

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

MERIT BRIEF OF PLAINTIFF-APPELLEE

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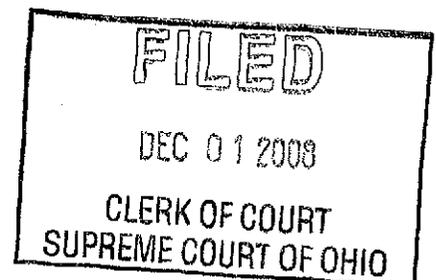


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INTRODUCTION

Several grounds exist either to affirm the Tenth District's judgment or to dismiss defendant's appeal as improvidently allowed.

Neither of the propositions of law accepted by this Court were preserved by a timely objection. No timely objection was made to the alleged meeting with the juror who was excused, even though the defense asserted facts indicating that the defense would have been aware of the meeting at the time and/or very soon after it happened. 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 propositions of law occurs 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 these propositions of law. Much of what defendant relies on are comments made by defense counsel *three weeks after* the alleged 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 prevents this Court from ultimately reaching a resolution of the appeal on either of the accepted propositions of

law. Recognition of plain error is not allowed when the party complaining on appeal made a tactical decision not to object. *State v. Clayton* (1980), 62 Ohio St.2d 45, 46-48.

In addition, both of the accepted propositions of law are 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**. Notably, defendant chooses to quote from Judge Whiteside’s unsupported dissent on this point rather than citing any part of the appellate record showing whether the excused juror was the “sole dissenter.” The State invites the defense to provide the appellate-record citation for this fact.

The defense will be unable to cite appellate-record support. The appellate record does not show what the excused juror’s position was on the case. 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 on that issue at the time of excusal*. See Defendant’s Merit Brief, at 6 (“That’s true”).

Finally, defendant cannot show plain error warranting reversal. Plain-error reversal is justified only when a manifest-miscarriage of justice has resulted. But this Court, earlier this year, approved the very procedure used by the common pleas court. Amendments to Crim.R. 24(G) that took effect on July 1, 2008, expressly allow the trial courts to make a mid-deliberation substitution with an alternate juror, just as occurred here. Crim.R. 24(G)(1). Unless the amended rule is to be deemed a “manifest miscarriage of justice,” plain error should not be recognized here.

STATEMENT OF THE CASE

In an indictment filed on September 29, 1997, defendant Clinkscale was charged with eight counts: (1) aggravated murder of Kenneth Coleman (with prior calculation); (2) aggravated murder of Coleman (during aggravated burglary); (3) aggravated murder of Coleman (during aggravated robbery); (4) attempted aggravated murder of Todne Williams; (5) aggravated burglary; (6) aggravated robbery of Coleman; (7) aggravated robbery of Williams; (8) kidnapping of Williams. (Trial Ct. Rec. 13) Each of the aggravated murder counts included three death-penalty specifications: (1) the murder occurred during an aggravated burglary; (2) the murder occurred during an aggravated robbery; (3) the murder occurred during the purposeful killing or attempted killing of two or more people. (Id.) All counts also included a three-year firearm specification. (Id.)

In a trial occurring in October 1998, defendant was acquitted of count one but convicted on all other counts and all specifications. (Trial Ct. Rec. 195-210) The jury recommended a sentence of life without parole on counts two and three. (Trial Ct. Rec. 236-38) The court imposed the life-without-parole sentence plus consecutive sentences totaling 53 years on the other counts and firearm specification. (Trial Ct. Rec. 240-46)

The Tenth District affirmed the convictions and sentences in all respects in an opinion and judgment rendered in December 1999. *State v. Clinkscale* (1999), 10th Dist. No. 98AP-1586. This Court declined review in April 2000. *State v. Clinkscale* (2000), 88 Ohio St.3d 1482.

The defense filed a motion for leave to file a delayed motion for new trial in October 2000. (Trial Ct. Rec. 285) The defense argued that defendant's trial attorneys

had been ineffective in failing to tender a timely notice of alibi, which resulted in the exclusion of the “alibi” evidence. (Id.) The defense claimed that Bryan Fortner, Rhonda Clark, and Arthur Clinkscale could provide an alibi for defendant. (Id.)

The trial court denied the motion for leave in December 2000. (Trial Ct. Rec. 286) The Tenth District affirmed the denial of leave in a memorandum decision in September 2001. (Trial Ct. Rec. 295) This Court declined review. *State v. Clinkscale* (2001), 93 Ohio St.3d 1497.

Defendant was ultimately successful in convincing the federal Sixth Circuit to grant him federal habeas relief based upon the purported “alibi” evidence counsel had been “ineffective” in failing to present in a timely notice of alibi. *Clinkscale v. Carter* (C.A. 6, 2004), 375 F.3d 430. The two-judge majority granted relief even though no evidentiary hearing had ever been held to confirm the existence of the “alibi” evidence. See id. at 447 (McKeague, J., dissenting).

With the case now back in the trial court, the case proceeded to trial on counts two through eight, now having been renumbered as counts one through seven. (See Trial Ct. Rec. 490-96 – referencing the renumbering) At the retrial, the defense did not present the testimony of Fortner or Clark, and defendant did not testify in support of any alibi. Instead, *the State* introduced defendant’s “alibi” testimony from the first trial, (T. 989 et seq.), in which defendant claimed that he had been with Fortner and Clark at the time of the crimes. In addition, the State established that Fortner had disappeared, (T. 1159, 1169, 1284), and the State itself called Rhonda Clark (now Parker), who testified that the alibi had been a lie from the beginning. (T. 1326-30)

The other "alibi" witness, Arthur Clinkscale, contradicted his own affidavit that had been relied on by the Sixth Circuit. The affidavit stated that defendant had returned home at approximately 5:45 a.m. to 6:00 a.m., (T. 1262), but the elder Clinkscale contended initially in his testimony that defendant had returned home "about 5:45," (T. 1243), and then claimed that defendant returned home exactly at 5:45 a.m., (T. 1261), but then contended that defendant had actually returned home exactly at 5:25 a.m. (T. 1317) The affidavit had also claimed that the elder Clinkscale was aware that Fortner and Clark could provide an alibi, but he claimed in his testimony that he had scant knowledge of Clark's significance, (T. 1291-1300), and even had told police in 2005 that he did not know Clark. (T. 1285-90) In addition, the elder Clinkscale's "alibi" placed defendant in Youngstown roughly 1 ¼ to 2 hours after the crimes, and therefore that testimony could only "alibi" defendant for the crimes occurring before the 911 call at 3:56 a.m. (see T. 733) based on the tenuous assumption that a killer would obey speed limits in going from Columbus to Youngstown.

The jury found defendant guilty on all counts and specifications and therefore necessarily concluded that the alibi raised no reasonable doubt about guilt. (Trial Ct. Rec. 452-59) The jury recommended a sentence of life imprisonment with parole eligibility after thirty years. (Trial Ct. Rec. 482) The court imposed the life-30 sentence plus some consecutive sentences on the other counts resulting in a total sentence of 53 years to life. (Trial Ct. Rec. 475-81)

The Tenth District affirmed in a 2-1 ruling.

STATEMENT OF THE FACTS

Todne Williams testified that she was married to Kenneth Coleman. (T. 45) They were living at 1261 Mooberry in September 1997. (T. 51-52) Coleman dealt in marijuana and liked to gamble on dog-fighting. (T. 54-55) Coleman kept cash in a safe in the upstairs bedroom. (T. 59)

Williams knew a man named "Silk," and Silk was a childhood friend of Coleman. (T. 63) Silk and Coleman were real good friends in September 1997. (T. 64) Williams identified defendant Clinkscale as "Silk." (T. 65) She had met or seen defendant 15 or 20 times prior to September 1997. (T. 64-65)

Coleman mentioned to Williams that he and some others, including "Silk," were going to Kentucky on a Saturday trip. (T. 67-69) Williams saw defendant that Saturday morning. (T. 69) They left around midday on Saturday. (T. 77)

Coleman returned home to the Mooberry address on Sunday morning. (T. 79-80) Coleman told Williams that he intended to play video games on Sunday night with Silk. (T. 81-82, 84, 85)

Silk arrived with a friend around 10:00 p.m. (T. 85) The people in the house at this point were Williams, her two kids, Coleman, Silk, and his friend "Woods". (T. 85, 86-87) Upon their arrival, Williams said "hi," and then she went upstairs to be with her kids. (T. 89) Williams could hear the men talking downstairs and wagering on the video game. (T. 89-90) Williams came downstairs at one point to get a bottle for her baby, and at that point she saw Coleman, defendant, and defendant's friend playing a video game. (T. 93-94)

Williams returned upstairs and fed the baby a bottle. (T. 96-97) Williams talked on the phone with a girlfriend around 2:00 a.m. or 2:30 a.m. and then dozed off for "like 15 minutes." (T. 96-97) The sound of a single gun shot awakened Williams. (T. 97)

Quickly thereafter, defendant came to her bedroom with a nine millimeter gun pointed at her. (T. 99-100) Defendant demanded to know where the money was at. (T. 100) She did not know and said that they should talk to Coleman, but defendant said they could not ask Coleman anything. (T. 100-101) When defendant began checking in the baby's dresser drawers, Williams pleaded with defendant not to hurt the baby (sleeping in the room), and Williams told defendant about the safe in the closet. (T. 101) The second man came into the room and held the gun on Williams while defendant left the room carrying the safe. (T. 102) Defendant returned and told the second man to go downstairs and told Williams to do so as well. (T. 103) Defendant told Williams to go lay next to Coleman, but Williams tried to escape and then began struggling with defendant. (T. 105) Defendant then shot Williams in the face. (T. 109) Williams fell to the floor and tried to act like she was unconscious, but defendant shot her two more times. (T. 110) Williams had tried to block the shots with her arms. (T. 110, 113) Defendant then left. (T. 114)

