IN THE SUPREME COURT OF OHIO

07-2270

STATE OF OHIO,	:	
	:	On Appeal from the Lorain
Appellee	:	County Court of Appeals,
	:	Ninth Appellate District
v.	:	
	:	
PAUL R. HASHMAN,	:	Court of Appeals
	:	Case No. 06CA008990
Appellant	:	

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT PAUL R. HASHMAN

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EXPLANATION AS TO WHY THIS IS A CASE OF PUBLIC INTEREST OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION AND WHY JURISDICTION SHOULD BE ACCEPTED

This Honorable Court should accept jurisdiction in this matter as it involves a felony conviction where a prison sentence has been imposed and is also a case of public or great interest and involves a substantial constitutional question. The Trial Court denied Appellant his right to present witnesses when it barred Sonya Hashman, a forty-five (45) year-old woman suffering from Down Syndrome, from testifying for the defense, whom sought to call her as a potential eyewitness to the events which led to Appellant's subsequent conviction and imprisonment.

Furthermore, the egregious conduct of the assistant county prosecutor during his closing argument to the Jury tainted the panel and unfairly and improperly influenced the Jury to the point that they returned a partial guilty verdict against Appellant. Due to the inappropriate comments from the State of Ohio, Appellant was denied a fair trial to an impartial jury.

This Honorable Court must accept jurisdiction to correct the injustice done to Appellant by denying him his right to call witnesses and his right to a fair and impartial jury. Additionally, it is up to this Court to protect similarly situated Defendants by establishing a clear rule as to when a developmentally disabled individual is competent to testify and to protect these Defendants against overzealous prosecutor's looking for a conviction, rather than justice.

STATEMENT OF THE CASE AND FACTS

Appellant is an eighty-five (85) year-old World War II Army veteran, who completed nine (9) full years of formal education. Appellant currently suffers from bladder cancer, high blood pressure, irregular heartbeat, and arthritis.

For the past twenty-five (25) to twenty-seven (27) years, Appellant, his now deceased wife and their daughter lived next door to the Oskins family in Elyria, Ohio. This relationship

deteriorated greatly over the past few years. Appellant had become increasingly fearful of Darrell Oskins and his family. The Hashman family had many violent run-ins with Oskins and his family. As a result of these incidents, Appellant resorted to carrying a firearm for protection. Appellant was questioned about having a firearm in the house and his denial to the police in August of 1999. Appellant denied having the weapon in his house, as he stored it in a detached garage to prevent his daughter from finding it. Contrary to the State's view, Appellant was truthful in this interrogation.

On January 19, 2004, these neighborhood tensions exploded. Early on this date, Appellant shoveled his driveway and sidewalk in front of his house. Later this day, Appellant noticed Oskins using his snowblower to clear snow. Appellant went outside to ask Oskins not to blow snow were he had already cleared. Due to the prior violence against him, Appellant brought his firearm with him for protection. Appellant described the incident as:

> He kept getting closer and closer, and I thought he was going to run over my feet and cut my feet off. I tried to get away from him. I thought I would run. I was afraid if I started running, he would get my heels. He kept coming at me. He got about a foot and a half away from me, and I shot him in the shoulder.

After the initial shot, a scuffle ensued for the firearm. During the scuffle, the gun discharged several more times, until Appellant was able to get on top of Oskins and struck him with the gun in order to stop Oskins. Afterward, Appellant threw the gun into the snow and waited for police. This incident was witnessed by Sonya Hashman as she was at home at the time of the shooting.

Appellant was indicted on or about March 10, 2004 by the Lorain County Grand Jury for two (2) counts Attempted Murder with firearm specifications and a single count of Felonious Assault with a firearm specification. Appellant's case proceeded to Jury Trial on July 17, 2006 in front of the Honorable Christopher Rothgery of the Lorain County Court of Common

