

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :
 :
 Plaintiff-Appellant, : Case No. 2006-2135
 :
 vs. : On Appeal from the Columbiana
 : County Court of Appeals
 : Seventh Appellate District
 TIMOTHY M. WAMSLEY, :
 :
 Defendant-Appellee. : C.A. Case No. 05CO11
 :

MERIT BRIEF OF APPELLEE TIMOTHY M. WAMSLEY

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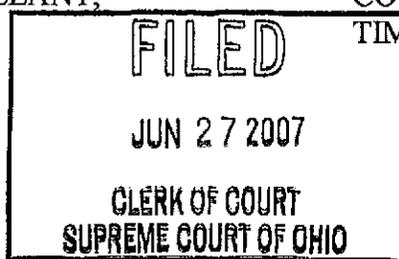


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STATEMENT OF THE CASE AND FACTS

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. (T.p. 94). Throughout their relationship, Mr. Wamsley and Ms. Stoddard lived together. (T.p. 103). But when Mr. Wamsley and Ms. Stoddard began having relationship difficulties, she decided to rent an apartment on her own. (T.p. 95).

Ms. Stoddard testified that one evening, while sleeping at her apartment, she was awakened by two loud thumps. (T.p. 105). 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!” Id. Ms. Stoddard explained that she turned around, saw a figure in the dark, and kicked the intruder in the chest. Id. A struggle then ensued between Ms. Stoddard and the trespasser. (T.pp. 99; 105). Ms. Stoddard testified that she tried to kick the intruder again, but ended up kicking her dresser instead. (T.p. 105). Ms. Stoddard lost her balance and fell, hitting her head on the nightstand. (T.pp. 105-106). The dresser flipped over, causing the television and videotape player to fall on top of her. (T.p. 106).

Ms. Stoddard testified that she did not realize that the person who entered the apartment was Mr. Wamsley. (T.p. 105; 111). She explained that although Mr. Wamsley did not have a key to her apartment, he knew where an outside key was hidden. (T.pp. 103-104). Mr. Wamsley had slept at the apartment for five nights prior to the evening of the alleged aggravated burglary. (T.p. 104). But Ms. Stoddard had removed the hidden key a few hours before the incident occurred because she was mad at Mr. Wamsley. Id. 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. (T.pp. 104; 109).

Ronald Scott, Ms. Stoddard’s landlord, also testified. (T.p. 56). Mr. Scott explained that he lived around the corner from Ms. Stoddard and knew that she had an ongoing relationship with Mr. Wamsley. (T.pp. 58; 62-63). However, on one or two prior occasions, Mr. Wamsley had to be removed from the apartment. (T.p. 58). Consequently, Mr. Scott had forbidden Ms. Stoddard to allow Mr. Wamsley into the apartment. (T.p. 59). But although Mr. Scott relayed instructions to Ms. Stoddard regarding Mr. Wamsley’s presence in the apartment, nothing in the record suggests that either Mr. Scott or Ms. Stoddard directly told Mr. Wamsley that he was not allowed to be in the apartment. (T.pp. 59; 73; 110).

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. (T.p. 62). 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. *Id.* When they approached Ms. Stoddard’s apartment, they saw Mr. Wamsley trying to enter. *Id.* At that time, Mr. Scott “got out of the vehicle and told [his] girlfriend to go back to the house and call the police.” *Id.* Mr. Scott testified that he saw Mr. Wamsley enter the apartment and heard Ms. Stoddard cry out, “He’s trying to kill me!” (T.p. 64). When Mr. Scott began to approach the apartment, Mr. Wamsley opened the door to leave. (T.pp. 64-65). At that moment, a police cruiser drove up to the residence. (T.p. 65).

Patrolman Wright was the first officer on the scene. (T.pp. 44-46). Upon arriving, he heard someone yelling for help. (T.pp. 44-45). Officer Wright saw Mr. Wamsley exit the

apartment and immediately placed Mr. Wamsley under arrest. (T.pp. 44-47). After Mr. Wamsley was in custody, another officer arrived and transported Mr. Wamsley to the police station. (T.p. 47). Officer Wright then re-entered the apartment and saw Ms. Stoddard, whose face was covered with blood. Id. 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].” (T.p. 48). However, during trial, Ms. Stoddard denied that she ever made that statement. (T.p. 100).

