

IN THE SUPREME COURT OF OHIO

STATE OF OHIO : Case No. 2007-0430
: :
Appellee : On Appeal from the
: : Geauga County Court of Appeals,
-vs- : Eleventh Appellate District
: :
JESSE A. COCHRAN : Court of Appeals
: : Case No. 2006-G-2697
Appellant :
:

MEMORANDUM IN OPPOSITION OF JURISDICTION
OF APPELLEE STATE OF OHIO

DAVID P. JOYCE (#0022437)
Geauga County Prosecutor
JANETTE M. BELL (#0047076)
Assistant Prosecuting Attorney
Courthouse Annex
231 Main Street – Ste. 3A
Chardon, Ohio 44024
(440) 279-2100
(440) 286-4357 – FAX

COUNSEL FOR APPELLEE,
STATE OF OHIO

PAUL MANCINO JR. (#0015576)
75 Public Square – Ste. 1016
Cleveland, Ohio 44113-2098
(216) 621-1742

COUNSEL FOR APPELLANT,
JESSE A. COCHRAN

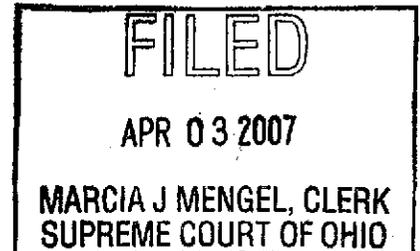


TABLE OF CONTENTS

	<u>Page</u>
ARGUMENT IN RESPONSE TO APPELLANT’S ASSERTION THAT THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION	1
ARGUMENT IN RESPONSE TO APPELLANT’S FIRST PROPOSITION OF LAW...	1
APPELLANT WAS NOT DENIED THE RIGHT TO CONFRONTATION AND EXAMINATION BECAUSE TESTIMONY GIVEN BY DETECTIVE ELIZABETH HURD AND DETECTIVE JUANITA VETTER WERE NOT OFFERED FOR TRUTH OF ASSERTION, BUT TO EXPLAIN THEIR CONDUCT WHILE INVESTIGATING THE BREAK-INS	1
ARGUMENT IN RESPONSE TO APPELLANT’S SECOND PROPOSITION OF LAW	3
APPELLANT’S MOTION FOR CONTINUANCE AND ADDITION OF POTENTIAL WITNESS WAS PROPERLY DENIED THE DAY OF TRIAL DUE TO UNREASONABLE LACK OF PRIOR NOTIFICATION.....	3
ARGUMENT IN RESPONSE TO APPELLANT’S THIRD PROPOSITION OF LAW	6
INTRODUCTION OF SIMILAR CRIMINAL ACTS PURSUANT TO EVID. R. 404(B) AND LIMITING JURY INSTRUCTION GIVEN WERE PROPER.....	6
ARGUMENT IN RESPONSE TO APPELLANT’S FOURTH PROPOSITION OF LAW	7
THE DEFINITION OF OCCUPIED STRUCTURE GIVEN WAS SUFFICIENT AND IN ACCORDANCE WITH OHIO JURY INSTRUCTION 509.02.....	7
ARGUMENT IN RESPONSE TO APPELLANT’S FIFTH PROPOSITION OF LAW	9
THE COURT OF APPEALS DECIDED THAT THIS ISSUE AS PROPOUNDED BY APPELLANT HAD MERIT AND THEREFORE REVERSED APPELLANT’S PETTY THEFT CONVICTION. IN THE INTEREST OF COMPLYING WITH THE MAXIMUM PAGE REQUIREMENT, THE STATE OF OHIO WILL NOT ADDRESS THIS PROPOSITION ANY FURTHER.....	9
ARGUMENT IN RESPONSE TO APPELLANT’S SIXTH PROPOSITION OF LAW	9

