[Cite as *State v. Knight*, 2009-Ohio-4102.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2008-P-0107**
- vs -	:	
ALBERT Q. KNIGHT,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Municipal Court, Ravenna Division, Case No. 2007 TRC 15256R.

Judgment: Affirmed.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

E. Spencer Muse, Cassetty, Muse & Reed, 86 South Cleveland Avenue, Suite B, Mogadore, OH 44260 (For Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} Appellant, Albert Q. Knight, appeals the trial court's denial of his motion for a mistrial. For the following reasons, we affirm the judgment of the trial court.

{¶2} Knight was charged with operating his vehicle under the influence of alcohol ("OVI"), in violation of R.C. 4511.19(A)(1)(a). Knight pled not guilty, and the matter proceeded to a jury trial. During voir dire, a prospective alternate juror indicated

that he had previously pled guilty to an OVI charge. Thereafter, the trial judge questioned the prospective juror, asking the following question:

{¶3} "THE COURT: ***. Would you have a tendency to think, 'Well, I did the right thing and pled to mine, he should have done the same thing'? Would you have any thoughts of that sort?"

{¶4} Attorney Edward Muse, Knight's trial counsel, exercised a preemptory challenge and excused this prospective alternate juror. After the completion of voir dire and prior to opening statements, Attorney Muse moved for a mistrial based on the question posed by the trial court to the prospective alternate juror. Attorney Muse argued the trial court's question prejudiced Knight, tainted the jury, and made the implication that pleading guilty to an OVI charge is the "right thing to do." The trial court denied Knight's motion for a mistrial and, on appeal, he asserts the following assignment of error for our review:

{¶5} "The lower court erred as a matter of law and thereby abused its discretion when it denied Defendant's motion for a mistrial."

{¶6} At the outset, we recognize that on appeal Knight has provided this court with only a part of the voir dire portion of the trial transcript. While Knight submitted for our review the entire transcript of the trial testimony, no error has been assigned to the underlying trial proceedings. Knight's sole assignment of error relates to the questioning during voir dire – that portion of the transcript being incomplete. See App.R. 9.

{¶7} In *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199, the Supreme Court of Ohio held:

{¶8} "The duty to provide a transcript for appellate review falls upon the appellant. This is necessarily so because an appellant bears the burden of showing error by reference to matters in the record. *** When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court's proceedings, and affirm." (Citations omitted.)

{¶9} Without a transcript or other acceptable statement of the proceedings, a review of the trial court's judgment is confined to the pertinent portions of the record before us.

{¶10} Knight argues the trial judge's comments during voir dire were prejudicial and constituted irregularity in the proceedings, thus unfairly prejudicing the jurors. As a result, Knight was prevented from having a fair trial. We disagree.

{¶11} A mistrial should only be declared "when the ends of justice so require and a fair trial is no longer possible." *State v. Franklin* (1991), 62 Ohio St.3d 118, 127. (Citations omitted.) When the trial court gives a curative instruction shortly after an error occurs at trial, the jury can be presumed to have followed the court's instruction. *State v. Loza* (1994), 71 Ohio St.3d 61, 75. (Citations omitted.)

{¶12} The decision to grant or deny a request for a new trial rests within the court's sound discretion. *State v. Jordan*, 11th Dist. No. 2005-T-0049, 2006-Ohio-3425, at ¶47. As a result, this court will not reverse a trial court's decision absent an abuse of discretion. "'The term "abuse of discretion" *** implies that the court's attitude is unreasonable, arbitrary or unconscionable.'" *State v. White*, 118 Ohio St.3d 12, 2008-

Ohio-1623, at ¶46, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157. (Secondary citations omitted.)

{¶13} "A party challenging a jury panel has the burden of showing that the jurors were either unlawfully empaneled or that the jurors cannot be fair and impartial. See 47 American Jurisprudence 2d (1995) 922, Jury, Section 251. Mere speculation as to bias among the pool of prospective jurors will not justify quashing the entire venire. *Id*. at 923, Section 252. This court will not reverse a trial court's refusal to dismiss an entire jury panel absent an abuse of discretion. See *Mitchell v. Leak* (Mar. 18, 1993), 1993 Ohio App. LEXIS 1562, Franklin App. No. 92AP-1024, unreported." *London v. Scurry* (July 22, 1996), 12th Dist. No. CA95-10-033, 1996 Ohio App. LEXIS 3120, at *5.

{¶14} During voir dire, the prospective alternate juror indicated that, approximately 14 years prior, he pled guilty to an OVI charge. Thereafter, the following colloquy occurred:

{¶15} "THE COURT: Would that effect the way you listen to the evidence in today's case? Would you tend to compare what you hear today with what happened in your case?

{¶16} "ALT. JUROR: No. Because I've had other people I know that have been charged with stuff and every situation is different, so you have to look at the facts of the case.

{¶17} "THE COURT: ***. Would you have a tendency to think, 'Well, I did the right thing and pled to mine, he should have done the same thing'? Would you have any thoughts of that sort?

{¶18} "ALT. JUROR: No. That's a personal opinion."

{¶19} Thereafter, Attorney Muse proceeded to question the proposed alternate juror. The following exchange occurred:

{¶20} "ATTORNEY MUSE: Did you plead at the initial arraignment?

{¶21} "ALT. JUROR: Yes.

{¶22} "ATTORNEY MUSE: Do you think you did the right thing in pleading guilty?

{¶23} "ALT. JUROR: I believe so. Yes.

{¶24} "ATTORNEY MUSE: And when you say you believe so, I mean, what do you mean by that?

