In the Supreme Court of Ohio

STATE OF OHIO,	}	
	}	CASE NO. 2020-0312
Plaintiff-Appellee,	}	
	}	ON APPEAL FROM THE STARK
v.	}	COUNTY COURT OF APPEALS
	}	FIFTH APPELLATE DISTRICT
THEODIS MONTGOMERY	}	
	}	COURT OF APPEALS CASE NO. 2019CA12
Defendant-Appellant.	}	

MERIT BRIEF OF *AMICUS CURIAE* OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF APPELLANT THEODIS MONTGOMERY

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STATEMENT OF INTEREST OF AMICUS

The Ohio Association of Criminal Defense Lawyers is an organization of approximately 700 dues-paying attorney members. The Association seeks to foster, maintain and encourage the integrity, independence and expertise of criminal defense lawyers through the presentation of accredited Continuing Legal Education programs; to educate the public as to the role of the criminal defense lawyer in the justice system, as it relates to the protection of the Bill of Rights and individual liberties; and to provide periodic meetings for the exchange of information and research regarding the administration of criminal justice.

The primary mission of the Association is to advocate for the rights secured by law to persons accused of the commission of a criminal offense.

STATEMENT OF THE CASE AND THE FACTS

Amicus concurs in the Statement of the Case and the Facts presented in the Merit Brief of Appellant.

LAW AND ARGUMENT

Overview and Summary of Argument. Contrary to the rulings of the lower courts in this case, the issue here is not whether the complainant had the right to be in the courtroom during the trial, but whether the complainant could be allowed to sit at the prosecutor's table throughout the trial. From a textual standpoint, neither Article I, Section 10a of the Ohio Constitution ("Marsy's Law"), R.C.. §2930.09, nor Evid.R. 615 permits such a practice. Moreover, the placement of the complainant at the prosecutor's table throughout the trial

constituted an impermissible vouching by the prosecutor of the complainant's credibility, and thereby violated Mr. Montgomery's right to a fair trial.

APPELLANT'S PROPOSITION OF LAW: An Appellant is denied his right to a fair trial guaranteed by the 6th and 14th amendments to the United States constitution when a trial court permits an alleged victim to be introduced to the jury during voir dire as representing the State of Ohio and permits them to sit with the Prosecutor for the State at counsel's table throughout the entire trial in front of the jury.

1. The trial court's ruling. At the outset of the trial, the prosecutor stated its intent to declare the complaining witness "as the State's representative pursuant to Ohio Rule of Evidence 615(B)((3) and (4)." Evid.R. 615 mandates that a judge "*shall* order" a separation of witnesses at the request of either party. (Emphasis supplied.) Paragraph (B) provides a list of exceptions:

> (B) This rule does not authorize exclusion of any of the following persons from the hearing:
>
> (1) a party who is a natural person;
>
> (2) an officer or employee of a party that is not a natural person designated as its representative by its attorney;
>
> (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause;
>
> (4) in a criminal proceeding, an alleged victim of the charged offense to the extent that the alleged victim's presence is authorized by statute enacted by the General Assembly or by the Ohio Constitution. As used in this rule, "victim" has the same meaning as in the provisions of the Ohio Constitution providing rights for victims of crimes.

The prosecutor's request was based on the incorrect provision of the rule. The designation of a representative of a party who is not a natural person is provided by subsection

(2). The State made no attempt at that point or at any other during the trial to show that the complainant's presence was "essential to the presentation of the party's case." (T.p. 10.)

Defense counsel objected to the complainant sitting at the prosecutor's table, noting that "I've never seen this request in the past in my career." (T.p. 11.) The court concurred that "I have never had this particular situation arise either," but agreed that in light of Marsy's law,[1] "I think that Mr. Bickis is certainly correct in the statement that she does have, according to that, a right to be present in the courtroom," and thus granted the prosecutor's request. (T.p. 12.) The complainant remained at the prosecutor's table throughout the trial.

2. The appellate court's decision. The appellate court correctly interpreted Mr. Montgomery's claim a being that "his right to fair trial was denied because the victim was permitted to be in the courtroom as the State's designated representative throughout the trial," but limited its consideration to subsection (4), the right of the complainant to be in the courtroom. *State v. Montgomery*, 5th Dist. Stark No. 2019CA12, 2019-Ohio-5178, ¶18.

The court then cited Marsy's Law and R.C. §2930.09, and determined that "a decision to allow a victim to remain in the courtroom during a trial is left to the discretion of the trial court." ¶21. It relied on three cases that addressed only the complainant's presence in the courtroom, and found that Mr. Montgomery's "vague, generalized assertion of prejudice" was not sufficient to justify reversal of the trial court's decision. ¶24.