Pleas. On this first day of Trial, the Court held a competency hearing to determine whether or not Appellant's daughter, Sonya, was competent to testify in her father's defense as an eyewitness to the events in question. The Court ruled that Sonya Hashman was not competent and barred her testimony. Trial Counsel provided a proffer to the Court as to the importance of this testimony. Appellant testified in his defense at the Trial. This Trial lasted seven (7) days, concluding on July 26, 2006, with a verdict convicting Appellant of Felonious Assault with a three (3) year firearm specification and an acquittal on the Attempted Murder count. Appellant was sentenced on August 1, 2006 where he received an aggregate sentence of seven (7) years in prison.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law Number 1: A witness suffering from Down syndrome is competent to testify so long as she has some ability to accuratly observe, Recollect, and communicate her personal observations

Ms. Sonya Hashman, the daughter of Appellant, is a forty-five (45) year old woman who suffers from Down Syndrome. Sonya had been the victim of physical and verbal attacks from Darrel Oskins and his family. In addition, she personally witnessed her father being attacked with a leaf blower by Oskins. Furthermore, as stated by Attorney Wightman, in his proffer to the Trial Court:

> "She is a fact witness. She is an important witness. We need her. She understands truth and lies. She understands that she is here to tell what she knows..."

Appellant recognizes the general rule in Ohio that the standard of review in dealing with the competency of witnesses is an abuse of discretion and that a reviewing court will not disturb a trial court's ruling unless such an abuse is present. *State v. Wildman, 145 Ohio St.379, 61 N.E.2d 790 (1945).* In this case, such an abuse is present.

She understood that a telling a lie was wrong. The Court asked:

The Court: What happens if you tell a lie and somebody finds out?
The Witness: In hot water.

The Appellate Court misconstrued the trial court record which abundantly demonstrates that the trial court abused its discretion in determining that the appellant's only fact witness to the Appellant's being attacked by his neighbor with a snowblower.

It is respectfully submitted that the Ninth District misconstrued the evidence of Sonya's competency and focused on responses by Sonya which were taken out of context by the Appellate Court.

The trial transcript is replete with evidence that Sonya has the ability to accurately observe, recollect and communicate that which goes on around her. *State v. Cooper, 139 Ohio App.3d 149 (2000).*

The following testimony by Ms. Hashman establishes beyond any serious contention that the Trial Court abused its discretion in deciding Sonya was incompetent to testify.

Set forth in proper context the following is the evidence that established her competence to testify:

The Court: Can you tell me your name?
The Witness: It is Sonya.
The Court: And that is your last name?
The Witness: Hashman. (Sonya corrects the Court who indicates to her that Sonya is her last name and Sonya responds appropriately). T. at 16. And,

The Court: Is that a house?
The Witness: Umm-hmm (indicating the appropriate answer as she resided in a group home with other learning disabled adults).
The Court: Who lives there with you?
The Witness: 32 (which is the truthful and appropriate response being that she resided at the Guadalupe House with thirty-one (31) other adults and the Trial Court was aware that she resided in a group home with other adults). T. at 18.

The Trial Court continued with a confusing response to her appropriate answer to the Trial Court's preceding question:

The Court:	Pardon me?
The Witness:	32 (again a correct and appropriate response to the question of who lives with her). T. at 18.
The Court:	32 other people.
The Witness:	Right (indicating an ability to observe, recollect and communicate her living environment). T. at 18.
The Court:	Did you live anywhere before that?
The Witness:	I me, stay in the house myself (another appropriate response indicating to the Court she lived in a house, which the Trial Court knew was 519 Woodland, in Elyria, Ohio, where her father was attacked). T. at 18.
The Court:	Ma'am how old are you?
The Witness:	45 (an exact and appropriate response which firmly proves her ability to recollect and communicate).
The Court:	Do you know your birthday?
The Witness:	Um-hmm (again an appropriate response demonstrating her competence).
The Court:	What is it?
The Witness:	1960 (her recollection and communication skills are crystal clear with this response).
The Court:	Do you know what the day of your birthday is?
The Witness:	Yes (another appropriate response confirms competency).
The Court:	What month or day it is?
The Witness:	November 23 (confirms competency of Sonya).
The Court:	Do you remember what you did on your last birthday?
The Witness:	I don't remember (an appropriate response to a question most 45 year old adults would provide the same response -- which confirms her ability to be truthful and competent under Ohio law. T. at 17.
The Court:	Do you work anywhere?
The Witness:	The workshop (again an appropriate response as she worked at a workshop. T. at 20.)
The Court:	What did you say, ma'am? What do you do there at the workshop?
The Witness:	I draw (confirming her competency). T. at 20.
The Court:	How do you get to the workshop?
The Witness:	The bus (an accurate and truthful response which solidifies her competency).

