

IN THE SUPREME COURT OF OHIO
2008

STATE OF OHIO,

Case No. 08-1012

Plaintiff-Appellee,

-vs-

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

DAVID B. CLINKSCALE,

Court of Appeals
Case No. 06AP-1109

Defendant-Appellant

**MEMORANDUM OF PLAINTIFF-APPELLEE IN OPPOSITION
TO JURISDICTION**

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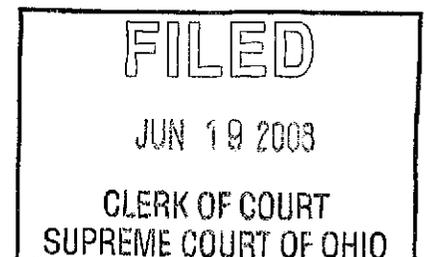


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EXPLANATION OF WHY THIS COURT SHOULD DECLINE JURISDICTION

Defendant presents no compelling reason for why this Court should expend its scarce judicial resources to review his case. This case would be a poor vehicle in which to review his claims of error. No timely objection was made to the meeting with the juror who was excused, even though the defense conceded that it was aware of the meeting at the time. No objection was ever made to the excusal of the juror. No objection was ever made to the substitution of the alternate. Thus, any review of the first two propositions of law would occur under a plain-error standard of review, which defendant cannot satisfy for the many reasons discussed in the argument below.

The appellate record is also inadequate to allow sufficient review of those propositions of law or of the claim of trial counsel ineffectiveness. Much of what defendant relies on are comments made by defense counsel three weeks after the meeting with and excusal of the juror. Such comments do not constitute a proper appellate record of what occurred. Moreover, the prosecutor contended that the defense had agreed to the excusal of the juror and the substitution of the alternate juror. See, also, Tenth Dist. Op. at ¶ 59 (Tyack, J., concurring – “we can only infer that counsel and the defendant did not disagree with the fact of the necessity to excuse the juror. Neither did counsel or the defendant express any dissatisfaction with seating the alternate and beginning deliberations anew.”). This factual dispute over whether there was defense agreement would prevent this Court from ultimately reaching a resolution of the appeal on any of the proposed propositions of law.

The appellate record is also inadequate regarding the claim of trial counsel

ineffectiveness. Counsel very well could have decided not to object for tactical reasons, and there was no prejudice.

In addition, each proposition of law is fatally flawed because each contends that the excused juror was the “sole dissenter” at the time of excusal. To be sure, Judge Whiteside’s dissent made that claim, but **there is no appellate-record support for such claim.** The appellate record does not show what the juror’s position was on the case. Indeed, defendant quotes a colloquy between defense counsel and the prosecutor three weeks after the fact, which shows that the defense counsel was uncertain what position the juror was taking and that counsel did not want to voir dire the juror at the time of excusal. See Memo Supp. Juris., at 7.

Finally, review of this case would provide little benefit for the review of future cases. Amendments to Crim.R. 24(G) that are scheduled to take effect on July 1, 2008, will expressly allow the trial courts to make a mid-deliberation substitution with an alternate juror. Review of the present case therefore would not aid Ohio trial courts in the future in dealing with such issues.

In the final analysis, the present case would come here on an inadequate appellate record, would come here under a plain-error standard of review, and would not aid Ohio trial courts in future cases. This Court’s resources would be better spent on other cases. Accordingly, the State respectfully requests that this Court decline jurisdiction in all respects.

STATEMENT OF THE CASE AND THE FACTS

The State incorporates by reference the factual and procedural history set forth

in paragraphs 1 to 5, paragraphs 22 to 30, and paragraphs 37 and 39 of the Tenth District's majority opinion.

ARGUMENT

Response to First and Second Propositions of Law: A defense claim of improper mid-deliberation excusal of a juror and substitution of an alternate is reviewed under a plain-error standard of review when the defense made no objection to such excusal and substitution.

Response to Third Proposition of Law: Trial counsel is strongly presumed to have acted in a competent manner.

A.

When the jury reconvened on the morning of Monday, September 11, 2006, to receive the answer to one of its questions from Friday, the court indicated that one of the jurors had been excused because of a "medical issue." (T. 1493) The court ordered that the first alternate, Mr. Thaler, be substituted, and Thaler was sworn. (T. 1493-94) The defense raised no objection.

After responding to the question from Friday, the court also instructed the jurors to begin deliberations anew. (T. 1497) The defense raised no objection.

