

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :
 :
 Plaintiff-Appellee, :
 :
 -vs- : Case No. 08-1012
 :
 DAVID B. CLINKSCALE, : On Appeal from the Franklin County
 : Court of Appeals, Tenth Appellate
 Defendant-Appellant. : District

REPLY BRIEF OF APPELLANT OF DAVID B. CLINKSCALE

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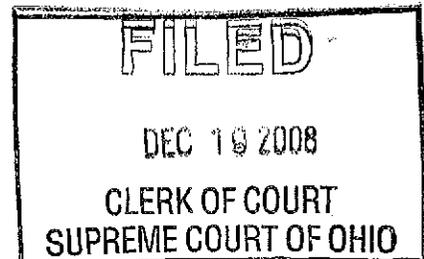


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ARGUMENT

PROPOSITION OF LAW NO. I

APPELLANT'S REPLY TO THE STATE'S ARGUMENT THAT IT IS NOT IMPROPER FOR A SUBSTITUTE TRIAL JUDGE TO PRIVATELY MEET WITH AND DISMISS A DELIBERATING JUROR WITHOUT NOTIFYING THE PARTIES AND PROVIDING THEM AN OPPORTUNITY TO QUESTION THE JUROR, SUGGEST ALTERNATIVES TO DISMISSAL, OR OTHERWISE OBJECT, PARTICULARLY WHEN THE DISMISSED JUROR IS THE SOLE DISSENTER AT THE TIME OF HER DISMISSAL.

PROPOSITION OF LAW NO. II

APPELLANT'S REPLY TO THE STATE'S ARGUMENT THAT IT IS NOT IMPROPER FOR A SUBSTITUTE TRIAL JUDGE TO DISMISS A DELIBERATING JUROR AND THEN REPLACE HER WITH AN ALTERNATE IN DIRECT CONTRAVENTION OF CRIM. R. 24(G)(2) WHICH PROHIBITS THE SUBSTITUTION OF ALTERNATE JURORS DURING DELIBERATION, PARTICULARLY WHEN THE DISMISSED JUROR IS THE SOLE DISSENTER AT THE TIME OF HER DISMISSAL.

The State replies to Propositions of Law Nos. I and II jointly, and Appellant will do likewise. In its Merit Brief the State does not contest the relevant facts which support Appellant's claims. Specifically, the State does not dispute:

1. That a substitute trial judge privately met with and dismissed a deliberating juror without notifying the parties and providing them an opportunity to question the juror, suggest alternatives to dismissal, or otherwise object;
2. That after dismissing the deliberating juror, the substitute trial judge replaced her with an alternate in direct contravention of Crim. R. 24(G)(2) which prohibits the substitution of alternate jurors during deliberation; and,
3. That the dismissed juror was the sole dissenter at the time of her dismissal.

Rather than attempting to challenge the undisputed facts, the State raises a number of collateral issues which it asserts provide this Court with reasons to ignore the facts and

deny Appellant relief. As discussed below, none of the State's rationales for denying relief are meritorious, and all should be summarily rejected by this Court.

A. Arguments regarding dismissed juror.

While not contesting the fact that the dismissed juror was the "sole dissenter" at the time of her excusal, the State asserts that Appellant's appeal should be dismissed because there is insufficient support in the record for such a finding. Brief of Appellee, p. 2. While acknowledging that Judge Whiteside made that finding in his dissent, the State asserts that Judge Whiteside's factual finding is somehow legally insufficient. *Id.*

Significantly neither Judge Klatt, who wrote the majority opinion in the Court of Appeals, nor Judge Tyack, who wrote a concurring opinion, disputed Judge Whiteside's finding that the dismissed juror was the sole dissenter. Furthermore the State never challenged the fact that dismissed juror was the sole dissenter in the Court of Appeals, either in its briefing or at oral argument.