The Court then inquires as to her boss at the workshop by inquiring as follows:

The Court: What is your boss's name?
The Witness: Don Nandy (once again appropriate). T. at 20-21.
The Court: Who brought you to Court today?
The Witness: Two of my friend (a truthful and accurate response).

The Court then presents her with a false statement which she understands and tells the Court the following:

The Court: If I told you that the police brought you here today, would that be the truth? (This is a confusing question to her as she has already testified that that her two friends brought her to Court. This is not a fair question by the Court examining for competency - it is a question which can scare and/or confuse a mentally disabled person).

Yet, Sonya answers this:

The Witness: No. T. at 22.

The Court continues testing her for her ability to understand a lie versus the truth, which Sonya handles quite easily.

The Court: Is it a bad thing or a good thing to lie?
The Witness: No tell the lie - me tell the truth. T. at 22.
The Court: What can happen if you tell a lie?
The Witness: Me lie to no one (nothing else needs to be said as to her ability to accurately recollect).

The Court then states that he is having a hard time understanding her - which the Court then states incorrectly to counsel the following:

The Court: I am having a very difficult time understanding her, Mr. Wightman. I mean, is it me or am I missing something?
Mr. Wightman: Judge, it is difficult to understand her but I don't think that is the competency issue.
The Court: No, but it goes to my ability to determine her competency. T. at 21.

Two points must be made here, her ability to articulate was certainly sufficient for the Court Reporter to transcribe her intelligible responses. Her inarticulateness and lack of

eloquence should not impact or effect the Court's determination of competency, as that, in effect, would automatically and perhaps illegally render all witnesses with speech impediments incompetent witnesses. That would seem to violate the Americans with Disabilities Act, *42 U.S.C 12101.*

As is plainly evident, the Trial Court abused its discretion in finding her incompetent in ignoring her appropriate responses to sometimes confusing and difficult questions and the Appellate Court ignored the evidence contained in this record which is replete with evidence that she is competent.

The Trial Court's error is compounded by refusing to allow the Director of the Guadalupe House, of Our Lady of the Wayside, located at 37665 Detroit Road, in Avon, Ohio, to assist with Sonya's communication to the Court. T. at 23-24. Our Lady of the Wayside, of which the Guadalupe House is a part, is the group home for developmentally disabled adults where Sonya resided at the time of the competency hearing with thirty-two (32) other individuals.

As the Court continued, Sonya's competency just became more evident with the following:

The Court: Has anyone talked to you about not telling a lie?
The Witness: Told me not to lie (again appropriate). T. at 25.
The Court: Told you not to lie?
The Witness: Un-unh. Tell the Truth (appropriate). T. at 25.

Sonya's competency cascaded before the Court as the Court asked:

The Court: What happens if you tell a lie and somebody finds out?
The Witness: In hot water (it can't be said any better by anyone, whether developmentally disabled or not). T. at 25.

The Court continued and Sony responded appropriately:

The Court: Would you promise me to tell the truth if I let you testify there? I know you just shook your head but you have to tell me the words, ma'am.

The Witness: Yes. I try. T. at 26. (at this point the Court should have declared her competent and allowed the Prosecution to utilize cross-examination on her to impeach her- not declare her incompetent).

Not satisfied with this response the Trial Court continued with confusing questions to Sonya:

The Court: Can you promise me that you will tell the truth today and not guess about anything?
The Witness: Unh-unh.
The Court: You can't promise me that? (which seems to be a leading question focusing on disqualifying her as a witness).
The Witness: Yes, me try. T. at 26. (as Sonya responds appropriately to a confusing interrogation for anyone).

Defense counsel then elicited the following:

Q. Is it good or bad to lie?
A. Wrong.
Q. Will you tell the truth?
A. Oh, yes, Me, I try. I see my father (as her father the Appellant was seated in the Courtroom and this naturally excited Sonya). T. at 28.