After the jury retired to deliberate, the defense discussed at length an objection it claimed to have regarding an answer to one of the questions from Friday. (T. 1500-1502) The defense still raised no objection to the substitution of the alternate.

The jury returned its guilty verdicts at noon on that Monday, and the defense requested a jury poll. (T. 1505-1511) All jurors, including Thaler, voiced their assent to the verdicts. (T. 1510-11) Thaler was now juror six on the jury. (T. 1510-11)

When court reconvened three weeks later on October 2, 2006, for the penalty

phase, defense counsel raised an issue regarding the excusal. Counsel conceded that no objection had been raised on September 11th, but counsel contended that the defense now wanted to object “to the process.” (T. 1524) According to counsel, the bailiff had informed the attorneys that juror number *three* was having heart palpitations,¹ and that juror had previously disclosed in jury selection that she had a previous heart condition. (T. 1523) According to counsel, the juror wanted to be excused. (T. 1523)

Counsel indicated that the substitute judge “presumably talked to Juror Number Three about her condition.” (T. 1523) Counsel indicated the substitute judge “came out and said something to the effect that she had excused Juror Number Three. She didn’t believe that somebody should lose their life, have a heart attack or something like that, because they were seated on a jury.” (T. 1524) Counsel said that the court had “already excused” the juror. (T. 1527) The defense still raised no objection under Crim.R. 24.

The prosecutor contended that the defense had affirmatively agreed to the excusal of the regular juror and the resulting substitution of the alternate because “everyone agreed as a group that we would let her go and seat the alternate.” (T. 1526) Had there been an objection, the court could have held a hearing, and, more importantly, deliberations could have been halted so that the juror could go see a doctor. (T. 1526) Defense counsel denied having agreed to the excusal and substitution. (T. 1526-27)

¹ Defense counsel’s unofficial rendition of events appeared to be flawed, since the transcript shows that alternate Thaler became juror number *six*, not juror number three. (T. 1510-11)

The court did not endorse either view of what occurred. (T. 1527) Instead, the court said that “their objection is either on the record or it isn’t on the record. We can’t revise the record at this point no matter how long ago.” (T. 1527)

B.

To the extent defendant relies on his trial counsel’s statements regarding the excusal of the juror, the State submits that those statements represent an inadequate appellate record to review the issue. Those statements were made three weeks after the excusal and represent *counsel’s* rendition of what occurred. The Appellate Rules approve of four ways in which a record of proceedings can be properly brought up to the appellate court, and the main way is a court reporter’s transcript. See App.R. 9(B). Other methods of creating an official appellate record require the approval of the trial or appellate court. See App.R. 9(C), 9(D), App.R. 9(E). None of these procedures were used to record and transmit what occurred when the juror was excused, and counsel’s unofficial, unilateral statements three weeks after the fact are not a proper means of settling the record. See *State v. Schiebel* (1990), 55 Ohio St.3d 71, 81-82; *King v. Plaster* (1991), 71 Ohio App.3d 360, 362; *State v. Dickard* (1983), 10 Ohio App.3d 293, 295.

A defendant claiming error has the burden of proving that error by reference to matters in the appellate record. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199. “[T]here must be sufficient basis *in the record* * * * upon which the court can *decide* that error.” *Hungler v. Cincinnati* (1986), 25 Ohio St.3d 338, 342 (emphasis sic). Defendant cannot prove error by reference to unofficial, unilateral statements of

trial counsel that were never approved by the trial court.

C.

Even under counsel's unofficial rendition, no timely objection was made to the juror's excusal, and the ex parte communications occurred with foreknowledge of the defense, as counsel acknowledged seeing the judge enter the office to privately speak with the juror. As a result, the issue is waived absent a showing of plain error, and defendant cannot show plain error. Had the defense objected, the juror's health issues might have been resolvable without excusing the juror, and, contrary to Judge Whiteside's contention below, there is no indication that the excused juror would have voted different than the alternate juror.

The State notes that an ex parte communication with the jury does not create a conclusive presumption of prejudice. *Schiebel*, 55 Ohio St.3d at 84. "The communication must have been of a substantive nature and in some way prejudicial to the party complaining." *Id.* at 84. "[E]ven where the communication involves a substantive issue, the defendant still must demonstrate that he was prejudiced by the communication." *State v. Cook*, 10th Dist. No. 05AP-515, 2006-Ohio-3443, ¶ 36. The record must show that a private contact, without full knowledge of the parties, occurred between the judge and jurors which involved substantive matters, and the record must show actual prejudice. *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, at ¶ 84.

