

**IN THE SUPREME COURT OF OHIO**

STATE OF OHIO, :  
 :  
 : Case No. 06-2135  
 :  
 Plaintiff-Appellant, :  
 :  
 : On Appeal from the Columbiana  
 v. : County Court of Appeals  
 : Seventh Appellate District  
 :  
 TIMOTHY M. WAMSLEY, :  
 :  
 : Court of Appeals  
 Defendant-Appellee. : Case No. 05 CO 11

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**MEMORANDUM IN OPPOSITION OF JURISDICTION  
OF APPELLEE TIMOTHY M. WAMSLEY**

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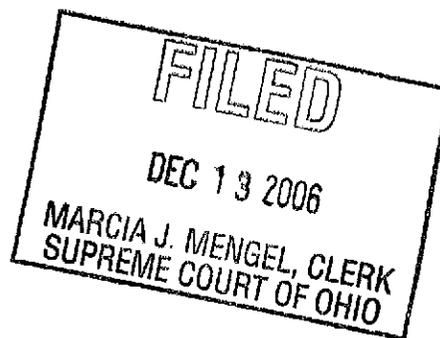
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**EXPLANATION OF WHY THIS IS NOT A CASE OF PUBLIC OR  
GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL  
CONSTITUTIONAL QUESTION**

This Court should not accept jurisdiction in *State v. Wamsley*, Seventh District No. 05CO11, 2006-Ohio-5303 because the case does not involve a substantial constitutional question, and is not of public or great general interest. The Seventh District Court of Appeals merely applied this Court's longstanding analysis regarding the plain-error doctrine and determined that the trial court committed prejudicial plain error when it failed to instruct the jury on every element of the offense of aggravated burglary. *Wamsley* at ¶1, 55.

The State proposes that this Court accept jurisdiction because the court of appeals discussed the structural-error doctrine in the opinion. (State's Memorandum in Support of Jurisdiction, pp. 4-8). However, the court of appeals did not reverse Mr. Wamsley's conviction due to a structural error, but because the trial court committed a plain and prejudicial error. As such, in the absence of any issue deserving of this Court's resources, it should decline jurisdiction and dismiss the State's appeal.

**STATEMENT OF THE CASE AND FACTS**

Timothy Wamsley was convicted of aggravated burglary because the trial court failed to instruct the jury on every element of the offense. As the trial testimony evidences, the trial court's error was prejudicial and outcome-determinative. At trial, Janet Stoddard—the alleged victim—testified that she and Mr. Wamsley had been in an “on and off” romantic relationship for approximately six years. Throughout their relationship, Mr. Wamsley and Ms. Stoddard lived together. But when Mr. Wamsley and Ms. Stoddard began having relationship difficulties, she decided to rent an apartment on her own.

Ms. Stoddard testified that one evening, while sleeping at her apartment, she was awakened by two loud thumps. When she heard someone enter the apartment, she jumped out of bed and yelled out her window, "Help, help, somebody's broken in[to] my house!" Ms. Stoddard explained that she turned around, saw a figure in the dark, and kicked the intruder in the chest. A struggle then ensued between Ms. Stoddard and the trespasser. Ms. Stoddard testified that she tried to kick the intruder again, but ended up kicking her dresser instead. Ms. Stoddard lost her balance and fell, hitting her head on the nightstand. The dresser flipped over, causing the television and videotape player to fall on top of her.

Ms. Stoddard testified that she did not realize that the person who entered the apartment was Mr. Wamsley. She explained that although Mr. Wamsley did not have a key to her apartment, he knew where an outside key was hidden. Mr. Wamsley had slept at the apartment for five nights prior to the evening of the alleged aggravated burglary. But Ms. Stoddard had removed the hidden key a few hours before the incident occurred because she was mad at Mr. Wamsley. Ms. Stoddard further testified to the fact that Mr. Wamsley had personal property in the apartment; that he gave money toward the apartment deposit; that he was "free to come and go into th[e] apartment as he wished;" and that she still loved him.

Ronald Scott, Ms. Stoddard's landlord, also testified. Mr. Scott explained that he lived around the corner from Ms. Stoddard and knew that she had an ongoing relationship with Mr. Wamsley. However, on one or two prior occasions, Mr. Wamsley had to be removed from the apartment. Consequently, Mr. Scott had forbidden Ms. Stoddard to allow Mr. Wamsley into the apartment.

