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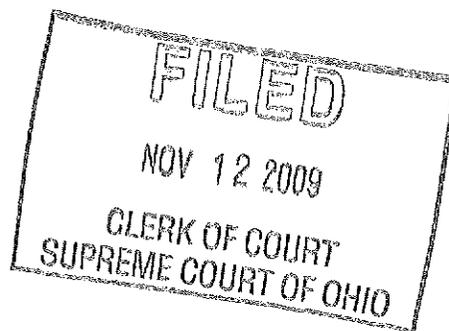
IN THE SUPREME COURT OF OHIO

State of Ohio)	Supreme Court Case No. 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)	

BRIEF ON THE MERITS
OF APPELLANT JAMES R. DOWNOUR

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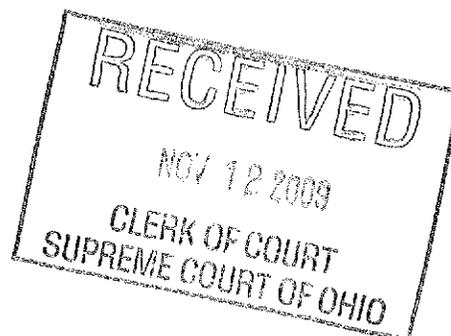


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STATEMENT OF FACTS

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. (Tr. at 183.)¹ 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.”² 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. (Tr. at 188.)³ 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.⁴ The appellant then appealed to this Court, which accepted the discretionary appeal for review.

¹ Transcript of Trial at 183.

² *State v. Downour* (6th Dist.), 2009 Ohio 1812, P3.

³ Transcript at 188.

⁴ *Downour* at P14.

ARGUMENT

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

I. The trial court's refusal to grant a new trial was contrary to the Ohio Constitution, the United States Constitution, the Ohio Revised Code, and the precedents of this Court.

Because the trial judge allowed an alternate juror to sit with the jury during deliberations, appellant James Downour was tried by a jury that was not allowed to deliberate privately, free of outside influence. The Ohio Constitution, in Article I, Section 5, states that "[t]he right of trial by jury shall be inviolate" except that, in civil cases, the legislature may enact laws allowing a verdict by three quarters or more of the jury. The United States Constitution, in Article III, Section 2, Clause 3, states that "the Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; . . ." The Sixth Amendment to the United States Constitution establishes that, "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ." When a stranger is allowed to sit with the jury during deliberations, the defendant's right to trial by jury is violated. While the stranger is not allowed to vote and does not assume the awesome responsibility commensurate with jury service, the stranger may impact the jury's decision in various ways, either intentional or accidental, overt or covert. Therefore, a stranger's presence in the jury room during deliberations represents a violation of a criminal defendant's rights under the Ohio and United States Constitutions.

In addition, the Ohio Revised Code explicitly dictates that an alternate may not sit with the jury during deliberations. R.C. 2313.37(C) directs that, in non-capital cases, alternate jurors "shall be discharged upon the final submission of the case to the jury." Given the plain and

mandatory language of the statute, it is hardly surprising that this Court has held that “it is generally regarded as erroneous to permit alternates to sit in on jury deliberations.”⁵ The only question, then, is how Ohio courts should determine the proper remedy for such errors. Unlike the high courts of many other states, this Court has held that, where the defendant fails to object to the alternate’s presence during deliberations, courts should review for plain error, reversing only where, “but for the [trial court’s] error, the outcome of the trial clearly would have been otherwise.”⁶

The situation is different, though, where the defendant properly objects at a time when the error could have been corrected, as Downour’s trial counsel did in the instant case. This Court held in *State v. Gross* 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.”⁷ The holding in *Gross* shifts the burden to the state to show a lack of prejudice where the defendant objects to the alternate’s presence during deliberations. Without such a showing, prejudice will be presumed. Reading the above language in isolation, there could be some doubt as to its applicability to the case at bar, since it is not clear whether or to what extent the alternate *participated* in the jury’s deliberations. The *Gross* opinion as a whole, though, makes clear that it is the alternate juror’s *presence*, not his level of participation, that triggers the shift in burden.