3. The lower courts misconstrued the defense argument. The lower courts considered only Marsy's Law and Evid.R. 615(B)(4) in determining that Mr. Montgomery hadn't been prejudiced, but, as noted earlier, that was not the issue in this case: this wasn't a question of

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[1] Article I, Section 10a of the Ohio Constitution.

whether the complainant should have been allowed to remain in the courtroom, but whether she should have been granted enhanced status by being seated at the prosecution table throughout the trial. The question then becomes whether the Amendment, the statutes enacted pursuant to the amendment, or Evid.R. 615 authorize this procedure. They do not.

4. Neither the text nor the common meaning of Marsy's Law, R.C. §2930.09, or Evid.R. 615 permit the complainant to sit at the prosecutor's table during trial.

A. Marsy's Law and R.C. §2930.09 do not provide a right of the complainant to sit at the prosecutor's table. In 1994, Ohio voters approved by referendum a victim's rights amendment to the constitution labeled "Marsy's Law." The amendment spelled out certain protections for victims, including one pertinent to this case: granting the victim the right "to reasonable and timely notice of all public proceedings involving the criminal offense … against the victim, *and to be present at all such proceedings*." Art. I, Section 10a(A)(2) (emphasis supplied.)

After passage of the amendment, the legislature enacted R.C. Chapter 2930, which codified and defined those rights. Pertinent here is R.C. §2930.09, which provides, in pertinent part,

> A victim in a case may be present whenever the defendant in the case is present during any stage of the case against the defendant that is conducted on the record unless the court determines that exclusion of the victim is necessary to protect the defendant's right to a fair trial. [All references to juvenile offenders or proceedings omitted.]

There are two aspects of this provision which are significant. First, nothing in the text of the statute (or the amendment) confers a right upon a complainant to be designated as the State's representative, or to be seated at the prosecutor's table. There are provisions of other states

which do; for example, §§ 15-14-53 and 56(a), Code of Alabama 1975, specifically authorizes a representative of the victim to be present at the counsel table. *Drinkard v. State*, 777 So.2d 225, 269 (Ala. Crim. App. 1998). But *cf. Hall v. State*, 579 So.2d. 329, 331 (Fla. Dist.Ct.App. 1991) (finding that victim's rights amendment to Florida Constitution did not permit victims to sit at trial table). Ohio law, both constitutional and statutory, has no similar provision.

Second, the statute recognizes that the complainant's mere presence may conflict with the defendant's right to a fair trial, and permits the court to exclude the complainant under that circumstance.[2]

B. Evid.R. 615(B)(4) does not provide a right of the complainant to sit at the prosecutor's table. As indicated in the Commentary to the Rule, paragraph (B)(4) was "designed to harmonize the rule with the provisions of R.C. 2930.09." Thus, the rule grants no rights greater than those provided by the amendment and the statute. As we have seen, the amendment and statute do not provide a right of the complainant to sit at the prosecutor's table during the trial, and so 615(B)(4) cannot provide that right, either.

C. Evid.R. 615(B)(2) does not provide a right of the complainant to sit at the trial table. Although the prosecutor cited Evid.R. 615(B)(3) as the basis for his request to have the complainant sit at the trial table, he couched that request in terms of Evid.R. 615(B)(2): "as the state's representative."

But the full text of that provision provides an exception for"(2) an *officer or employee* of

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[2] This provision obviously presents the future possibility that this Court may have to decide when the mere presence of the victim in the courtroom prejudices the defendant's right to a fair trial. That is not the issue presented here. See *In re D.S.*, 152 Ohio St.3d 109, 2017-Ohio-8289, ¶7, 93 N.E.3d 937 ("We should avoid reaching a constitutional question when other issues are apparent in the record which will dispose of the case on its merits".)

a party that is not a natural person designated as its representative by its attorney." (Emphasis supplied.) While the State is not a natural party, the complainant is certainly not an officer or employee of the State. A simple reading of the text of the rule does not support placing the complainant at the prosecutor's table.

Nor is the complainant a "representative" of the State. The common usage of that term in this context would be "one that represents another as agent, deputy, substitute, or delegate usually being invested with the authority of the principal." Merriam-Webster Online Dictionary. The complainant does not fall into that category. While she has the right to express her opinion as to various matters, such as acceptance of a plea or sentencing, the State is not bound by her preferences, and indeed has very distinct interests from hers. As the American Bar Association notes, the prosecutor "serves the *public* interest." The public's interest and the complainant's are distinct. The prosecutor is free to "pursu[e] criminal charges of appropriate severity," and to "exercis[e] discretion to not pursue criminal charges in appropriate circumstances." The complainant has no obligation to "respect the constitutional and legal rights of all persons, including suspects and defendants"; the prosecutor does. Criminal Justice Standards for the Prosecution Function, Fourth Ed. 2017, Part 1, Standard 3-1.2(B).