Furthermore it would have been unethical for the State to have challenged the finding that the dismissed juror was the sole dissenter because the State knew that it was true. After the guilty verdicts were returned, the trial prosecutor and one of Appellant's defense attorneys met with several of the jurors in the jury room. They were told by the jury foreman that Juror Number Three (the dismissed juror) was the dissenting juror that Question Three referenced.¹

¹ See Affidavit of Trial Attorney Gerald Simmons at para. 28, attached hereto, filed in the same case on June 8, 2007 in support of Appellant's petition for post-conviction relief. *State v. Clinkscale*, Franklin County Common Pleas Court Case No. 97CR-09-5339. The same assistant prosecuting attorney who now represents the State in this action also represented the State in regard to Appellant's post-conviction action.

A party challenging a factual finding made by a state court must demonstrate by clear and convincing evidence that the factual finding is erroneous. The State has not even attempted to do so. Even if the State had met its burden, such a finding would not (as the State asserts) be fatal to Appellant's claims. The fact that the dismissed juror was the sole dissenter at the time of her excusal demonstrates the prejudice Appellant suffered.² It does not change the fact that a deliberating juror was improperly excused by a substitute trial judge and then improperly replaced by an alternate juror in contravention of the Ohio Rules of Criminal Procedure.

B. Arguments regarding waiver.

The State argues that "no timely objection was ever made to the purported meeting, and no objection at all was ever made to the juror's excusal or substitution of the alternate. As a result, the issue (sic) is waived." Brief of Appellee, p. 18 (footnote omitted.) Although no objection to the trial court's *ex parte* excusal and replacement of Juror Number Three was made at the time, a lengthy objection was made at a subsequent hearing. See Appellant's Merit Brief, pp. 5 - 7.

Here, any failure to more timely and completely object must be linked to the trial court's decision to meet and excuse the deliberating juror *ex parte*. Defense counsel was not present during these *ex parte* conversations, nor did the trial court offer the parties the opportunity to voir dire the deliberating juror prior to her excusal, nor did the trial court request a court reporter to record her conversation with the deliberating juror. Defense counsel acknowledged discussing the juror's problems with the prosecutor and bailiff, but

² As set forth in the Merit Brief, the previously deadlocked jury returned guilty verdicts to as to all counts and specifications shortly after the deliberating juror was replaced by an alternate.

at no time did counsel ever consent to releasing the juror. (Vol. VII, pp. 1526-27). Furthermore, when the trial judge entered the courtroom, she indicated that she had already excused Juror Number Three. *Id.* at 1527.

As Judge Whiteside noted in his dissent:

The State has conceded error by the new trial judge's ex parte excusal of a deliberating juror. **An after the fact objection was futile. The juror was excused and no longer available.** In light of the State's concession of error, assignment of error four should be sustained since the prejudicial nature of the error is obvious. The new trial judge excused the one juror who was know to be questioning the prosecution's case because of "inability" to believe the testimony of more than one of the state's witnesses.

Opinion, pp. 22-23 (emphasis added).

Although trial counsel raised no specific objection to the substitute trial judge's improper replacement of the deliberating juror with an alternate in direct contravention of the Ohio Rules of Criminal Procedure, the court's actions also constituted plain-error subject to review by this Court. A reviewing court must apply a four-prong test in a plain-error inquiry:

First and most fundamentally, there must be error, i.e. a deviation from a legal rule. *United States v. Olano* (1993), 507 U.S. 725, 732-733. Second, the error must be plain. To be plain, the error must be "clear" or, equivalently, "obvious." *Id.* at 734, citing *United States v. Young* (1985), 470 U.S. 1, 17. Third, the error must affect substantial rights. In most cases, this means that the error must have affected the outcome of the trial. *Olano*, 507 U.S. at 734.

If a party satisfies the three foregoing conditions, a reviewing court then has the discretion to correct the plain error [but only if the error "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Johnson v. United States* (1997), 520 U.S. 461, 467. [Internal citations omitted.]

State v. Hill, 92 Ohio St.3d 191, 2001-Ohio-141, at 206 (Cook, J., concurring in judgment).

