

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)	

MERIT BRIEF OF THE APPELLEE

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STATEMENT OF THE FACTS

On November 14, 2007, Appellant appeared in the Oregon Municipal Court for a criminal jury trial for an alleged violation on Oregon Municipal Code 333.01A1A, Operating a Vehicle while Intoxicated (OVI). After all of the evidence had been presented to the jury, Defense Counsel objected to the trial court's following instruction to the jury:

“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.

“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 begin anew from the beginning.”

(Trial Transcript pp. 143-144). The Trial Court overruled the objection and sent the alternate juror into the jury room during the jury's deliberations. *Id.* at 144. After deliberating, the jury returned a verdict of guilty to the single charge. *Id.* at 185.

Appellant appealed to the Sixth District. The Sixth District affirmed Appellant's conviction, overruling Appellant's sole assignment of error. *State v. Downour*, 2009 Ohio 1812 (6th App. Dist. 2009). Appellant now seeks review in this Court.

ARGUMENT

A. The Trial Court did not commit structural error by allowing the alternate juror to be present in the jury room during deliberations over a timely objection.

Errors occurring at trial are presumed to be non-structural in nature. *State v. Perry*, 101 Ohio St. 3d 118, 122, (2004). Structural errors permeate the entire trial from beginning to end, making the trial unreliable in its function to determine guilt or innocence because they affect the entire framework of the trial, rather than just being an error in the trial process. *Id.* at 121-122.

The mere presence of an alternate juror in the jury room during deliberations is not grounds for presuming prejudice. *State v. Jackson*, 92 Ohio St. 3d 436, 439, (2001). Although it is error for a Trial Court to place an alternate juror in the jury room, in the face of a proper objection, the Court must analyze the error under the harmless error standard. *State v. Gross*, 97 Ohio St. 3d 121, 152-153 (2002). This Court held that once an objection is made to the presence of alternate jurors in the jury room during deliberations, it is the State's burden to show the defendant was not prejudiced. *Id.* at 153.

In *Gross*, the defendant clearly objected to the presence of alternates in the jury room during sentencing deliberations. 97 Ohio St. 3d at 153. This Court remanded *Gross* for resentencing after finding that the alternate jurors actively participated in the deliberation process by physically assaulting members of the jury. *Id.* at 151-152. The Trial Court in *Gross* failed to cure the error by accepting the jury's sentencing recommendation even after evidence of the alternate's participation came to light. *Id.*

In this case, both Appellant and Amicus in support of Appellant argue now that this error amounts to structural error. Appellant states that "numerous jurisdictions" would have required a retrial after an alternate appeared within the jury room during deliberations. The Indiana

Supreme Court has held that Indiana Trial Courts may place alternates in the jury room for deliberations with instructions not to participate. *Johnson v. State*, 267, Ind. 256, 259-260 (Ind. Sup. Ct. 1977).

The Supreme Court of Georgia allows the State to produce affidavits of jurors to determine whether an alternate juror who sits in the deliberations with the trial jurors participated in any manner with deliberations. *Johnson v. State*, 235 Ga. 486, 494-495 (Ga. Sup. Ct. 1975). Case law in Georgia mirrors Ohio's in that jurors are not qualified to testify in a manner that would impeach their own verdict. *Id.*

The decisions by the Indiana and the Georgia Supreme Courts illustrate that the different jurisdictions throughout the United States handle similar issues differently depending on their own case law and rules of procedure. Appellee argues this Court has already held that the presence of alternates in the jury room during deliberations does not amount to structural error, and therefore should maintain the harmless error approach the Sixth District used in overruling Appellant's assignment of error in the Court below.

B. Appellant did not suffer prejudice by the alternate juror's presence in the jury room during deliberations.

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." *Gross*, 97 Ohio St. 3d at 154. All judicial proceedings enjoy a presumption of regularity. *State v. Sweet*, 72 Ohio St. 3d 375, 376 (1995).

In *Gross*, this 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. This Court remanded the case for sentencing because the errors only occurred during the sentencing phase of a capital murder trial, and no evidence of the alternates interfering with deliberations during the guilt phase existed. *Id.* at 155.

The presumption of regularity presumes jurors follow the instructions given to them by the Trial Court. *State v. Neal*, 2002 Ohio 6786, P80, (2nd App. Dist. 2002). In *Neal*, the Trial Court instructed the alternate juror to not participate in any way with deliberations. *Id.* at P72. The Second District concluded that since no evidence of the alternate interfering with the jury’s deliberations appeared on the record, the State had met its burden of proof in showing that the error was harmless beyond a reasonable doubt. *Id.* at P80.

In this case, the Trial Court below gave the jury and the alternate juror specific instructions that the alternate was not to participate in the jury deliberation process. (Trial Transcript at pp. 143; 183). The jury never once contacted the Trial Court to inform the Court of any misconduct by the alternate juror. The jury was polled after they returned a verdict of guilty to the offense of driving under the influence. (Trial Transcript 186-187). While they were polled, none of the jurors spoke to any misconduct by the alternate juror.

Unlike in *Gross*, and just like *Neal*, no evidence is present on the record of the alternate tampering with the deliberation process. In *Gross*, the jury’s foreman specifically made allegations of clear tampering with the deliberation process by the alternates. In this case, just like in *Neal*, there is no evidence on the record to show the deliberations were disrupted by the alternate juror. Because of this, Appellee argues the Sixth District correctly found the error in putting the alternate juror in the jury room during deliberations harmless.

CONCLUSION

The Sixth District Court properly affirmed Appellant's conviction in the Oregon Municipal Court for Driving Under the Influence. Appellant suffered no prejudice from the Trial Court's error in placing the alternate juror in the jury room during deliberations. Appellee respectfully requests this honorable Court to affirm the judgment from the Sixth District.

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 23rd day of December, 2009, to Dan Nathan, 520 Madison Ave. Suite 830, Toledo, OH 43604, Counsel for Appellant, and Claire Cahoon, 250 East Broad Street, Suite 1400, Columbus, OH 43215, Counsel for Amicus Curiae, Ohio Public Defender.

A handwritten signature in black ink, appearing to read "Tim Dugan", written over a horizontal line.

Tim A. Dugan
Counsel for Appellee