The Prosecutor inquired with this:

Q. I understand you love your father very much. What does it mean to testify?
A. Me to tell the truth (which is a crystal clear answer - which the Court Reporter heard and transcribed). T. at 29.

Yet the Prosecutor tries to confuse Sonya with:

Q. I'm sorry. I didn't understand.
A. Me tell the truth (Sonya's competency is plainly seen).

As Sonya was the only eyewitness on Appellant's behalf, the Court's ruling cannot be harmless error as the ruling dealt a death blow to a case where the Appellant claimed and prevailed on a Count of Attempted Murder and was convicted of Felonious Assault. Sonya witnessed the attack and it was wrong to declare her incompetent to testify.

The Appellate Court found the response "thirty-two", inappropriate to the question as to whom she lived with. The transcript verifies the answer was appropriate and responsive as she was telling the Court she lived with thirty-two (32) other adults. So, that Appellate Court contention must fail as justification for not finding her competent.

The Ninth District also wrote that she was unable to tell the Court her address, yet Sonya's response was:

> The Court: Do you know the address there?
> The Witness: 44 - I don't know. 44011

Her response was the zip code for the Guadalupe House in Avon, Ohio -- which is more than many individuals know -- who certainly would be competent to testify despite not knowing their zip code or their address for that matter. Again, the Appellate Court's decision cannot be supported by Sonya providing her zip code rather than the address of "37665 Detroit Road, Avon, Ohio 44011", which is not a litmus test for competency.

The Appellate Court reaches for justification of its' decision affirming the Trial Court by stating that Sonya did not know what she did on her last birthday. Her answer was "I don't remember" -- which is how most people would answer that question.

The Appellate Court holds it against finding Sonya competent by stating she wanted to see her father.

As her father had been in jail for two and one-half (2 1/2) years at the time of her competency hearing this reaction is perfectly normal for her. She had lived with her father for forty-three (43) years and she missed her father. This should not affect a legal finding of competency merely because she reacts to her seeing her father as a developmentally disabled adult.

Proposition of Law Number 2: Egregious prosecutorial misconduct during the prosecutor's final argument to the jury entitles the accused to a new trial

The Prosecutor in this trial made personal comments on the credibility of witnesses and he expressed his personal beliefs that Appellant was lying as a witness.

The Prosecutor, in his closing argument, argued as follows as to the Appellant's credibility:

MR. CILLO: ...the admitted liar which you are allowed to weigh about his credibility.
MR. DUFF: Object. Admitted liar, Your Honor.
MR. CILLO: Okay. A proven liar.

And the Trial Court adds to this error by ruling:

THE COURT: Why don't you just be specific.
MR. DUFF: Object to proven liar.
MR. CILLO: The proven liar for August of -- .

Again the Trial Court allows the Prosecutor to continue with the personal insults and insinuations directed at the Appellant:

MR. CILLO: The proven liar based upon the August 1999--

MR. DUFF: Object.

And the Prosecutor's closing continues with improper personal attacks upon the Appellant. The egregious prosecutorial misconduct is the theme of the Prosecutor's closing argument.

As to the Appellant's trial testimony, the Prosecutor states that:

MR. CILLO: ...Well apparently it took two and a half years to concoct this story.

The attack continues:

MR. CILLO: The Defendant had an opportunity to alter, to imagine--
MR. DUFF: Object.
MR. CILLO: And to do things and to create different --
THE COURT: Overruled.

MR. CILLO: Differences that what he told Detective Baker.

And there is more:

MR. CILLO: I don't try to explain everything to mislead you. But the defendant did.
MR. DUFF: Object.
THE COURT: Overruled.

With the Trial Court compounding the error by adding the imprimatur of legitimacy to the prosecutorial misconduct, the Appellant had no chance at receiving a fair trial.

But the Prosecutor has not finished yet with his misconduct as he argues that:

MR. CILLO: You know, the cold, hard, ugly truth of the matter is sometimes people are just mean and vindictive and make a decision to kill other people. Eighty-two years of law-abiding life is not an excuse nor will it be offered in the jury instructions by the Judge.
MR. DUFF: Object.

And the Trial Court allows this by ruling:

THE COURT: Overruled.

