

[Cite as *State v. York*, 2002-Ohio-1398.]

**IN THE COURT OF APPEALS  
THIRD APPELLATE DISTRICT  
SENECA COUNTY**

**STATE OF OHIO**

**CASE NO. 13-01-19**

**PLAINTIFF-APPELLEE**

**v.**

**DONALD K. YORK**

**OPINION**

**DEFENDANT-APPELLANT**

---

---

**CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas  
Court**

**JUDGMENT: Judgment Reversed**

**DATE OF JUDGMENT ENTRY: March 28, 2002**

---

---

**ATTORNEYS:**

**GENE P. MURRAY  
Attorney at Law  
Reg. #0006962  
227 West Center Street  
Fostoria, Ohio 44830  
For Appellant**

**KENNETH H. EGBERT, JR.  
Prosecuting Attorney  
Reg. #0042321  
71 South Washington St., Suite E  
Tiffin, Ohio 44883  
For Appellee**

**HADLEY, J.**

{¶1} The defendant/appellant, Donald K. York, appeals the judgment of the Seneca County Court of Common Pleas, finding him guilty of Aggravated Burglary with a fire arm specification, in violation of R.C. 2911.11(A)(2), and two counts of Attempted Aggravated Murder with a firearm specification, in violation of R.C. 2923.02(A) and R.C. 2903.01(A). Based on the following, we reverse the judgment of the trial court.

{¶2} On Monday, August 28, 2000, the appellant broke into the home shared by his ex-wife, Mary Goodin, and her live-in boyfriend, Alan Beam. The appellant brandished a 22 caliber rifle at the couple. Ms. Goodin called the police as Mr. Beam struggled to subdue the appellant. During the struggle between the two men, the appellant pulled the trigger on the rifle, firing one shot.

{¶3} The police arrived and arrested the appellant. He was indicted on one count of Aggravated Burglary and two counts of Attempted Aggravated Murder. Each count carried a fire arm specification. At trial, the appellant pled Not Guilty and Not Guilty by Reason of Insanity. The appellant was ultimately tried before a jury and found guilty on all charges. The trial court sentenced the appellant to nine years apiece for each of the three counts and to three years on the merged firearm specification, all of which were to be served consecutively for a total of thirty years in prison.

{¶4} The appellant now appeals, asserting four assignments of error for our review.

**ASSIGNMENT OF ERROR NO. I**

**{¶5} In an abuse of discretion, the trial court erred prejudicially and so reversibly when it overruled the defendant’s objection to the trial court’s decision to question witnesses at trial.**

{¶6} The appellant asserts that the trial court erred to his prejudice by inviting jurors to ask questions of the witnesses. For the following reasons, we agree with the appellant.

{¶7} In the past, we have taken a dim view of juror questioning. We previously addressed this issue in *State v. Cobb*<sup>1</sup> wherein we held that the decision to allow jurors to question witnesses, while not encouraged, is within the sound discretion of the trial court.<sup>2</sup> We stated in *Cobb* that the appellant must show that such an error resulted in prejudice to him in order to overturn the trial court’s decision to allow the jury to question witnesses.<sup>3</sup> The appellant asks us to go further than we did in *Cobb* and hold that inviting jurors to ask questions is so inherently prejudicial that it should not occur under any circumstances.

{¶8} In the instant case, the trial court instituted numerous safeguards to help alleviate any prejudice that might arise from the jury’s questions. First, the

---

<sup>1</sup> (July 24, 2000), Seneca App. No. 13-2000-07, unreported.

<sup>2</sup> *Id.*, quoting *State v. Shepard* (1955), 100 Ohio App. 345, 390, *aff’d* (1956) 165 Ohio St. 293. For a more thorough discussion of the problems regarding this issue, see *Cobb, supra*.

<sup>3</sup> *Id.*, citing *State v. Stanton* (1968), 15 Ohio St.2d 215, paragraph two of the syllabus.

jurors submitted their questions in written form to the court. The attorneys were then allowed a side bar to review and object to any questions they believed to be inappropriate. The judge read to the witnesses only those questions that were determined to comport with the rules of evidence. The attorneys then were allowed a limited opportunity to ask follow-up questions. The trial court reminded the jurors more than once that if their questions were not asked it was because they were deemed inappropriate under the rules of evidence. A review of the juror questions that were asked in this case reveal no prejudice to the appellant. Thus, under the *Cobb* standard, we would find no error prejudicial to the appellant. We are not satisfied, however, that the *Cobb* ruling sufficiently assuages the numerous problems with permitting jurors to question witnesses.