Williams was able to call 911. (T. 115) At the hospital, Williams told police about "Silk" but said she needed to call Coleman's mom to get defendant's real name. (T. 122-23) "Silk" was defendant Clinkscale. (T. 124) Williams is 100 percent certain of her identification, and she identified him in a photo as the shooter. (T. 125, 126)

Other evidence introduced at the trial indicated that, given blood patterns,

Coleman was seated upright facing toward the television when he was shot in the back of the head. (T. 407-410, 436-37) Coleman died as a result of a through-and-through gunshot wound entering in the back of the head. (T. 672-80, 682-83)

Columbus police fingerprint examiner Rhonda Cadwallader testified that she examined several latent fingerprint lifts from the crime scene. (T. 862-63, 864-65) Fifty-five lifts were examined, of which 35 were of no value. (T. 865) Several of the prints of value were matched to the victim Coleman. (T. 869)

Defendant's prints were found on certain items. (T. 872-73) A single latent print of his left thumb and four latent prints of his left index finger were found on a Playstation game booklet for "NFL Gameday '98" that was found at the scene. (T. 873, 876, 896) A latent print of his left thumb was found on a game controller found at the scene. (T. 873) The prints on the booklet had good ridge detail consistent with being very fresh prints. (T. 877) Regarding the game controller, Cadwallader determined that there was good ridge detail and that the thumbprint was "the last print that was put on this particular item * * *." (T. 878)

Columbus police criminalist Debra Lambourne testified that she examined a blue ball cap that had been found at the scene. (T. 922) She swabbed the hatband area on the inside of the cap and came up with a clean DNA sample. (T. 936) The DNA from the hatband of the blue ball cap was consistent with defendant's known DNA profile. (T. 936) The frequency for the DNA from the hatband is one in every 5,386 African-Americans. (T. 939) Defendant is an African-American. (T. 939)

The State introduced defendant's testimony from the first trial. In that testimony,

defendant conceded that his nickname is "Silk." (T. 1042) According to defendant, he stayed in Columbus part of that Sunday, and then he returned to Youngstown with Jerome Woods on Sunday afternoon, with defendant eventually ending up at the home of his cousin Bryan Fortner to watch a football game on television that Sunday evening. (T. 1024-27) Defendant claimed that he went to bed that night with his girlfriend Rhonda Clark at the Fortner house. (T. 1028-29) Then he went to his parents' home around 5:30 a.m. on Monday morning. (T. 1029)

The defense called Darry Woods, who testified that he, and not Jerome Woods, had accompanied defendant. (T. 1129-30, 1143-44, 1165) Woods contradicted defendant's first-trial testimony that defendant had made some side trips in Columbus on Sunday before heading back to Youngstown. (Compare T. 1024-25 with T. 1156)

Defendant's father, Arthur Clinkscale, testified, *inter alia*, that defendant had come home at exactly 5:45 a.m. on that Monday morning, September 8, 1997, (T. 1238, 1243), thereby contradicting his earlier vaguer affidavit on that point.

Rhonda Clark (now Parker) testified that she had not even met defendant until mid-September 1997. (T. 1326) She had not been with defendant on September 7 or 8, 1997. (T. 1326) Defendant asked her to lie for him. (T. 1326-27) Defendant told her that he had been with his parents at the time of the murder and that he needed somebody outside the family to say that he was with them. (T. 1327) Defendant told her to say that she came over to Fortner's house sometime around 10:00 or 11:00, that she finished watching football with them, and then went upstairs with defendant. (T. 1330, 1334) It was all a lie. (T. 1330)

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.

In the two accepted propositions of law, defendant complains that the trial court held an ex parte meeting with a juror and excused that juror and that the trial court then substituted an alternate juror. But there was no objection, timely or otherwise, to the excusal or substitution, and there was only an untimely objection three weeks later vis-à-vis the meeting with the juror. In addition, defendant's claims of error are largely based on defense counsel's unofficial unilateral rendition of what purportedly occurred. Given these problems with the appellate record and the lack of objection, the claims of error present no basis for reversal.

By way of introduction, however, the State wishes to highlight the following points. First, contrary to Judge Whiteside's deeply-flawed dissent, and contrary to defendant's merit brief here, the State does **not** concede that error occurred. Rather, the State contends that it would have been highly appropriate for the court to meet privately with a juror complaining of chest palpitations and to excuse that juror on that basis given such health concerns. Moreover, the State contends that the mid-deliberation substitution of the alternate was lawful, as statutory law supported the substitution, and such statutory law on the substantive matter of whether the trial could continue prevails over the then-extant provision in former Crim.R. 24(G)(2) prohibiting such substitution. The State's position is that no legal error occurred.

Given the lack of objection, the State also argues that the purported errors do

not rise to the level of plain error warranting reversal. The unofficial defense rendition asserted facts showing that it was aware of the meeting at the time or very soon thereafter. No objection was ever raised to the excusal or substitution, and the meeting was only objected to three weeks after the verdicts. And the prosecutor contended in her unofficial rendition that the defense *had agreed* with the excusal and substitution.

Great care must be exercised here. The strong inference exists here that the defense *welcomed* the excusal and substitution, not just because the prosecutor said there was such agreement, but also because, if the defense had wanted to ask for a mistrial, such a request would have been the very first thing raised.

The requirement of timely objection is meant to avoid this kind of gamesmanship. A party cannot be allowed to gamble on the outcome, happy to accept a favorable verdict but keeping an objection in its hip pocket on the chance that the verdict is not favorable.

Nor is it a matter that an objection would have been futile. Had the defense not expressed agreement with the prosecution, the *prosecution* could have possibly delayed matters long enough for the court to reconsider the excusal before the juror even left the court's chambers. In addition, the juror very well could have been contacted immediately and told that she remained subject to her juror duties while her medical situation was dealt with.

In addition, the defense clearly could have objected to the substitution if it desired. Even then, and even assuming the excused juror could not be recalled, the court and the parties could have discussed the possibility of proceeding with eleven

jurors. *State ex rel. Warner v. Baer* (1921), 103 Ohio St. 585, paragraph two of the syllabus (trial can proceed with eleven jurors if there is waiver and court approves); *State v. Brooks* (2000), 8th Dist. Nos. 75711 & 75712. But the defense did not object, apparently pleased that the trial would now proceed with a 12-member jury that did not include the excused juror, and pleased that it might still win an acquittal in this trial (rather than having to undergo another trial). See *Warner*, 103 Ohio St. at 612 (“excused juror might have been objectionable” to the defense). “These and numerous other tactical advantages, known perhaps only to himself and his counsel, might make it very important to him to proceed with the trial.” *Id.* at 612. Cast in this light, the after-the-fact defense objection to the meeting, and the objections made to the excusal and substitution for the first time on appeal, all appear to be sour grapes with the verdict, not sour grapes with the procedure used. Appellate reversal simply should not be available under such circumstances.

A. Deliberations and Assertions Thereafter

The jury began deliberations at 2:01 p.m. on Friday, September 8, 2006. (T. 1474) After two other written jury questions were answered, the jury sent out a written question at 4:50 p.m. indicating that one member of the jury was not comfortable returning a guilty verdict based on the testimony of one witness because “[t]he juror does not believe a guilty verdict could ever be declared without more evidence.” (T. 1478) The jury question indicated that the issue did not appear to be resolvable through more time and discussion, and therefore the question indicated that “[a]ny advice would be appreciated.” (T. 1478)

At 5:55 p.m., the court convened the jury and told them that, upon their request, they were being excused for the weekend and that on Monday morning there would be additional instructions based upon their last question. (T. 1478-79)

The case reconvened on the morning of Monday, September 11, 2006, with a second judge substituting for the first judge, who was out of town. (T. 1479, 1481) The discussion focused on how the “single witness” question would be answered. (T. 1481-88)

When the jury reconvened to receive the answer to the “single witness” question, 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 to the excusal or substitution.

At that point, the court responded to the “one witness” question from Friday by giving a supplemental instruction. (T. 1494-96) Given the substitution of the alternate juror, the court also instructed the jurors to begin deliberations anew. (T. 1497) Again, there was no objection to the excusal or substitution.

The jury returned its guilty verdicts at noon on that Monday, September 11th, 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 number six on the jury. (T. 1510-11)

When court reconvened for the penalty phase three weeks later on October 2, 2006, defense counsel raised an issue regarding “the process” surrounding the excusal.

Counsel conceded that no objection had been raised on September 11th. (T. 1524)
According to counsel, the bailiff had informed the attorneys that juror number *three* was having heart palpitations. (T. 1523)¹ Counsel stated that the 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 went into the first judge's office and "presumably talked to Juror Number Three about her condition." (T. 1523) Counsel indicated that the substitute judge then "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 contended that the court had "already excused" the juror. (T. 1527) The defense still raised no objection to the excusal or substitution.

The prosecutor stated that she had a "quite different" recollection of events. (T. 1525) The prosecutor stated that the bailiff "made us aware that there was juror who was having heart palpitations, that we were considering even calling the squad. The woman didn't think she needed that, but she did want to get to her doctor, that she had had a heart attack before * * *." (T. 1525) The prosecutor indicated that "[w]e as a group discussed what to do with it." (T. 1525)

The prosecutor further indicated that defense counsel had said at the time that he wondered whether "she's the one that they are talking about in these questions." (T.

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

1525) The prosecutor recounted that she asked him, “Do you want to ask that question?” (T. 1525) The prosecutor indicated that counsel said “No, I don’t.” (T. 1526) Defense counsel interjected and agreed that he had said “No, I don’t.” (T. 1526 – “That’s true.”)