⁵ *State v. Murphy* (2001), 91 Ohio St.3d 516, 531.

⁶ *Id.* at 533.

⁷ *State v. Gross*, (2002), 97 Ohio St.3d 121, 154.

The trial judge in *Gross* gave explicit instructions to the alternates not to participate in the jury's deliberations:

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.⁸

This Court noted, though, that an alternate could affect the outcome even without violating the judge's admonition, since an alternate could prejudice the defendant's rights simply because the alternate's presence has a chilling effect on the jury.⁹ Therefore, it does not require a showing of active participation in order to shift the burden to the state to show a lack of prejudice. Rather, "[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"¹⁰ (emphasis added.) Under that law, appellant James Downour is entitled to a new trial.

Since Downour's trial counsel timely objected to the presence of an alternate in jury deliberations, the burden in the instant case shifted to the state to show that the alternate's presence did not prejudice the defendant. The determinative question, then, is whether the state met its burden. The Sixth District erred in this aspect of its analysis, holding that the *lack* of evidence of prejudice meant that the error was harmless.¹¹ Neither the state nor the accused provided any evidence whatsoever regarding what the alternate juror said or did

⁸ *Id.* at 151.

⁹ *Id.* at 153.

¹⁰ *Id.*

¹¹ *State v. Downour* (6th Dist.), 2009 Ohio 1812, P14.

during the deliberations or regarding whether or to what extent the regular jurors were influenced by the alternate's presence. (As will be discussed later, an investigation into these issues would have been improper.) There is nothing in the record to indicate that the state asked for the jurors or the alternate to be questioned. Therefore, the state did absolutely nothing to meet its burden to show a lack of prejudice. Furthermore, the duration of the alternate's presence – the entire length of the deliberations – does nothing to dispel the concern that the defendant was prejudiced. But the Sixth District, contrary to the law as expressed by this Court, placed the burden on the defendant to prove lack of prejudice. In addition, the Sixth District implied that a new trial should be granted only where the defendant could produce evidence "that the alternate juror actively *participated*"¹² in the proceedings (emphasis *sic.*). This Court in *Gross*, though, mandated that the burden must shift to the state to show lack of prejudice any time an alternate, over the defendant's objection, is *present* during deliberations, whether or not there is any evidence that he actively participated.

The instant case can be decided merely by an application of the law established by this Court in *Gross*. Where the defendant objects to the alternate's presence in the jury room during deliberations, the state bears the burden to show a lack of prejudice. If the state fails to meet this burden, then the accused is entitled to a new trial. The state, of course, cannot meet an affirmative burden to show a lack of prejudice merely by stating that there is no evidence of prejudice. To do so would be to shift the burden, contrary to the express holding in *Gross*.

¹² *Id.* at P14.

The Maryland Supreme Court held in 2004 in *Stokes v. Maryland*,¹³ as did this Court in *Gross*, that prejudice will be presumed when an alternate is allowed in the jury room over the objection of a defendant. The *Stokes* Court addressed the issue of what the state would have to do to meet its burden to show lack of prejudice, explaining that “[i]n order to rebut prejudice, it must affirmatively appear that there was not, and could not have been, any prejudice. . . . The presumption may be rebutted, for example, by showing that the alternate juror was not in the jury room after the door was shut, or where the alternate juror entered the room merely to get a coat and deliberations had not yet begun . . .”

In the instant case, because the state failed to produce any evidence that the defendant was not prejudiced by the alternate’s presence during jury deliberations, James Downour is entitled to a new trial.

II. It would be improper for a trial court to allow testimony by the jurors or the alternate regarding whether the alternate influenced the jury’s decision.

