape recording were to be played for the jury, she would be able to understand it by reading the court reporter’s typed transcription of the tape.

{¶ 101} Furthermore, attorneys are charged with protecting the interests of their clients. The defense was presented with a number of opportunities to object to the accommodations afforded to Leow-Johannsen, yet never raised any objection during the trial. In holding that the trial court abused its discretion, the court of appeals and the majority conclude in hindsight and contrary to the case record that this juror was unable to adequately or effectively evaluate the 9-1-1 tape. This conclusion, however, does not consider that the defendant raised this objection only after the completion of the trial. The defendant did not object

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when the 9-1-1 tape was played to the jury and did not then request that Leow-Johannsen be replaced by an alternate juror.

impartially to consider evidence presented at a trial.” *Batson v. Kentucky* (1986), 476 U.S. 79, 87, 106 S.Ct. 1712, 90 L.Ed.2d 69. It is important that discretion to make this assessment remains with the trial court, which is in the best position to weigh all information and circumstances before it. See *State v. Johnson*, 112 Ohio St.3d 210, 2006-Ohio-6404, 858 N.E.2d 1144, ¶ 187 (“[U]nder our system it is [the trial] judge who is best situated to determine competency to serve impartially”).