In cases such as Appellant's that may require two deliberation phases, alternate jurors continue to serve in the event that a substitution is required. Crim.R. 24(G) (2). An alternate juror may be substituted for an original juror *after* the trial phase and *before* deliberations in the penalty phase begins. However, no alternate is permitted to be substituted during any deliberation. The trial court violated this Rule when, after deliberations began in the trial-phase of Appellant's trial, the court *sua sponte* dismissed a juror after an *ex parte* discussion. Moreover, the trial court improperly permitted an alternate juror to replace the dismissed juror and continue the trial-phase deliberations.

This Court has mandated that "[i]f a juror becomes ill or is otherwise disqualified after the jury has begun its deliberations on guilt or innocence, a mistrial results." *State v. Hutton*, 53 Ohio St.3d 36, 47 (1990), citing *Pfeffer v. State*, 683 S.W. 2d 64 (Tex. App. 1984); *People v. Loving*, 67 Cal. App. 3d Supp. 12 (1977). The Court noted that one of the rationales advanced by other courts in support of a rule prohibiting mid-deliberation substitution of jurors is that:

[If] alternates were allowed to replace regular jurors after the jury retired to deliberate, jurors in the minority might fake illness in order to be replaced and thereby escape the emotional pressures of holding out against the majority.

Hutton, 53 Ohio St.3d 47, citing *United States v. Lamb*, 529 F.2d 1153, 1156 (9th Cir., 1975). *See, also, State v. Bowling*, Franklin App. No. 95APA05-599, 1996 WL 52892 (seating an alternate juror once deliberations begin and without notifying counsel constitutes error).

The trial court's error violated Appellant's right to due process and prejudiced the outcome of his trial. At the time that the trial court *sua sponte* dismissed Juror Number Three, the jury was deadlocked. (Vol. VI, pp. 1477-80). Out of the twelve jurors, at least

one was “not comfortable making a guilty verdict based on the testimony of one person.” *Id.* Had Appellant’s trial attorneys been able to voir dire the juror before the dismissal occurred, a mistrial would likely have been requested. And, because of the rule forbidding the substitution of jurors during deliberations, the trial court would have had no choice but to grant defense counsel’s request.

The fact that Judge Lynch brought the “new” panel back into the courtroom and directed them to begin their deliberations anew did not cure the error. (Vol. VI, pp. 1496-97). In Appellant’s case, the jury had “progressed to a stage where the original eleven jurors were in substantial agreement and, as such, were in a position to present a formidable obstacle to any attempt that the alternate juror might make to persuade and convince the original jurors.” *State v. Miley*, 77 Ohio App.3d 786, 792 (1991), citing *People v. Ryan*, 19 N.Y.2d 100 (1966). The alternate juror, being a newcomer to the proceedings, could likely have been coerced or intimidated by the other eleven jury members who likely had already formulated positions, viewpoints, or opinions.

In order to have ensured that Appellant’s rights were protected, defense counsel should have been permitted to voir dire Juror Number Three. Had voir dire been allowed, defense counsel would have been able to question Juror Number Three as to whether she felt an undue amount of pressure regarding her opinions of the issues in the case. And counsel would have had the opportunity to object to the dismissal of Juror Number Three or alternatively to have moved for a mistrial. Instead, the trial court erred by *sua sponte* dismissing the juror during the trial-phase deliberations and allowing an alternate juror to continue in place of the original juror. Not surprisingly, the jury

announced a short time later that it had found Appellant guilty of all charges and specifications. (Vol. VI, pp. 1504-11).

C. Arguments regarding prior concessions of error.

In an apparent attempt to backtrack from concessions made in the Court of Appeals, the State now argues “contrary to Judge Whiteside’s deeply-flawed dissent, and contrary to defendant’s merit brief here, the State does **not** concede that error occurred.” Brief of Appellee, p. 10 (emphasis in original). In his dissent, Judge Whiteside’s found as follows:

The State has conceded error by the new trial judge’s ex parte excusing a deliberating juror. An after the fact objection was futile. The juror was excused and no longer available. In light of the State’s concession of error, assignment of error number four should be sustained since the prejudicial nature of the error is obvious.