The prosecutor stated they discussed whether they should let the juror go or whether they should just let her go to the doctor and then come back. (T. 1526) The prosecutor stated that “everyone agreed as a group that we would let her go and seat the alternate.” (T. 1526)

The prosecutor noted that “[t]here was never an objection.” (T. 1526) The prosecutor noted that, if there had been an objection, the court could have held a hearing, and, more importantly, deliberations could have been halted for a recess so that the juror could go see a doctor. (T. 1526)

Defense counsel agreed that the prosecutor “does correctly state the conversation we had back there,” but counsel contended that “at no point did we agree to let her go.” (T. 1526-27)

The prosecutor stated that “this is an important point, because this is going to go up on appeal again. And what they are trying to do is set up an appealable issue on this, and it just didn’t happen that way.” (T. 1527)

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. Inadequate Appellate Record

The statements of the defense counsel and the prosecutor do not provide a basis for reversal because those statements do not constitute a proper record of what occurred regarding any meeting, the excusal, or the substitution.

The Appellate Rules approve of four ways in which a record of proceedings can be properly brought up to the appellate court. First, the official court reporter's transcript is the chief means by which trial court proceedings are recorded and then transmitted to the appellate court. See App.R. 9(B). Second, if there is no transcript available, the appellant prior to transmission of the record can tender a proposed statement of the evidence or proceedings, at which point the appellee can serve objections, and the trial court then settles the record. See App.R. 9(C). Third, before transmission of the record, the parties can agree to a statement of the case, which is subject to approval by the trial court and then will be included in the appellate record. See App.R. 9(D). Fourth, if any difference arises as to whether the record truly discloses what occurred in the trial court, or if something material is omitted from the record by error or accident, the trial court can settle and correct the record. See App.R. 9(E).

None of these procedures were used to record and transmit what occurred regarding the circumstances surrounding the purported meeting between the court and the juror. Defendant's claims of error are based on his trial counsel's unofficial rendition of what had occurred, counsel having given that rendition three weeks after events. Such comments are not a proper basis for reversal. Counsel is not the official

court reporter of what occurred in chambers on September 11th, and the trial court did not approve either the prosecutor's or the defense counsel's unofficial renditions.

The need for an *official* record is important. The rule can be seen as presuming the accuracy of an official court reporter's certified verbatim rendition of a proceeding. But no such presumption attends to any other type of rendition. Appellate Rules 9(C), (D), and (E) generally require trial court approval to make a rendition official. For example, a statement of evidence under App.R. 9(C) does not achieve the requisite formality, validity, and authenticity until it is approved by the trial court. *King v. Plaster* (1991), 71 Ohio App.3d 360, 362. The determinations of the trial court under App.R. 9 "are its responsibility and its authority," see *State v. Dickard* (1983), 10 Ohio App.3d 293, 295, not the authority of the parties. If a party submits an unapproved statement of the case, that statement must be disregarded. *Id.* at 295. The trial judge has the responsibility, duty, and authority to determine the accuracy and truthfulness of the proposed statement of proceedings and to make the statement conform to the truth. *State v. Schiebel* (1990), 55 Ohio St.3d 71, 81-82. In the present case, the trial court did not approve counsel's rendition of events at any point, and therefore counsel's unofficial rendition must be disregarded.

The lack of an adequate and full appellate record falls on the shoulders of the defense. 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).

The defense never sought to use of the App.R. 9 procedures to provide a full appellate record to the appellate courts. The failure to use such procedures to establish what occurred prevents review, including the failure to establish whatever was said in the alleged meeting between the juror and the judge. Defendant “has not established that he was prejudiced by any conversations that the trial judge may have had with the jury. In fact, he has not even attempted to reconstruct what occurred in an effort to show prejudice. See App.R. 9(B) and (E); *State v. Goodwin* (1999), 84 Ohio St.3d 331, 340. We have declined to reverse on the basis of unrecorded conferences when the accused has failed to demonstrate material prejudice.” *State v. Williams*, 99 Ohio St.3d 439, 2003-Ohio-4164, ¶ 98; see, also, *State v. Frazier*, 115 Ohio St.3d 139, 2007-Ohio-5048, ¶ 213 (“Frazier has not attempted to reconstruct what the trial court discussed with the jury in an effort to show prejudice. See App.R. 9(B) and (E)”).

C. Waiver Through Lack of Objection; Defendant Must Show Plain Error

In any event, no timely objection was ever made to the purported meeting, and no objection at all was ever made to the juror’s excusal or to the substitution of the alternate. As a result, the issue is waived.² As stated 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

² The State uses the word “waiver” in this brief to refer to the forfeiture of an issue through lack of timely objection. “Waiver” and “forfeiture” are often used interchangeably in this way. See *State v. Campbell* (1994), 69 Ohio St.3d 38, 41 n. 1. Waiver through forfeiture does not require a personal, knowing, and intelligent decision on the part of the defendant. See *United States v. Olano* (1993), 507 U.S. 725, 733 (distinguishing personal waiver from forfeiture of objection).

standing, and it goes to the heart of an adversary system of justice.” The principle even extends to constitutional questions. The longstanding waiver rule is “strict.” *State v. Long* (1978), 53 Ohio St.2d 91, 96.

“In Ohio, Crim.R. 52 gives appellate courts narrow power to correct errors that occurred during the trial court proceedings.” *State v. Wamsley*, 117 Ohio St.3d 388, 2008-Ohio-1195, ¶ 19; *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, ¶ 9 (same). Although an issue is waived through lack of objection, Crim.R. 52(B) provides that “[p]lain 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 recognized only when, “but for the error, the outcome of the trial clearly would have been otherwise.” *Long, supra*, 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. “The power afforded to notice plain error, whether on a court’s own motion or at the request of counsel, is one which courts exercise only in exceptional circumstances, and exercise cautiously even then.” *Id.* at 94.

As stated in *Campbell*, 69 Ohio St.3d at 41 n. 2, “[o]ur cases make clear that we will not *overturn* a conviction for alleged error not raised below, unless it amounts to plain error.” (Emphasis *sic*) “[T]he lack of a ‘plain’ error within the meaning of Crim.R. 52(B) ends the inquiry and *prevents recognition of the defect.*” *State v. Barnes* (2002), 94 Ohio St.3d 21, 28 (emphasis added) As stated in *Murphy*:

Even constitutional rights “may be lost as finally as any others by a failure to assert them at the proper time.”
The waiver rule operates even in capital cases, for “capital

defendants are not entitled to special treatment regarding evidentiary or procedural rules.”

The Rules of Criminal Procedure *make but one exception* to the contemporaneous-objection requirement: “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).

Under this rule, we may take notice of waived errors *only if* they can be characterized as “plain errors.” As we have repeatedly emphasized, the plain error test is a strict one: “An alleged error ‘does not constitute a plain error or defect under Crim.R. 52(B) unless, but for the error, the outcome of the trial clearly would have been otherwise.’” We have warned that the plain error rule is not to be invoked lightly. “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.”

Murphy, 91 Ohio St.3d at 532 (emphasis added; citations omitted).

This Court has repeatedly stated that plain-error review is the exclusive means to reverse based upon a forfeited error. Several recent cases have recognized that a litigant “waived all but plain error” in failing to timely object in the trial court. See, e.g., *State v. Were*, 118 Ohio St.3d 448, 2008-Ohio-2762, ¶¶ 77, 87, 99, 115, 148, 196, 206, 213; *State v. Johnson*, 112 Ohio St.3d 210, 2006-Ohio-6404, ¶ 31; *State v. Elmore*, 111 Ohio St.3d 515, 2006-Ohio-6207, ¶¶ 52, 93, 127; *In re J.J.*, 111 Ohio St.3d 205, 2006-Ohio-5484, ¶ 13. See, also, *id.* at ¶ 15 (“These cases establish the duty of a complaining party seeking review to object in the trial court and timely preserve the error for appeal * * *”).

In light of the “waived all but plain error” case law, and in light of *Campbell*, *Murphy*, and *Barnes*, a waived error will not qualify as grounds for reversal unless it amounts to “plain error” under the strict standards for plain-error review.

D. Plain Error Review is Strict

This Court extensively addressed the plain-error standard in *State v. Barnes* (2002), 94 Ohio St.3d 21, in which the trial court without objection gave an instruction on felonious assault as a lesser-included offense of attempted murder. After the defendant was convicted of felonious assault, the defendant contended on appeal that felonious assault was not a true lesser-included offense. This Court concluded that the defendant had “forfeited all but plain error” and that the plain-error standard could not be satisfied. This Court stated, as follows:

Under Crim.R. 52(B), “plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” By its very terms, the rule 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. We have acknowledged the discretionary aspect of Crim.R. 52(B) by admonishing courts to notice plain error “with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.”

As we noted above, the trial court incorrectly instructed the jury that felonious assault with a deadly weapon was a lesser included offense of attempted murder. Barnes therefore satisfied the “first condition to be met in noticing plain error,” *i.e.*, the trial court having committed

a legal error in instructing the jury on felonious assault as a lesser included offense of attempted murder. This error, however, was not “plain” at the time that the trial court committed it. Before today, this court had not decided the question of whether felonious assault with a deadly weapon is a lesser included offense of attempted murder. The Ohio appellate courts were divided on this issue as well. The lack of a definitive pronouncement from this court and the disagreement among the lower courts preclude us from finding plain error.

Despite the lack of an obvious error by the trial court in giving the instruction, the court of appeals corrected the defect by reversing Barnes’s conviction for felonious assault. In doing so, the court of appeals emphasized the third limitation on plain-error review, noting that it recognized plain error when a defect in the trial proceedings affects a defendant’s substantial rights. But if a forfeited error is not plain, a reviewing court need not examine whether the defect affects a defendant’s substantial rights; the lack of a “plain” error within the meaning of Crim.R. 52(B) ends the inquiry and prevents recognition of the defect. By failing to conduct the proper plain-error analysis required by Crim.R. 52(B), the court of appeals erred as a matter of law in reversing Barnes’s conviction for felonious assault.