THE COURT REFUSED TO GIVE THE JURY AN INSTRUCTION FOR A LESSER-INCLUDED OFFENSE AS SAID ELEMENTS WERE NOT ESTABLISHED DURING THE TRIAL	9
ARGUMENT IN RESPONSE TO APPELLANT'S SEVENTH PROPOSITION OF LAW	11
APPELLANT OFFERED PLEA AGREEMENTS OF ACCOMPLICES AS IMPEACHMENT EVIDENCE AND THEREFORE CANNOT NOW COMPLAIN ABOUT THE ADMISSION AND JURY INTERPRETATION OF SAID GUILTY PLEAS WHEN NO OBJECTIONS OR INSTRUCTION REQUESTS WERE MADE AT TRIAL	11
ARGUMENT IN RESPONSE TO APPELLANT'S EIGHTH PROPOSITION OF LAW	12
APPELLANT'S CONVICTION WAS PROPER BECAUSE SUFFICIENT EVIDENCE WAS PRESENTED FROM WHICH A REASONABLE FACT- FINDER COULD RETURN A GUILTY VERDICT	12
ARGUMENT IN RESPONSE TO APPELLANT'S NINTH PROPOSITION OF LAW	14
THE COURT APPLIED THE SENTENCING LAWS TO GIVE APPELLANT AN APPROPRIATE SENTENCE, INTEGRATING SENTENCING GUIDELINES FROM R.C. 2929.14(C) AND R.C. 2929.12(D)	14
CONCLUSION.....	15
PROOF OF SERVICE.....	16

**ARGUMENT IN RESPONSE TO APPELLANT'S ASSERTION THAT THIS
CASE IS OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A
SUBSTANTIAL CONSTITUTIONAL QUESTION**

Appellant argues that this Honorable Court should accept jurisdiction over the matter citing to dicta from the dissenting opinion, however Appellant fails to assert whether the case involves a substantial constitutional question or is one of public or great general interest. The State of Ohio, Appellee herein, asserts this matter is neither. The lower court examined every assignment of error on its own facts and circumstances and applied well-established principles of law to reach its conclusions. There were no novel or new issues that were matters of first impression for the court. The issues involved evidentiary considerations; jury instructions; the exclusion of alibi evidence when notice was not provided to the State of Ohio; "other acts evidence" and sentencing. The end result for Appellant was that the majority of his arguments lacked merit or were moot. Although, the Appellate Court reversed Appellant's conviction on three of fifteen counts, Appellant's sentence was unaffected.

The fact that Appellant is not pleased with the outcome of his appeal does not convert this matter to one of public or great general concern. Simply put, Appellant's concern is not one of a public magnitude or great general interest. As this case fails to present a case of public or great general interest, the State of Ohio respectfully requests that this Honorable Court decline to accept jurisdiction over the matter.

ARGUMENT IN RESPONSE TO APPELLANT'S FIRST PROPOSITION OF LAW

APPELLANT WAS NOT DENIED THE RIGHT TO CONFRONTATION AND EXAMINATION BECAUSE TESTIMONY GIVEN BY DETECTIVE ELIZABETH HURD AND DETECTIVE JUANITA VETTER WERE NOT OFFERED FOR TRUTH OF ASSERTION, BUT TO EXPLAIN THEIR CONDUCT WHILE INVESTIGATING THE BREAK-INS.

Detectives Elizabeth Hurd from the Portage County Sheriff's Office and Juanita Vetter from the Geauga County Sheriff's Office testified about the steps they each took during investigations into break-ins occurring between July 2002 and January 2003. Appellant here contends that the testimony given by both detectives was hearsay and therefore inadmissible, because Appellant was denied the rights of confrontation and examination of the out-of-court statements each testified to.

Evid. R. 801(C) defines hearsay as a statement, other than one made by the declarant while testifying at a trial, offered in evidence to prove the truth of the matter asserted. Detective Hurd and Detective Vetter offered testimony solely for the purpose of establishing their investigations into the break-ins occurring in both Portage and Geauga Counties from July 2002 to January 2003, not to assert the truth of their statements. An out-of-court statement is generally admissible when offered to explain a police officer's conduct while investigating a crime. *State v. Thomas* (1980), 61 Ohio St.2d 223, 232, 400 N.E.2d 401. Detective Hurd's testimony relating her interview with Jack Laughery showed the steps she took to determine how, when, and where the break-ins occurred. Her interviews with the purchasers of the stolen items explained the supplementary steps she took to investigate the break-ins. Also, Detective Vetter's testimony showed the steps she took to create a comprehensive file for the crimes and how she documented and perpetuated the investigation through the recovery process. The statements made by Detectives Hurd and Vetter were not offered to prove anything other than the investigation each detective initiated in response to break-in reports.