Opinion, p. 22.

Ironically the State ignores the majority opinion of Judge Klatt upon whose opinion the State asks this Court to rely. Judge Klatt also found that the State had conceded error in regard to the process in which a deliberating juror was dismissed and replaced: “The State concedes that the trial court violated this rule when it substituted an alternate juror during the jury’s deliberations.” Opinion, p. 13. Although the State may now wish to backtrack from concessions made in the Court of Appeals, it should not be permitted to do so by misrepresenting what occurred in the Court of Appeals.

D. Arguments regarding “gamesmanship.”

The State also argues that “[a] rule of automatic reversal particularly would be inappropriate because such a rule would encourage gamesmanship.” Brief of Appellee, p. 33. A defendant should not, the State continues, “be permitted to keep some of their

objections in their hip pockets and to disclose them only to the appellate tribunal,” thereby taking a “chance on a favorable verdict, reserving a right to impeach it if it happens to go the other way.” *Id.* at pp. 33-34 (citing *Hunter v. United States*, 606 A.2d 139, 144 (D.C. App. 1992)).

First, Appellant is not seeking a rule of automatic reversal. As noted in his Merit Brief and as recognized by Judge Whiteside in his dissent, the prejudice in this case is clear. Shortly after the sole dissenting juror was dismissed by the substitute trial judge and replaced by an alternate, the jury returned guilty verdicts as to all counts and specifications.

Furthermore, the State argues throughout its Brief that defense counsel’s failure to immediately object to the substitute trial judge’s dismissal of the deliberating juror and replacement with an alternate was a conscious decision obviously made in the best interest of their client. The State now takes the opposite position, implying that defense counsel knew from the beginning that reversible error had been committed and failed to object simply to get “two bites at the apple.” If this were in fact the case, then trial counsel’s foresight would have to be faulted since the Tenth District Court of Appeals did not grant Appellant an automatic reversal, but instead affirmed his convictions.

E. Arguments regarding changes in the law.

In the Appendix to its Merit Brief, the State attaches a copy of Crim. R. 24 in effect at the time of Appellant’s trial (the State refers to this as “Former” Rule 24) as well as a copy of Crim. R. 24 as amended on July 1, 2008 (the State refers to this as “Current” Rule 24). Whereas the version of Crim. R. 24 in effect at the time of Appellant’s trial

clearly prohibited the replacement of deliberating jurors with alternates during deliberation, the current version permits it.

In its Brief the State seems to imply that this Court can ignore the Rule in effect at the time of Appellant's trial, and rely instead on the newer version:

[T]his 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).

Brief of Appellee, p. 2. In Appellant's case, the substitute trial judge improperly replaced a deliberating juror with an alternate on September 11, 2006, nearly ten months before the July 1, 2008 amendments became effective.

The State cites to no authority permitting a court to ignore a criminal rule in effect at the time of a defendant's trial, and rely instead upon a rule enacted or amended ten months later. Nor is Appellant's counsel aware of any such authority. This Court should reject the State's invitation to ignore the law in effect at the time of Appellant's trial, and rely instead upon the version of Crim. R. 24 in effect at the time which clearly prohibited the substitution of a deliberating juror with an alternate.

F. Arguments regarding inadequate appellate record.

The State further asserts that "[t]he 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." Brief of Appellee, p. 16. The State then discusses the various ways an appellate record can be made pursuant to Ohio R. App. P. 9, and chides defense counsel for failure to comply with its requirements. *Id.*

The State fails, however, to explain why the statements of defense counsel and the prosecutor (included in the transcript of proceedings) do not constitute “a proper record.” Although each recalled the facts somewhat differently, there was no dispute as to the relevant facts. There was no dispute as to the fact that a substitute trial judge privately met with and dismissed a deliberating juror without notifying the parties and providing them an opportunity to question the juror, suggest alternatives to dismissal, or otherwise object. Nor was there a dispute as to the fact that after dismissing the deliberating juror, the substitute trial judge replaced her with an alternate in direct contravention of Crim. R. 24(G)(2) which prohibits the substitution of alternate jurors during deliberation.