Though it is improper to consider the prosecution's and defense's unofficial renditions, the State notes that, if those renditions are true, the trial court could rightly treat the matter on an ex parte basis because the inquiry was health-related only and

because a more formal hearing with counsel and defendant present and participating could have added to the juror's stress and affected her health further. Ex parte discussions of the juror's health do not violate the rights of the defense. *Randolph v. State* (2001), 117 Nev. 970, 989-90, 36 P.3d 424, 436-37; see, also, *Toombs v. State* (Ala.Crim.App. 1999), 739 So.2d 550, 552 (illness of juror's child treated as emergency).

The State further notes that, if the prosecutor's rendition is accepted as true, then the defense invited the purported error by affirmatively agreeing to the excusal even without participating in the conference with the sick juror.

D.

Criminal Rule 24(G)(1) provides that, except in "capital cases," alternate jurors shall be discharged when the jury retires to consider its verdict. In "capital cases," the alternate jurors can continue to serve if more than one deliberation is required. Crim.R. 24(G)(2). Pursuant to *State v. Harwell*, 102 Ohio St.3d 128, 2004-Ohio-2149, this case was still a "capital" case because defendant faced capital specifications, and because *Harwell* requires "capital" procedures in such cases, a penalty-phase jury deliberation was required. But even when the alternates continue to serve, Crim.R. 24(G)(2) provides (until July 1, 2008) that "[n]o alternate juror shall be substituted during any deliberation." If Crim.R. 24(G)(2) is constitutional, see Part F below, then Crim.R. 24(G)(2) was violated when alternate Thaler was substituted for the regular juror who had "medical issues."²

² Purporting to quote *State v. Hutton* (1990), 53 Ohio St.3d 36, defendant contends that the rule against substitution during deliberations was founded on a fear that jurors

Notwithstanding the violation of Crim.R. 24(G)(2), the case evades reversal because there was no objection at any time before the verdicts. Even three weeks later, counsel did not object to the substitution, did not raise Crim.R. 24, and instead only complained that the “process” of meeting with and excusing the regular juror had been flawed. If one considers the prosecutor’s rendition, the defense agreed with the substitution.

The lack of objection results in a waiver/forfeiture of the issue. As recognized in *State v. Murphy* (2001), 91 Ohio St.3d 516, 532, “The waiver rule requires that a party make a contemporaneous objection to alleged trial error in order to preserve that error for appellate review. The rule is of long standing, and it goes to the heart of an adversary system of justice.” The principle even extends to constitutional questions. *State v. Awan* (1986), 22 Ohio St.3d 120, syllabus. “The legitimate state interest in orderly procedure through the judicial system is well recognized as founded on the desire to avoid unnecessary delay and to discourage defendants from making erroneous records which would allow them an option to take advantage of favorable verdicts or to avoid unfavorable ones.” *Id.* at 123. The longstanding waiver rule is “strict.” *State v. Long* (1978), 53 Ohio St.2d 91, 96.

“Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” Crim.R. 52(B). But plain error will be

in the minority would feign illness to avoid the turmoil of deliberations. But defendant fails to mention that the *Hutton* court was merely reciting what others had “suggested.” The *Hutton* court expressly *rejected* that view and stated that “we agree with those commentators who consider the possibility of malingering unduly speculative, * * * unrealistic, * * * and inconsistent with the familiar presumption that jurors obey the court's instructions * * *.” *Hutton*, 53 Ohio St.3d at 47-48.

recognized only when, “but for the error, the outcome of the trial clearly would have been otherwise.” *Long*, paragraph two of the syllabus. “Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.” *Id.* at paragraph three of the syllabus.

In *State v. Barnes* (2002), 94 Ohio St.3d 21, the Court discussed the plain-error standard extensively and concluded that correction of plain error is discretionary:

[Crim.R. 52(B)] places three limitations on a reviewing court’s decision to correct an error despite the absence of a timely objection at trial. First, there must be an error, *i.e.*, a deviation from a legal rule. Second, the error must be plain. To be “plain” within the meaning of Crim.R. 52(B), an error must be an “obvious” defect in the trial proceedings. Third, the error must have affected “substantial rights.” We have interpreted this aspect of the rule to mean that the trial court’s error must have affected the outcome of the trial.

Even if a forfeited error satisfies these three prongs, however, Crim.R. 52(B) does not demand that an appellate court correct it. *Crim.R. 52(B) states only that a reviewing court “may” notice plain forfeited errors; a court is not obliged to correct them. * * **

Barnes, 94 Ohio St.3d at 27-28 (citations omitted; emphasis added). Courts will also refuse to correct plain error when the failure to object was a deliberate, tactical decision.