Barnes, 94 Ohio St.3d at 27-28 (citations omitted). Courts will also refuse to correct plain error when the failure to object was a deliberate, tactical decision. *Clayton*, 62 Ohio St.2d at 46-48.

E. No Plain Error Regarding Claim of Ex Parte Meeting and Excusal of Juror

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. 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 further show actual prejudice. *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, ¶ 84. “[The] mere occurrence of an ex parte conversation between a trial judge and a juror does not constitute a deprivation of any constitutional right. The defense has no constitutional right to be present at every interaction between a judge and a juror, nor is there a constitutional right to have a court reporter transcribe every such communication.” *United States v. Gagnon* (1985), 470 U.S. 522, 526 (internal quotation marks omitted).

Defendant cannot show plain error in regard to the purported ex parte meeting with the juror. Although defendant would likely complain that he had no duty to object to the meeting, litigants in fact do have a duty to object when they learn of an ex parte communication. *Bryan*, at ¶ 83 (“Trial counsel did not object to the ex parte discussions.”). “A rule allowing the defendants, as well as their trial counsel, to stay silent at trial and then claim on appeal that their absence constitutes reversible error will only encourage ‘sandbagging.’” *United States v. Peterson* (C.A. 2, 2004), 385 F.3d 127, 139. “[There] is scarcely a lengthy trial in which one or more jurors does not have occasion to speak to the trial judge about something, whether it relates to a matter of personal comfort or to some aspect of the trial.’ A defendant knowing of such a discussion must assert whatever right he may have under Rule 43 to be present.” *Gagnon*, 470 U.S. at 528, quoting *Rushen v. Spain* (1983), 464 U.S. 114, 118. “Ex parte communications with jurors fall within the confines of the plain error rule * * * . [I]f there is no objection to the ex parte communication, we review the communication only to decide if there is plain error.” *United States v. McDonald* (C.A. 10, 1991), 933

F.2d 1519, 1524.

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 would have been 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); *United States v. Scisum* (C.A. 10, 1994), 32 F.3d 1479, 1482 ("a juror's sudden illness or other truly emergent situations come to mind" as "rare exceptions" allowing ex parte contact with juror); *People v. Brennan* (Mich. App. 2004), 2004 Mich. App. LEXIS 3246 (ex parte contact not substantive but rather pertained "to personal matters concerning the juror's husband's health and the question whether she could continue to participate as a juror.").

In *State v. Shields* (1984), 15 Ohio App.3d 112, 119, a juror phoned the court and notified the court that her sister had become critically ill and that the juror would not be able to concentrate on the trial if required to attend. The court related the information to the parties and excused the juror over defense objection. On appeal, the defendant complained that he had not had the opportunity to question the excused juror. The Eighth District disagreed, concluding that neither Crim.R. 24 nor R.C. 2945.29 "requires the court to examine the reportedly disabled juror personally. Neither

authority requires the court to offer counsel an opportunity to do so.” *Id.* at 119. While the “better practice” would be to afford a hearing on the record, “an in-court examination of a reportedly disabled juror is not always feasible. The juror’s infirmity or other disability may preclude the juror from appearing in court for an extended interval, and thereby significantly disrupt orderly proceedings.” *Id.* at 119.

The juror was a prior heart-attack victim. The juror was reporting heart palpitations. To say that the court must conduct a hearing with the juror and parties present and participating would be to significantly tie the hands of the court in addressing a medical emergency and could potentially endanger the health of the juror.

In light of the foregoing authorities, defendant cannot show that the purported *ex parte* meeting addressing health issues was error that was “‘plain’ at the time that the trial court committed it.” *Barnes*, 94 Ohio St.3d at 27-28.

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

Nor can defendant show any outcome-determinative prejudice from the purported *ex parte* meeting. While the defense eventually objected to “the process” three weeks after the fact, the defense never objected to the excusal of the juror and never doubted the court’s grounds for excusing the juror. The defense very likely would have agreed to the excusal as it occurred, even if it had been involved in the meeting.

Contrary to defendant’s and Judge Whiteside’s contentions, there is no

indication whatsoever in the appellate record (not even in counsel's comments) that the excused juror was a vote for acquittal. The jury question about a juror believing that the testimony of one witness could never be enough did not identify the juror who held that belief. It could have been any of the jurors, not necessarily the juror who was excused. The excused juror's heart palpitations could have arisen from the stress of deliberations generally, perhaps because *another* juror was being difficult in holding to the legally-incorrect position that corroboration was required.

In addition, the jury's returning of guilty verdicts within a few hours of the excusal and substitution does not show that the excused juror was a dissenting juror. The court had correctly instructed the jury that "the final test in judging evidence should be the force and the weight of the evidence regardless of the number of witnesses on each side of the issue. The testimony of one witness that is believed by you is sufficient to prove any fact." (T. 1495) Corroboration was not legally required.³ The juror who had believed that corroboration was required could have remained on the jury and could have merely been following the court's correct jury instruction. Whether or not the excused juror held a similar view is simply not shown by this record.

The defense conceded that, even if allowed to voir dire the juror, the defense would not have asked about how she was voting on the case. (T. 1525-26) Such a question would have been improper anyway. A deliberating juror should not be asked

³ The "one witness believed by you" instruction was approved in *State v. Cunningham*, 105 Ohio St.3d 197, 2004-Ohio-7007, ¶¶ 51-56, as a proper instruction of law on matters of credibility and weight of the evidence. More generally, Ohio courts have recognized that there is no general corroboration requirement, and the testimony of a single witness can be sufficient to support conviction. See, e.g., *State v. Matha* (1995), 107 Ohio App.3d 756, 759; *State v. Love* (1988), 49 Ohio App.3d 88, 91.

about how he or she is voting in that deliberation. “As a general rule, no one -- including the judge presiding at a trial -- has a “right to know” how a jury, or any individual juror, has deliberated or how a decision was reached by a jury or juror.” *State v. Robb* (2000), 88 Ohio St.3d 59, 81, quoting *United States v. Thomas* (C.A. 2, 1997), 116 F.3d 606, 618. “Making inquiries of the jury * * * is not to be encouraged because it threatens the secrecy of jury deliberations and invites charges of coercion and interference with the jury function by the trial judge.” *United States v. Lee* (C.A. 3, 1976), 532 F.2d 911, 915.

The propriety of the excusal on health grounds would not have called for an inquiry into how the juror was voting anyway. “Evidence of the nature and extent of a juror’s unavailability, or incapacitation, for example, is ordinarily available without inquiring into the substance of deliberations.” *Thomas*, 116 F.3d at 620 (internal citations omitted).

Since there is no support for the view that the excused juror was the “sole dissenter,” and since, even three weeks afterward, the defense did not object to the excusal or substitution, there was no plain error in excusing the juror after an alleged ex parte meeting. The facts stated in counsel’s own rendition showed that the trial court did not abuse its discretion in excusing a juror who had a prior heart condition and who was experiencing heart palpitations. *Bryan*, at ¶¶ 81-82 (abuse-of-discretion standard applied to excusal); *State v. Group*, 98 Ohio St.3d 248, 2002-Ohio- 7247, ¶¶ 72-74 (same). Moreover, by almost every indication, the defense welcomed the excusal and would not have objected to the excusal even if present and participating in the meeting.

F. No Plain Error in Allowing Substitution

At the time of trial, former Criminal Rule 24(G)(1) provided that, except in “capital cases,” alternate jurors shall be discharged when the jury retires to consider its verdict. In “capital cases,” the alternate jurors could continue to serve if more than one deliberation was required. Former 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 *Harwell* requires “capital” procedures in such cases, including a penalty-phase jury deliberation. But even when the alternates continued to serve, former Crim.R. 24(G)(2) provided that “[n]o alternate juror shall be substituted during any deliberation.” If former Crim.R. 24(G)(2) was constitutional, see Part J below, then former Crim.R. 24(G)(2) was violated when alternate Thaler was substituted for the regular juror who had “medical issues.”⁴

Notwithstanding the violation of former 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.

⁴ 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 in the minority would feign illness to avoid the turmoil of deliberations. But *Hutton* 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.

Under plain-error review, defendant's claim of error under former Crim.R. 24(G)(2) does not warrant reversal, and the two-judge majority below did not abuse its discretion in declining to reverse.

Defendant cannot show that the error was outcome determinative. Had the defense timely objected to the excusal, the court could have stopped the proceedings and very well could have contacted the juror it had excused, perhaps even before the juror left the court's chambers or jury room. See *United States v. DiPietro* (C.A.1, 1991), 936 F.2d 6, 11 ("Had an objection been registered, the court could have reconsidered its decision. Although the jury was dismissed when the mistrial was declared, upon an immediate objection, the court could have asked the jury to remain while reconsidering its decision."). Even when the discharge of a full jury has been announced after verdict, the discharge is not complete until the jury disperses and goes outside the control of the court. *State v. Myers* (S.C. 1995), 318 S.C. 549, 551, 459 S.E.2d 304, 305 ("Notwithstanding a 'formal discharge,' several courts recognize that the jury may be reassembled so long as it remains an essentially undispersed unit, and has not been subjected to any outside influence in between the 'discharge' and the reassembly."); see, also, *Sargent v. State* (1842), 11 Ohio 472 (jury discharged and separated could not be recalled).

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 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 a timely objection and reconsideration.

A mistrial also could have been avoided if the defense had been willing to proceed with a jury of eleven. See *Warner*, supra. To be sure, the defense would now say that a waiver would not have been forthcoming, but that claim would come with the benefit of perfect hindsight. By all indications before the verdicts, including the failure to object to the substitution, the defense wanted this trial to continue to a final verdict.