The above discussion of burden-shifting begs the question of what evidence the parties might be able to present regarding the jury’s deliberations. Both public policy and Ohio Evid.R. 606(B) dictate that it would be improper for either party to examine the jurors or the alternate juror to determine the extent of the alternate’s influence on the deliberations. Evid. R. 606(B) holds that, after the rendering of a verdict, testimony of the jurors regarding misconduct is generally inadmissible:

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury’s deliberations or to the effect of anything upon that or any other juror’s mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror’s mental processes in connection therewith.

¹³ *Stokes v. Maryland* (2004), 379 Md. 618.

A juror 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 applied the above rule in *State v. Robb*.¹⁴ After the verdict was rendered, a juror submitted an affidavit alleging juror misconduct. This Court explained that the juror's "affidavit seeks to introduce juror statements about the deliberative process, and this is precisely what Evid.R. 606 prohibits."¹⁵ Furthermore, and crucial to the analysis of the instant case, this Court held in *State v. Reiner* that "[t]he prohibitions against receiving evidence from a juror in Evid.R. 606(B) apply to alternate jurors."¹⁶ Thus, "[e]vidence received from an alternate juror, without other outside evidence, is insufficient *aliunde* evidence under Evid.R. 606(B) upon which a court may rely in order to conduct an inquiry of other jurors into the validity of a verdict."¹⁷ Applying *Robb* and *Reiner*, without evidence from some outside source regarding juror misconduct, neither the regular jurors nor the alternate may testify regarding whether the alternate's presence influenced the jury. The *Gross* Court, citing *Reiner*, acknowledged that the Court did not have "means to determine whether prejudice occurred."¹⁸ Important policy considerations underlie the above rule. In *Koch v. Rist*, a civil case in which an alternate went into the jury room during deliberations, a concurring justice of this Court explained that questioning of jurors, even prior to the verdict, "would have infringed upon the privacy of the jury's deliberative process."¹⁹

¹⁴ *State v. Robb* (2000), 88 Oho St.3d 59.

¹⁵ *Id.* at 79, quoting *Tasin v. SIFCO Industries, Inc.* (1990), 50 Ohio St.3d 102, 108.

¹⁶ *State v. Reiner* (2000), 89 Ohio St.3d 342, paragraph one of the syllabus, overruled on other grounds by *Ohio v. Reiner* (2001), 532 U.S. 17.

¹⁷ *Id.* at paragraph two of the syllabus.

¹⁸ *Gross, supra*, at 154-5.

¹⁹ *Koch v. Rist* (2000), 89 Ohio St.3d 250, 253, Fain, J., concurring.

Other jurisdictions agree. Facing a case in which alternate jurors were allowed to sit with the jury during deliberations, the Massachusetts Supreme Court declined to remand for an evidentiary hearing, holding that “any inquiry into whether any juror was actually influenced would violate the principle . . . that inquiry into the subjective mental process of jurors is impermissible.”²⁰ The Tenth Circuit Court of Appeals concurred that “[t]he inquiry at a hearing under a standard which requires a showing of prejudice is itself a dangerous intrusion into the proceedings of the jury.”²¹ The North Carolina Supreme Court gave a detailed explanation of the dangers:

Public policy and practical considerations preclude any hearing to determine whether the alternate’s presence in the jury room during deliberations affected the jury’s verdict or prejudiced the defendant in that (a) any such hearing would necessarily be inconclusive because no adequate standards can be devised for determining whether the alternate’s presence affected the jury; (b) upon a hearing in which a defendant attempts to show prejudice he would have to rely upon either the testimony of the alternate juror, members of the panel or both; and (c) an inquiry into what transpired in the jury room during the alternate’s presence itself invades the sanctity, confidentiality, and privacy of the jury process and gives the appearance of judicial interference with the jury.²²

The Washington Supreme Court explained practical limitations to an investigation of an alternate’s influence:

A factual hearing would not be likely to shed much light on the actual effect of the alternate juror’s presence in the jury room. It would certainly be impossible to recreate at this point every move, every expression he might have made during the several hours of deliberations. Even if it were determined exactly what he did or said, it would be difficult to tell how or whether his actions affected the other jurors. The outcome of such an investigation would only be further doubt; its primary effect would be to further invade the jury room and impose on those who served in it.²³

²⁰ *Commonwealth v. Smith* (1988), 403 Mass. 489, 496-7.

