

ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio)	09-0886
)	
Appellee)	On Appeal from
)	The Lucas County Court of Appeals
vs.)	Sixth Appellate District
)	
James R. Downour)	Court of Appeals
)	Case No. L-08-1029
Appellant)	

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT JAMES R. DOWNOUR

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EXPLANATION OF WHY THIS CASE IS A CASE OF
PUBLIC OR GREAT GENERAL INTEREST AND
INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This case is of great public importance because it involves a breach of one of the most basic tenets of our country's judicial system: the right to trial by jury. In order to ensure that right, Ohio Criminal Rule 24(G) and O.R.C. 2313.37 have prescribed the proper role of alternate jurors. According to both the rule and the statute, an alternate juror in a non-capital case must be discharged when the case is sent to the jury. Furthermore, this Court in *State v. Gross*¹ held not only that the presence of an alternate juror during deliberations is error, but also that, when the error is the subject of a properly made objection, the State bears the burden to show that the defendant was not prejudiced. In the absence of such a showing by the State, prejudice will be presumed.²

In the face of the criminal rule, the statute, and precedent from this Court, two districts – the Second³ and now the Sixth – have held that a trial court's decision to allow an alternate to sit in the jury room during deliberations is harmless error unless the defendant can show prejudice. In two of Ohio's districts, therefore, the restrictions set out by the legislature and interpreted by this Court no longer exist. Despite the law, a defendant in those districts is powerless to prevent a trial judge from allowing an alternate juror into the jury room during deliberations.

In the case at bar, counsel for the defendant properly objected and pointed out to the trial court that the alternate juror was prohibited from entering the jury room during

¹ *State v. Gross* (2002), 97 Ohio St.3d 121.

² *Id.* at 153.

³ *State v. Neal* (2d Dist.), 2002 Ohio 6786.

deliberations. Nonetheless, the trial judge ignored the law. Counsel for the defendant renewed his objection after the verdict and was instructed to file a motion for new trial, which he did. The motion was overruled. The defendant then appealed. The Sixth District agreed with the defendant that the trial court had erred, but the appellate court held that the error was harmless because the defendant had not shown prejudice.

The defendant was unable to show prejudice because Evid. R. 606(B) severely restricts the right of litigants to know what goes on in the jury room. Jurors may “testify on the question whether extraneous prejudicial information was improperly brought to the jury’s attention or whether any outside influence was improperly brought to bear on any juror, only after some outside evidence of that act or event has been presented.” This Court in *State v. Hessler*⁴ held that an alternate juror’s testimony or affidavit is not “outside evidence” in the context of Evid. R. 606(B). The alternate who has sat in on the trial is part of the jury for purposes of the rule. Therefore, the defendant and his attorney were prohibited from compelling testimony from either the jurors or the alternate juror regarding what went on in the jury room.

In light of the above, this case raises an issue of great importance to the public and to our state’s system of justice. One wonders whether the trial judge in this case violated the statute and the criminal rule, even after objection, because he did not know the law or because he simply chose to disregard the law. If the latter, then the Sixth District gave him no reason to discontinue this practice. Future defendants in front of this particular judge may be tried by a jury that is accompanied during its deliberations by an alternate, and those future defendants, in light of Evid. R. 606(B), will never know whether they have been prejudiced. As the law

⁴ *State v. Hessler* (2000), 29 Ohio St.3d 108, 123.

currently stands in the Second and Sixth Districts, no defendant has the power to stop such a practice, even where an objection is properly made. Only this Court has that power.

STATEMENT OF THE CASE AND FACTS

The appellant, James R. Downour, was charged with the misdemeanor traffic offense of Operating a Vehicle under the Influence, a violation of Oregon Municipal Code Section 313.01(A)(1)(A). The case proceeded to a jury trial on November 14, 2007. At the conclusion of closing arguments, the Court provided the jurors with instructions for deliberating and instructed the alternate juror to retire with the regular jurors.⁵ The parties stipulated and the reviewing court held that “[a]ppellant’s counsel objected to the proposed instruction allowing the alternate juror to be present in the jury room during deliberations as violative of his constitutional right to a trial by jury.”⁶ The trial court overruled the objection, and the jury returned a guilty verdict.

Appellant’s counsel again objected to the presence of the alternate juror and moved for a new trial, which motion was denied.⁷ The appellant filed a timely appeal with the Sixth District Court of Appeals, which in a Decision dated April 17, 2009, found that the appellant’s assignment of error was not well taken.⁸

⁵ Transcript of Trial at 183.

