ORIGINAL

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	)	

REPLY BRIEF OF APPELLANT JAMES R. DOWNOUR

Dan Nathan (0078532) (COUNSEL OF RECORD)
Jeff Goldstein (0005465)
520 Madison Avenue, Suite 830
Toledo, Ohio 43604
Telephone: 419-241-6168
Facsimile: 419-241-4215

COUNSEL FOR APPELLANT, JAMES R. DOWNOUR

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Tim A. Dugan (0082115) (COUNSEL OF RECORD)
2460 Navarre Avenue, Suite 6
Oregon, Ohio 43616
Telephone: 567-249-6427
Facsimile: 419-691-3004

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TABLE OF AUTHORITIES

Cases **Pages**

Bullock v. State (1979), 150 Ga. App. 824 3

Glenn v. State (1962), 217 Ga. 553 3

Johnson v. State (1975), 235 Ga. 486 2-3

Johnson v. State (1977), 267 Ind. 256 2

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

Statutes

R.C. 2313.37 2

In *State v. Gross,*[1] this Court held that the State bears the burden to show lack of prejudice where, over a defendant's objection, an alternate is allowed into the jury room during deliberations. In its Merits Brief, the State acknowledges that holding but then ignores it, attempting to impose the burden on the appellant to prove a lack of prejudice. The State points to the general rule that "[t]he presumption of regularity presumes jurors follow the instructions given to them by the Trial Court,"[2] as if that rule somehow negates the holding of *Gross*. The State also emphasizes that, in *Gross*, there was affirmative evidence of misconduct by the alternate. While it is true that the facts of *Gross* were more egregious than the facts of the instant case, it is not true, under the holding of *Gross*, that a defendant will receive a new trial only if the defendant can make an affirmative showing of misconduct by the alternate juror. To require such a showing would be to place the burden with the defendant, contrary to *Gross*. Where, as here, the alternate is present during the entire course of deliberations and there is no showing by either party as to whether the defendant was prejudiced, the placing of the burden with the State dictates that the defendant must prevail.

In his Merit Brief, the appellant discussed holdings in a number of other states. Several of those states have been broader than Ohio in determining when the presence of an alternate in the jury room during deliberations will require a new trial. (For instance, some states require a new trial even where the defendant did not object to the alternate's presence in the jury room.) All of the states mentioned in the appellant's Merit Brief would hold that, under the facts of the instant case, James Downour is entitled to a new trial. In rebuttal, the State

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[1] *State v. Gross* (2002), 97 Ohio St.3d 121.
[2] State's Merit Brief at 7.

mentions two states, Indiana and Georgia, that purportedly would support the State's position here. In fact, though, the cases from Indiana and Georgia are not helpful to the State.

In Indiana, no statute explicitly prohibits an alternate juror from being present during deliberations, and the Indiana Supreme Court has held that it is permissible for a court to allow an alternate into the jury room during deliberations so long as the court gives an instruction that the alternate is not to participate.[3] In Ohio, though, the law is different. R.C. 2313.37(C) requires that, in non-capital cases, alternate jurors "shall be discharged upon the final submission of the case to the jury. . ." Unlike in Indiana, in Ohio it is clearly error for a court to allow an alternate to retire with the jury. The only question is under what circumstances such error will require a new trial. Because of the difference in statutory law between the two states, Indiana case law should have no persuasive value with this Court.

In Georgia, contrary to the State's implication, James Downour would be entitled to a new trial. Georgia, like Ohio, places the burden on the state to show a lack of prejudice where an alternate, over the defendant's objection, has been allowed into the jury room during deliberations. The State cites *Johnson v. State*,[4] a case in which the Georgia Supreme Court denied a new trial after the alternate had been present during part of the deliberations. The *Johnson* Court held that the presumption of prejudice was overcome after all twelve jurors swore in affidavits that they had not been influenced by the alternate, and the alternate swore that he had said nothing and that he had been removed from the jury room before the final vote.[5] Furthermore, the alternate's presence was inadvertent rather than by the instruction of

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[3] *Johnson v. State* (1977), 267 Ind. 256, 259-60.
[4] *Johnson v. State* (1975), 235 Ga. 486.
[5] *Id.* at 493-4.

the trial court. The alternate was removed by the bailiff as soon as the court became aware of the situation. The *Johnson* Court distinguished that case from *Glenn v. State*,[6] an earlier Georgia Supreme Court case in which "the state . . . came forward with no evidence to rebut the presumption of harm to the defendant."[7]

In, *Bullock v. State*, a Georgia appellate case decided several years after *Johnson*, the Court held that "[i]t was error to allow the alternate juror to retire with the other 12 jurors for deliberations in the face of defense counsel's objections."[8] The Court distinguished *Johnson* as follows:

> The case of *Johnson v. State* is not authority for a contrary result. There, the court was at first unaware of the alternate juror's presence in the jury room and instructed the bailiff to remove him immediately upon learning of it. Furthermore, in *Johnson* all 12 jurors submitted affidavits stating that they had not been influenced in any way by the presence of the alternate juror. From this and from other sworn statements made both by the regular jurors and the alternate, the court determined that the state had made a sufficient showing of harmlessness to overcome the presumption of prejudice which arose automatically from the alternate's presence in the jury room. No such showing of harmlessness was made or attempted by the state in this case. Instead, the trial court merely asked the foreman whether the alternate juror had participated in the vote or the deliberations. Although the foreman replied in the negative, we do not consider this a showing that none of the jurors were influenced in any way by the alternate's presence, particularly in the face of defense counsel's vociferous objections to the alternate's presence made at the time the jury first retired.

It is clear that the case at bar bears much more similarity to *Bullock and Glenn* than it does to *Johnson*.

The appellant recognizes that this Court is not bound by the case law of other states. Nonetheless, it is noteworthy that the State is unable to cite case law from any other state with

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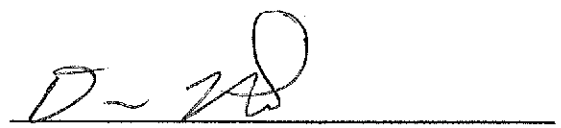
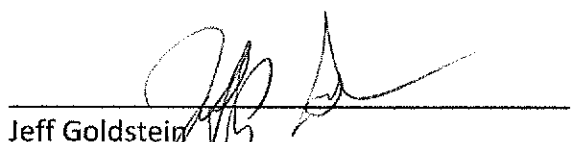
[6] *Glenn v. State* (1962), 217 Ga. 553.
[7] *Johnson v. State* (1975), 235 Ga. 486, 493.
[8] *Bullock v. State* (1979), 150 Ga. App. 824, 825.

a statute similar to Ohio's showing that James Downour should not be entitled to a new trial. More importantly, the State is unable to show that the decision of the appellate court below was consistent with this Court's holding in *Gross*. Therefore, appellant James Downour respectfully requests this Court to reverse the decision of the Sixth District Court of Appeals and to remand with an order for a new trial.

Respectfully submitted,



Dan Nathan
Counsel of Record for
Appellant James Downour



Jeff Goldstein
Counsel for Appellant James Downour

CERTIFICATE OF SERVICE

A copy of the foregoing reply brief was sent by ordinary U.S. Mail this 5th day of January, 2010, to counsel for appellee, Tim A. Dugan, 2460 Navarre Ave., Suite 6, Oregon, Ohio 43616.

Dan Nathan
Counsel of Record for
Appellant James Downour