In the Supreme Court of Ohio

STATE OF OHIO,	}	
	}	CASE NO. 2020-0978
Plaintiff-Appellee,	}	
	}	ON APPEAL FROM THE FRANKLIN
v.	}	COUNTY COURT OF APPEALS
	}	TENTH APPELLATE DISTRICT
JAMES R. WEST,	}	
	}	COURT OF APPEALS CASE NO. 19AP-90
Defendant-Appellant.	}	

MERIT BRIEF OF *AMICUS CURIAE* OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF APPELLANT JAMES R. WEST

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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

APPELLANT'S PROPOSITION OF LAW: A criminal defendant's Due Process right to a fair trial under the United States and Ohio Constitutions is violated when the trial court engages in questioning that shows bias against the defendant. Such error is subject to a structural error analysis and is grounds for automatic reversal.

1. The constitutional right to a fair tribunal. A fair judge is indispensable to a fair trial. As the Court observed in *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955), "[a] fair trial in a fair tribunal is a basic requirement of due process."

There is a dispute as to whether the appearance of bias is a due process violation. Cf. *Offut v. United States*, 348 U.S. 11, 14, 75 S.Ct.11, 99 L.Ed. 11 (1954) ("justice must satisfy the appearance of justice") with *Rivera v. Superintendent Houtzdale SCI*, 738 F.Appx. 59, 65 (3d Cir. 2018) (noting that Supreme Court has never directly held that an appearance of bias of a judge, without more, constitutes a due process violation). There is no dispute that actual bias is sufficient. *State v. Bayer*, 102 Ohio App.3d 172, 656 N.E.2d 1314 (8th Dist. 1995) (judge's questioning of defendant showed lack of impartiality).

2. The authority of the trial court to interfere in the trial process. Evid.R. 614(B) provides that "[t]he court may interrogate witnesses, in an impartial manner, whether called by itself or by a party." (Emphasis supplied.) The courts have consistently recognized the judge's right to participate in the questioning of witnesses to clarify the facts. *State v. Tyler*, 1978 Ohio App. LEXIS 9652 (7th Dist. 1978). But that role is severely circumscribed, as the court explained in *State ex rel. Wise v. Chand*, 21 Ohio St.2d 113, 256 N.E.2d 613, Syll. No. 2 and 3:

> 3. In a trial before a jury, the court's participation by questioning or comment must be scrupulously limited, lest the court, consciously or unconsciously, indicate to the jury its opinion on the evidence or on the credibility of a witness.
>
> 4. In a jury trial, where the intensity, tenor, range and persistence of the court's

> interrogation of a witness can reasonably indicate to the jury the court's opinion as to the credibility of the witness or the weight to be given to his testimony, the interrogation is prejudicially erroneous.

See also *State v. Wade*, 53 Ohio St.2d 182, 187, 373 N.E.2d 1244 (1978) (because "juries are highly sensitive to every utterance by the trial judge …judge must be cognizant of the effect of his comments upon the jury").

3. The court here acted in a biased manner, denying the defendant the right to a fair trial. The State, in its Memorandum in Opposition to Jurisdiction, cited only two instances the trial court's questioning of the defendant when he testified. In the first, the court asked the defendant during the presentation of the surveillance video, "Is that you with the gun, shooting?" (T.p. 366.) The State fluffs this off by noting that the surveillance video shows the same thing. The only other comment of the judge the State addresses is the trial court's question, "You lied to the police, didn't you?" (T.p. 411.) The State dismisses this by pointing out that the detectives had already testified that the defendant had lied to them.

But this ignores the context of the court's questioning. The defense argument was that West acted in self-defense of a robbery attempt. That ran into a problem early on in the court's questioning of West:

> A: His car is right here. So he said he was going to his car after he said he was going to rob me. I was trying to get out to my car.
>
> THE COURT: He didn't say he was going to rob you. You thought that's what he was implying by saying the "N" word, and I'm going to take your money? (T.p. 366.)

In short, by its question the court disputed the central thesis of West's defense. How the phrase "I'm going to take your money" could be interpreted as something other than "I'm going

to rob you" is not readily discernible.

But the court wasn't done:

> Q: And, of course, you told them you had a gun and were shooting because these guys brought a gun into the situation?
>
> THE COURT: You lied to the police, didn't you?
>
> THE DEFENDANT: Because I wanted to give myself a fighting chance at court.
>
> Q. That's what you're doing, you're lying to the Court to give yourself a fighting chance here? (T.p. 411-412.)

There are two notable things about this exchange. First, the court intruded in the cross-examination by the prosecutor; there was nothing about the court's participation that so much as hinted of a desire to clarify. Second, in a span of two questions, we have the court essentially telling the jury that West lied to the police, followed by the prosecutor telling the jury that West is lying to the court. The linkage of these two questions could not help but place the judge in the role of advocate for the State. "There are strict limits placed on the propriety of judicial questions of witnesses, lest the court by its inquiries give the appearance of favoring one side or the other." *Harper v. Roberts*, 173 Ohio App. 3d 560, 2007-Ohio-5726, 879 N.E.2d 264, ¶ 7 (8th Dist.)