Even if the three *Barnes* prongs were satisfied, an appellate court could disregard the error under former Crim.R. 24(G)(2). Given the many opportunities to object, the failure to object must have been deliberate and tactical because the defense welcomed the substitution of alternate Thaler. Deliberate, tactical decisions of this sort preclude the correction of the error.

G. No Rule of Per Se Reversal under the Case Law

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, this 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.

In *State v. Miley* (1991), 77 Ohio App.3d 786, the Twelfth District summarized the case law and concluded that per se reversal was not required. In the end, the *Miley* court did reverse because the original jury had reached partial verdicts before the substitution and because the trial court had failed to instruct the jurors to begin deliberations anew. In contrast, no verdicts had been reached here, and the jury was instructed to begin deliberations anew.

The Tenth District recognized in *State v. Fisher* (1996), 10th Dist. No. 95AP-437, that substitution of an alternate during deliberations does not require per se reversal and that “a violation of Crim.R. 24(F) [now (G)] will not justify reversal unless the record demonstrates prejudice.” The Tenth District emphasized that a “defendant’s failure to object requires this court to employ a ‘plain error’ standard in reviewing this” issue. The Tenth District declined to reverse because, unlike in *Miley*, no verdict had been reached, because the substituted juror had been encouraged to express her views, and because the deliberations continued for a significant period of time after the substitution. The *Fisher* Court also found distinguishable the decision in *State v. Bowling* (1996), 10th Dist. No. 95AP-599, in which the alternate had been substituted without knowledge of the defense and without instructions to begin deliberations anew.

Also distinguishable is *State v. Locklear* (1978), 61 Ohio App.2d 231, since the alternate in *Locklear* had already been discharged before the substitution therein.

In the end, no reversal for plain error was warranted here because: (1) the excusal of the regular juror could have been reconsidered or the trial possibly could have proceeded with eleven jurors; (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 results from an appellate court declining to reverse.

H. No Constitutional Error in Mid-Deliberation Substitution; No Structural Error

Requiring per se reversal would improperly elevate this issue to the level of structural error, and only *constitutional* errors can rise to that level. As this Court stated earlier this year, “[i]f an error in the trial court is not a constitutional error, then the error is not structural error.” *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, ¶ 21. “Although all structural errors are by nature constitutional errors, not all constitutional errors are structural.” *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, ¶ 18. See, also, *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, ¶ 55; *Perry*, 101 Ohio St.3d 118, at ¶ 24.

No constitutional error, and, therefore, no structural error, is involved here. Substitution of an alternate juror with instructions to begin deliberations anew 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 allowed). A finding of constitutional error here would mean the recently-amended Crim.R. 24(G)(1), which

follows the federal rule in allowing mid-deliberation substitution with an instruction to begin deliberations anew, would be unconstitutional.⁵

Even if the error were constitutional and “structural,” such errors can be waived through lack of objection and are subject to plain-error analysis. Structural error and plain error are “two completely separate and distinct standards.” *Wamsley*, ¶ 27. “The failure to object to any error, even a structural one, leaves the appellate court with the power to notice only plain error.” *Rahn v. Hawkins* (C.A. 8, 2006), 464 F.3d 813, 819. The United States Supreme Court has specifically ruled that “structural error” is subject to plain-error standards under federal Crim.R. 52(b). *Johnson v. United States* (1997), 520 U.S. 461, 466. Unobjected-to “structural error” does not result in “automatic reversal” but rather results in plain-error review that may or may not result in reversal. *Id.* at 469-70 (even if “structural,” no reversal); *United States v. Cotton* (2002), 535 U.S. 625, 632-33 (same). For some time, this Court followed that approach, see *Perry*, ¶ 23, but recent precedent appears to create a structural-error exception to plain-error review. *Colon*, *supra*.

I. Automatic Reversal Would Encourage Gamesmanship

A rule of automatic reversal particularly would be inappropriate because such a rule would encourage gamesmanship. “Litigants should not be permitted to keep some

⁵ The violation of former Crim.R. 24(G)(2) would not perforce make the issue a constitutional one. A “mere error of state law” is not a violation of due process. *Engle v. Isaac* (1977), 456 U.S. 107, 121 n. 21. Accordingly, the violation of a state rule barring mid-deliberation substitution does not amount to a constitutional violation. *Claudio*, 68 F.3d at 1576-77. (“[A] violation of the established criminal procedure is not sufficient in itself to create a constitutional violation.”; “appellants in this case cite no prejudice that would elevate a violation of a rule of criminal procedure to a violation of the United States Constitution.”).

of their objections in their hip pockets and to disclose them only to the appellate tribunal; one cannot take his chance on a favorable verdict, reserving a right to impeach it if it happens to go the other way.” *Hunter v. United States*, 606 A.2d 139, 144 (D.C.App. 1992) (internal quotation marks omitted).

This Court’s cases make this plain. In *State v. Glaros* (1960), 170 Ohio St. 471, 475, this Court stated:

[W]e do not believe that we should, without some good reason or unless required to do so by some applicable statute * * * approve a practice which would enable counsel to place his client in a position where he could take advantage of a favorable verdict and, at the same time, avoid an unfavorable verdict merely because of an error of the trial judge that counsel made no effort to prevent when he could have made such effort and when such error could have been avoided. Such a practice would enable counsel to obtain for his client more than the one fair trial to which he is entitled.

In *State v. Tudor* (1950), 154 Ohio St. 249, 257-58, the Court stated the following in regard to the need to timely object to jury instructions:

A fair administration of justice requires that, when an error occurs in a trial, the trial judge should be given an opportunity, if possible, to correct it. Otherwise, a party could take a chance on success without raising any objection to such error, and then, if he failed to succeed, avail himself of an error which might otherwise have been corrected. * * *

Any other rule would relieve counsel from any duty or responsibility to the court and place the entire responsibility upon the trial judge to give faultless instructions upon every possible feature of the case. This would disregard entirely the true relation between court and counsel which enjoins upon counsel the duty to exercise diligence and to aid the court, -- not by silence to mislead the court into the commission of error.

It follows that, in the absence of statutory provisions to the contrary, a party, represented by counsel, may not ordinarily avail himself of an error which was not called to the attention of the trial judge and which could and might have been corrected by the trial judge if it had been called to his attention.

In *State v. Adams* (1874), 25 Ohio St. 584, 587-88, this Court stated:

These rules, it is said, have their foundation in a just regard to the fair administration of justice, which requires that when an error is supposed to have been committed there should be an opportunity to correct it at once, before it has had any consequences; and does not permit the party to lie by, without stating the ground of his objection, and take the chances of success on the grounds on which the judge has placed the cause, and then, if he fails to succeed, avail himself of an objection which, if it had been stated, might have been removed.

In *State v. Awan* (1986), 22 Ohio St.3d 120, 123, this Court also stated that

“[t]he 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.”

In *Perry*, at ¶ 23, this Court reiterated the strong public policy against allowing litigants to withhold their objections and to thereby gamble on the outcome:

[B]oth this court and the United States Supreme Court have cautioned against applying a structural-error analysis where, as here, the case would be otherwise governed by Crim.R. 52(B) because the defendant did not raise the error in the trial court. * * * This caution is born of sound policy. For to hold that an error is structural even when the defendant does not bring the error to the attention of the trial court would be to encourage defendants to remain silent at trial only later to raise the error on appeal where the conviction would be automatically reversed. We believe that our holdings

should foster rather than thwart judicial economy by providing incentives (and not disincentives) for the defendant to raise all errors in the trial court -- where, in many cases, such errors can be easily corrected.

A rule of automatic reversal would also be one-sided. Had the defense gamble succeeded and defendant had been acquitted, the State could not retry defendant because of a substitution-of-juror error. Thus, a rule of automatic reversal would amount to a one-way street favorable to the criminal defendant, a “heads I win, tails I win” approach to the problem that is contrary to the fair administration of justice.

This Court’s refusal to allow litigants to withhold objections of this sort is reflected in 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. These cases support the view that timely objections must be made to the identity of the particular judge or juror(s) deciding the case, and the losing party may not raise such objection for the first time after the party has lost.

J. Substitution was Lawful under Statutory Law

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 former Crim.R. 24(G)(2) prohibited such substitution, the statute and the rule conflicted.

The statutory right of the parties to a continued trial is a matter of substantive law, and therefore the statute controls over the rule. Article IV, Section 5(B), Ohio Constitution. The right to a continued trial is considered a “valued right” of constitutional dimension for a criminal defendant, who has a double jeopardy right to have a trial reach a final resolution absent manifest necessity for ending it earlier. *Arizona v. Washington* (1978), 434 U.S. 497, 503-505. A second trial “increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed.” *Id.* at 503-505. The defendant also possesses a constitutional right to a jury trial under federal and Ohio constitutional law, which itself is considered “substantive.” *State ex rel. Columbus v. Boyland* (1979), 58 Ohio St.2d 490, 492 (“substantive constitutional right to a trial by jury”; but number of jurors deemed procedural if above six).

There is also “the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury” and “the public interest in having a just judgment reached by an impartial tribunal.” *Washington*, 434 U.S. at 505, 512.

“Substantive” is that “body of law which creates, defines and regulates the

rights of the parties. The word substantive refers to common law, statutory and constitutionally recognized rights.” *State v. Slatter* (1981), 66 Ohio St.2d 452, 455. Under such definition, the statutory right to substitution of an available alternate, which is grounded in statutory and constitutional interests, is substantive. “[O]nce provided by a state’s legislature, [it] is a valuable statutory incident to the right of trial by jury.” See *State v. Greer* (1988), 39 Ohio St.3d 236, 245-46 (right to peremptory challenges is substantive right; number of such challenges is procedural).