Prosecutor Cillo opines that the Appellant:

MR. CILLO: Now, the fact of the matter is, Paul Hashman had enough.
MR. DUFF: Object.
THE COURT: Overruled.
MR. DUFF: Opinion, not based on evidence, Your Honor.
THE COURT: Rephrase.

Mr. Cillo continues the prosecutorial misconduct by characterizing the Appellant as follows:

MR. CILLO: What does this tell you about Mr. Hashman? An out and out liar to the police and that day.

It is hornbook law that it is improper for Prosecutors to either comment on the credibility of a witness or to express a personal belief that a particular witness is lying. *United States v. Young, 470 U.S. 17-19 (1985), Berger v. United States, 295 U.S. 78, 86-88 (1935).*

Prosecutors cannot put forth their opinions as to the guilt or credibility of a defendant. *United States v. Carroll, 26 F.3D 1380, 1389 (6TH Cir. 1994).* The Sixth Circuit stated in Carroll that: "We cannot overstate the extent to which we disapprove of this sort of improper vouching by prosecutors." *Id. at 1389.* Ohio law has long held that it is improper for an attorney to express his personal belief or opinion as to the credibility of a witness or as to the guilt of the accused. *State v. Smith,* 14 Ohio St.3d 13 (1984).

In this case, Prosecutor Cillo called Appellant a "proven liar" and a "mean and vindictive" man who made a decision to kill other people. This Court cannot sanction or approve of such as argument.

The Appellate Court assumed for the "sake of argument" that the Prosecutor's closing argument was improper based upon personal insults the Prosecutor directed at the Appellant in calling him a "liar, an admitted liar", and found that this error was harmless. This finding is wrong and unsupported by the record that "the jury was presented with evidence from several witnesses that demonstrated Mr. Hashman's guilt." This is simply false.

This was a close case where the jury acquitted Appellant of Attempted Murder for having shot his neighbor who attacked him with a snowblower. The Appellant was an eighty-four (84) year old man who was convicted of Felonious Assault for hitting the alleged victim with the butt of the gun after shooting Oskins.

The only testifying witness to the fight over the gun was a passerby named Chris Kantura, who testified as follows:

> Q. Just fighting over something?
> A. Yeah, they were wrestling, T. at 241-242.

Mr. Kantura testified that Oskins was on the ground, and gained control of the gun. T. at 242. Also see, Transcript at 245-265, wherein he testified that he saw two (2) men holding each

other while erect and struggling and they eventually fell to the ground and wrestled with the larger man, until Mr. Oskins, got control of the gun. T. at 236-239, 241-242. As he watched the two men he thought they were just goofing around in the snow. T. at 245.

This individual eyewitness is hardly "several different witnesses that demonstrated Mr. Hashman's guilt" of Felonious Assault as found by the Appellate Court. There were not any other testifying eyewitness as to the fight between the Appellant and Oskins.

The only other eyewitness was Appellant's daughter, Sonya Hashman, who watched the incident from the Appellant's house and who was improperly declared incompetent as a witness by the Trial Court.

Thus, the Appellate Court's assumption "for the sake of argument" falls flat on its face as there were no eyewitnesses to the fight other than Appellant, who testified he acted in self-defense, and Oskins, who attacked Appellant with a snowblower.

Therefore, the Appellate Court's conclusion that Appellant cannot demonstrate that but for the improper argument by the Prosecutor that there is a reasonable probability of the outcome of the trial would have been different is wrong and unsupported by the facts and the record. In fact, in a one on one fight with no eyewitnesses, the conclusion is compelled that the outcome would have been different but for the prosecutorial misconduct in closing argument of personally attacking the Appellant as being a "proven liar" or "admitted liar."

And the Trial Court sanctioned and approved of this stating:

Mr. Duff:	Object. Admitted liar; Your Honor.
Mr. Cillo:	Okay. A proven liar.
The Court:	Why don't you be specific.
Mr. Cillo:	The proven liar from August of
Mr. Duff:	Objection.
The Court:	Hold on a second. Hold on a second Mr. Duff. If you will allow me to rule on your objection, then we can move on.

Mr. Cillo: I will tie it to an event.
The Court: Please do.
Mr. Cillo: That's what I was trying to do.
The Court: Start with that
Mr. Cillo: The proven liar based upon the August 1999-
Mr. Duff: Object. T. at 958-959.