4. The court's actions were not cured by its instruction to the jury. Perhaps one of the greatest fictions in law is that prejudicial evidence can be disregarded if the judge simply tells the jury to do so. In fact, research over the past seventy years has demonstrated the exact opposite: that rather than reducing the impact of inadmissible evidence, admonitions to disregard increased the prejudicial effect. Broeder, *The University of Chicago Jury Project*, 38 Neb.L.Rev 744 (1959); Oros & Elman, *Impact of Judge's Instructions Upon Jury Decisions:*

The Cautionary Charge in Rape Trials, 10 Representative Res. In Soc. Psychology 28, 32 (1979); Thompson, Fong & Rosenhan, *Inadmissible Evidence and Juror Verdicts*, 40 J. Personality & Soc. Psychology 453, 457-458 (1981); see generally Tanford, *The Law and Psychology of Jury Instructions*, 69 Nebraska L. Rev. 71 (1990).

Of course, a curative instruction is not tantamount to a deletion of prejudice. *United State v. 1012 Germantown Rd.*, 963 F.2d 1496, 1502 (11th Cir. 1992). To hold otherwise would be to create a rule that prejudicial evidence is admissible so long as it is accompanied by a curative instruction. As the Court observed in *Bruton v. United States*, 391 U.S. 123, 135, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), "There are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." See also *State v. Porter*, 6th Dist. No. E-93-52, 1994 Ohio App. LEXIS 5618 (improper admission of taped conversation could not be remedied by curative instruction); *State v. Williams*, 8th Dist. No. 94242, 2010-Ohio-5484 (same; admission of hearsay evidence linking defendant to van used in crime).

In this case, at the conclusion of the jury instructions the judge gave the standard advisory instruction that "[i]f during the trial the court said or did anything that you consider an indication of the court's view on the facts, you are instructed to disregard it." That instruction, of course, came well after the court's interrogation of West and the damaging comments it made about his credibility. That delay in itself is problematic; while a quick intervention by the trial court is helpful in curing prejudice, *State v. Veatch*, 223 Ore.App. 444, 196 P.3d 45 (Ore.App. 2008), a delay in addressing the problem may not be sufficient. *Williams, supra*.

The trial court here took on the role of advocate, essentially telling the jury that West was

not credible. No instruction could have cured that. "If you throw a skunk in the jury box, you cannot instruct the jury not to smell it," *Dunn v. United States*, 307 F.2d 883, 886 (5th Cir. 1962).

5. The error here was structural. The court below determined that the trial court's questioning could only be reviewed for plain error, since there was no objection to the trial court's questioning. This finding presents two problems. First, the damage had already been done by the court's questions; the damage would not have been cured by an objection, even assuming the judge would have sustained one.

Second, and more significantly, the presence of a biased judge at a defendant's trial does not lend itself to harmless error analysis, plain error or no. 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 are "structural": they require automatic reversal. Such errors – such as "absence of counsel for a criminal defendant" or "the presence on the bench of a judge who is not impartial" – "are structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards." U.S. at 309-311.

The courts have followed that admonition, finding that "the presence of a biased judge is structural error, which, if demonstrated, requires reversal." *State v. Sanders*, 92 Ohio St.3d 245, 278, 2001 Ohio 189, 750 N.E.2d 90 (2001). See also *State v. Cepec*, 149 Ohio St.3d 438, 2016-Ohio-8076, 75 N.E.3d 1185.

CONCLUSION

There are several analogies and metaphors a trial court uses in its initial instructions to

the jury. For example, it explains the concept of circumstantial evidence with the snowfall metaphor: you go to sleep, the ground is bare, you wake, there's snow on the ground; you can infer that it snowed during the night. Another judge might use the cookie analogy: from a tray missing several freshly-baked chocolate chip cookies and an eight-year old with chocolate smears and cookie crumbs on his face, you can infer that the child ate the cookies.

Another metaphor that judges commonly use in explaining their role at trial as being that of an umpire: the judge is an impartial arbiter, his role during the presentation of testimony limited to calling balls and strikes.

Complying with that metaphor is essential to a fair trial. We have an adversary system of justice. Jurors expect the lawyers to be advocates; they do not anticipate that the judge will become one. So important is it to preclude that possible inference in the jurors' minds that the judge will instruct them if they drew any such inference – say, the judge's subconscious furrowing of a brow at some particular testimony, or a note of exasperation in ruling on an objection – they are to disregard it. The judge here in fact gave that instruction, but by then it was too little, too late.

Maintaining he line between arbiter and advocate is essential to a fair trial. The judge in this case clearly crossed that line. This case offers this Court an opportunity to remind judges that their role in examination of witnesses should be carefully circumscribed, and that if they cross that line, the only remedy is a new trial.

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.

/s/Russell S. Bensing
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