⁶ *State v. Downour* (6th Dist.), 2009 Ohio 1812, P3.

⁷ Transcript at 188.

⁸ *Downour* at P14.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law: When a trial court, in spite of a properly made objection, allows an alternate juror to sit with the jury during deliberations in violation of O.R.C. 2313.37(C) and Crim. R. 23(G)(1), the defendant is entitled to a new trial unless the state can show a lack of prejudice.

R.C. Section 2313.37(C) states that “the alternate jurors . . . shall be discharged upon the final submission of the case to the jury.” Crim. R. 24(G)(1) mirrors the statute, requiring that “[e]xcept in capital cases, an alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict.”

It cannot be disputed, therefore, that the trial court committed error when it failed to discharge the alternate juror when the case was sent to the jury and instead allowed the alternate to sit in the jury room during the entirety of the jury’s deliberations. This Court has analyzed such errors in two contexts: where the defendant has failed to object and where the defendant has properly raised an objection. When this case was on review in the Sixth District, both the state and the reviewing court discussed at some length cases in which a defendant failed to object. In such a case, unlike in the case at bar, the mistake is reviewed for plain error.⁹ The appellant will not focus on those cases, as they cast no light on whether the appellant was entitled to a new trial after his properly made objection was overruled in error.

This Court in *State v. Gross*¹⁰ addressed a situation analogous to the situation here, where the defendant properly objected when the trial court proposed to allow the alternate into the jury room. The *Gross* Court first confirmed this Court’s earlier holding that “allowing

⁹ *State v. Murphy* (2001), 91 Ohio St.3d 516, 532; *State v. Jackson* (2001), 92 Ohio St.3d 436, 438.

¹⁰ *State v. Gross* (2002), 97 Ohio St.3d 121.

alternate jurors to sit in on sentencing deliberations constitute[s] error.”¹¹ Then the Court turned its attention to the question at issue there (and here): how to determine whether such error is prejudicial when an objection has been properly entered.

The *Gross* Court pointed out that an alternate could prejudice a defendant’s rights either by participating in deliberations or simply because his presence might have a chilling effect on the jury.¹² Most importantly, the Court made the following holding, which subsequently has been ignored not only by the reviewing court in the instant case but also by the Second District:¹³ “Once *Gross* objected to the presence of the alternates in jury deliberations, the burden shifted to the state to demonstrate an absence of prejudice.”¹⁴

The reviewing court below chose to ignore that language and instead focused on a statement by the *Gross* Court that “reversible error occurs where, over objection, an alternate juror participates in jury deliberations resulting in an outcome adverse to a defendant and either (1) the state has not shown the error to be harmless, or (2) the trial court has not cured the error.” The Sixth District emphasized the word “participated” and pointed out that “there is not one scintilla of evidence in the record of this cause showing that the alternate juror actively *participated*, in any way, during those deliberations.”¹⁵ (The *Gross* Court did not use the word “actively” and did not italicize “participated.” Those changes were made by the Sixth District.)

The parties could argue whether the alternate’s long-term presence in the room amounts to “participation,” but such argument is not necessary. The *Gross* Court’s meaning is clear when the entire opinion is read. That entire opinion includes not only the language

¹¹ *Id.* at 152, citing *State v. Jackson* (2001), 92 Ohio St.3d 436, 439.

¹² *Id.* at 153.

¹³ *State v. Neal* (2d Dist.), 2002 Ohio 6786.

¹⁴ *Gross* at 153.

¹⁵ *Downour* at P14.

regarding participation by the alternate juror, but also the holding that “[o]nce Gross objected to the presence of the alternates in jury deliberations, the burden shifted to the state to demonstrate an absence of prejudice.”¹⁶ (Emphasis added.) The only question for the Sixth District, then, should have been whether the state met its burden to demonstrate an absence of prejudice. In fact, the state offered no evidence on that point and therefore failed to meet its burden.

The Sixth District below correctly noted that its decision was in accord with the Second District case of *State v. Neal*,¹⁷ a case where, as in the case at bar, the defendant properly objected to the trial court’s decision to allow an alternate to sit with the jury during deliberations. In *Neal*, decided just over a month after *Gross*, the Second District ignored its obligation to be bound by the precedent of this Court. Citing a Seventh Circuit case from 1981, the *Neal* Court explained that “the defendant would need to show he was prejudiced by a violation of Crim. R. 24(F)(1) in order to merit setting aside the jury’s verdict.”¹⁸ Again citing the Seventh Circuit, the *Neal* Court clarified that “[p]rejudice is not presumed merely because a stranger invades the sanctity of the jury deliberations.”¹⁹ That proposition, of course, flies directly in the face of this Court’s holding in *Gross* that prejudice is presumed when, over the defendant’s objection, an alternate juror is present during deliberations.