{¶9} The Supreme Court of Ohio has not yet addressed the issue of juror questioning. Although the majority of Ohio appellate districts that have addressed this issue have applied the same standard as did this Court in *Cobb*, most have also strongly discouraged the practice.<sup>4</sup> Presumably, courts have provided these cautionary notes because of the litany of problems this practice presents. The First

---

<sup>4</sup> *State v. Wayt* (1992), 83 Ohio App.3d 848, 857-858; *State v. Sheppard* (1955), 100 Ohio App. 345, 390, 60 O.O. 298, 322-323, affirmed on other grounds (1956), 165 Ohio St. 293; *State v. Noser* (Dec. 7, 2001), Lucas App. No. L-00-1154, unreported; *State v. Cobb* (July 24, 2000), Seneca App. No. 13- 2000-07, unreported; *Logan v. Quillen* (Oct. 27, 1995), Hocking App. No. 94CA26, unreported; *State v. Mascarella* (July 6, 1995), Tuscarawas App. No. 94AP100075, unreported; *State v. Sexton* (Nov. 24, 1982), Clark App. No. 1689, unreported; *State v. Ernst* (Oct. 29, 1982), Sandusky App. No. S-82-7, unreported. But, see, *State v. Fisher* (Dec. 20, 2001), Franklin App. No. 01AP-614, unreported (“To the extent that assuming an active role encourages a jury to stay alert and pay attention to the proceedings, allowing jurors to submit questions can be viewed as positive.”).

District Court of Appeals recently held in *State v. Gilden*<sup>5</sup> that questioning by jurors is inherently prejudicial and should not occur even where the trial court takes precautions like those implemented in this case.<sup>6</sup> We agree with the First District and now hold that inviting questioning by jurors, under any circumstances, constitutes plain error.

{¶10} In recent years, proponents of juror questioning have advanced it as a solution to jury inattentiveness and dissatisfaction with the trial process. While these are important issues, any ameliorating effect that juror questioning may provide is far outweighed by its negative effects. Although we have previously discussed many of our concerns regarding juror questioning in *Cobb*, a more detailed analysis is warranted here in order to explain why even the safeguards implemented by the trial court herein are insufficient.

{¶11} One of the principal problems with juror questioning arises because of the complex rules of evidence--a system so thorny that is sometimes confuses trained attorneys. A juror's lack of understanding regarding the rules of evidence may lead him or her to ask an improper question.<sup>7</sup> When this happens, an attorney is left in an awkward situation. Understandably, an attorney may be reticent about objecting to a juror's question out of fear of biasing him or her, but failure to

---

<sup>5</sup> (2001), 144 Ohio App.3d 69.

<sup>6</sup> *Id.* at 75.

<sup>7</sup> *Gilden*, 144 Ohio App.3d at 72; *Cobb*, *supra*; *Mascarella*, *supra*.

object means that the issue is not preserved for appeal.<sup>8</sup> This problem may be somewhat alleviated by requiring jurors to submit written questions and by allowing the attorneys to object to questions at side bar. However, this process allows the juror to speculate regarding which side objected, why, and whether they have something to hide.<sup>9</sup>

{¶12} The safeguards themselves can create problems. A significant number of juror questions will slow the trial process and consume judicial resources. This result will be magnified where courts employ the long process of inviting written questions and allowing the attorneys to object at sidebar and to further examine witnesses. Although a trial judge may use his discretion to limit the number of questions asked by jurors, this will reduce any advantages of juror questioning.<sup>10</sup>

{¶13} The most significant problem with juror questioning--one that cannot be cured through procedural safeguards--is that it distorts the juror's role as the impartial factfinder at trial.<sup>11</sup> As the First District points out, "[t]he jury's neutrality is essential to reaching the truth in an adversary trial."<sup>12</sup> When jurors are permitted to question witnesses, they take on the role of advocate, "actively

---

<sup>8</sup> Jeffrey Reynolds Sylvester, *Your Honor May I Ask a Question? The Inherent Dangers of Allowing Jurors to Question Witnesses*, 7 COOLEY L. REV. 213, 217; *State v. Cobb*, *supra*.

<sup>9</sup> Jeffrey S. Berkowitz, Note, *Breaking the Silence: Should Jurors Be Allowed to Question Witnesses During Trial?*, 44 VANDERBILT L. REV. 117, 143-44.

<sup>10</sup> *Id.* at 144.

<sup>11</sup> *United States v. Johnson* (C.A.8 1989), 892 F.2d 707, 713 (Lay, C.J., concurring).

<sup>12</sup> *Gilden*, 144 Ohio App.3d at 73.

seeking out facts instead of grappling with what the lawyers have provided.”<sup>13</sup>

Once entangled in the fact-finding process, jurors may begin to draw conclusions prematurely, giving more weight to those facts which they themselves have rooted out rather than reserving judgment until the conclusion of all the evidence and weighing all the facts together.<sup>14</sup> The right to a trial before an impartial jury of one’s peers is a fundamental tenant of the judicial system. Although there is no way to ensure that jurors will remain unbiased throughout a trial, the likelihood decreases the more that they participate in the advocacy process.<sup>15</sup>

{¶14} Based on all of the foregoing, we hold that the trial court erred in inviting the jurors to ask questions of trial witnesses, notwithstanding the procedural safeguards that it employed. Accordingly, the appellant’s first assignment of error is well-taken and is sustained. The appellant’s other assignments of error are moot and we, therefore, decline to address them.<sup>16</sup>

{¶15} Having found error prejudicial to the appellant herein, in the particulars assigned and argued, we reverse the judgment of the trial court and remand the matter for further proceedings consistent with this opinion.