²¹ *United States v. Beasley* (C.A.10 1972), 464 F.2d 468, 470.

²² *State v. Bindyke* (1975), 288 N.C. 608, 627.

²³ *State v. Cuzick* (1975), 85 Wn.2d 146, 150.

Indeed, even aside from the important policy considerations against interrogating the jury, it is unrealistic to imagine that such an inquiry would be fruitful. We all imagine that our decisions, both large and small, are the function of our own rational thought processes. It seems unlikely, for instance, that a person would state that he drives a certain car because he has seen commercials in which beautiful people drive that car along beautiful roads. Car companies, however, have committed significant sums to the proposition that such influence exists. Likewise, we would not expect a juror to state that she found a defendant guilty because the alternate juror made certain faces or gestures during the jury's deliberations. Yet the juror's failure to admit or even to recognize such influence does not mean that the influence does not exist. Therefore, any after-the-fact questioning regarding the jurors' decision-making process would not only be a violation of the sanctity of the jury, but in addition would be unreliable.

Because it is not proper to interrogate the jurors regarding their subjective decision-making processes, and because an alternate juror's statements are not considered under Ohio law as statements *aliunde* that would allow for such inquiry into the jurors' mental processes, this Court's emphasis in *Gross* on burden-shifting has limited applicability. The Maryland Supreme Court recognized this fact in *Stokes v. Maryland*.²⁴ As discussed above, the *Stokes* Court agreed with this Court's holding in *Gross* that, where the defendant has properly objected to the alternate juror's presence during the deliberations, the state bears the burden to show a lack of prejudice. The Maryland Court recognized that the state generally would not have available the evidence necessary to rebut the presumption. The Court explained that,

²⁴ *Stokes v. Maryland* (2004), 379 Md. 618.

“[b]ecause Rule 5-606 prevents a juror from impeaching the verdict, the presumption of prejudice which arises from the presence of the alternate jurors may not be rebutted by inquiring into the proceedings inside the jury room or into the juror’s mental processes or any statements made during the deliberations.”²⁵ Therefore, “[t]he presence of alternate jurors during deliberations creates a presumption that is effectively un rebuttable under most circumstances.”²⁶ The Court concluded that the presumption could be rebutted only where the alternate had no real opportunity to influence the jury, such as where the alternate was in the jury room only momentarily and with the door open, or where the alternate briefly entered the jury room to get her coat before deliberations had begun.²⁷

In the instant case, in contrast to the above examples, the alternate had ample opportunity to influence the jurors. In fact, it is difficult to imagine the alternate sitting in the jury room for the course of the entire deliberations without ever indicating, by word, gesture, or facial expression, some emotion regarding the jurors’ discussions. Under the facts of this case, the state cannot meet its burden to show lack of prejudice.

Finally, even if a post-verdict inquiry into the jurors’ decision-making process were ever appropriate, it would not be appropriate at this point in the instant case. If it would be difficult for jurors shortly after the rendering of the verdict to recognize the influence of the alternate’s comments, gestures or facial expressions, it would border on absurd to imagine that the jurors could give any accurate account years after the fact upon remand from this Court. The state, which bore the burden in the trial court to show lack of prejudice, declined to ask for the court

²⁵ *Stokes v. Maryland* (2004), 379 Md. 618, 641-2.

²⁶ *Id.* at 642.