Mr. Scott testified that, on the night that the alleged aggravated burglary occurred, he and his girlfriend were walking out of his house when they heard someone screaming. Immediately

upon hearing the screams, Mr. Scott and his girlfriend got into Mr. Scott's car and drove around the block in an attempt to find out who was in trouble. When they approached Ms. Stoddard's apartment, they saw Mr. Wamsley trying to enter. At that time, Mr. Scott "got out of the vehicle and told [his] girlfriend to go back to the house and call the police." Mr. Scott testified that he saw Mr. Wamsley enter the apartment and heard Ms. Stoddard cry out, "He's trying to kill me!" When Mr. Scott began to approach the apartment, Mr. Wamsley opened the door to leave. At that moment, a police cruiser drove up to the residence.

Patrolman Wright was the first officer on the scene. Upon arriving, he heard someone yelling for help. Officer Wright saw Mr. Wamsley exit the apartment and immediately placed Mr. Wamsley under arrest. After Mr. Wamsley was in custody, another officer arrived and transported Mr. Wamsley to the police station. Officer Wright then re-entered the apartment and saw Ms. Stoddard, whose face was covered with blood. When Officer Wright asked Ms. Stoddard what happened, she stated that Mr. Wamsley had broken into the apartment and "kicked the hell out of [her]." However, during trial, Ms. Stoddard denied that she ever made that statement.

Before submitting the case to the jury, the trial court gave the following instruction for aggravated burglary:

Before you can find [Mr. Wamsley] guilty you must find beyond a reasonable doubt that on or about the 29<sup>th</sup> day of May 2004, in Columbiana County, Ohio, Timothy M. Wamsley, by force, stealth or deception, did trespass in an occupied structure being the residence of Janet Stoddard...when another person, other than an accomplice of [Mr. Wamsley] was present, with purpose to commit in the structure any criminal offense, where [Mr. Wamsley] inflicted or attempted or threatened to inflict physical harm on Janet Stoddard.

Purpose is an essential element of the crime of aggravated burglary. A person acts purposely when it is his specific intention to cause a certain result. It must be established in this case at the time in question there was present in the mind of [Mr. Wamsley] a specific intention to commit in the structure any criminal offense. The purpose with which a person does an act is determined from the manner in which it is done, the means used and all other facts and circumstances in evidence.

To trespass means that a person enters onto the land or premises of another without the privilege to do so.

Force means any violence, compulsion, effort or constraint exerted upon or against a person or thing to gain entrance.

Stealth means any secret or sly act to gain entrance.

Deception means knowingly deceiving another to be deceived by any false or misleading representation by withholding information, by preventing another from acquiring information or by another other conduct, act, or omission that creates, confirms, or perpetuates a false impression in another, including a false impression as to law, value, state of mind or other objective or subjective fact.

Physical harm to persons means any injury, illness, or any other physiological impairment regardless of its gravity or its duration.

A criminal offense is described as acts, which constitute a violation of law and subject a person to criminal penalties.

Mr. Wamsley was found guilty of committing aggravated burglary and was sentenced to four years in prison. He filed a timely appeal. Among other issues, he raised the following assignment of error:

The trial court erred when it omitted from the jury instructions the culpable mental state needed for the trespass element of aggravated burglary, the definition of an occupied structure, the definition of cause or attempt to cause physical harm, as well as the underlying criminal offense of assault thereby denying [Mr. Wamsley] his right to due process.

The Seventh District Court of Appeals reversed the trial court, finding that the trial court committed prejudicial plain error when it failed to instruct the jury on the culpable mental state for trespass. *Wamsley* at ¶15-55. Additionally, the court of appeals found that the trial court committed prejudicial plain error when it failed to define the underlying crime of assault. *Wamsley* at ¶64-70. The State filed a memorandum in support of jurisdiction on November 17, 2006.

## **RESPONSE TO THE STATE'S PROPOSITIONS OF LAW**

### **I. Introduction**

While the precise wording of the State's propositions of law differs, the issue presented by each is the same: when a court of appeals conducts a plain-error analysis, may it include dicta involving the structural-error doctrine? The State confuses dicta in the court of appeals' opinion with the court's ruling. In so doing, the State unreasonably argues that a discussion involving other courts of review, and how those other courts have dealt with the same issue, is tantamount to "an unwarranted expansion of Criminal Rule 52(B)." (State's Memorandum in Support of Jurisdiction, p. 4). However, a plain-error analysis, which the court of appeals conducted, evidences that the trial court prejudiced the outcome of Mr. Wamsley's trial when it failed to charge the jury with every element of the offense of aggravated burglary.