The admission of testimony by Detectives Hurd and Vetter does not violate Appellant's Constitutional rights under *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354. In *Crawford*, the United States Supreme held that the Confrontation Clause bars the admission of

“testimonial hearsay” unless the declarant is unavailable and the accused has had a prior opportunity to cross-examine him. *Id.* at 68-69. The testimony was offered to show the detectives investigation process, not to prove the facts of the matter. “[E]ven if the statement at issue was “testimonial” because it was made to police officers during their investigation of the crime...the statement would not fall within the holding of *Crawford* because... [it was] not offer[ed]...to prove the truth of the matter asserted...The *Crawford* Court made clear that “[t]he [Confrontation] Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.” *Tennessee v. Street* (1985), 471 U.S. 409, 414, 105 S.Ct. 2078. Since the statements were made for the purpose of showing an investigation, not to prove the truth of the statements made, Appellant’s constitutional rights were not violated by the admission of the detectives testimony.

ARGUMENT IN RESPONSE TO APPELLANT’S SECOND PROPOSITION OF LAW

APPELLANT’S MOTION FOR CONTINUANCE AND ADDITION OF POTENTIAL WITNESS WAS PROPERLY DENIED THE DAY OF TRIAL DUE TO UNREASONABLE LACK OF PRIOR NOTIFICATION.

On the first day of trial, September 27, 2005, Counsel for Appellant motioned for a continuance and to introduce a new witness. (T.p. 6). Counsel argued that the potential witness had only recently contacted him and had evidence he had not previously obtained. (T.p. 6). The State opposed the motion because the new witness was Appellant’s mother, Alicia Gilson, and the State did not believe it was difficult to find her and the continuance would inconvenience the court and the State because approximately seventeen witnesses had been called and were present. (T.p. 8). The court denied the motion for continuance and the addition of the new witness, stating, it is “beyond the realm of, almost beyond the realm of possibility that [the mother] was unaware of this [trial].” (T.p. 9). Counsel for Appellant renewed this motion the second day of trial, at which time, the State again opposed the request arguing that a notice of alibi had to be

filed at least seven days prior to trial in accordance with Crim. R. 12.1. The court again denied the request. (T.p. 279). Appellant now contends that his Sixth Amendment right to present a defense has been violated by the denial of these continuances and the exclusion of his mother as a witness because the court did not consider any alternative including a continuance and because it is impermissible to totally exclude evidence based upon an alleged non-disclosure of the evidence.

Appellant's motions for continuance and to add a witness were properly denied because the motion came immediately prior to the commencement of the trial, violating Crim. R. 16. Crim. R. 16(C) requires a defendant to supply a list of witnesses and their addresses to the prosecuting attorney. The Ohio Supreme Court in *City of Lakewood v. Papadelis* (1987), 32 Ohio St. 3d 1, 511 N.E.2d 1138, offered a set of factors that should be considered before a Crim. R. 16 discovery violation be found: the extent to which the prosecution will be surprised or prejudiced by the witness' testimony, the impact of witness preclusion on the evidence at trial and the outcome of the case, whether violation of the discovery rules was willful or in bad faith, and the effectiveness of less severe sanctions. In the case at bar, the prosecution would have been extremely prejudiced by the introduction of the potential witness because no time was available to research her background and determine proper questioning. Moreover, Appellant already had one alibi witness; the additional evidence offered by Ms. Gilson would not have impacted the outcome of the trial because alibi evidence was already being offered. Furthermore, waiting until the morning of trial to introduce an alibi witness should be seen as a willful attempt to surprise the prosecution, with the proper sanction being the exclusion of the witness. "In the exercise of [the right to present witnesses], the accused...must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and

innocence.” *Chambers v. Mississippi* (1973), 410 U.S. 284, 93 S. Ct. 1038. Discovery minimizes the risk that a judgment will be predicated on incomplete, misleading, or even deliberately fabricated testimony. The “State’s interest in protecting itself against an eleventh-hour defense” is one component of the broader public interest in a full and truthful disclosure of critical facts. *Taylor v. Illinois* (1988), 484 U.S. 400, 108 S. Ct. 646. Since the last minute introduction of another witness is a discovery violation, Appellant’s motion was properly denied.