²⁷ *Id.*

to question the jurors regarding the alternate's influence. While the appellant maintains that such a request would have been properly denied by the trial court, certainly that would have been the proper time to make such a request.

III. Even under much less egregious circumstances, most jurisdictions require a new trial when an alternate is present during jury deliberations.

In the Sixth District below, the state was unable to cite a single jurisdiction whose highest court refused to grant a new trial where an alternate was allowed, over a defendant's objection, to sit in during the entire course of the jury's deliberations. On the other hand, there are numerous jurisdictions that require a new trial even where the error is much less severe. For instance, in a Massachusetts case,²⁸ the prosecutor and defense counsel agreed that the four alternate jurors would be allowed to sit in the jury room during deliberations, but the defendant was not consulted. The Massachusetts Supreme Court held that the trial court committed reversible error by acquiescing to such an arrangement.²⁹ The Court noted that "[w]hen [alternate jurors] attend jury deliberations they do so as mere strangers."³⁰ The Court elaborated:

A fair jury trial can be achieved only if the jury is insulated from outside communications or influences. . . . Such communications, even if subtle or unintended, are nonetheless an adulteration of the pristine character of the jury function. It would be understandably difficult for an alternate to remain locked up with regular jurors, perhaps for days, without at some time, during heated discussions reflecting agreement or disagreement, support or opposition, encouragement or disapproval, praise or derision, hope or frustration, or any of countless other emotions. Even if only one regular juror observed such a response on the part of the alternate – not necessarily from his speech, but from

²⁸ *Commonwealth v. Smith* (1988), 403 Mass. 489.

²⁹ *Id.* at 490.

³⁰ *Id.* at 494.

his gestures, attitude or facial expressions – it could well have a tilting effect on the ensuing vote.³¹

In a Washington case, the prosecutor suggested that the alternate be allowed to sit in on deliberations, and the defendant's counsel did not object. The trial court accepted the prosecutor's suggestion. The Washington Supreme Court granted review "to determine whether allowing an alternate juror into the jury room constitutes reversible error absent proof of prejudice to the defendant stemming therefrom."³² The Court assumed that the alternate followed the trial court's instruction not to participate.

He was, then, essentially an outsider watching the other members of the panel reach their decision. His presence as one not obligated to express an opinion, not committed to the decision that was ultimately reached, not faced with the awful responsibility to decide, could not have gone unnoticed by the 12 formally empaneled jurors and may well have affected their willingness to speak and act freely. Such observation, even by one sworn to secrecy and silence, violates the cardinal requirement that juries must deliberate in private.³³

The Court held that "prejudice will be presumed to flow from a substantial intrusion of an unauthorized person into the jury room unless it affirmatively appears that there was not, and could not have been, any prejudice. Where, as here, the intrusion involves the visible presence of a nonjuror for the full length of deliberations, the presumption of prejudice clearly has not been so conclusively defeated."³⁴

Similarly, in a Fourth Circuit case,³⁵ the trial judge, with the agreement of both parties' counsel, allowed the alternate to sit in with the jury during deliberations after a regular juror began feeling ill during closing arguments. The Fourth Circuit held that the defendant was

³¹ *Id.* at 495, quoting *People v. Valles* (1979), 24 Cal.3d 121, 131, Mosk, J., dissenting.

³² *State v. Cuzick* (1975), 85 Wn.2d 146, 147.

³³ *Id.* at 149.

³⁴ *Id.* at 150.

³⁵ *United States v. Virginia Erection Corp.* (C.A.4 1964), 335 F.2d 868.

entitled to a new trial, despite the trial judge's admonishment that the alternate say nothing during the jury's deliberations.