{¶25} "ALT. JUROR: Well, after the situation, I realized, you know, that I was in the wrong and I just, you know, felt that that was the proper thing to do.

{¶26} "ATTORNEY MUSE: And if you had felt that you weren't in the wrong, would you have taken it to trial?

{¶27} "ALT. JUROR: Oh, I'm sure. Yes."

{¶28} In the instant case, no abuse of discretion occurred. First, Attorney Muse was given the opportunity to further question the prospective alternate juror regarding his decision to plead guilty to the OVI charge. The prospective alternate juror, in front of the empanelled jury, indicated that he pled guilty to an OVI charge because he deemed it proper, under the facts and circumstances of his particular case. Nevertheless, he explained that he would have proceeded to trial if he had believed he was innocent.

{¶29} Further, as demonstrated above, the trial judge's line of questioning was not to imply that pleading guilty to an OVI charge was the "right thing to do." On the other hand, the trial judge was questioning the prospective alternate juror to determine

whether he could be fair and impartial in the instant case, even though he had previously pled guilty to a similar charge.

{¶30} While the following discussion took place in-chambers, it is illustrative of the trial judge's reasoning in asking the question to the prospective alternate juror.

{¶31} "MR. MUSE: Your Honor, I just wanted to make a motion for the record for a mistrial. No offense to you, with all due respect, the comment made to [the prospective alternate juror] that, 'Do you feel you did the right thing by pleading guilty?'

{¶32} "THE COURT: I asked him, 'Did you feel you did the right thing?'

{¶33} "MR. MUSE: Right.

{¶34} "THE COURT: 'And would you, therefore, want to hold it against the defendant?' If he had said yes, then I would have excused him.

{¶35} "MR. MUSE: Right. And the implication that pleading guilty is the right thing to do is what concerns me.

{¶36} "THE COURT: O.K. I don't believe the way I phrased it would have been. Because what I said to him, 'Do you feel that you did the right thing and, therefore, he should have done the same thing?' With the implication being, you know, if you think that, then you can't stay.

{¶37} "***

{¶38} "MR. MUSE: Right. But my concern is the poison to the jury that's sitting.

{¶39} "THE COURT: Oh, I don't believe that at all. I have been through repeatedly that he has a right to have the trial."

{¶40} Furthermore, the in-chambers colloquy reveals that during voir dire, the trial court repeatedly informed the prospective jurors that it was Knight's right to have a

trial. In fact, after the in-chambers colloquy, the record before us demonstrates the trial court again informed the jury that Knight had entered into a plea of not guilty to the charge, that he is presumed innocent, and that Knight cannot be found guilty unless the jury is convinced beyond a reasonable doubt by the state's evidence that he is guilty of the offense charged.

{¶41} Therefore, for the reasons stated in the opinion of this court, Knight's claim that a mistrial should have been declared lacks merit. It is the judgment and order of this court that the judgment of the Ravenna Division of the Portage County Municipal Court is hereby affirmed.

CYNTHIA WESTCOTT RICE, J., concurs,

COLLEEN MARY O'TOOLE, J., concurs with Concurring Opinion.

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{¶42} I concur with the majority to affirm the judgment of the trial court. However, I write separately to note the following with respect to App.R. 9(B).

{¶43} App.R. 9(B) states in pertinent part:

{¶44} "(B) The transcript of proceedings; duty of appellant to order; notice to appellee if partial transcript is ordered.

{¶45} "***

{¶46} "Unless the entire transcript is to be included, the appellant, with the notice of appeal, shall file with the clerk of the trial court and serve on the appellee a

description of the parts of the transcript that the appellant intends to include in the record, a statement that no transcript is necessary, or a statement that a statement pursuant to either App.R. 9(C) or 9(D) will be submitted, and a statement of the assignments of error the appellant intends to present on the appeal. If the appellee considers a transcript of other parts of the proceedings necessary, the appellee, within ten days after the service of the statement of the appellant, shall file and serve on the appellant a designation of additional parts to be included. The clerk of the trial court shall forward a copy of this designation to the clerk of the court of appeals.

{¶47} "If the appellant refuses or fails, within ten days after service on the appellant of appellee's designation, to order the additional parts, the appellee, within five days thereafter, shall either order the parts in writing from the reporter or apply to the court of appeals for an order requiring the appellant to do so. At the time of ordering, the party ordering the transcript shall arrange for the payment to the reporter of the cost of the transcript. ***"

{¶48} The majority recognizes that on appeal, appellant has provided this court with only a portion of the trial transcript. This writer stresses that according to App.R. 9(B), an appellant need not provide an entire transcript, but may "*** with the notice of appeal, *** file with the clerk of the trial court and serve on the appellee a description of the parts of the transcript that the appellant intends to include in the record ***. *** If the appellee considers a transcript of other parts of the proceedings necessary, the appellee, within ten days after the service of the statement of the appellant, shall file and serve on the appellant a designation of additional parts to be included. *** If the appellant refuses or fails, within ten days after service on the appellant of appellee's

designation, to order the additional parts, the appellee, within five days thereafter, shall either order the parts in writing from the reporter or apply to the court of appeals for an order requiring the appellant to do so."

{¶49} Thus, based on App.R. 9(B), the prosecutor could have filed and served on appellant a designation of additional parts to be included. If appellant refused or failed to order the additional parts, the prosecutor should have either ordered the parts in writing from the reporter or applied to this court for an order requiring appellant to do so.

{¶50} In any event, I concur with the majority to affirm.