In addition, the motion to add a new witness was properly denied because the State was not notified of the potential alibi witness in accordance with Crim. R. 12.1, leaving no time for investigation into Ms. Gilson’s background or her claims. Crim. R. 12.1 states that when a criminal defendant proposes to offer alibi testimony, he must file a written notice at least seven days before trial. Alibi has been defined as a defendant’s claim that he was at some place other than the scene of the crime at the time the crime was taking place and that he could not have taken part. *State v. Elersic*, 11th Dist. Nos. 2001-G-2335, 2003-G-2512, 2003-Ohio-7218, at ¶ 49; quoting *State v. Cloud* (Sept. 26, 2001), 7th Dist. No. 98-CO-51. “Given the ease with which an alibi can be fabricated, the State’s interest in protecting itself against an eleventh-hour defense is both obvious and legitimate...The adversary system of trial...is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played.” *Williams v. Florida* (1970), 399 U.S. 78, 81-82, 90 S. Ct. 1893; see generally *State v. Howard* (1978), 56 Ohio St.2d 328, 383 N.E.2d 912. The Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system; one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth. *Taylor*, at 412-413. Since Appellant’s Sixth Amendment right has not been infringed, no error occurred by the denial of Appellant’s motions for continuance or exclusion of the potential witness.

ARGUMENT IN RESPONSE TO APPELLANT'S THIRD PROPOSITION OF LAW

INTRODUCTION OF SIMILAR CRIMINAL ACTS PURSUANT TO EVID. R. 404(B) AND LIMITING JURY INSTRUCTION GIVEN WERE PROPER.

Evid. R. 404(B) allows the introduction of other acts evidence for the purpose of showing motive, identity, intent, plan, and opportunity. Evidence of other acts is admissible if there is substantial proof that the alleged acts were committed by the defendant and the evidence tends to prove one of the purposes specifically stipulated by Evid. R. 404(B). *State v. Lowe* (1994), 69 Ohio St.3d 527, 530, 634 N.E.2d 616. Other acts forming a unique, identifiable plan of criminal activity are admissible to establish identity, and establishment that the accused has committed similar crimes within a period of time reasonably near to the offense on trial and that a similar scheme, plan, or system was utilized to commit both the offense at issue and other crimes is also proper. *State v. Jamison* (1990), 49 Ohio St. 3d 137, 141, 551 N.E.2d 190; see also *State v. Elersic*, 11th Dist. Nos. 2001-G-2335, 2003-G-2512, 2003-Ohio-7218, citing *State v. Coleman* (1988), 37 Ohio St.3d 286, 292, 525 N.E.2d 792.

The other acts testimony regarding the Portage County break-ins show certain unique characteristics that establish a behavioral fingerprint that links Appellant to the charges, showing a specified time period and a systematic plan. Detective Hurd's testimony detailed her investigations into the break-ins occurring from July 2002 to January 2003: how homes, garages, and outbuildings were broken into and items taken, and many later sold to Portage County residents. The evidence offered shows that the Geauga County crimes and the Portage County crimes were inseparable and that Jack Laughery and Angelo Vecchio were indeed accomplices of Appellant's for the break-ins occurring in both counties.

The jury instruction offered by the court, stating the other acts testimony should be considered "for the purpose of [Appellant's] motive, opportunity, intent or purpose, preparation