[I]f [the alternate] heeded the letter of the court's instructions and remained orally mute throughout, it is entirely possible that his attitude, conveyed by facial expressions, gestures or the like, may have had some effect upon the decision of one or more jurors. In any event, the presence of the alternate in the jury room violated the cardinal principle that the deliberations of the jury shall remain private and secret in every case. The presence of any person other than the jurors to whom the case has been submitted for decision impinges upon that privacy and secrecy.³⁶

The above three cases show that the Fourth Circuit and the Supreme Courts of Washington and Massachusetts would have granted James Downour a new trial even if his trial counsel had agreed to the alternate's presence in the jury room during deliberations. In other cases, federal circuit courts or state supreme courts have remanded for a new trial where the alternate's intrusion into the jury room was limited in time. For instance, in *United States v. Beasley*,³⁷ an alternate, unbeknownst to the court or the parties, retired to the jury room with the jurors. The alternate "participated in the vote to select a foreman, and voted to go to lunch. She was with the jury about twenty minutes after it retired."³⁸ The trial judge, after holding a brief hearing "to determine the extent the alternate had participated," denied the defendant's motion for a mistrial.³⁹ The Tenth Circuit reversed, holding that "[o]nce the prescribed number of jurors becomes 'the jury,' then, and immediately, any other persons are strangers to its proceedings. Their presence destroys the sanctity of the jury and a mistrial is necessary."⁴⁰

³⁶ *Id.* at 872.

³⁷ *United States v. Beasley* (C.A.10 1972), 464 F.2d 468.

³⁸ *Id.* at 469.

³⁹ *Id.*

⁴⁰ *Id.* at 470.

In a North Carolina case,⁴¹ the alternate retired with the jury for three or four minutes before the trial judge recalled the alternate. Defense counsel did not move for a mistrial. Even under those facts, the North Carolina Supreme Court required a new trial, explaining that “at any time an alternate is in the jury room during deliberations he participates by his presence and, whether he says little or nothing, his presence will void the trial.”⁴² The only exception would be “where the alternate’s presence in the jury room is inadvertent and momentary, and it occurs under circumstances from which it can be clearly seen or immediately determined that the jury has not begun its function as a separate entity.”⁴³ The Court noted that it was following the majority rule,⁴⁴ and it also observed that “[t]he most elementary precautions will prevent an alternate from entering the jury room upon the panel’s retirement to deliberate.”⁴⁵

The Montana Supreme Court⁴⁶ held that even a brief appearance by the alternate in the jury room during deliberations was cause for a mistrial. The Court explained that “[i]f unauthorized persons interfere with this process we are not at liberty to make arbitrary exceptions based on time, actual harm, nor the fact that during the trial the person involved was a sworn alternate juror. If such were the case we would soon damage the solemnity associated with the jury system and loss of faith in its usefulness would soon follow.”⁴⁷

⁴¹ *State v. Bindyke* (1975), 288 N.C. 608.

⁴² *Id.* at 627-8.

⁴³ *Id.* at 628.

⁴⁴ *Id.* at 623.

⁴⁵ *Id.* at 630.

⁴⁶ *State Highway Comm. v. Dunks* (1975), 166 Mont. 239.

⁴⁷ *Id.* at 244.

Finally, the Georgia Supreme Court concurred that it was reversible error to send the alternate in with the jury, despite an instruction by the trial judge that the alternate was not to participate in deliberations.⁴⁸

Ohio has not gone as far as most of the above jurisdictions, and the appellant here does not need the Court to go so far. Unlike in several of the above cases, here the alternate juror was in the jury room for the entire period of the deliberation. Also unlike in several of the above cases, here the defendant's trial counsel objected to the inclusion of the alternate at a time when the error could have been cured. Under these facts, where the defendant in no way invited the error and where the alternate juror had ample opportunity to infect the proceedings, Ohio would be venturing into uncharted territory if this Court were to hold that the appellant was not entitled to a new trial.

⁴⁸ *Glenn v. State* (1962), 217 Ga. 553, 555-6.