Some might argue that former Crim.R. 24(G)(2) addressed matters of “timing” and “numbers” vis-à-vis when and how alternate jurors shall be substituted, so as to be considered “procedural.” But, even so, a procedural rule can have a “substantive effect” if it is “so restrictive as to constitute a *de facto* abrogation or modification of the right itself.” *Greer*, 39 Ohio St.3d at 246. Former Crim.R. 24(G)(2) had such a substantive effect because it choked off the ability of the defendant and prosecution to reach a final resolution of their trial with a full jury despite the availability of an alternate juror who could be substituted in a manner consistent with constitutional standards.

Another statute, 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 General

Assembly's reenactment of the death penalty in 1981, and it shows the General Assembly's strong policy that alternate jurors remain available for substitution at least up to the beginning of penalty-phase deliberations. Given the substantial stakes involved in capital prosecutions, and the often lengthy proceedings involved in such prosecutions, this policy judgment should be deemed substantive in light of the parties' substantial interests in obtaining a verdict in the first trial. In the conflict between this statute and former Crim.R. 24(G)(2), the statute controls on this substantive matter.

Defendant's propositions of law do not warrant reversal.

CONCLUSION

For the foregoing reasons, plaintiff-appellee requests that this Court affirm the judgment of the Tenth District Court of Appeals.⁶

Respectfully submitted,

RON O'BRIEN
Franklin County Prosecuting Attorney

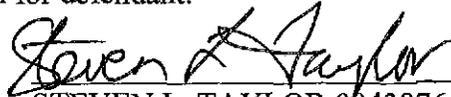


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Assistant Prosecuting Attorney
Counsel for Plaintiff-Appellee

⁶ If this Court contemplates a decision upon an issue not briefed, the State respectfully requests notice of that intention and requests an opportunity to brief the issue before this Court makes its decision. *Miller Chevrolet v. Willoughby Hills* (1974), 38 Ohio St.2d 298, 301 & n. 3; *State v. 1981 Dodge Ram Van* (1988), 36 Ohio St.3d 168, 170.

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail on this 1st day of Dec., 2008, to William S. Lazarow, 400 South Fifth Street, Suite 301, Columbus, Ohio 43215, counsel for defendant.



STEVEN L. TAYLOR 0043876
Assistant Prosecuting Attorney

CrimR 24. Trial Jurors.

(A) Brief introduction of case. To assist prospective jurors in understanding the general nature of the case, the court, in consultation with the parties, may give jurors a brief introduction to the case.

(B) Examination of prospective jurors. Any person called as a prospective juror for the trial of any cause shall be examined under oath or upon affirmation as to the prospective juror's qualifications. The court may permit the attorney for the defendant, or the defendant if appearing *pro se*, and the attorney for the state to conduct the examination of the prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the state and defense to supplement the examination by further inquiry. Nothing in this rule shall limit the court's discretion, with timely notice to the parties at anytime prior to trial, to allow the examination of all prospective jurors in the array prior to any challenges for cause or peremptory challenges.

(C) Challenge for cause. A person called as a juror may be challenged for the following causes:

(1) That the juror has been convicted of a crime which by law renders the juror disqualified to serve on a jury.

(2) That the juror is a chronic alcoholic, or drug dependent person.

(3) That the juror was a member of the grand jury that found the indictment in the case.

(4) That the juror served on a petit jury drawn in the same cause against the same defendant, and the petit jury was discharged after hearing the evidence or rendering a verdict on the evidence that was set aside.

(5) That the juror served as a juror in a civil case brought against the defendant for the same act.

(6) That the juror has an action pending between him or her and the State of Ohio or the defendant.

(7) That the juror or the juror's spouse is a party to another action then pending in any court in which an attorney in the cause then on trial is an attorney, either for or against the juror.

(8) That the juror has been subpoenaed in good faith as a witness in the case.

(9) That the juror is possessed of a state of mind evincing enmity or bias toward the defendant or the state; but no person summoned as a juror shall be disqualified by reason of a previously formed or expressed opinion with reference to the guilt or innocence of the accused, if the court is satisfied, from the examination of the juror or from other evidence, that the juror will render an impartial verdict according to the law and the evidence submitted to the jury at the trial.

(10) That the juror is related by consanguinity or affinity within the fifth degree to the person alleged to be injured or attempted to be injured by the offense charged, or to the person on whose complaint the prosecution was instituted; or to the defendant.

(11) That the juror is the person alleged to be injured or attempted to be injured by the offense charged, or the person on whose complaint the prosecution was instituted, or the defendant.

(12) That the juror is the employer or employee, or the spouse, parent, son, or daughter of the employer or employee, or the counselor, agent, or attorney, of any person included in division (B)(11) of this rule.

(13) That English is not the juror's native language, and the juror's knowledge of English is insufficient to permit the juror to understand the facts and the law in the case.

(14) That the juror is otherwise unsuitable for any other cause to serve as a juror.

The validity of each challenge listed in division (B) of this rule shall be determined by the court.

(D) Peremptory challenges. In addition to challenges provided in division (C) of this rule, if there is one defendant, each party peremptorily may challenge three prospective jurors in misdemeanor cases, four prospective jurors in felony cases other than capital cases, and six prospective jurors in capital cases. If there is more than one defendant, each defendant

peremptorily may challenge the same number of prospective jurors as if the defendant was the sole defendant.

In any case where there are multiple defendants, the prosecuting attorney peremptorily may challenge a number of prospective jurors equal to the total peremptory challenges allowed all defendants. In case of the consolidation of any indictments, informations, or complaints for trial, the consolidated cases shall be considered, for purposes of exercising peremptory challenges, as though the defendants or offenses had been joined in the same indictment, information, or complaint.

(E) Manner of exercising peremptory challenges. Peremptory challenges may be exercised after the minimum number of jurors allowed by the Rules of Criminal Procedure has been passed for cause and seated on the panel. Peremptory challenges shall be exercised alternately, with the first challenge exercised by the state. The failure of a party to exercise a peremptory challenge constitutes a waiver of that challenge, but does not constitute a waiver of any subsequent challenge. However, if all parties, alternately and in sequence, fail to exercise a peremptory challenge, the joint failure constitutes a waiver of all peremptory challenges.

A prospective juror peremptorily challenged by either party shall be excused and another prospective juror shall be called who shall take the place of the prospective juror excused and be sworn and examined as other prospective jurors. The other party, if that party has peremptory challenges remaining, shall be entitled to challenge any prospective juror then seated on the panel.

(F) Challenge to array. The prosecuting attorney or the attorney for the defendant may challenge the array of petit jurors on the ground that it was not selected, drawn or summoned in accordance with law. A challenge to the array shall be made before the examination of the jurors pursuant to division (A) of this rule and shall be tried by the court.

No array of petit jurors shall be set aside, nor shall any verdict in any case be set aside because the jury commissioners have returned such jury or any juror in any informal or irregular manner, if in the opinion of the court the irregularity is unimportant and insufficient to vitiate the return.

(G) Alternate jurors.

(I) Non-capital cases. The court may direct that not more than six jurors in addition to the

regular jury be called and impaneled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, have the same qualifications, be subject to the same examination and challenges, take the same oath, and have the same functions, powers, facilities, and privileges as the regular jurors. Except in capital cases, an alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each party is entitled to one peremptory challenge in addition to those otherwise allowed if one or two alternate jurors are to be impaneled, two peremptory challenges if three or four alternate jurors are to be impaneled, and three peremptory challenges if five or six alternative jurors are to be impaneled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by this rule may not be used against an alternate juror.

(2) Capital cases. The procedure designated in division (F)(1) of this rule shall be the same in capital cases, except that any alternate juror shall continue to serve if more than one deliberation is required. If an alternate juror replaces a regular juror after a guilty verdict, the court shall instruct the alternate juror that the juror is bound by that verdict. No alternate juror shall be substituted during any deliberation. Any alternate juror shall be discharged after the trial jury retires to consider the penalty.

(H) Control of juries.

(1) Before submission of case to jury. Before submission of a case to the jury, the court, upon its own motion or the motion of a party, may restrict the separation of jurors or may sequester the jury.

(2) After submission of case to jury.

(a) Misdemeanor cases. After submission of a misdemeanor case to the jury, the court, after giving cautionary instructions, may permit the separation of jurors.

(b) Non-capital felony cases. After submission of a non-capital felony case to the jury, the court, after giving cautionary instructions, may permit the separation of jurors during any period of court adjournment or may require the jury to remain under the supervision of an officer of the court.

(c) **Capital cases.** After submission of a capital case to the jury, the jury shall remain under the supervision of an officer of the court until a verdict is rendered or the jury is discharged by the court.

(3) **Separation in emergency.** Where the jury is sequestered or after a capital case is submitted to the jury, the court may, in an emergency and upon giving cautionary instructions, allow temporary separation of jurors.

(4) **Duties of supervising officer.** Where jurors are required to remain under the supervision of an officer of the court, the court shall make arrangements for their care, maintenance and comfort.

When the jury is in the care of an officer of the court and until the jury is discharged by the court, the officer may inquire whether the jury has reached a verdict, but shall not:

(a) Communicate any matter concerning jury conduct to anyone except the judge or;

(b) Communicate with the jurors or permit communications with jurors, except as allowed by court order.

(I) **Taking of notes by jurors.** The court, after providing appropriate cautionary instructions, may permit jurors who wish to do so to take notes during a trial. If the court permits the taking of notes, notes taken by a juror may be carried into deliberations by that juror. The court shall require that all juror notes be collected and destroyed promptly after the jury renders a verdict.