### **II. The plain-error doctrine and the faulty jury instructions**

A trial court has the duty to instruct the jury on each and every element which must be proven to establish the crime charged. *State v. Adams* (1980), 62 Ohio St. 2d 151, 153. See, also, R.C. 2945.11 ("in charging the jury, the court must state to it all matters of law necessary for the information of the jury in giving its verdict"). If a party fails to make a timely objection to an erroneous jury instruction, the plain-error doctrine must be applied on review. *State v.*

*Underwood* (1983), 3 Ohio St.3d 12. See, also, Crim. R. 30(A); 52(B). A plain error is one that results in a clear miscarriage of justice. *State v. Long* (1978), 53 Ohio St.2d 91.

Mr. Wamsley was charged with aggravated burglary. The Pattern Jury Instructions in Ohio recommends the following instruction for aggravated burglary:

The defendant is charged with aggravated burglary. Before you can find the defendant guilty, you must find beyond a reasonable doubt, that on or about the \_\_\_ day of \_\_\_\_\_, 20\_, and in (County), Ohio, the defendant, with purpose to commit the offense of (*insert name of criminal offense*), *trespassed* by (force) (stealth) (deception) in (an occupied structure) (a separately secured or separately occupied portion of an occupied structure), when another person (other than an accomplice of the defendant) was present in that (structure) (separately secured or separately occupied portion of the occupied structure) and the defendant

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(A)(1) (inflicted) (attempted to inflict) (threatened to inflict) physical harm on that person.

4-511 OJI §511.11 (2005). (Emphasis added). However, further instructions must be given as to what a jury must consider before finding that a person has committed a trespass. Additionally, the trial court must give certain instructions regarding the underlying offense that the defendant is alleged to have committed.

**A. A trial court is required to instruct the jury on all of the elements of the crime of trespass when the defendant is charged with aggravated burglary.**

The commentary to the Ohio Jury Instructions states that a trial court is required to instruct the jury on the elements of trespass as part of the instructions for aggravated burglary:

Trespass is an element of the offense of aggravated burglary. A trespass can be committed with a knowing, reckless or negligent culpable mental state. See R.C. 2911.21. *The court must instruct on the elements of trespass including the appropriate culpable mental state as indicated by the facts of the case.* See 4 OJI 511.21.

4-511 OJI §511.11.4 (2005). (Emphasis added).

The Pattern Jury Instructions in Ohio recommends the following instruction for trespass:

The defendant is charged with criminal trespass. Before you can find the defendant guilty, you must find beyond a reasonable doubt that on or about the \_\_\_ day of \_\_\_\_\_, and in (County), Ohio, the defendant, without privilege to do so,

(A)(1) knowingly (entered) (remained) on the land or premises of (*insert name of owner or occupant*).

(*or*)

(A)(2) knowingly (entered) (remained) on the land or premises of (*insert name of owner or occupant*), the use of which was lawfully restricted to certain (persons) (purposes) (modes) (hours) and the defendant (knew that) (was reckless with regard to whether) he/she was in violation of any such restriction.

4-511 OJI §511.21 (2005). (Emphasis original). Knowingly is to be defined as:

A person acts knowingly, regardless of his purpose, when (he is aware that his conduct will probably cause a certain result) (he is aware that his conduct will probably be of a certain nature). A person has knowledge of circumstances when he is aware that such circumstances probably exist. R.C. 2901.22(B).

4-409 OJI §409.11 (2005).

**B. A trial court is required to instruct the jury on the elements of an underlying offense when the defendant is charged with aggravated burglary.**

The Ohio Jury Instructions state that when instructing the jury for the offense of aggravated burglary, a trial court “must instruct the jury on the elements of the underlying criminal offense together with the meaning of pertinent words and phrases.” 4-511 OJI §511.11.3 (2005). At a minimum, a trial court must give enough information for the jury to be able to determine whether the defendant had the purpose to commit any criminal offense. See *State v. Dimitrov* (February 15, 2001), Eighth District No. 76986 (the jury instructions were

acceptable because the trial court explained that a theft crime would satisfy the “purpose to commit [the]...any-criminal-offense” element of burglary).

In this case, although the trial court instructed the jury as to what amounted to a trespass, the court failed to define the term knowingly—i.e., the culpable mental state that is required for a conviction of criminal trespass. (See Statement of the Case and Facts, *infra*.) Additionally, the trial court gave no instruction as to what the jury needed to consider before finding that the underlying offense of assault was committed. *Id.* However, as the court of appeals noted, Mr. Wamsley did not object to the jury instructions. *Wamsley* at ¶32. As such, the failure to object “waive[d] all but plain error on appeal.” *Id.*, citing *State v. Underwood*, 3 Ohio St.3d 12.