or plan to commit the...offenses charged in this trial...or knowledge of circumstances surrounding the offense charged in this trial, or the identity of the person who committed the offense in this trial” was a proper Evid. R. 404(B) limiting instruction. (T.p. 444-445). The record indicates that Counsel for Appellant did not object to the jury instructions during trial, effectively waiving any complaint pursuant to Crim. R. 30. (T.p. 465). Therefore, this instruction may only be reviewed for plain error. *State v. Underwood* (1983), 3 Ohio St.3d 12, 444 N.E.2d 1332; see also *State v. Long* (1978), 53 Ohio St.2d 91, 97, 372 N.E.2d 804. According to Crim. R. 52(B), plain error occurs only where there is an obvious defect that changes the outcome of the proceedings, that results in a manifest miscarriage of justice. See also *State v. Barnes* (2002), 94 Ohio St.3d 21, 27, 759 N.E.2d 1240. The limiting instruction given by the court mirrors OJI 205.22, including all pertinent words and phrases. The instruction given is sufficient to counteract any prejudice to Appellant from the admission of other acts evidence. See *State v. Rivera* (1994), 99 Ohio App.3d 325, 650 N.E.2d 906; quoting *State v. Weible* (March 15, 1989), 9th Dist. No. 13754. Also, the jury was given a tape-recorded version of the jury instructions to alleviate any confusion prior to making their determination. (T.p. 456). Therefore, since the limiting instruction was properly given, no plain error occurred and Appellant was not prejudiced by the introduction of other acts evidence.

ARGUMENT IN RESPONSE TO APPELLANT’S FOURTH PROPOSITION OF LAW

THE DEFINITION OF OCCUPIED STRUCTURE GIVEN WAS SUFFICIENT AND IN ACCORDANCE WITH OHIO JURY INSTRUCTION 509.02.

The court instructed the jury of the definition of Burglary and included with this the definition of “Occupied Structure.” (T.p. 446-447). Appellant contends the definition given was improper, violating his right to due process and a fair trial.

The record indicates that Counsel for Appellant did not object to the jury instructions during trial, effectively waiving any complaint pursuant to Crim. R. 30. (T.p. 465). Consequently, this instruction may only be reviewed for plain error. *State v. Underwood* (1983), 3 Ohio St.3d 12, 444 N.E.2d 1332; see also *State v. Long* (1978), 53 Ohio St.2d 91, 97, 372 N.E.2d 804. To reiterate, plain error occurs only where there is an obvious defect that changes the outcome of the proceedings, that results in a manifest miscarriage of justice. Crim. R. 52(B); see also *State v. Barnes* (2002), 94 Ohio St.3d 21, 27, 759 N.E.2d 1240.

OJI 509.02(7) includes multiple definitions for “Occupied Structure” that a court may give the jury since “the decision to issue a particular jury instruction rests within the sound discretion of the trial court.” *State v. Huckabee* (Mar. 9, 2001), 11th Dist. No. 99-G-2252. Jury instructions must be viewed not in isolation, but as a whole for complete explanations and definitions. *State v. Prince* (1979), 60 Ohio St.2d 136, 398 N.E.2d 772. The initial definition given by the court for burglary includes in part, “[T]respass in an occupied structure or in a separately secured or separately occupied portion of an *occupied structure, that is a permanent or temporary habitation of any person when any person other than an accomplice of the offender is present or likely to be present*, with the purpose to commit in the habitation any criminal offense.” [emphasis added] (T.p. 446). This instruction comes directly from OJI 509.02(7). The secondary and clarifying definition given later in the record, gave a clearer and more commonly used definition for an Occupied Structure: “any house, building, or other structure or shelter or any portion thereof.” (T.p. 447). Again, the jury was given a tape-recorded version of the jury instructions to alleviate any confusion prior to making their determination. (T.p. 456). The complete jury instruction offered a non-prejudicial definition and clarifying explanation for an Occupied Structure which when taken together could not alter the outcome of Appellant’s trial.

Since Appellant is unable to prove that the jury instruction was improperly given, plain error has not occurred.

ARGUMENT IN RESPONSE TO APPELLANT'S FIFTH PROPOSITION OF LAW

THE COURT OF APPEALS DECIDED THAT THIS ISSUE AS PROPOUNDED BY APPELLANT HAD MERIT AND THEREFORE REVERSED APPELLANT'S PETTY THEFT CONVICTION. IN THE INTEREST OF COMPLYING WITH THE MAXIMUM PAGE REQUIREMENT, THE STATE OF OHIO WILL NOT ADDRESS THIS PROPOSITION ANY FURTHER.