Although the State seems to contend that the parties should each have prepared their own statement of fact to “be submitted to and settled by [the] court and the record made to conform to the truth” pursuant to App. R. 9(E), such an effort would have been futile. As to the facts which remained disputed, Judge Cain was not in a position to determine which were true and so advised the parties:

THE COURT: Well, the record is what it is. I mean, we have a record, I assume, what happened on September the 11th; and that record is not going to be changed.

(Vol. VII, p. 1527). As such, this Court should reject the State’s invitation to find that the statements of defense counsel and the prosecutor, and included in the transcript of proceedings, do not constitute a proper appellate record.

CONCLUSION

For the reasons set forth herein, as well as in the previously filed Merit Brief of Appellant David B. Clinkscale, this Court should reverse Clinkscale’s convictions and remand his case for a new trial.

Respectfully submitted,

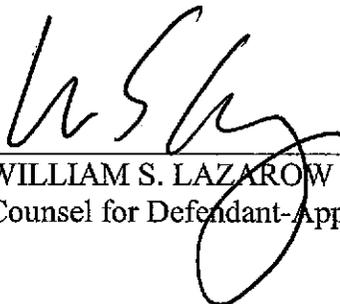


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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing REPLY BRIEF OF APPELLANT DAVID B. CLINKSCALE was forwarded by regular U.S. mail to Ron O'Brien, Franklin County Prosecuting Attorney, and Steven L. Taylor, Assistant Prosecuting Attorney, 373 S. High Street, 13th Floor, Columbus, Ohio 43215, on the 19th day of December, 2008.



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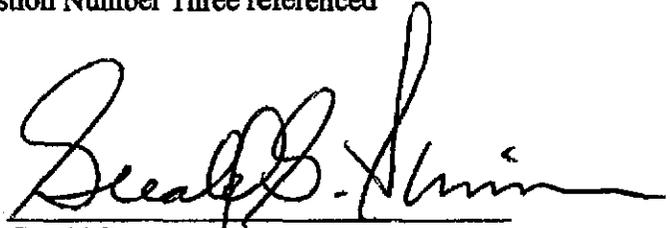
- 9 Ten minutes after Judge Cain told the jury that a hung jury would require "many more hours of deliberation", the jury foreman submitted the following question

We have one member who is not comfortable making a guilty verdict based on the testimony of one person (in this case Todne Williams) This inability is not specific to this witness The juror does not believe a guilty verdict could ever be declared without more evidence This issue appears to not be resolvable with more time and discussion Any advice would be appreciated
(See Appendix)

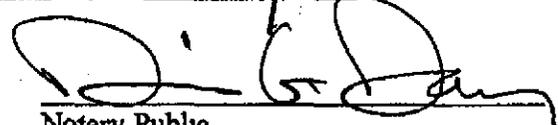
- 10 Judge Cain called me at home to inform me of this question, and I returned to the courthouse in an effort to assist in formulating a response Since this was a complicated question, and the parties were unable to agree upon a response that late on a Friday afternoon, the jury was excused for the weekend, at their request
- 11 On Monday morning, September 11, 2006, I returned to the courthouse with supplemental jury instructions that I believed should be given in response to the jury's third question
- 12 While I was reviewing my proposed jury instructions, Judge Cain's bailiff told us that Juror Number Three was in Judge Cain's office behind closed doors We were told that Juror Number Three had experienced heart palpitations and did not want to remain on the jury Judge Cain had left for vacation and his chambers mate, Judge Julie Lynch, was presiding The defense was unaware of any conversations between Judges Lynch and Cain to that point
- 13 Moments later, Judge Lynch gave the prosecutor and me an additional jury instruction This instruction was pretty much what the prosecutors had argued the previous Friday in Judge Cain's chambers and which Mr DiMartino and I had objected to as to narrow Judge Lynch then went into Judge Cain's office to meet with Juror Number 3 alone
- 14 We began reviewing Judge Lynch's supplemental instruction while she met with Juror Number Three
- 15 At no time did Judge Lynch ever tell me that Juror Number Three was going to be excused
- 16 During my review of Judge Lynch's supplemental instruction, and while Juror Number Three was in Judge Cain's chambers, I told the prosecutor that I wondered whether Juror Number Three was the dissenting juror that the juror questions had referenced
- 17 The prosecutor asked me whether I wanted to ask her that question
- 18 At that time I responded no because I believed that we would later be able to voir dire Juror Number Three on her request to be excused
- 19 I did not learn of Juror Number Three's dismissal until Judge Lynch stated that the juror had a medical issue and had been excused