### **III. The court of appeals’ application of the plain-error doctrine**

The trial court failed to instruct the jury on the appropriate mens rea for the crime of trespass. The trial court also failed to instruct the jury as to the elements of the underlying crime of assault. Before submitting Mr. Wamsley’s case to the jury, the trial court was required to define both of those terms. The court of appeals reviewed the trial court’s failure to define the term “knowingly” and the underlying crime of “assault” separately. And, analyzing the facts of Mr. Wamsley’s case with the plain-error doctrine, the court of appeals found that the trial court’s failure to instruct the jury on the culpable mental state for trespass alone was sufficient to support a reversal. *Wamsley* at ¶55. Moreover, the trial court’s deficient jury instruction as to the underlying crime of assault was also found to support a reversal. *Id.* at ¶70.

#### **A. The trial court committed prejudicial plain error when it failed to instruct the jury on all of the elements of the crime of trespass.**

The court of appeals first addressed the fact that the trial court failed to instruct the jury on the culpable mental state for trespass. After explaining that the issue would be analyzed

under the plain-error doctrine, the court noted that *State v. Smith* (January 20, 1989), 11<sup>th</sup> District No. 1720, was the “only Ohio appellate case [that] specifically discusse[d] the type of error alleged by [Mr. Wamsley], i.e., whether it is plain error for the trial court to fail to instruct the jury on the culpable mental state for criminal trespass as an element of aggravated burglary.” *Wamsley* at ¶41. The *Smith* court held that a failure to instruct the jury on an essential element of the crime constituted automatic reversible error, whether or not an objection was made at trial. *Wamsley* at ¶45, internal citations omitted. However, the court of appeals in *Wamsley* recognized that the *Smith* court identified the error as structural, and that the *Smith* court did not conduct a plain-error analysis. *Wamsley* at ¶46.

Because the only Ohio case that presented the same issue as *Wamsley* was *State v. Smith*, the court of appeals conducted a review of federal court decisions. The court of appeals noted that the *Smith* court relied on *Hoover v. Garfield Heights Mun. Ct.* (C.A. 6, 1986), 802 F.2d 168, *certiorari denied* (1987), 480 U.S. 949, and that *Hoover* was an authoritative case in the United States Court of Appeals for the Sixth Circuit regarding a trial court’s failure to instruct on every element of a crime. *Wamsley* at ¶45, 51.

In *Hoover*, the petitioner was convicted of assault and resisting arrest. *Hoover* at 170. However, before submitting the case to the jury, the trial court failed to explain every element of the resisting-arrest charge to the jury. *Hoover* at 172. Specifically, Mr. Hoover argued that the trial court erred by refusing to instruct the jury that the State had to prove that an arrest was lawful before a person could be convicted of resisting arrest. *Id.* Thus, the failure to instruct the jury that the State had the burden of proving that Mr. Hoover was resisting a lawful arrest beyond a reasonable doubt violated the due process principles recognized in *In re Winship* (1970), 397 U.S. 358, 364. *Id.* The Sixth Circuit agreed, and reversed Mr. Hoover’s conviction

because “the failure to instruct the jury on an essential element of the crime charged is one of the exceptional constitutional errors to which the *Chapman* harmless error analysis does not apply.” *Hoover* at 178.

The court of appeals acknowledged that while a structural-error analysis was inappropriate in a plain-error situation, “the fact that the Sixth Circuit ha[d] reversed state court convictions in federal habeas proceedings based on the precise type of trial error that occurred in [Mr. Wamsley’s case] should be treated as very significant persuasive authority.” *Wamsley* at ¶52. Thus, the court of appeals was emphasizing the prejudicial impact of the trial court’s failure to instruct the jury on every element of the offense of aggravated burglary. And, because *Smith* and *Hoover* were the only cases that the court of appeals found to be exactly on point, it had a duty to discuss those cases.

Moreover, the court of appeals reviewed this Court’s previous opinions that addressed the issue as to whether a trial court commits plain error when it fails to instruct the jury on every element of a crime. Citing to *State v. Adams*, 62 Ohio St.2d, at paragraphs two and three of the syllabus, the court of appeals explained that this Court “left open the possibility that a trial court’s failure to instruct the jury on all the elements of an offense might not necessarily be reversible as plain error.” *Wamsley* at ¶34. In *Adams*, the trial court failed to instruct the jury on the culpable mental state for child endangerment—i.e., recklessness. However, this Court determined that, under a plain-error analysis, reversible error did not occur in *Adams* for two reasons. First, Mr. Adams’s culpable mental state was never at issue during trial. *Adams* at 155. Second, a manifest injustice did not occur because no jury could have found that the crime was the result of mere negligence, rather than recklessness. *Id.*

But the court of appeals distinguished Mr. Wamsley's case from the *Adams* case:

[Mr. Wamsley's] culpable mental state with respect to the trespass was an issue at trial. One of the defenses [that Mr. Wamsley] raised at trial was that he could not have committed a trespass because the Dresden Avenue apartment was, in effect, his apartment. Considerable evidence was presented concerning [Mr. Wamsley's] prior access to the Dresden Avenue apartment, whether he had a key, whether he paid rent, how often he stayed there, and his prior living arrangements with the victim.... These facts and other facts relate both to [Mr. Wamsley's] privilege to be in the apartment and whether he "knowingly" committed a trespass by entering the apartment that he claimed to have believed was in some respect his apartment.