ARGUMENT IN RESPONSE TO APPELLANT'S SIXTH PROPOSITION OF LAW

THE COURT REFUSED TO GIVE THE JURY AN INSTRUCTION FOR A LESSER-INCLUDED OFFENSE AS SAID ELEMENTS WERE NOT ESTABLISHED DURING THE TRIAL.

The court gave the jury instructions pertaining to the definition and elements of Burglary, a second degree felony, as charged in Counts 1, 3, 6, 8, and 10, " the Jury must find beyond a reasonable doubt that [Appellant] did, on the assigned dates for each of these counts, in Geauga County, Ohio, by force, stealth, or deception, trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, that is permanent or temporary habitation of any person when any person other than an accomplice of the offender is present or likely to be present, with the purpose to commit in the habitation any criminal offense." (T.p. 446). Appellant contends that an instruction detailing the lesser-included offense of Burglary, a third degree felony, listed in R.C. 2911.12 (A)(3), should have been given because the evidence presented offered a question of fact whether any person besides an accomplice was present or likely to be present.

OJI 413.21(2) states that a lesser-included offense must be defined if the jury would be unable to find that the State proved beyond a reasonable doubt all the essential elements of the crime charged. "[J]ury instructions of a lesser included offense are not automatically given; there must be some basis for them arising from the law and the evidence of the case." *State v. Streeter*

(Oct. 26, 1990), 11th Dist. No. 88-T-4170, 1990 WL 162585, at 3. An instruction on a lesser-included offense is only required where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction on the lesser-included offense. *State v. Thomas* (1988), 40 Ohio St.3d 213, 533 N.E.2d 286, paragraph two of the syllabus. “If the jury can reasonably find that the state failed to prove one element of the charged offense beyond a reasonable doubt but that the other elements of the offense were proven beyond a reasonable doubt, thus sustaining a conviction on a lesser included offense...is required. However, if the jury could not reasonably find against the state on an element of the crime, then a charge on a lesser-included offense is not only not required but is also improper.” *State v. Miller*, 11th District No. 2002-L-162, 2004-Ohio-6342, at ¶ 54, quoting *State v. Kilby* (1977), 50 Ohio St.2d 21, 24-25, 361 N.E.2d 1336.

In the case at bar, the evidence presented at trial does not show a basis for a lesser-included offense instruction, nor does it support an acquittal of the crime charged and a conviction on the lesser-included offense. The testimony offered by these witnesses shows that on the dates in question, homes and attached garages had items taken during times of the day when the victims were not home, but could likely have been. See also *State v. Fowler* (1983), 4 Ohio St.3d. 16, 19, 445 N.E.2d 1119 (occupants of the burglarized dwelling were home on the day of the crime, that both husband and wife occasionally worked at different locations, and that they were likely to come home at varying times, a permissive inference could be drawn by the jury regarding the likelihood of the occupants being present in the residence at the time of the burglary). R.C. 2911.12(A)(2) only requires a showing that a person would “likely be present,” not that they must be present. Since sufficient evidence has been presents for all of the elements

required by R.C. 2911.12(A)(2), an acquittal on the burglary counts is not supported and there is no rational basis for which the lesser-included offense instruction should have been given.

In addition, Counsel for Appellant did not object to the Burglary instruction given during trial, effectively waiving any complaint pursuant to Crim. R. 30. (T.p. 465). The instruction subsequently may only be reviewed for plain error. *State v. Underwood* (1983), 3 Ohio St.3d 12, 444 N.E.2d 1332; see also *State v. Long* (1978), 53 Ohio St.2d 91, 97, 372 N.E.2d 804. Under Crim. R. 52(B), Appellant was not prejudiced nor would the outcome of the trial been different because sufficient evidence was presented fulfilling all of the requirements of R.C. 2911.12(A)(2).

ARGUMENT IN RESPONSE TO APPELLANT'S SEVENTH PROPOSITION OF LAW

APPELLANT OFFERED PLEA AGREEMENTS OF ACCOMPLICES AS IMPEACHMENT EVIDENCE AND THEREFORE CANNOT NOW COMPLAIN ABOUT THE ADMISSION AND JURY INTERPRETATION OF SAID GUILTY PLEAS WHEN NO OBJECTIONS OR INSTRUCTION REQUESTS WERE MADE AT TRIAL.