D. Evid.R. 615(B)(3) does not provide a right of the complainant to sit at the trial table. And so we are left with Evid.R. 615(B)(3) as the only possible source of the prosecutor's placement of the complainant at the trial table; in fact, that was the provision he specifically cited. The subsection exempts from a separation of witnesses "a person whose presence is shown by a party to be essential to the presentation of the party's cause."

Again, from a textual standpoint, the subsection does not permit what transpired here. The rule requires that the person's presence is "shown by a party" to be essential. The

prosecutor made not even the allegation that the complainant was essential – relying instead on the provision designating her as the State's representative – let alone made a showing demonstrating that.

Moreover, once more the text and common meaning of the term "essential" does not sanction the procedure here. The rule to this point has been invariably applied to the right of the prosecutor to designate an agent, police officer, or detective to sit at the trial table and assist in the presentation of the case. *State v. Fuller*, 1st Dist. Hamilton No. C-960753, 1997 WL 598404, *1, aff'd 83 Ohio St.3d 108, 698 N.E.2d 977 (1998) (representative of law enforcement may assist the prosecutor during trial and may remain in the courtroom although separation of witnesses has been ordered); *United States v. Martin*, 920 F.2d 393, 397 (6th Cir.1990) (case agent may remain in courtroom even when other witnesses are sequestered); *State v. Hartzell*, 2nd Dist. Montgomery No. 17499, 1999 Ohio App. LEXIS 3812 (since police officer was employee of state, he was exempt from separation by Evid.R. 615(B)(2)).

Both defense counsel and the trial judge commented on the novelty of the procedure used by the prosecution here. Further testament to that novelty is that counsel can find but a single Ohio appellate case dealing with the prosecution seeking to have a victim sit at the trial table. In *Cleveland v. Rodic*, 8th Dist. Cuyahoga No. 63138, 1993 Ohio App. LEXIS 3535, the defendant in a *pro se* appeal argued that the trial court erred by permitting the victim to sit at the prosecutor's table. The lawyer never raised the issue below, the defendant submitted only a partial transcript of the proceedings, and the appellate court never addressed the issue.

4. Allowing the complainant to sit at the prosecutor's table prejudiced Mr. Montgomery by impermissibly vouchsafing for the credibility of the complainant.

A. Numerous other courts have found the procedure here prejudicial to the

defendant's rights. While this might be a case of first impression in Ohio, other courts have encountered it, and have not hesitated to find it prejudicial. In *Fuselier v. State*, 468 So.2d 45 (1985), the victim's mother was allowed to sit within the bar of the courtroom (apart from spectators, and directly behind the prosecutor) throughout the trial. The court found not only that the rule did not sanction that procedure, since "Mrs. Winstead was neither an officer of the court, attorney, litigant or representative of a litigant," but that

> Her presence at counsel table and open display of emotion presented the jury with the image of a prosecution acting on behalf of Mrs. Winstead. Because such an erroneous view can all too easily lead to a verdict based on vengeance and sympathy as opposed to reasoned application of rules of law to the facts we conclude that the trial court should not have permitted Mrs. Winstead to remain within the bar of the courtroom.

The court reached a similar result in *Walker v. State*, 132 Ga. App. 476, 208 S.E.2d 350 (1974). There, the victim's mother was not only allowed to sit within the bar of the courtroom, she was allowed to sit at the prosecution table.

> The presence of the bereaved mother at the prosecutor's table during the trial of one accused of murdering her son surely must have had an impact on the jury and we cannot say it was not harmful and prejudicial to the defendant's right to have a fair trial. There was no showing by the state that her presence was necessary for an orderly presentation of the case. The trial judge abused his discretion and the judgment is reversed.

Finally, we come to *Mask v. State*, 314 Ark. 25, 869 S.W.2d 1 (1993), a case virtually identical to the one presented here. There, after the complainant testified, the prosecution asked that she be allowed to sit at the counsel table for the remainder of the trial, which the court permitted. Although the Arkansas Supreme Court found "substantial evidence to support the jury verdict," it determined that the trial court committed reversible error by allowing the complainant to sit at counsel's table during the trial. Noting that the complainant "was not a

party," the court found that by permitting the complainant to do so, it was in effect vouching for the credibility of the witness.