State v. Clayton (1980), 62 Ohio St.2d 45, 46-48.

E.

Under plain-error review, defendant’s claim of error under Crim.R. 24(G)(2) does not warrant reversal. Defendant cannot show that the error was outcome determinative. An objection would not have been “futile.” Had the defense timely objected to the substitution, the court could have stopped the proceedings and very well

could have contacted the juror it had released. It is axiomatic that a court only speaks through its journal and that, until an entry is journalized, the court retains the right and discretion to review and reverse its previous rulings. *State ex rel. Hansen v. Reed* (1992), 63 Ohio St.3d 597, 599. The release of the regular juror had not been journalized and therefore was subject to reconsideration. Moreover, the release of the juror at that point had been recent, and it was unlikely that anything had occurred in the interim that would permanently affect the juror's ability to sit on the jury, provided that the medical issues were resolved. A voir dire of the juror could have been conducted upon the juror's return to ensure that the juror had not been tainted by the release. Defendant cannot show that the outcome clearly would have been different, as a mistrial might have been avoided through reconsideration and return of the juror.

Even if the three *Barnes* prongs were satisfied, an appellate court should disregard the error. Given the many opportunities to object, the failure to object must have been deliberate and tactical because the defense welcomed the substitution of the alternate. Deliberate, tactical decisions of this sort preclude the correction of the error.

Enforcing the waiver against defendant does not constitute a manifest miscarriage of justice. A leading case is *LeFort v. Century 21-Maitland Realty Co.* (1987), 32 Ohio St.3d 121, in which the pertinent Civil Rule had been violated by the substitution of an alternate during deliberations. In the absence of an objection, the Court in its syllabus refused to reverse:

Where a juror is incapacitated and replaced during the course of jury deliberations, a violation of Civ. R. 47(C) does not require reversal, where counsel knows of the substitution, raises no objections thereto, and participates in the rule-violating procedures.

As in *LeFort*, the defense here did not object and even participated in the rule-violating procedures by asking for a poll of the jury, including the juror Thaler.

There is no requirement of per se reversal for this issue. *State v. Miley* (1991), 77 Ohio App.3d 786; *State v. Fisher* (1996), 10th Dist. No. 95AP-437. Requiring per se reversal would improperly elevate this issue to the level of structural error, and only constitutional errors can rise to that level. *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, at ¶ 55. Substitution of an alternate juror under these circumstances does not amount to a constitutional error. *Claudio v. Snyder* (C.A. 3, 1995), 68 F.3d 1573, 1575-77 (collecting cases); *United States v. Hillard* (C.A. 2, 1983), 701 F.2d 1052, 1055-57; Fed.R.Crim.P. 24(C)(3) (mid-deliberation substitution now allowed). And even if the error were constitutional and “structural,” such errors can be waived through lack of objection and are subject to plain-error analysis. *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, ¶ 23; *State v. Garrard*, 170 Ohio App.3d 487, 2007-Ohio-1244, ¶¶ 56-58. But, see, *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624.

No reversal for plain error is warranted here because: (1) the excusal of the regular juror could have been reconsidered; (2) the lack of objection was deliberate and tactical and the defense participated in the rule-violating procedures; (3) the jury had been deliberating for only a short time (less than three hours) and was not deadlocked; (4) the jury was instructed to begin deliberations anew; and (5) no manifest miscarriage of justice would occur if the verdicts are allowed to stand. See, also, *State v. Armstrong*, 8th Dist. No. 81114, 2002-Ohio-6053, at ¶¶ 21-30. The absence of grounds for reversal is confirmed by cases like *In re J.J.*, 111 Ohio St.3d 205, 2006-Ohio-5484,

¶¶ 10-15, and *State v. Thomas*, 97 Ohio St.3d 309, 2002-Ohio-6624, ¶¶ 53-58, which found that irregularities in assigning visiting judges do not warrant per se reversal.

F.