Upon cross-examining accomplices Jack Laughery and Angelo Vecchio, Counsel for Appellant offered the plea agreements each had entered into as evidence to impeach their credibility for the jury. (T.p. 259, 342) The Court afterwards defined "Accomplice" to the jury as one who knowingly assists another in the commission of a crime, and also gave a limiting instruction that their testimony should be considered cautiously and with suspicion. (T.p. 269, 351, 445). Appellant now contends that the jury should have been further instructed that the guilty pleas signed by Jack Laughery and Angelo Vecchio should not be considered as evidence of Appellant's guilt.

The record indicates that Counsel for Appellant did not object to the jury instructions given during trial, effectively waiving any complaint pursuant to Crim. R. 30. (T.p. 465). Therefore, this instruction may only be reviewed for plain error. *State v. Underwood* (1983), 3

Ohio St.3d 12, 444 N.E.2d 1332; see also *State v. Long* (1978), 53 Ohio St.2d 91, 97, 372 N.E.2d 804. According to Crim. R. 52(B), plain error occurs only where there is an obvious defect that changes the outcome of the proceedings, that results in a manifest miscarriage of justice. See also *State v. Barnes* (2002), 94 Ohio St.3d 21, 27, 759 N.E.2d 1240.

As the party who offered the plea agreements as evidence, Appellant would not have objected to its admissibility, thereby waiving any appeal predicated on the admission of this evidence. See *State v. Scott*, 11th Dist. No. 2001-L-086, 2002-Ohio-6692, at ¶ 23. The admission of the evidence may now only be reviewed for plain error under Crim. R. 52(B). *Id.* Any plain error that occurred, though, was invited by Appellant. “A party cannot complain on appeal of error which he himself introduced or provoked the trial court to commit.” *Hal Artz Lincoln-Mercury, Inc. v. Ford Motor Co., Lincoln-Mercury Div.* (1986), 28 Ohio St.3d 20, 502 N.E.2d 590, paragraph one of the syllabus. Plain error did not occur when Appellant did not object to the admission of his own exhibits or when he did not object to the jury instructions given because no obvious defect occurred that Appellant did not invite.

ARGUMENT IN RESPONSE TO APPELLANT’S EIGHTH PROPOSITION OF LAW

APPELLANT’S CONVICTION WAS PROPER BECAUSE SUFFICIENT EVIDENCE WAS PRESENTED FROM WHICH A REASONABLE FACT-FINDER COULD RETURN A GUILTY VERDICT.

Appellant was convicted of five counts of Burglary, a felony of the second degree, in violation of R.C. 2911.12 (A)(2). To sustain the conviction, the State had to prove beyond a reasonable doubt that Appellant, in Geauga County, Ohio, trespassed in the occupied structures or in separately secured or separately occupied portions of the occupied structures which are permanent or temporary habitations of any person when any person other than an accomplice of the offender is present or likely to be present, with purpose to commit in the habitation any

criminal offense. (T.p 446). Appellant contends the State did not prove the element that “a person...is present or likely to be present” sufficiently enough to sustain the conviction.

When presented with a challenge to the sufficiency of the evidence, “an appellate court’s function...is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant’s guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.” *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, quoting *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781. Whether the evidence is legally sufficient is a question of law, not fact, which must be determined by the trier of fact. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 678 N.E.2d 541; *State v. Yarbrough* (2002), 95 Ohio St.3d 227, 767 N.E.2d 216. A guilty verdict should not be disturbed unless it is apparent that reasonable minds could not reach the conclusion reached by the jury. *State v. Treesh* (2001), 90 Ohio St.3d 460, 739 N.E.2d 749; *Jenks, supra*, at 273.