CONCLUSION

The trial court committed error by allowing an alternate juror to be present with the jury during deliberations. The defendant's counsel properly objected to the trial court's ruling at a time when the error could have been corrected. Because the state failed to meet its burden to show that the appellant was not prejudiced by the trial court's error, the appellant is entitled to a new trial. Furthermore, it would be both improper and fruitless for this Court to remand the case for an examination of the jurors or the alternate to determine the extent of the alternate's influence on the proceedings. Such a procedure is prohibited by Evid.R. 606(B), and its usefulness would have been minimal at the time of trial and would be even less so now, more than two years after the trial.

For the above reason, the appellant respectfully requests this Court to remand the matter for a new trial.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing merits brief was sent by ordinary U.S. mail this 10th day of November, 2009, to counsel for appellee, Tim A. Dugan, 2460 Navarre Ave., Suite 6, Oregon, Ohio 43616.

A handwritten signature in black ink, appearing to read "D. Nathan", written above a horizontal line.

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APPENDICES

IN THE SUPREME COURT OF OHIO

State of Ohio)	09-0886
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Appellee)	On Appeal from
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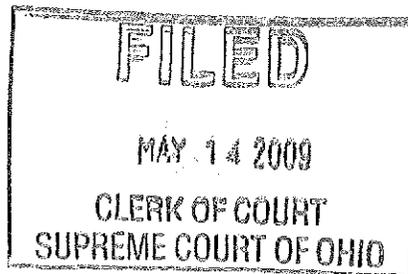
NOTICE OF APPEAL OF APPELLANT JAMES R. DOWNOUR

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COUNSEL FOR APPELLEE, STATE OF OHIO



Notice of Appeal of Appellant James R. Downour

Appellant James R. Downour hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Lucas County Court of Appeals, Sixth Appellate District, entered in Court of Appeals case number L-08-1029 on April 17, 2009.

This case raises a substantial constitutional question and is a case of public or great general interest.

Respectfully submitted,



Dan Nathan
Counsel of Record for
Appellant James R. Downour

Certificate of Service

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



Dan Nathan
Counsel of Record for
Appellant James R. Downour

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COMMON PLEAS COURT
LUCAS COUNTY
COURT CLERK

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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APR 17 2009

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.

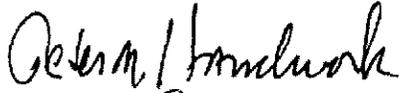
JUDGMENT AFFIRMED.

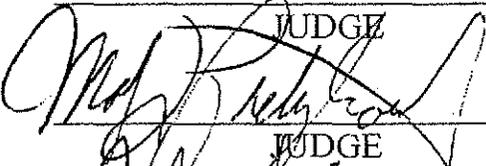
A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

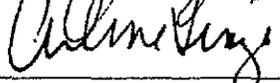
Peter M. Handwork, J. _____

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).

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*** CURRENT THROUGH LEGISLATION PASSED BY THE 128TH OHIO GENERAL ASSEMBLY AND FILED
WITH THE SECRETARY OF STATE THROUGH OCTOBER 27, 2009 ***
*** ANNOTATIONS CURRENT THROUGH OCTOBER 1, 2009 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH OCTOBER 14, 2009 ***

TITLE 23. COURTS -- COMMON PLEAS
CHAPTER 2313. COMMISSIONERS OF JURORS
MISCELLANEOUS

ORC Ann. 2313.37 (2009)

§ 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.

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*** RULES CURRENT THROUGH OCTOBER 1, 2009 ***
*** ANNOTATIONS CURRENT THROUGH APRIL 1, 2009 ***

Ohio Rules Of Evidence
Article VI Witnesses

Ohio Evid. R. 606 (2009)

Rule 606. Competency of Juror as Witness

(A) At the trial.

A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(B) Inquiry into validity of verdict or indictment.

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. A juror 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. However a juror may testify without the presentation of any outside evidence concerning any threat, any bribe, any attempted threat or bribe, or any improprieties of any officer of the court. A juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying will not be received for these purposes.