Later in its Opinion, the *Neal* Court finally acknowledges the existences of *Gross*, admitting that “[t]he Ohio Supreme Court has recently held that the State has the burden to demonstrate an absence of prejudice when, over objection, alternates are present in jury

¹⁶ *Gross* at 153.

¹⁷ *State v. Neal* (2d Dist.), 2002 Ohio 6786.

¹⁸ *Neal* at P76, citing *Johnson v. Duckworth* (7th Cir. 1981), 765 F.2d 122, 125.

¹⁹ *Id.*

deliberations.”²⁰ But the Second District refused to accept the *Gross* holding, instead subverting it through a logical sleight of hand. While noting that the state bears the burden to show a lack of prejudice, the *Neal* Court concluded that the burden was met due to “the presumption of regularity which presumes that jurors follow the instructions given them by the trial court . . .”²¹ In other words, the state had to prove nothing in order to meet its burden. The state needed only to point to a countervailing presumption in favor of the state. Thus, the burden-shifting mandated by this Court in *Gross* is rendered meaningless. The presumption of prejudice will be overridden in every case by the presumption of regularity, placing the burden back on the defendant to show prejudice. The *Neal* Court’s conclusion is self-contradictory and shows the error of its logic. The Court concluded, “Since there is no evidence in the case before us that the alternate participated in any way in the jury’s deliberations, we find the State has met its burden of proof, and the error is harmless beyond a reasonable doubt.”²² If the state really had the burden, or course, a lack of evidence could not lead to a finding for the state. Rather, the state’s failure to produce any evidence should have led to a finding for the defendant.

There is an important problem with the approach taken by the Second and Sixth Districts. A defendant, not being privy to what happens in the jury room, is not in a position to show prejudice. In the case at bar, as in any similar case, the appellant has no idea whether or to what extent the alternate actively participated in deliberations. As noted above, Evid. Rule

²⁰ *Id.* at P80.

²¹ *Id.*

²² *Id.*

606(B) prohibits either the state or the defendant from procuring testimony regarding the jury deliberations, whether that testimony would come from the actual jurors or the alternate.

This problem is particularly acute because of courts' recognition that an alternate may influence a jury through words, gestures, facial expressions, or even simply "because his presence has a chilling effect on the jury."²³ In fact, common sense tells us that it would be quite difficult indeed for an alternate to sit in the jury room for the entire course of jury deliberations, having heard all the evidence at trial, and refrain from even a single sigh or shake of the head as jurors express positions with which the alternate may disagree.

At least in *Gross* the trial judge gave a clear and detailed instruction to the alternates:

Now, there are five of you who have been selected as alternate jurors in this case. You will retire to the jury room with the original panel of 12 jurors. However, you are instructed that you will in no way participate in the deliberations.

You will listen and watch the deliberations, but under no circumstances are you to participate in said deliberations by discussing with the original jurors or among yourselves, or even make gestures during these deliberations. You are there to listen and to watch only. Again, under no conditions are you to engage in any conversations during any deliberations.²⁴

In contrast, the instructions in the case at bar were cursory:

An alternate juror was selected to serve in the event of a misfortune to a member of the panel. As you will retire to the jury room, with eight members of the jury and the alternate for deliberation, the alternate is not – is not to participate in the deliberation process.

Once the jury deliberates and renders a verdict, the alternate will be excused from the jury – from the role as an alternate juror. In the event that a member of the jury becomes ill, or is otherwise unable to complete the deliberation process, you will step into the juror's seat to deliberate in their absence. If the

²³ *State v. Gross* (2002), 97 Ohio St.3d 121.

²⁴ *Id.* at 151.

alternate juror is required, then a deliberation shall begin anew from the beginning.