(J) **Juror questions to witnesses.** The court may permit jurors to propose questions for the court to ask of the witnesses. If the court permits jurors to propose questions, the court shall use procedures that minimize the risk of prejudice, including all of the following:

(1) Require jurors to propose any questions to the court in writing;

(2) Retain a copy of each proposed question for the record;

(3) Instruct the jurors that they shall not display or discuss a proposed question with other

jurors;

(4) Before reading a question to a witness, provide counsel with an opportunity to object to each question on the record and outside the hearing of the jury;

(5) Read the question, either as proposed or rephrased, to the witness;

(6) Permit counsel to reexamine the witness regarding a matter addressed by a juror question;

(7) If a question proposed by a juror is not asked, instruct the jurors that they should not draw any adverse inference from the court's refusal to ask any question proposed by a juror.

HISTORY: Amended, eff 7-1-75; 7-1-02; 7-1-05; 7-1-06

RULE 24 Trial Jurors

(A) **Brief introduction of case.** To assist prospective jurors in understanding the general nature of the case, the court, in consultation with the parties, may give jurors a brief introduction to the case.

(B) **Examination of prospective jurors.** Any person called as a prospective juror for the trial of any cause shall be examined under oath or upon affirmation as to the prospective juror's qualifications. The court may permit the attorney for the defendant, or the defendant if appearing *pro se*, and the attorney for the state to conduct the examination of the prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the state and defense to supplement the examination by further inquiry. Nothing in this rule shall limit the court's discretion, with timely notice to the parties at anytime prior to trial, to allow the examination of all prospective jurors in the array prior to any challenges for cause or peremptory challenges.

(C) **Challenge for cause.** A person called as a juror may be challenged for the following causes:

(1) That the juror has been convicted of a crime which by law renders the juror disqualified to serve on a jury.

(2) That the juror is a chronic alcoholic, or drug dependent person.

(3) That the juror was a member of the grand jury that found the indictment in the case.

(4) That the juror served on a petit jury drawn in the same cause against the same defendant, and the petit jury was discharged after hearing the evidence or rendering a verdict on the evidence that was set aside.

(5) That the juror served as a juror in a civil case brought against the defendant for the same act.

(6) That the juror has an action pending between him or her and the State of Ohio or the defendant.

(7) That the juror or the juror's spouse is a party to another action then pending in any court in which an attorney in the cause then on trial is an attorney, either for or against the juror.

(8) That the juror has been subpoenaed in good faith as a witness in the case.

(9) That the juror is possessed of a state of mind evincing enmity or bias toward the defendant or the state; but no person summoned as a juror shall be disqualified by reason of a previously formed or expressed opinion with reference to the guilt or innocence of the accused,

if the court is satisfied, from the examination of the juror or from other evidence, that the juror will render an impartial verdict according to the law and the evidence submitted to the jury at the trial.

(10) That the juror is related by consanguinity or affinity within the fifth degree to the person alleged to be injured or attempted to be injured by the offense charged, or to the person on whose complaint the prosecution was instituted; or to the defendant.

(11) That the juror is the person alleged to be injured or attempted to be injured by the offense charged, or the person on whose complaint the prosecution was instituted, or the defendant.

(12) That the juror is the employer or employee, or the spouse, parent, son, or daughter of the employer or employee, or the counselor, agent, or attorney, of any person included in division (C)(11) of this rule.

(13) That English is not the juror's native language, and the juror's knowledge of English is insufficient to permit the juror to understand the facts and the law in the case.

(14) That the juror is otherwise unsuitable for any other cause to serve as a juror.

The validity of each challenge listed in division (C) of this rule shall be determined by the court.

(D) Peremptory challenges. In addition to challenges provided in division (C) of this rule, if there is one defendant, each party peremptorily may challenge three prospective jurors in misdemeanor cases, four prospective jurors in felony cases other than capital cases, and six prospective jurors in capital cases. If there is more than one defendant, each defendant peremptorily may challenge the same number of prospective jurors as if the defendant was the sole defendant.

In any case where there are multiple defendants, the prosecuting attorney peremptorily may challenge a number of prospective jurors equal to the total peremptory challenges allowed all defendants. In case of the consolidation of any indictments, informations, or complaints for trial, the consolidated cases shall be considered, for purposes of exercising peremptory challenges, as though the defendants or offenses had been joined in the same indictment, information, or complaint.

(E) Manner of exercising peremptory challenges. Peremptory challenges may be exercised after the minimum number of jurors allowed by the Rules of Criminal Procedure has been passed for cause and seated on the panel. Peremptory challenges shall be exercised alternately, with the first challenge exercised by the state. The failure of a party to exercise a peremptory challenge constitutes a waiver of that challenge, but does not constitute a waiver of any subsequent challenge. However, if all parties, alternately and in sequence, fail to exercise a peremptory challenge, the joint failure constitutes a waiver of all peremptory challenges.

A prospective juror peremptorily challenged by either party shall be excused and another prospective juror shall be called who shall take the place of the prospective juror excused and be sworn and examined as other prospective jurors. The other party, if that party has peremptory challenges remaining, shall be entitled to challenge any prospective juror then seated on the panel.

Nothing in this rule shall limit the court's discretion to allow challenges under this division or division (D) of this rule to be made outside the hearing of prospective jurors.

(F) Challenge to array. The prosecuting attorney or the attorney for the defendant may challenge the array of petit jurors on the ground that it was not selected, drawn or summoned in accordance with law. A challenge to the array shall be made before the examination of the jurors pursuant to division (B) of this rule and shall be tried by the court.

No array of petit jurors shall be set aside, nor shall any verdict in any case be set aside because the jury commissioners have returned such jury or any juror in any informal or irregular manner, if in the opinion of the court the irregularity is unimportant and insufficient to vitiate the return.

(G) Alternate jurors.

(1) Non-capital cases. The court may direct that not more than six jurors in addition to the regular jury be called and impaneled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, have the same qualifications, be subject to the same examination and challenges, take the same oath, and have the same functions, powers, facilities, and privileges as the regular jurors. The court may retain alternate jurors after the jury retires to deliberate. The court must ensure that a retained alternate does not discuss the case with anyone until that alternate replaces a juror or is discharged. If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew. Each party is entitled to one peremptory challenge in addition to those otherwise allowed if one or two alternate jurors are to be impaneled, two peremptory challenges if three or four alternate jurors are to be impaneled, and three peremptory challenges if five or six alternative jurors are to be impaneled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by this rule may not be used against an alternate juror.

(2) Capital cases. The procedure designated in division (G)(1) of this rule shall be the same in capital cases, except that any alternate juror shall continue to serve if more than one deliberation is required. If an alternate juror replaces a regular juror after a guilty verdict, the court shall instruct the alternate juror that the juror is bound by that verdict.

(H) Control of juries.

(1) Before submission of case to jury. Before submission of a case to the jury, the court, upon its own motion or the motion of a party, may restrict the separation of jurors or may sequester the jury.

(2) After submission of case to jury.

(a) Misdemeanor cases. After submission of a misdemeanor case to the jury, the court, after giving cautionary instructions, may permit the separation of jurors.

(b) Non-capital felony cases. After submission of a non-capital felony case to the jury, the court, after giving cautionary instructions, may permit the separation of jurors during any period of court adjournment or may require the jury to remain under the supervision of an officer of the court.

(c) Capital cases. After submission of a capital case to the jury, the jury shall remain under the supervision of an officer of the court until a verdict is rendered or the jury is discharged by the court.

(3) Separation in emergency. Where the jury is sequestered or after a capital case is submitted to the jury, the court may, in an emergency and upon giving cautionary instruction, allow temporary separation of jurors.

(4) Duties of supervising officer. Where jurors are required to remain under the supervision of an officer of the court, the court shall make arrangements for their care, maintenance and comfort.

When the jury is in the care of an officer of the court and until the jury is discharged by the court, the officer may inquire whether the jury has reached a verdict, but shall not:

(a) Communicate any matter concerning jury conduct to anyone except the judge or;

(b) Communicate with the jurors or permit communications with jurors, except as allowed by court order.

(I) Taking of notes by jurors. The court, after providing appropriate cautionary instructions, may permit jurors who wish to do so to take notes during a trial. If the court permits the taking of notes, notes taken by juror may be carried into deliberations by that juror. The court shall require that all juror notes be collected and destroyed promptly after the jury renders a verdict.

(J) Juror questions to witnesses. The court may permit jurors to propose questions for the court to ask of the witnesses. If the court permits jurors to propose questions, the court shall use procedures that minimize the risk of prejudice, including all of the following:

- (1) Require jurors to propose any questions to the court in writing;
- (2) Retain a copy of each proposed question for the record;
- (3) Instruct the jurors that they shall not display or discuss a proposed question with other jurors;
- (4) Before reading a question to a witness, provide counsel with an opportunity to object to each question on the record and outside the hearing of the jury;
- (5) Read the question, either as proposed or rephrased, to the witness;
- (6) Permit counsel to reexamine the witness regarding a matter addressed by a juror question;
- (7) IF a question proposed by a juror is not asked, instruct the jurors that they should not draw any adverse inference from the court's refusal to ask any question proposed by a juror.

[Effective: July 1, 1973; amended effective July 1, 1975; July 1, 2002; July 1, 2005; July 1, 2006; amended July 1, 2008.]

Staff Note (July 1, 2008 Amendment)

Criminal Rule 24 is amended in order to give trial judges the option of retaining alternate jurors during the deliberation process in non-capital cases. The judge would have the option of retaining the alternate or alternates who would be sequestered from the rest of the jurors during deliberation, and if one of the regular jurors is unable to continue deliberations, to replace the juror with the alternate and instruct the jury to begin its deliberations anew.

The proposed amendments do not change the requirement in the current rule that alternate jurors be retained during the guilt phase of capital case deliberations. Under former Crim. R. 24, however, an alternate juror could not substitute for a juror unable to continue during deliberations. The proposed amendments allow trial judges in capital cases, as well as non-capital cases, the option of retaining alternates during any deliberations and substituting an alternate in the middle of deliberation.

§ 2313.37. Additional or alternate jurors.