So the Trial Court gives its' blessing to the Prosecutor calling Appellant a liar. This was purely abusive and beyond the pale. *See, State v. Clemons, 82 Ohio St. 3d at 452 (1998) and State v. Brown, 38 Ohio St. 3d at 317 (1988), and State v. Leonard, 104 Ohio St. 3d 54 at 86 (2004)* wherein this Court stated that a prosecutor's characterization of a defendant as a liar is generally improper.

The record of the closing argument verifies the prosecutor's comments were "purely abusive" and not based upon any evidence at trial.

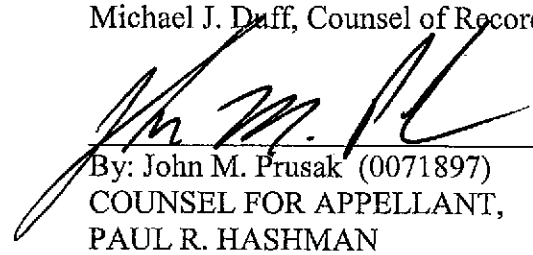
The comments were egregious and materially prejudiced Appellant in a case of Appellant's word being pitted against the word of Oskins as to who had the gun while they wrestled and who hit whom with the gun.

CONCLUSION

For the reasons discussed above, Appellant respectfully requests that this Honorable Court accept jurisdiction in this case so that the important issues presented could be reviewed and Appellant's freedom restored at the appropriate time.

Respectfully submitted,

Michael J. Duff, Counsel of Record



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CERTIFICATE OF SERVICE

I certify that a copy of this Memorandum in Support of Jurisdiction was hand delivered to the Lorain County Prosecutor's Office, 225 Court Street, Third Floor, Elyria, Ohio 44035 on the 7TH day of December, 2007.

Michael J. Duff, Counsel of Record

By: John M. Prusak (0071897)

COUNSEL FOR APPELLANT,
PAUL R. HASHMAN

APPENDIX

A. Decision and Journal Entry of the Ninth District Court of Appeals Reversing Trial Court;

EXHIBIT A.

Decision and Journal Entry of the Ninth District Court of Appeals Affirming Trial Court

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	
STATE OF OHIO		C. A. No. 06CA008990
Appellee		
v.		APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS
PAUL R. HASHMAN		COUNTY OF LORAIN, OHIO
Appellant		CASE No. 04 CR 064703

DECISION AND JOURNAL ENTRY

Dated: October 22, 2007

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

CARR, Judge.

{¶1} Appellant, Paul R. Hashman, appeals the decision of the Lorain County Court of Common Pleas, which found him guilty of felonious assault. This Court affirms.

I.

{¶2} Mr. Hashman and his daughter, Sonya Hashman, lived next door to Darrell Oskins and his family for a period of twenty-five to twenty-seven years.

{¶3} Prior to 1998, the Hashmans and the Oskins coexisted peacefully. However, this relationship changed in 1998 when Mr. Oskins constructed a garage

on his property. During the construction, the relationship between Mr. Oskins and Mr. Hashman began to deteriorate. Over the next several years, the two families had several confrontations, many of them involving violence. On January 19, 2004, the hostilities between Mr. Oskins and Mr. Hashman resulted in Mr. Hashman shooting Mr. Oskins multiple times and then hitting Mr. Oskins repeatedly with the same firearm. As a result of Mr. Hashman's actions, Mr. Oskins sustained multiple injuries which required numerous surgeries.

{¶4} When the police arrived on the scene, Mr. Hashman was taken into custody. Mr. Hashman admitted to carrying a gun on January 19, 2004, when he approached Mr. Oskins, but claimed it was because he was afraid of the Oskins family.

{¶5} Due to the incident on January 19, 2004, Mr. Hashman was indicted by the Lorain County Grand Jury on two counts of attempted murder, violations of R.C. 2923.02/2903.02 with firearm specifications, and one count of felonious assault, a violation of R.C. 2903.11 with a firearm specification. One count of attempted murder was dismissed prior to trial.