While the trial court gave a decent explanation of the potential role of the alternate in case of illness to a regular juror, regarding the prohibition against active participation the trial court said only that “the alternate is not – is not to participate in the deliberation process.” Would an alternate juror be expected to know exactly what is meant by “not to participate in the deliberation process”? Would the alternate necessarily understand that this admonishment would include a prohibition against gestures or other non-verbal expressions of disagreement? An alternate might believe that, while he was not allowed to vote, he could aid the regular jurors by supplementing their recollections of the testimony. The alternate reasonably could believe that he could act as a sort of mediator without taking a side or casting a vote. We have no idea, of course, regarding how the alternate understood the trial court’s vague instruction. But it cannot be said that the state met its burden to show that the alternate understood, much less followed, the trial court’s instruction. Given that the trial court was violating the law as clearly stated by both rule and statute, the court’s meager admonition was wholly inadequate.

Finally, it is worth noting that most states are much stricter than Ohio in enforcing requirements that alternate jurors must be dismissed upon submission of the case to the jury. The Supreme Court of North Carolina, citing cases from the 10th Circuit, the 4th Circuit, California, Florida, Georgia, Montana, Washington, New York, Oklahoma, and Pennsylvania, explained that “[t]he rule formulated by the overwhelming majority of the decided cases is that the presence of an alternate, either during the entire period of deliberation preceding the verdict, or his presence at any time during the deliberations of the twelve regular jurors, is a

fundamental irregularity of constitutional proportions which requires a mistrial or vitiates the verdict, if rendered.”²⁵ In the North Carolina case as well as several of the cases cited, the alternate was in the jury room for only a short time before the trial judge realized and corrected the error. Nonetheless, the defendant’s rights were determined to be prejudiced, and a new trial was ordered.

As the law stands now in the Second and Sixth Districts, Crim. R. 24(G)(1) and R.C. 2313.37(C) are optional. If a judge chooses not to follow the rule and statute, a defendant has no recourse. Given that neither the defendant nor his counsel can be privy to what takes place in the jury room, in the vast majority of cases the defendant will have no way to know or to establish whether he was prejudiced by the improper presence of an alternate juror during deliberations. Therefore, this Court sensibly held in *Gross* that prejudice will be presumed and that a new trial will be required where the trial court allows an alternate to be present during deliberations over the objection of the defendant.

A new trial is an expense to the state and an inconvenience to witnesses. A court understandably is reluctant to grant a new trial based on an error that may or may not have prejudiced a defendant. But the basic right to trial by jury outweighs any inconvenience or expense. In any event, it will be simple in this context for courts to avoid the waste of resources inherent in a new trial. A trial judge need only follow the law after it has been pointed out to him by defense counsel. Where the defendant does not object to the inclusion of the alternate juror during deliberations, courts will continue to review for plain error.

²⁵ *State v. Bindyke* (1975), 288 N.C. 608, 623.

This Court should accept jurisdiction to make clear to the Second, Sixth, and all other districts that Crim. R. 24(G), R.C. 2313.37, and *State v. Gross* must be followed. If this Court declines jurisdiction, courts will be free to ignore the rule and statute at their whim, and defendants will have no recourse.

CONCLUSION

For the reasons discussed above, this case involves a matter of public and great general interest and a substantial constitutional question. The appellant requests that this Court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,



Dan Nathan
Counsel of Record for
Appellant Robin James Downour

CERTIFICATE OF SERVICE

I certify that a copy of this Memorandum in Support of Jurisdiction was sent by ordinary U.S. mail on this 7th day of May, 2009, to counsel for appellee, Tim A. Dugan, 2460 Navarre Avenue, Suite 6, Oregon, Ohio 43616.



Dan Nathan
Counsel of Record for
Appellant James Downour

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2009 APR 17 2:12

COMMON PLEAS COURT
LUCAS COUNTY

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio/City of Oregon

Court of Appeals No. L-08-1029

Appellee

Trial Court No. 07TRC00926-0102

v.

James R. Downour

DECISION AND JUDGMENT

Appellant

Decided: APR 17 2009

Tim A. Dugan, for appellee.

Jeff Goldstein and Beau Harvey, for appellant.

HANDWORK, J.

{¶ 1} This is an appeal from a judgment of the Oregon Municipal Court wherein a jury found appellant, James R. Downour, guilty of operating a motor vehicle while under the influence of alcohol, a violation of Oregon Municipal Code 333.01(A)(1)(a). The court sentenced appellant to 180 days incarceration in the Corrections Center of Northwest Ohio, with all but 20 of those days suspended upon the completion of certain

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conditions, imposed nine years on community control, ordered Downour to pay a \$1,000 fine, and suspended his motor vehicle driver's license for a period of one year.