In the trial in the court of common pleas of any civil case, when it appears to the judge presiding that the trial is likely to be protracted, upon direction of the judge after the jury has been impaneled and sworn, an additional or alternate juror shall be selected in the same manner as the regular jurors in the case were selected, but each party is entitled to two peremptory challenges as to the alternate juror.

(B) In all criminal cases, the selection of alternate jurors shall be made pursuant to Criminal Rule 24.

(C) The additional or alternate jurors selected shall be sworn and seated near the regular jurors, with equal opportunity for seeing and hearing the proceedings and shall attend at all times upon the trial with the regular jurors and shall obey all orders and admonitions of the court to the jury, and when the regular jurors are ordered kept together in a criminal case, the alternate jurors shall be kept with them. The additional or alternate jurors shall be liable as regular jurors for failure to attend the trial or to obey any order or admonition of the court to the jury, shall receive the same compensation as other jurors, and except as provided in this section shall be discharged upon the final submission of the case to the jury.

(D) If before the final submission of the case to the jury, which in capital cases includes any hearing required under division (D) of section 2929.03 of the Revised Code, a regular juror becomes unable to perform his duties, incapacitated, or disqualified, he may be discharged by the judge, in which case, or if a regular juror dies, upon the order of the judge, an additional or alternate juror, in the order in which called, shall become one of the jury and serve in all respects as though selected as an original juror.

HISTORY: GC § 11419-47; 114 v 193(206); Bureau of Code Revision, 10-1-53; 139 v S 1. Eff 10-19-81.

§ 2945.29. Jurors becoming unable to perform duties.

If, before the conclusion of the trial, a juror becomes sick, or for other reason is unable to perform his duty, the court may order him to be discharged. In that case, if alternate jurors have been selected, one of them shall be designated to take the place of the juror so discharged. If, after all alternate jurors have been made regular jurors, a juror becomes too incapacitated to perform his duty, and has been discharged by the court, a new juror may be sworn and the trial begin anew, or the jury may be discharged and a new jury then or thereafter impaneled.

HISTORY: GC § 13443-13; 113 v 123(184), ch 22, § 13; Bureau of Code Revision. Eff 10-1-53.

AppR 9. The record on appeal.

(A) Composition of the record on appeal. The original papers and exhibits thereto filed in the trial court, the transcript of proceedings, if any, including exhibits, and a certified copy of the docket and journal entries prepared by the clerk of the trial court shall constitute the record on appeal in all cases. A videotape recording of the proceedings constitutes the transcript of proceedings other than hereinafter provided, and, for purposes of filing, need not be transcribed into written form. Proceedings recorded by means other than videotape must be transcribed into written form. When the written form is certified by the reporter in accordance with App. R. 9(B), such written form shall then constitute the transcript of proceedings. When the transcript of proceedings is in the videotape medium, counsel shall type or print those portions of such transcript necessary for the court to determine the questions presented, certify their accuracy, and append such copy of the portions of the transcripts to their briefs.

In all capital cases the trial proceedings shall include a written transcript of the record made during the trial by stenographic means.

(B) The transcript of proceedings; duty of appellant to order; notice to appellee if partial transcript is ordered. At the time of filing the notice of appeal the appellant, in writing, shall order from the reporter a complete transcript or a transcript of the parts of the proceedings not already on file as the appellant considers necessary for inclusion in the record and file a copy of the order with the clerk. The reporter is the person appointed by the court to transcribe the proceedings for the trial court whether by stenographic, phonographic, or photographic means, by the use of audio electronic recording devices, or by the use of video recording systems. If there is no officially appointed reporter, App.R. 9(C) or 9(D) may be utilized. If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the weight of the evidence, the appellant shall include in the record a transcript of all evidence relevant to the findings or conclusion.

Unless the entire transcript is to be included, the appellant, with the notice of appeal, shall file with the clerk of the trial court and serve on the appellee a description of the parts of the transcript that the appellant intends to include in the record, a statement that no transcript is necessary, or a statement that a statement pursuant to either App.R. 9(C) or 9(D) will be submitted, and a statement of the assignments of error the appellant intends to present on the appeal. If the appellee considers a transcript of other parts of the proceedings necessary, the appellee, within ten days after the service of the statement of the appellant, shall file and serve on the appellant a designation of additional parts to be included. The clerk of the trial court shall forward a copy of this designation to the clerk of the court of appeals.

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If the appellant refuses or fails, within ten days after service on the appellant of appellee's designation, to order the additional parts, the appellee, within five days thereafter, shall either order the parts in writing from the reporter or apply to the court of appeals for an order requiring the appellant to do so. At the time of ordering, the party ordering the transcript shall arrange for the payment to the reporter of the cost of the transcript.

A transcript prepared by a reporter under this rule shall be in the following form:

(1) The transcript shall include a front and back cover; the front cover shall bear the title and number of the case and the name of the court in which the proceedings occurred;

(2) The transcript shall be firmly bound on the left side;

(3) The first page inside the front cover shall set forth the nature of the proceedings, the date or dates of the proceedings, and the judge or judges who presided;

(4) The transcript shall be prepared on white paper eight and one-half inches by eleven inches in size with the lines of each page numbered and the pages sequentially numbered;

(5) An index of witnesses shall be included in the front of the transcript and shall contain page and line references to direct, cross, re-direct, and re-cross examination;

(6) An index to exhibits, whether admitted or rejected, briefly identifying each exhibit, shall be included following the index to witnesses reflecting the page and line references where the exhibit was identified and offered into evidence, was admitted or rejected, and if any objection was interposed;

(7) Exhibits such as papers, maps, photographs, and similar items that were admitted shall be firmly attached, either directly or in an envelope to the inside rear cover, except as to exhibits whose size or bulk makes attachment impractical; documentary exhibits offered at trial whose admission was denied shall be included in a separate envelope with a notation that they were not admitted and also attached to the inside rear cover unless attachment is impractical;

(8) No volume of a transcript shall exceed two hundred and fifty pages in length, except it

may be enlarged to three hundred pages, if necessary, to complete a part of the voir dire, opening statements, closing arguments, or jury instructions; when it is necessary to prepare more than one volume, each volume shall contain the number and name of the case and be sequentially numbered, and the separate volumes shall be approximately equal in length.

The reporter shall certify the transcript as correct, whether in written or videotape form, and state whether it is a complete or partial transcript, and, if partial, indicate the parts included and the parts excluded.

If the proceedings were recorded in part by videotape and in part by other media, the appellant shall order the respective parts from the proper reporter. The record is complete for the purposes of appeal when the last part of the record is filed with the clerk of the trial court.

(C) Statement of the evidence or proceedings when no report was made or when the transcript is unavailable. If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement shall be served on the appellee no later than twenty days prior to the time for transmission of the record pursuant to App.R. 10, who may serve objections or propose amendments to the statement within ten days after service. The statement and any objections or proposed amendments shall be forthwith submitted to the trial court for settlement and approval. The trial court shall act prior to the time for transmission of the record pursuant to App.R. 10, and, as settled and approved, the statement shall be included by the clerk of the trial court in the record on appeal.

(D) Agreed statement as the record on appeal. In lieu of the record on appeal as defined in division (A) of this rule, the parties, no later than ten days prior to the time for transmission of the record pursuant to App.R. 10, may prepare and sign a statement of the case showing how the issues presented by the appeal arose and were decided in the trial court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented. If the statement conforms to the truth, it, together with additions as the trial court may consider necessary to present fully the issues raised by the appeal, shall be approved by the trial court prior to the time for transmission of the record pursuant to App.R. 10 and shall then be certified to the court of appeals as the record on appeal and transmitted to the court of appeals by the clerk of the trial court within the time provided by App.R. 10.

(E) Correction or modification of the record. If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either

party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the trial court, either before or after the record is transmitted to the court of appeals, or the court of appeals, on proper suggestion or of its own initiative, may direct that omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the court of appeals.

HISTORY: Amended, eff 7-1-77; 7-1-78; 7-1-88; 7-1-92

§ 5. Additional powers of supreme court; supervision; rule making.

(A) (1) In addition to all other powers vested by this article in the supreme court, the supreme court shall have general superintendence over all courts in the state. Such general superintending power shall be exercised by the chief justice in accordance with rules promulgated by the supreme court.

(2) The supreme court shall appoint an administrative director who shall assist the chief justice and who shall serve at the pleasure of the court. The compensation and duties of the administrative director shall be determined by the court.

(3) The chief justice or acting chief justice, as necessity arises, shall assign any judge of a court of common pleas or a division thereof temporarily to sit or hold court on any other court of common pleas or division thereof or any court of appeals or shall assign any judge of a court of appeals temporarily to sit or hold court on any other court of appeals or any court of common pleas or division thereof and upon such assignment said judge shall serve in such assigned capacity until the termination of the assignment. Rules may be adopted to provide for the temporary assignment of judges to sit and hold court in any court established by law.

(B) The supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. Proposed rules shall be filed by the court, not later than the fifteenth day of January, with the clerk of each house of the general assembly during a regular session thereof, and amendments to any such proposed rules may be so filed not later than the first day of May in that session. Such rules shall take effect on the following first day of July, unless prior to such day the general assembly adopts a concurrent resolution of disapproval. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Courts may adopt additional rules concerning local practice in their respective courts which are not inconsistent with the rules promulgated by the supreme court. The supreme court may make rules to require uniform record keeping for all courts of the state, and shall make rules governing the admission to the practice of law and discipline of persons so admitted.

(C) The chief justice of the supreme court or any judge of that court designated by him shall pass upon the disqualification of any judge of the courts of appeals or courts of common pleas or division thereof. Rules may be adopted to provide for the hearing of disqualification matters involving judges of courts established by law.

HISTORY: (Amended, effective Nov. 6, 1973; SJR No.30. Adopted May 7, 1968.)