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 29th 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 or causing another to be deceived by any false or misleading representation by withholding information, by preventing another from acquiring information or by any 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, [sic] which constitute a violation of law and subject a person to criminal penalties.

(T.pp. 153-155).

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.

State v. Wamsley, Seventh District No. 05CO11, 2006-Ohio-5303, at ¶13.

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. Mr. Wamsley filed a memorandum in opposition of jurisdiction on December 13, 2006. This Court accepted jurisdiction on February 28, 2007.

ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW

APPELLEE'S FIRST PROPOSITION OF LAW

When a defendant does not object to the trial court's failure to separately and specifically charge the jury with every element of the crime(s) with which the defendant is charged, the error is reviewed under the plain-error doctrine.

When a trial court fails to instruct the jury as to every element of the crime(s) with which the defendant is charged, and the defendant fails to object, a reviewing court must determine whether the error is plain and prejudicial before reversing the judgment of the trial court. *State v. Adams* (1980), 62 Ohio St.2d 151, 154; *Johnson v. United States* (1997), 520 U.S. 461, 469. Accordingly, as the plain-error doctrine mandates, "only by reviewing the record in each case can the probable impact of [the trial court's] failure [to instruct the jury as to every element of the charged crime(s)] be determined, and a decision reached as to whether substantial prejudice may have been visited on the defendant, thereby resulting in a manifest miscarriage of justice." *Adams* at 154.

Mr. Wamsley does not dispute the legal standard that this Court formulated nearly three decades ago in *State v. Adams*. Moreover, the court of appeals did not object to following and applying *Adams*, as is evidenced by the plain-error analysis that the court of appeals conducted before reversing and remanding Mr. Wamsley's case for a new trial. (See Appellee's Second Proposition of Law, Roman Numerals III and IV, *infra*). The only substantive disagreements between the State and Mr. Wamsley are: (1) whether a court of appeals may include dicta involving the structural-error doctrine in a plain-error analysis; and (2) how the *Adams* standard applies to the specific facts of this case. (See Appellee's Second Proposition of Law, *infra*).

APPELLEE'S SECOND PROPOSITION OF LAW

A court of appeals does not err by including dicta regarding the structural-error doctrine in a plain-error analysis.

I. Introduction

The State proposes that this Court reverse the decision in *State v. Wamsley*, 2006-Ohio-5303, because the court of appeals included a review of the structural-error doctrine in its opinion. (State's Merit Brief, pp. 4-11). However, the discussion regarding the structural-error doctrine came after the court of appeals decided that the trial court committed a prejudicial and plain error by failing to instruct the jury as to every element of the crime of aggravated burglary. (See Roman Numeral III(A), *infra*). Consequently, the portion of the court of appeals' opinion that discusses the structural-error doctrine is dicta. (See Roman Numerals III(A); III(B); and IV, *infra*). As such, this Court should dismiss this appeal as being improvidently accepted. (See Roman Numeral IV, *infra*). In the alternative, this Court should affirm the court of appeals' decision reversing Mr. Wamsley's conviction and granting him a new trial, as the court of appeals ultimately reached the correct result. (See Roman Numeral V, *infra*).

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. *Adams* at 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. *Adams* at 153; *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

(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). *Wamsley* at ¶24-25, 40. 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*, Eighth District No. 76986, 2001-Ohio-4133 (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 little-to-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 ¶40, 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. Recognizing that Mr. Wamsley’s counsel “did not object to the jury instructions,” the court of appeals explained that “generally speaking, a failure to object to a trial error *waives all but plain error on appeal.*” *Wamsley* at ¶32, citing *State v. Underwood*, 3 Ohio St.3d 12. Emphasis added. In the very next paragraph, the court of appeals stated that, in order “[t]o constitute plain error, the error must be obvious on the record, and the error must be so fundamental that it should have been apparent to the trial court without objection.” *Wamsley* at ¶33, citing *State v. Tichon* (1995), 102 Ohio App.3d 758. The court of appeals further noted that “[t]he decision to conduct a plain error review is discretionary with the reviewing court.” *Wamsley* at ¶33, citing *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044.