*Wamsley* at ¶40. As such, because Mr. Wamsley contended that he had a privilege to enter the apartment, there was a reasonable probability that the failure to instruct the jury on the culpable mental state for trespass prejudiced the outcome of his trial. *Id.*

In sustaining Mr. Wamsley's assignment of error, the court of appeals stated that "*under the facts of this case*, the failure of the trial court to instruct the jury on the culpable mental state for criminal trespass as part of the definition of the crime of aggravated burglary warrants reversal." *Wamsley* at ¶55. (Emphasis added). As such, the State's argument that the court of appeals developed a per se rule mandating reversal in every case in which a trial court fails to instruct on every element of an offense is unfounded. (State's Memorandum in Support of Jurisdiction, pp. 6-8). See *Wamsley* at ¶81 (DeGenero, J., dissenting) ("I disagree with the majority because *I do not think the trial court's error rises to the level of plain error*"). (Emphasis added).

Indeed, the court of appeals conducted an in-depth analysis of cases that dealt with the same issue; a discussion involving federal court cases; recent Ohio courts of appeals decisions that applied the plain-error doctrine; this Court's explanation of what constitutes plain error; and then analyzed the facts of Mr. Wamsley's case accordingly. After its in-depth analysis, the court

determined that the trial court committed prejudicial plain error when it omitted the definition of the applicable mens rea in its instructions. *Wamsley* at ¶1, 26, 33, 55.

**B. The trial court committed prejudicial plain error when it failed to instruct the jury on the elements of the underlying offense of assault.**

The trial court not only failed to instruct the jury as to the appropriate mens rea for the crime of trespass, but it also failed to instruct the jury on the underlying crime of assault. In fact, the court of appeals found that “there [was] no direction at all from the trial court as to how the jury should consider the underlying offense, or what that offense might be.” *Id.* at ¶70. Consequently, the court of appeals determined that the trial court once again committed prejudicial plain error and reversed the trial court’s judgment. *Id.*

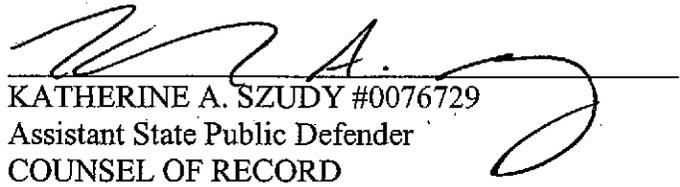
This Court should not accept jurisdiction and allow the State to present an argument for reversal merely because the State disagrees with the court of appeals. In the exercise of its sound discretion, the court of appeals acted to protect Mr. Wamsley’s right to have each and every element of the alleged crime submitted to the jury and proved beyond a reasonable doubt. See *In re Winship*, 397 U.S. at 364. Because this Court requires more than a simple allegation of appellate court error to justify a grant of jurisdiction, it should decline jurisdiction and dismiss the State’s appeal.

**CONCLUSION**

For the foregoing reasons, this Court should decline to accept jurisdiction in this case and let the decision of the Columbiana County Court of Appeals stand.

Respectfully submitted,

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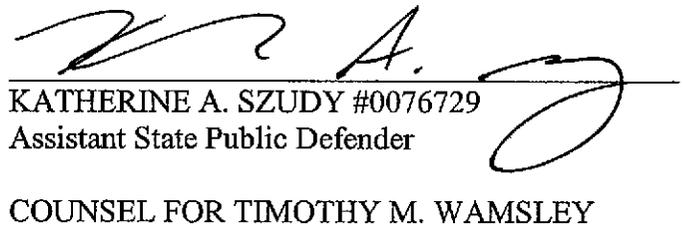
  
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**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing **Memorandum in Opposition of Jurisdiction of Appellee Timothy M. Wamsley** was sent by regular U.S. Mail, postage prepaid to Robert L. Herron, Columbiana County Prosecutor, and Tammie Riley Jones, Assistant Prosecuting Attorney, Columbiana County Courthouse, 105 South Market Street, Lisbon, Ohio 44432, this 13th day of December, 2006.

  
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