A person does not have to be physically present within his residence for a burglary to occur there. “Where the state proves that an occupied structure is a permanent dwelling house which is regularly inhabited, that the occupying family was in and out on the day in question, and that such house was burglarized when the family was temporarily absent, the state has presented sufficient evidence.” *State v. Kilby* (1977), 50 Ohio St.2d 21, 361 N.E.2d 1336, paragraph one of the syllabus. In *State v. Fowler* (1983), 4 Ohio St.3d. 16, 445 N.E.2d 1119, the family was home on the day their home was burglarized, but not at the exact time; both husband and wife occasionally worked at different locations, and they were likely to come home at varying times. The jury was allowed to draw a permissive inference regarding the likelihood of

the occupants being present in the residence at the time of the burglary. The testimony offered by each of the homeowner victims shows that any one of them could easily have returned home during the time of the break-ins, sufficiently proving presence or likelihood of presence in the home at the time of the break-in.

ARGUMENT IN RESPONSE TO APPELLANT'S NINTH PROPOSITION OF LAW

THE COURT APPLIED THE SENTENCING LAWS TO GIVE APPELLANT AN APPROPRIATE SENTENCE, INTEGRATING SENTENCING GUIDELINES FROM R.C. 2929.14(C) AND R.C. 2929.12(D).

In this case, Appellant contends that he did not commit the worst form of Burglary justifying a maximum sentence since it was proven that no one besides an accomplice was present during the break-ins.

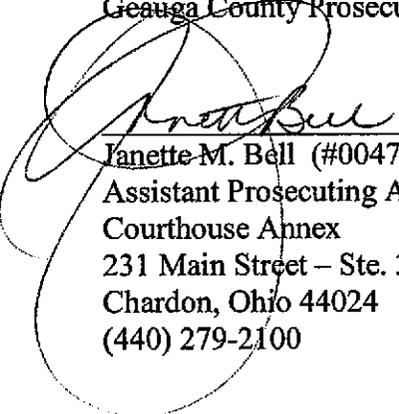
The record reflects that the court determined Appellant's maximum sentence based on the great likelihood that Appellant would continue to commit crimes in the future, not that Appellant committed the worst form of Burglary. (Sentencing Tr. 12). R.C. 2929.12 provides a non-exclusive list of factors to consider if Appellant is likely to be a repeat offender: if Appellant was on parole or probation, whether he showed genuine remorse for the offenses, and whether he pleaded guilty or was convicted of a prior criminal offense. *Id.* at (D)(1), (2) and (5). See also *State v. Murphy*, 11th Dist. No. 2003-L-049, 2005-Ohio-412, at ¶ 31. The court adduced that the maximum sentence length was eight years because Appellant was found guilty of and subsequently convicted of a second degree felony. It would have been unlawful for the court to consider any sentencing option other than for a second degree felony under the circumstances. The court considered and stated other factors as to Appellant's likelihood of recidivism: that after being released on bond prior to sentencing, Appellant failed to show up for his sentencing hearing, that he was subsequently convicted for lying to a police officer about his identity, and also that Appellant was convicted of Assault. (Sentencing Tr. 11) The court also took into

consideration Appellant's extensive criminal history, his methamphetamine addiction, and his lack of self discipline. (Sentencing Tr. 11-16). A review of the sentencing transcript shows that the Court did, in addition, review and apply the "general overall principles and objectives of sentencing to adequately and fairly punish the [Appellant] while protecting the public at the same time," prior to imposing the aggregate sentence of eight years. (Sentencing T.p. 11). The record supports the imposition of the maximum sentence and Appellant was sentenced in accordance with R.C. 2929.14 and R.C. 2929.12.

CONCLUSION

In light of the foregoing, Appellee, the State of Ohio, respectfully urges this Honorable Court to decline jurisdiction over this matter as Appellant has failed to state a case of any public or great interest or involves a substantial constitutional question.

Respectfully submitted,
DAVID P. JOYCE
Geauga County Prosecutor



Janette M. Bell (#0047076)
Assistant Prosecuting Attorney
Courthouse Annex
231 Main Street – Ste. 3A
Chardon, Ohio 44024
(440) 279-2100

PROOF OF SERVICE

A true and accurate copy of the foregoing was forwarded by regular U.S. mail, postage prepaid, to Paul Mancino Jr., 75 Public Square, Suite 1016, Cleveland, Ohio, 44113-2098 on this 29th day of March 2007.



Janette M. Bell (#0047076)
Assistant Prosecuting Attorney