Upon deciding to review the trial court’s failure to instruct the jury on every element of the crime of aggravated burglary as plain error, the court of appeals first turned to *State v. Adams* for guidance. *Wamsley* at ¶34. Citing to *State v. Adams*, the court of appeals pointed out that this Court “left open the possibility that a trial court’s failure to instruct the jury on all 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. There was also evidence that the victim called the police to have [Mr. Wamsley] removed from the apartment just a few hours prior to the time of the crime, and that she had removed the outside key because she was angry with [Mr. Wamsley]. 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. Since [Mr. Wamsley's] culpable mental state was an issue at trial, this case can be distinguished from the situation that occurred in *Adams*.

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.*

Only after explaining that the trial court's failure to instruct the jury on every element of the crime of aggravated burglary would be analyzed under the plain-error doctrine, and deciding that the trial court's error was plain and outcome-determinative in Mr. Wamsley's case, did the court of appeals mention the structural-error doctrine. And the discussion of the structural-error doctrine was confined to the portion of the opinion in which the court was reviewing various cases that addressed the same issue that had been raised by Mr. Wamsley. Because the court of appeals had a duty to review the caselaw on the issue presented, and numerous courts had determined that failing to instruct the jury as to every element of a crime was a structural error, the *Wamsley* court was then required to discuss the structural-error doctrine.

In its examination of previously decided cases, the court of appeals first noted that *State v. Smith*, Eleventh District No. 1720, 1989 Ohio App. LEXIS 194 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 which presented the same issue that was raised by Mr. Wamsley was *State v. Smith*, the court of appeals then 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, failing to instruct the jury that the State had the burden of proving, beyond a reasonable doubt, that Mr. Hoover was resisting a lawful arrest violated the due process principles recognized in *In re Winship* (1970), 397 U.S. 358, 364. *Id.* The Sixth Circuit 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 in *Wamsley* 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.

The court of appeals then cited to various recent cases in which Ohio appellate courts addressed a trial court’s failure to instruct a jury on every element of a crime. *Wamsley* at ¶53-54. One of those cases was *State v. Stacy*, Twelfth District No. CA2002-03-073, 2003-Ohio-4752. In *Stacy*, the defendant was convicted of carrying a concealed weapon. *Id.* at ¶1. On appeal, Mr. Stacy argued that the trial court improperly instructed the jury as to the necessary elements to prove that he carried a concealed weapon. *Id.* at ¶3. Specifically, Mr. Stacy challenged the trial court’s failure to instruct the jury on the essential elements of “loaded” and “ammunition ready at hand.” *Id.* See R.C. 2923.12(A) (“No person shall knowingly carry or have, concealed on his or her person or concealed ready at hand, any deadly weapon or dangerous ordnance.”); R.C. 2923.12(D) (“Whoever violates this section is guilty of carrying concealed weapons, a misdemeanor of the first degree[; but if] the weapon involved is a firearm that is either loaded or for which the offender has ammunition ready at hand, [then carrying a concealed weapon is a felony of the fourth degree.]”). Law of April 7, 2004, Ohio Rev. Code Ann. § 2923.12 (amended April 8, 2004; and March 14, 2007). *Stacy* at ¶5.

The *Stacy* court explained that, because Mr. Stacy did not object at trial to the jury instructions, it would review the issue under the plain-error doctrine. *Id.* at ¶4. Citing to *Glenn v. Dallman* (C.A. 6, 1982), 686 F.2d 418, 421 and *State v. Moore*, Twelfth District No. CA92-12-034, 1994 Ohio App. LEXIS 329, the *Stacy* court explained that:

We find that the trial court's failure to instruct the jury on every essential element of the offense of carrying [a] concealed weapon was plain error under Crim.R. 52(B). The trial court's instructions effectively deprived [Mr. Stacy] of his right to have the jury properly instructed of the crime for which he was actually being tried, and the essential elements of that crime. The trial court's error is not corrected simply because a reviewing court is satisfied after the fact of a conviction that sufficient evidence existed that the jury would or could have found that the state proved the missing element had the jury been properly instructed; the constitutional right to a jury places the burden on the state of proving the elements of a crime to the jury's satisfaction, not to the satisfaction of the reviewing court.