Appellant's sentence was stayed pending this appeal. Appellant asserts the following assignment of error:

{¶ 2} "The trial court committed error when it instructed an alternate juror to retire with the empanelled jurors while they considered the guilt phase of the trial in violation of Ohio Revised Code 2313.37(C) and Criminal Rule 24(G)(1)."

{¶ 3} These are the facts relevant to a disposition of appellant's assignment of error. After hearing all of the evidence in this cause, the trial court provided counsel with copies of proposed jury instructions. Appellant's counsel objected to the proposed instruction allowing the alternate juror to be present in the jury room during deliberations as violative of his constitutional right to a trial by jury. The court overruled this objection, and subsequently provided the jury with the following instruction:

{¶ 4} "An alternate juror was selected to serve in the event of a misfortune to a member of the panel. As you will retire to the jury room, with eight members of the jury and the alternate for deliberation, the alternate is to not -- is not to participate in the deliberation process.

{¶ 5} "Once the jury deliberates and renders a verdict, the alternate will be excused from the jury -- from the role as an alternate juror. In the event that a member of the jury becomes ill, or is otherwise unable to complete the deliberation process, you will step into the juror's seat to deliberate in their absence. If the alternate juror is required, then a deliberation shall began anew from the beginning."

{¶ 6} After the jury returned its verdict of guilty, appellant again made the same objection and moved for a new trial based upon the fact that the alternate juror was present during jury deliberations. The judge denied the motion, but told trial counsel that he could file a motion for a new trial. Thereafter, appellant filed a timely written motion for a new trial, arguing that allowing the alternate juror to be present during deliberations violated Crim.R. 24(G)(1) and R.C. 2945.29¹. The court below denied, without comment, the motion for a new trial.

{¶ 7} In his sole assignment of error, appellant contends that his constitutional right to a jury trial was substantially prejudiced when the municipal court allowed an alternate juror to be present during the jury's deliberations in violation of R.C. 2313.37(C) and Crim.R. 24(G)(1). Because the trial court record clearly establishes that appellant did object to the court's jury instruction allowing the alternate juror to be present during the jury's deliberations, we shall discuss that alleged error within that context rather than as the denial of a motion for a new trial.

{¶ 8} R.C. 2313.37(C) provides that an alternate juror "shall be discharged upon the final submission of the case to the jury." Crim.R. 24(G)(1), formerly denoted as Crim.R. 24(F), states that in criminal cases, "an alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict."

{¶ 9} In *State v. Murphy*, 91 Ohio St.3d 516, 2001-Ohio-112, the Ohio Supreme Court was faced with the question of whether allowing alternate jurors to be present

¹This statute governs the procedure to be followed if a juror is unable to perform his or her duties and is, therefore, not relevant to the case before us.

during the jury deliberations in both the guilty phase and sentencing phase of the trial was error under former Crim.R. 24(F). *Id.* at 531. The court first noted that it is generally considered erroneous to permit alternates to sit in on jury deliberations. *Id.* (Citations omitted.) Nevertheless, Ohio's high court further observed that the defendant failed to object to the presence of the alternate jurors during deliberations. *Id.* at 532. Finding that even a constitutional error can be waived, the court held the alleged error could be reviewed only under a plain error standard pursuant to Crim.R. 52(B). *Id.* In applying that standard, the court noted that the party complaining "has the burden of showing that the alternates disobeyed the court's instructions by participating in the deliberations either verbally or through their body language, or that their presence chilled the deliberative process." *Id.* at 533, citing *United States v. Olano* (1993), 507 U.S. 725, 739-741. After examining the record before it, the *Murphy* court found that the defendant failed to offer any evidence of the fact that the presence of alternate jurors during deliberations affected the outcome of his trial. Therefore, he failed to demonstrate plain error under Crim.R. 52(B). *Id.* at 533-534.

{¶ 10} The Ohio Supreme Court revisited this same issue in *State v. Jackson*, 92 Ohio St.3d 436, 2001-Ohio-1266. In that case, the defendant again failed to object to the presence of alternate jurors during jury deliberations. *Id.* at 438. In addition, the trial judge warned the alternate jurors that they were not permitted to participate in those deliberations. *Id.* at 439. Unlike the court in *Murphy*, however, the *Jackson* court expressly determined that "[t]he trial court clearly erred in failing to abide by the

mandates of Crim.R. 24(F) [now Crim.R. (G)(1)] in allowing the alternate jurors to remain present during deliberations." *Id.* The Ohio Supreme Court then engaged in a plain error analysis and found that the defendant failed to show that he was prejudiced by the alternate jurors' presence. *Id.* at 440.