- 20 I did not formally object on the record to this process or when the alternate juror was sworn in because Juror Number Three had already been dismissed and had left
- 21 I later placed an objection on the record
- 22 Had I thought about it at the time the juror substitution had taken place, I would have objected to the new juror and requested that Judge Lynch declare a mistrial
- 23 Had Judge Lynch consulted with me before dismissing Juror Number Three, I would never have agreed to that juror's dismissal
- 24 I wanted to voir dire Juror Number Three and find out what brought on the heart palpitations
- 25 I would have wanted to explore whether Judge Cain's instruction that "many more hours of deliberation" was needed before a hung jury could have been declared, brought about added stress to this juror, contributing to her request to be excused
- 26 Furthermore, I would have wanted to address the question relating to the juror who needed more evidence before rendering a guilty verdict
- 27 Based upon the answers I received to these initial questions, I would have asked Juror Number Three a number of follow-up questions in order to assure myself that she was not being unduly pressured by the remaining jurors in an effort to get her to violate her oath as a juror to "diligently inquire into and carefully deliberate all matters between the State of Ohio and the defendant David Clinkscale" and to do this "to the best of [her] skill and understanding, without bias or prejudice"
- 28 After the guilty verdicts were returned, the prosecutor and I met with a number of the jurors in the jury room and were told by the jury foreman that Juror Number Three was the dissenting juror that Question Number Three referenced

Further Affiant sayeth naught


 Gerald Simmons

Signed and sworn before me this 30 day of MAY 2007


 Notary Public

#257221

DENNIS G. DAY, Attorney-At-Law
 NOTARY PUBLIC - STATE OF OHIO
 My commission has no expiration date.
 Section 147.03 R.C.

DO WE GET A COPY OF THE TRANSCRIPTS
AS STANDARD PROCEDURE? No

55092E08

~~DO~~ CAN WE GET SPECIFIC TESTIMONY
UPON REQUEST? WHAT PROCESS?

W. L. L.

3:27 PM
9-8-06

Please rely on your
collective memory of
the testimony.

W. L. L.

9/8/06
at 3:55 p.

~~WE~~ ~~HAVE~~

55092E09

WHAT WOULD REQUIRE DECLARATION OF
HUNG JURY?

Adm Sgt

Many more hours
of deliberations.

W. L. L.

9/8/06

4:40 p.

A-5

WE HAVE ONE MEMBER WHO IS NOT COMFORTABLE
MAKING A GUILTY VERDICT BASED ON THE TESTIMONY
OF ONE ~~PERSON~~ PERSON (IN THIS CASE TODNE WILLIAMS)
~~THIS~~ THIS INABILITY IS NOT SPECIFIC TO THIS WITNESS.
THE JURER DOES NOT BELIEVE A GUILTY VERDICT
COULD EVER BE DECLARED WITHOUT MORE EVIDENCE.
THIS ISSUE APPEARS TO [^]BE RESOLVABLE WITH TIME [^]AND DISCUSSION. _{NOT} _{MORE}

~~ANY~~ ~~ADVICE~~ ~~WOULD~~ BE APPRECIATED.

Wm. J. J.

4:50 PM 9-8-06

55092E10

RULE 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.

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 the 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.

[Effective: July 1, 1971; amended effective July 1, 1977; July 1, 1978; July 1, 1988; July 1, 1992.]