{¶6} A jury trial commenced on July 17, 2006. The trial court held a competency hearing to determine whether Mr. Hashman's daughter Sonya was competent to testify. Sonya was forty-five years old and has been diagnosed with Down Syndrome. The trial court found that Sonya was not competent to testify, and the trial proceeded. Mr. Hashman was found guilty of felonious assault with a

three-year firearm specification and not guilty of attempted murder. Mr. Hashman was sentenced to a total period of seven years incarceration.

{¶7} Mr. Hashman timely appealed, setting forth two assignments of error for review.

II.

ASSIGNMENT FOF ERROR I

> "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN RULING THAT SONYA HASHMAN, A FORTH-FIVE (45) YEAR OLD WOMAN SUFFERING FROM DOWNS [sic] SYNDROME, WAS INCOMPETENT TO TESTIFY AS A KEY DEFENSE WITNESS IN HER FATHER'S TRIAL WHEN SHE COULD [ACCURATELY] OBSERVE, RECOLLECT, AND COMMUNICATE HER PERSONAL OBSERVATIONS."

{¶8} In his first assignment of error, Mr. Hashman argues that the trial court erred in finding Sonya Hashman incompetent to testify. This Court disagrees.

{¶9} Decisions on witness competency are within the sound discretion of the trial court and will not be overturned absent an abuse of discretion. *State v. Clark* (1994), 71 Ohio St.3d 466, 469. An abuse of discretion is more than an error of law or judgment; rather, it is a finding that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Under this standard of review, an appellate court may not merely substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621.

{¶10} Evid.R. 601 relevantly provides that "[e]very person is competent to be a witness except *** [t]hose of unsound mind, and children under ten years of age, who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly." Evid.R. 601(A); see also R.C. 2317.01. The term "[o]f unsound mind", as defined at R.C. 1.02(C), includes all forms of mental retardation. Being of unsound mind, however, does not automatically render a witness incompetent to testify. *State v. Bradley* (1989), 42 Ohio St.3d 136, 140; see, also, *State v. Sanders*, 8th Dist. No. 86405, 2006-Ohio-809, ¶12. "Indeed, some unsoundness of mind does not render a witness incompetent if the witness otherwise possesses the three basic abilities required for competency: the ability to accurately observe, recollect, and communicate that which goes on around him or her." *State v. Cooper* (2000), 139 Ohio App.3d 149, 164, citing *State v. Wildman* (1945), 145 Ohio St. 379.

{¶11} In the present matter, the court questioned Sonya at length in its effort to determine whether she was competent to testify. Sonya was able to tell the court how old she was. However, she was unable to tell the court her address. When asked with whom she lived, Sonya replied "thirty-two (32)." The court asked if she meant that she lived with thirty-two other people and she answered "right." When asked with whom she lived prior to that, Sonya replied "[y]es, who lives on all name, all three beat him and her daughter beat me, too." Sonya was

unable to recall what she did on her last birthday, but upon further questioning, she was able to tell the court her birth month, date, and year.

{¶12} Sonya told the court that she did not go to school, but that she works at the workshop. When asked what she does at the workshop, she replied "18 years."

{¶13} When asked if she knew what can happen if you tell a lie, Sonya responded, "No. Nobody talked about this." Sonya stated that someone talked to her about what to say at the trial, but when the court asked her who, she replied, "Her name. All three beat him." The court asked Sonya if she could promise to tell the truth and she answered, "Yes, me try." When asked why she was in court, Sonya stated, "To see my father." Throughout the questioning, Sonya stated several times that she wanted to see her father.

{¶14} Based upon our review of the record and the case law set forth above, the trial court did not abuse its discretion in determining that Sonya was incompetent to testify at trial. Sonya's answers did not demonstrate that she possessed the ability to accurately observe, recollect, and communicate what was occurring during the competency hearing portion of the trial. More often than not, Sonya's replies did not respond to the questions she was asked. Rather, Sonya's responses demonstrated that her primary concern was that she be allowed to see her father. Furthermore, the trial court was in the best position to observe the

witness and assess her credibility and propensity to competently testify. Mr. Hashman's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

"PROSECUTORIAL MISCONDUCT ENTITLES APPELLANT TO A NEW TRIAL."