*Judgment reversed and cause remanded.*

**WALTERS, J., concurs.**

---

<sup>13</sup> *Id.*

<sup>14</sup> *Gilden, supra* at 73; *Cobb, supra*; *Sylvester, supra* at 219-220.

<sup>15</sup> *Berkowitz, supra*, citing *Johnson*, 892 F.2d at 713 (Lay, C.J., concurring).

<sup>16</sup> See App.R. 12(A)(1)(c).

**BRYANT, J., Dissents.**

{¶16} **Bryant, J., Dissenting.** Because I am loath to hold that permitting a juror to ask a question is in all circumstances inherently prejudicial or plain error, I must respectfully dissent.

{¶17} Today, the majority overrules our prior holding in *State v. Cobb* (July 24, 200), Seneca App. No. 13-200-07, unreported where we registered concerns with the practice of allowing jurors to pose questions to witnesses but nevertheless held, “An appellant must demonstrate resulting prejudice in order for a reviewing court to overturn a judgment based upon the trial court’s decision to allow jurors to question the witnesses.”

{¶18} In overruling the *Cobb* decision, the majority’s holding mirrors that of the First District Court of Appeals in *State v. Gilden* (June 15, 2000), Hamilton App. No. C-000276, unreported. The *Gilden* court was the first in Ohio to take the issue of juror questioning out of the trial court’s hands by declaring it “inherently prejudicial” and therefore plain error. The majority here is the first to give weight to the *Gilden* decision.

{¶19} The Tenth District Court of Appeals, in *State v. Fisher* (Dec. 20, 2001), Franklin App. No. 01-AP-614, unreported refused to apply *Gilden* and in doing so pointed to the fact that the ultimate holding in *Gilden* conflicted with every Ohio court that has addressed this issue not to mention the majority of

federal courts. The *Fisher* court concluded, “the practice of allowing jurors to submit questions does not amount to plain error. Instead, cases should be carefully examined to ascertain whether there was an abuse of discretion in the process.” *Id.*

I do not dispute the majority’s contention that allowing a juror to question a witness is problematic and is not ideal in all circumstances. I do however take issue with the majority’s conclusion that would leave a trial judge without the discretion to gauge or assess the proper circumstances in which juror questions could be beneficial and thereafter to implement protective guidelines. Rather than tie a trial court’s hands, I would provide specific guidance as did The United States Sixth Circuit Court of Appeal’s in *U.S. v. Collins*(2000), 226 F.3d 457 where the appellate court instructed the district courts as follows:

**{¶20} Allowing juror questions should not become a routine practice, but should occur only rarely after the district court has determined that such questions are warranted. In exercising their discretion, trial judges must weigh the potential benefits of juror questioning against the possible risks and, if the balance favors juror questions, employ measures to minimize the risks. When a court decides to allow juror questions, counsel should be promptly informed. At the beginning of the trial, jurors should be instructed that they will be allowed to submit questions, limited to important points, and informed of the manner by which they may do so. The court should explain that, if the jurors do submit questions, some proposed questions may not be asked because they are prohibited by the rules of evidence, or may be rephrased to comply with the rules. The jurors should be informed that a questioning juror should not draw any conclusions from the rephrasing of or failure to ask a proposed question. Jurors should submit their questions in writing without**

**disclosing the content to other jurors. The court and the attorneys should then review the questions away from the jurors' hearing, at which time the attorneys should be allowed an opportunity to present any objections. The court may modify a question if necessary. When the court determines that a juror question should be asked, it is the judge who should pose the question to the witness. *Id* at 464.**

{¶21} While I do not favor a court's encouraging or soliciting juror questions, I do not believe it is properly the province of this court or within its appellate jurisdiction to promulgate procedural rules of general application. The sweep of the judgment entered in the Third Appellate District today precludes even the single juror asking a pertinent question in a case in which the trial judge ought to have the discretion to allow or deny that opportunity considering the circumstances then obtaining.

{¶22} Furthermore, while the majority expresses valid concerns with juror questioning, I am not convinced that a juror is more distracted by framing a question to assist understanding of all the issues than he is by pondering an unanswered question or confusing testimony or even by boredom.

{¶23} The most alarming aspect of the majority's decision today is the deviation from the elementary proposition of law that an appellant, in order to secure reversal of a judgment against him, must not only show some error but must also show that that error was prejudicial to him. *Smith v. Flesher* (1967) 12 Ohio St.2d 107. Since we have never found prejudice in a case where the jury

Case No. 13-01-19

was permitted to ask questions of a witness, it is inconsistent to find that the practice itself is per se prejudicial.

{¶24} Accordingly, I would overrule Appellant's first assignment of error and address the remaining assignments.