{¶ 11} *State v. Gross*, 97 Ohio St.3d 121, 2002-Ohio-5524, involved a circumstance where the defendant did object when the trial court allowed the alternate jurors to be present during deliberations on sentencing. *Id.* at ¶ 122. The lower court did, however, instruct the alternate jurors to listen and follow the deliberations, but not to participate in the deliberations in any way, either through words or gestures. *Id.* at ¶ 123-124. The court also told the alternate jurors that they were not to have any conversations. *Id.* at ¶ 124. Nevertheless, during deliberations the alternate jurors played a game of cards, "threw pens and things," and one alternate juror commented that he thought that the deliberating jurors were being "pressured in making decision." *Id.* at ¶ 125-129.

{¶ 12} Upon learning of the alternate jurors behavior, the trial court swore in the bailiffs and took testimony concerning that behavior. *Id.* at ¶ 129. Defense counsel moved for a mistrial, which was denied by the court. *Id.* The trial judge then decided to bring the jury, including the alternate jurors, back into the courtroom in order to repeat his jury instructions. *Id.* Before the court could, however, follow through on this decision, it received a note from the jury foreman. *Id.* The note stated that the two jurors who were accused of being pressured did not, in fact, feel that way and that the jury had reached a decision. *Id.* ¶ 130-131. Without reinstructing the jury, the court brought the

jury and the alternates back into the courtroom and accepted the jury's judgment. Id. ¶ 132.

{¶ 13} On appeal, the Ohio Supreme Court reiterated that sending alternate jurors to the jury room during deliberations was error. Id. ¶ 133. The court then distinguished *Gross* from *Murphy* and *Jackson* because the defendant's trial counsel did object to permitting the alternate jurors to be present during deliberations. Id. ¶ 134. Because there was an objection, the *Gross* court found that there was presumed prejudice. Id. Consequently, the majority concluded that "reversible error occurs where, over objection, an alternate juror *participates* in jury deliberations resulting in an outcome adverse to the defendant and either (1) the state has not shown the error to be harmless, or (2) the trial court has not cured the error." Id. ¶ 137. (Emphasis added.)

{¶ 14} In the present case, we are required to find, pursuant to *Gross*, that the municipal court committed error in allowing the alternate juror to be present during deliberations. Nonetheless, contrary to the situation in *Gross*, there is not one scintilla of evidence in the record of this cause showing that the alternate juror actively *participated*, in any way, during those deliberations. Moreover, the trial court gave the appropriate instructions in this situation. Therefore, in this cause, granting the alternate juror the right to be present in the jury room during deliberations is harmless error. Accord, *State v. Neal*, 2d Dist. Nos. 2000-CA-16, 2000-CA-18, 2002-Ohio-6786, ¶ 80. For these reasons, appellant's sole assignment of error is found not well-taken.²

²On appeal, appellee asserted for the first time that permitting an alternate juror to be present during deliberations is not a constitutional structural error and is, therefore,

{¶ 15} The judgment of the Oregon Municipal Court is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Lucas County.

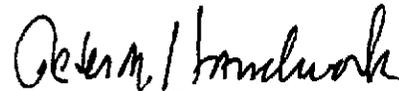
JUDGMENT AFFIRMED.

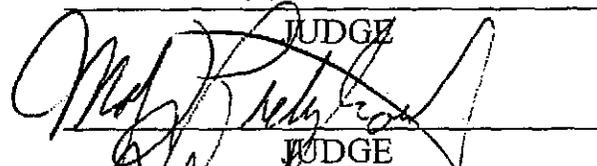
A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

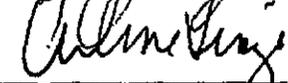
Peter M. Handwork, J.

Mark L. Pietrykowski, J.

Arlene Singer, J.
CONCUR.



JUDGE


JUDGE


JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <http://www.sconet.state.oh.us/rod/newpdf/?source=6>.

subject to the harmless error rule. In his reply, appellant claims that the same is a constitutional structural error requiring automatic reversal. We disagree. *Gross* could have, but did not, address this issue for the first time on appeal. See *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, syllabus (A constitutional structural error is not waived by a failure to raise it in the trial court.) Thus, *Gross*, albeit sub silentio, appears to find that the same is not a structural error. See, also, *State v. Neal*, supra, at ¶ 79 (finding that placing an alternate juror with the jury during deliberations is not a constitutional structural error).