{¶15} In his second assignment of error, Mr. Hashman contends that he is entitled to a new trial due to improper comments made by the prosecutor during the State's closing argument. Specifically, Mr. Hashman argues that the prosecutor made personal comments on the credibility of witnesses and that he expressed his personal beliefs that Mr. Hashman was lying.

{¶16} "In deciding whether a prosecutor's conduct rises to the level of prosecutorial misconduct, a reviewing court must determine if the remarks were improper, and, if so, whether they actually prejudiced the substantial rights of the defendant." *State v. Overholt*, 9th Dist. No. 02CA0108-M, 2003-Ohio-3500, at ¶47, citing *State v. Smith* (1984), 14 Ohio St.3d 13, 14. "Isolated comments by a prosecutor are not to be taken out of context and given their most damaging meaning." *State v. Hill* (1996), 75 Ohio St.3d 195, 204, citing *Donnelly v. DeChristoforo* (1974), 416 U.S. 637, 647. Furthermore, Mr. Hashman must show that there is a reasonable probability that but for the prosecutor's misconduct, the result of the proceeding would have been different. *State v. Loza* (1994), 71 Ohio St.3d 61, 78.

{¶17} In reviewing Mr. Hashman's claim, we note that

> "[i]t is not prosecutorial misconduct to characterize a witness as a liar or a claim as a lie if the evidence reasonably supports the characterization. However, prosecutors may not invade the realm of the jury by, for example, stating their personal beliefs regarding guilt and credibility, or alluding to matters outside the record." (Internal citations omitted.) *State v. Baker,* 159 Ohio App.3d 462, 2005-Ohio-45, at ¶19.

Generally, a prosecutor is allowed wide latitude in the closing argument to present his most convincing positions to the jury, and "[t]he jury should be given credit for sufficient common sense and sound judgment" to weigh the prosecutor's words appropriately. *State v. Woodards* (1966), 6 Ohio St.2d 14, 26; see, also, *State v. Smith*, 9th Dist. Nos. 01CA0039, 01CA0055, 2002-Ohio-4402, at ¶96.

{¶18} Mr. Hashman points to multiple instances of alleged prosecutorial misconduct during closing argument. Mr. Hashman takes issue with several of the prosecutor's statements in which the prosecutor used the word "liar." One statement that Mr. Hashman points to is "In fact, five days later after they called the police, after he has lied, the admitted liar which you are allowed to weigh about his credibility [sic]." Mr. Hashman points to several more statements within this portion of the State's closing in which the word "liar" is used. At first glance, the prosecution in the present matter appears to be calling Mr. Hashman a liar. However, when read in context, it is clear that the prosecution is pointing out to the jury that Mr. Hashman's own testimony showed that he lied to an Elyria police officer during the investigation of a firearm complaint in August of 2003 about

whether he possessed a firearm. While personal opinions of guilt which are based upon the evidence are not encouraged, they are not deemed to be prejudicially erroneous. *State v. Stephens* (1970), 24 Ohio St.2d 76, 83.

{¶19} Mr. Hashman also takes issue with several more of the prosecutor's statements which, when not read in context, appear to make reference to Mr. Hashman's credibility or seem to be a result of the prosecutor's personal opinion. However, when read in context, the prosecutor's statements do not rise to the level of prosecutorial misconduct.

{¶20} Assuming for the sake of argument that the State's argument was improper, Mr. Hashman has failed to demonstrate prejudice from such an error. The jury was presented with evidence from several different witnesses that demonstrated Mr. Hashman's guilt. Consequently, Mr. Hashman cannot demonstrate that but for the statements regarding credibility in the State's closing argument that there is a reasonable probability that the outcome of his trial would have been different. Consequently, Mr. Hashman has failed to meet his burden of demonstrating both error and prejudice. Mr. Hashman's second assignment of error is overruled.

III.

{¶21} Mr. Hashman's assignments of error are overruled. The decision of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellant.

DONNA J. CARR
FOR THE COURT

WHITMORE, P. J.
MOORE, J.
CONCUR

APPEARANCES:

MICHAEL J. DUFF, Attorney at Law, for appellant.

DENNIS WILL, Prosecuting Attorney and BILLIE JO BELCHER, Assistant Prosecuting Attorney, for appellee.