B. The procedure here violated Mr. Montgomery's rights. But by having the complainant sit at the trial table, not only does the trial court vouch for her credibility, but the prosecutor does as well. The court and prosecutor are saying in essence that the prosecutor is not advocating for the interests of the State, but for the complainant. The jury is essentially told that this is no longer about justice, but a contest of credibility between the complainant and the defendant, with the court and prosecutor vouching for the credibility of the former by giving her enhanced status by virtue of her placement in the courtroom.

This is especially significant in this case. As Mr. Montgomery details in his Brief, this was a pure credibility contest, the paradigmatic "he said/she said" situation. There was no dispute that sex had taken place; the jury had only to determine whether Mr. Montgomery or the complainant was truthful in whether the sex was consensual. This was not a case where the credibility of other witnesses would be dispositive, where forensic evidence would compel a conclusion one way or the other.

R.C. §2930.09 explicitly recognizes the tension between the complainant's presence in the courtroom and the defendant's right to a fair trial. That tension is extended beyond the breaking point where the complainant is not merely present, but becomes part of the prosecution team.

5. The seating of the complainant at the prosecution table was structural error, requiring reversal. There is no real question that the error here is one of constitutional dimension, impinging upon the defendant's right to a fair trial. Nor can there be any question that the error cannot be sloughed off as harmless under the standards for constitutional error

promulgated in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), and *Harrington v. California*, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969). In *Chapman*, the Court held that to find a constitutional error harmless, the reviewing court must be satisfied beyond a reasonable doubt that the error did not contribute to the defendant's conviction. *Harrington* expanded the definition of harmless error to include cases where the constitutionally impermissible evidence was merely cumulative, and the other evidence against the accused was overwhelming. Whatever adjective might be applied to the State's evidence in this case, "overwhelming" is not on the list.

But in *Arizona v. Fulminante*, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991), the Court established that there was another class of constitutional error which defied harmless error analysis. Those errors were "structural": they required automatic reversal.

In *Weaver v. Massachusetts*, ___ U.S. ___, 137 S.Ct. 1899, 198 L.Ed.2d 420 (2017), the Court articulated three types of structural error, two of which are relevant here:[3] where the effects of the error are too hard to measure, and where the error always results in fundamental unfairness. 137 S.Ct. at 1908.

Amicus submits that the error here qualifies under both. A transcript will tell a reviewing court what was said and by whom; there is no possibility that the transcript will capture the interaction between the prosecutor and the complainant sitting next to him. Does the prosecutor consult with her during the trial, as he would with the case agent, thereby enhancing the

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[3] The first was where "the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest," such as the right of the defendant to self-representation, even though the exercise of that right "usually increases the likelihood of a trial outcome unfavorable to the defendant." S.Ct. at 1908. That obviously has no applicability not the situation here.

complainant's role not as a mere witness but as a key participant in the prosecution? Does he seek her input in what questions to ask a witness?

There is no way to measure the effect it had on the jury's view of the complainant's credibility to be told at the outset of the trial that she was the State's "representative," and to see her ensconced at the table, joined to the prosecutor throughout the trial. What we can be certain of is that it did have some effect, and whatever effect it had resulted in a fundamental unfairness. The mission of the jury is to determine the credibility of the witnesses, and if the credibility of a witness is impermissibly enhanced, that mission is fatally compromised. A ruling which affects the jury's fact-finding capabilities in determining guilt or innocence is the paradigmatic example of structural error.

CONCLUSION

The first question the courts below should have asked when the prosecutor sought to have the complainant join him at the prosecution table was, "What provision of law authorizes this?" The answer is none. There is nothing in the text of any constitutional provisions, statute, or rule, nor any common understanding of the meaning of the terms in those documents, which permits a court to consent to this. Instead, those courts answered another, totally irrelevant question: "Is the complainant permitted to remain in the courtroom?"

That misanalysis led the courts below to ignore the second question: "Does this procedure prejudice the defendant?" The appropriate answer to that question is, "How could it not?"

The State invites this Court to sanction this procedure, to allow county and municipal prosecutors throughout the state to vouch for the credibility of a complainant by presenting the

jury with a united front at the prosecution table. The Court should reject that invitation. Nothing in the law countenances it, and it invariably results in fundamental unfairness to the defendant.

For the foregoing reasons, *Amicus* respectfully prays the Court to reverse the Defendant's conviction, and to remand the case for a new trial.

Respectfully submitted,

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SERVICE

The undersigned hereby certifies that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Association of Criminal Defense Lawyers was served upon all parties by email.

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