ORIGINAL

**IN THE SUPREME COURT OF OHIO**

| | | |
|---|---|---|
| State of Ohio/City of Oregon, | ) | Case Number: 09-0886 |
| | ) | |
| APPELLEE | ) | On Appeal from |
| | ) | The Lucas County Court of Appeals |
| | ) | Sixth Appellate District |
| vs. | ) | |
| | ) | Court of Appeals Case No: L-08-1029 |
| James R. Downour | ) | |
| | ) | |
| APPELLANT | ) | |

---

**STATE'S RESPONSE TO APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION**

---


Tim A. Dugan (0082115) (COUNSEL OF RECORD)
2460 Navarre Ave. Ste 6
Oregon, OH 43616
PH: (567) 249-6427
FAX: 419-691-3004
**Counsel for the Appellee**

Dan Nathan (0078532) (COUNSEL OF RECORD)
Jeff Goldstein (0005465)
520 Madison Avenue, Suite 830
Toledo, OH 43604
Phone: 419-241-6168
FAX: 419-241-4215
**Counsel for Appellant**



FILED
JUL 20 2009
CLERK OF COURT
SUPREME COURT OF OHIO

**TABLE OF CONTENTS**

I. EXPLANATION OF WHY THIS COURT SHOULD DECLINE JURISDICTION ..... 3

II. STATEMENT OF FACTS ..... 4

III. RESPONSE TO APPELLANT'S PROPOSITION OF LAW ..... 5

IV. CONCLUSION ..... 7

V. CERTIFICATE OF SERVICE ..... 8

## I. EXPLANATION OF WHY THIS COURT SHOULD DECLINE JURISDICTION

This case does not present a substantial constitutional question and is not a case of great public importance or great general interest. Appellant's argument stems from the Trial Court's error in not properly applying Ohio Criminal Rule 24(G) and ORC § 2313.37 by allowing an alternate juror in the jury room during deliberations. The Sixth District correctly applied case law from this Honorable Court in *State v. Gross*, 97, Ohio St. 3d 121 (2002). Appellant is incorrect in stating that members of jury could not be asked at the Trial Court level whether or not the alternate juror actively participated in the deliberation process in the face of instructions not to. Appellant never asked the Trial Court for permission to voir dire the jury panel to determine if the alternate juror had participated in the deliberation process. This case does not present a substantial constitutional question for this Honorable Court to answer.

In light of the Sixth District's decision, it is error for a Trial Court to allow an alternate juror into the jury room during deliberations. The Oregon Municipal Court has held other jury trials after Appellant's case, and every time since the Trial Court tried this case, it has dismissed any alternate jurors before deliberations as prescribed by the Criminal Rules and the Ohio Revised Code. The Trial Court is not blatantly disregarding the law on a daily basis. Save for this particular case, the same event has not happened since. This case does not present a case of public or great general interest.

## II. STATEMENT OF THE FACTS

The State essentially agrees with Appellant's Statement of the Facts, but adds the following:

During the instructions to the jury, the Trial Court specifically instructed the eight jurors and the alternate juror that the alternate juror was to not participate in the deliberations. Trial Transcript p. 183, lines 7-14.

## III. RESPONSE TO APPELLANT'S PROPOSITION OF LAW

In the face of a proper objection by Appellant's counsel, reversible error occurs only when "an alternate juror participates in jury deliberations in any way and either (1) the state has not shown the error to be harmless, or (2) the trial court has not cured the error." *Gross,* 97 Ohio St. 3d at 154. In *Gross,* the Court had evidence of interference in the deliberation process by the alternates, including at least one alternate making statements of disagreement, statements of intimidation, and throwing "pens and things" at the other jurors. *Id.* 151-152. Despite the jury's foreman bringing these disruptions to the Trial Court's attention, the Trial Court failed to correct the error. *Id.* at 152-155. The *Gross* Court stated: "And here the record contains indicia of participation by alternate jurors that create a presumption of prejudice that the state has failed to rebut." *Id.* at 153.

Courts in general have a presumption of regularity, which among other things, presumes jurors follow the instructions given to them by the Trial Court. *State v. Neal,* 2002 Ohio 6786, P80, (2d Dist. 2002). In *Neal,* the Trial Court instructed the alternate juror to not participate in any way with deliberations. *Id.* at P72. The Second Appellate District Court of Ohio concluded that because there was no evidence on the record that the alternate participated in any way in the deliberations, the State had met its burden of proof in showing that the error was harmless beyond a reasonable doubt. *Id.* at P80.

Upon an inquiry into the validity of a verdict, a juror is not competent to testify as to any matter or statement occurring during the course the jury's deliberations. Ohio Evid. R 606(B). However, this rule allows for testimony from a juror as to if any outside influence was improperly brought to bear on any juror after some outside evidence of that act or event has been presented. *Id., State v. Hessler,* 90 Ohio St. 3d. 108, 123 (2000).

In *Hessler*, this Court found that an alternate juror's affidavit about possible misconduct was not outside evidence as the Court considered the alternate juror part of the jury. *Hessler*, 90 Ohio St. 3d at 123. However, Hessler's counsel *did not* object to the alternate being present in deliberations and alleged no error due to the alternate juror's presence. *Id.*

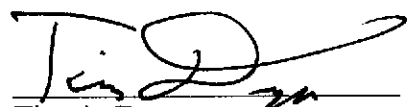
In this case, Appellant did not request an evidentiary hearing from the Trial Court based upon the alternate juror's presence in the jury room during deliberations. Appellant for the first time makes the argument that he could not request such a hearing or even the ability to ask if the alternate participated in the deliberations, but the State believes this is not the case. Appellant did object to the presence of the alternate juror in the jury room, making the alternate juror an outside force. It would have been proper for the Trial Court, upon request, to inquire to each of the eight seated jurors as to whether or not the alternate juror had participated in any way with the deliberation process.

Unlike in *Gross*, the record in this case has no indicia of prejudice to Appellant. The Trial Court gave the clear instruction to the jury that the alternate was not to participate in the deliberation process. There is a presumption of regularity in that jurors are believed to follow the instructions given to them. This presumption exists because it is impossible to look into the mind of a human being and determine whether or not he or she is actually following instructions from a judge. With no evidence that the defendant was prejudiced, the Sixth District properly found the State had met its burden.

## IV. CONCLUSION

For the reasons discussed above, this case does not involve a substantial constitutional question or a matter of public or great general interest. The Sixth District Court of Appeals properly applied precedent from this Honorable Court, and this case presents a single occurrence that does not look to be repeated by the Oregon Municipal Court. The State respectfully requests that this Honorable Court decline jurisdiction to hear this case.

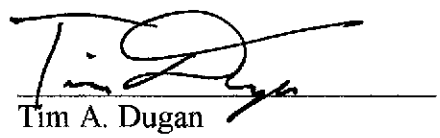
Respectfully Submitted,



Tim A. Dugan
Counsel for Appellee

## SERVICE

This is to certify that a copy of the foregoing was sent via ordinary U.S. Mail this 17th day of July, 2009, to Dan Nathan, 520 Madison Ave. Suite 830, Toledo, OH 43604, Counsel for Appellant.



Tim A. Dugan
Counsel for Appellee