The substitution complied with R.C. 2945.29 and R.C. 2313.37(D). R.C. 2945.29 commands that an alternate shall be substituted “before the conclusion of the trial” for a regular juror who is unable to proceed. “[T]he word ‘trial’ in criminal procedure means the proceedings in open court after the pleadings are finished and the prosecution is otherwise ready, *down to and including the rendition of the verdict * * **.” *Thomas v. Mills* (1927), 117 Ohio St. 114, 119 (emphasis added); see, also, *Hutton*, 53 Ohio St.3d at 45 (“trial jury” includes alternate substituted after guilt-phase verdicts); R.C. 2945.24 (jury “shall try the accused”). Since R.C. 2945.29 commands substitution of an alternate up to the time of verdict, and since Crim.R. 24(G)(2) prohibits such substitution (until July 1, 2008), the statute and the rule conflict. The statutory right of the participants to a continued trial is a matter of substantive law, and therefore the statute controls over the rule. Cf. *State v. Greer* (1988), 39 Ohio St.3d 236, 245-46 (right to peremptory challenges is substantive right; number of such challenges is procedural).

R.C. 2313.37(D) generally limits substitution to the time “before final submission of the case to the jury.” But it recognizes an exception for “capital cases” by providing that “final submission” in such cases “includes any hearing required under division (D) of section 2929.03 of the Revised Code * * *.” Thus, “final submission” in a capital case does not occur until the penalty-phase deliberations begin under R.C.

2929.03(D). This exception was added as part of the reenactment of the death penalty in 1981, and it shows the General Assembly's intent that alternate jurors remain available for substitution up to the beginning of penalty-phase deliberations. In the conflict between this statute and Crim.R. 24(G)(2), the statute controls on this substantive matter. Given compliance with these statutes, no error occurred.

G.

To succeed on a claim of ineffectiveness, a defendant must initially show that his trial counsel acted incompetently. *Strickland v. Washington* (1984), 466 U.S. 668. In assessing such claims, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 689, quoting *Michel v. Louisiana* (1955), 350 U.S. 91, 101.

"There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689. The question is whether counsel acted "outside the wide range of professionally competent assistance." *Id.* at 690. In assessing the competence of counsel, every effort must be made to avoid the distorting effects of hindsight. *Id.*

Even if a defendant shows that his counsel was incompetent, the defendant must then satisfy the second prong of the *Strickland* test. Under this "actual prejudice" prong, the defendant must show that "there is a reasonable probability that, but for

counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

When counsel's alleged ineffectiveness involves the failure to pursue an objection, this actual prejudice prong of *Strickland* breaks down into two components. First, the defendant must show that the objection "is meritorious," and, second, the defendant must show that there is a reasonable probability that the verdict would have been different if the objection or motion had been granted. See *Kimmelman v. Morrison* (1986), 477 U.S. 365, 375; see, also, *State v. Santana* (2001), 90 Ohio St.3d 513, citing *State v. Lott* (1990), 51 Ohio St.3d 160, 175 ("Lott has not demonstrated that the trial court would have granted such a motion").

The actual prejudice prong presumes that the judge or jury will act according to law. *Strickland*, 466 U.S. at 694. "To hold otherwise would grant criminal defendants a windfall to which they are not entitled." *Lockhart v. Fretwell* (1993), 506 U.S. 364, 366. The right to effective counsel does not entitle a defendant to the luck of a lawless decisionmaker. *Strickland*, 466 U.S. at 695.

In the present case, the claim of trial counsel ineffectiveness cannot be determined on this appellate record. As recognized in *Massaro v. United States* (2003), 538 U.S. 500, claims of trial counsel ineffectiveness usually will be unreviewable on appeal because the appellate record is inadequate to determine whether the omitted objection or motion really had merit and/or because the possible reasons for counsel's actions appear outside the appellate record. Ohio law similarly recognizes that error cannot be recognized on appeal unless the appellate record supports a finding of error.

Knapp, supra; Hungler, supra.

The decision not to object very well could have been tactical if there were grounds for welcoming the substitution of the alternate. An appellate court cannot say that it is always incompetent assistance to fail to object to the substitution of an alternate. Notably, the jury selection process has not been transcribed. Of course, in hindsight, the no-objection strategy turned out badly, but such hindsight is not allowed.

Nor can defendant show a reasonable probability of a different outcome. Even if counsel had pressed for a greater role in the process of excusing the juror, there is no indication that fuller involvement would have created a reasonable probability of a different outcome. The regular juror very well could have been returned to the jury after a doctor's visit. And an objection to the substitution under Crim.R. 24(G)(2) would have failed because that provision is unconstitutional as in conflict with substantive statutory provisions.

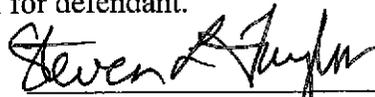
Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail on this 19th day of June, 2008, to William S. Lazarow, 400 South Fifth Street, Suite 301, Columbus, Ohio 43215, counsel for defendant.



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