Stacy at ¶7.

The *Wamsley* court found the Twelfth District's reasoning in *Stacy* instructive in that the State has the burden of proving the elements of a crime to the jury's satisfaction. *Wamsley* at ¶53-54. And 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 Merit Brief, pp. 8-11). 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 reviewed this Court's explanation as to what constitutes plain error and then, applying this Court's precedent to Mr. Wamsley's case, conducted an in-depth plain-error analysis; evaluated how Ohio courts of appeals historically treated a trial court's failure to instruct the jury as to every element of a crime; assessed recent Ohio courts of appeals decisions that applied the plain-error doctrine; and discussed federal court cases that addressed similar issues. And before the court of appeals ever mentioned the structural-error doctrine, 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.*

IV. This Court should dismiss this appeal as being improvidently accepted.

The State's case is based on the incorrect premise that the Seventh District Court of Appeals strayed from the legal standard that this Court adopted in *State v. Adams*. The State erroneously argues that the court of appeals expanded the plain-error rule and “skew[ed] the rule's careful balancing of our need to encourage all trial participants to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly redressed.” (State's Merit Brief, p. 5, quoting *State v. Hill*, 92 Ohio St.3d 191, 2001-Ohio-141).

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. And any reference that the court of appeals made to the structural-error doctrine was merely dicta. Dicta is defined as "opinions of a judge which do not embody the resolution or determination of the specific case before the Court." *Blount-Hill v. Bd. of Educ.* (C.A. 6, 2006), 195 Fed. Appx. 482, 488, quoting *Black's Law Dictionary* 454 (6th ed. 1990). See, also, *Westfield v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, at ¶85 (Sweeney, J., dissenting) ("Dicta' is defined as 'expressions in [a] court's opinions which go beyond the facts before [the] court and therefore are...not binding in subsequent cases as legal precedent.'"), quoting *Black's Law Dictionary* (6th Ed.1990) 454; *Easter v. Complete General Construction Co., et al.*, Tenth District No. 06AP-763, 2007-Ohio-1297, at ¶34, quoting Lile, William M. et al., *Brief Making and the Use of Law Books* (3rd Ed. 1914) 307 (citing to dictum as a part of the doctrine of a decision "is almost certain to bring upon [the] brief maker adverse comment...").

Judge DeGenaro's dissenting opinion confirms that the majority found that the trial court's error was plain and prejudicial, and that the majority's discussion regarding the structural-error doctrine was dicta. Judge DeGenaro's objection to the majority's structural-error review was secondary to her objection regarding the majority's finding that the trial court's error was prejudicial. The first two paragraphs of the dissent are devoted to the majority's plain-error analysis. *Wamsley* at ¶81 (DeGenero, J., dissenting) ("In this case, the majority correctly concludes that the trial court erred when it failed to instruct the jury on the culpable mental state for trespass[, but] *I disagree with the majority because I do not think the trial court's error rises to the level of plain error.*"). (Emphasis added).

Only after disagreeing with the majority's finding that the trial court committed prejudicial, plain error did the dissent assert that the portion of the opinion which discussed the structural-error doctrine was "misleading." *Id.* at ¶82. The dissenting opinion explained that the majority's review of cases which discussed the structural-error doctrine was confusing, because those cases "were all decided before 1997, so they no longer state good law to the extent that they apply a structural error analysis in the absence of a contemporaneous objection." *Id.* Consequently, Judge DeGenero stressed that the majority's opinion may have been less "confusing" or "misleading" by omitting the discussion involving the structural-error doctrine. However, confusing or misleading dicta may not be the basis for a reversal. See 20 American Jurisprudence 2d 526 *et seq.*, Sections 190, 193 (*stare decisis* does not attach to parts of an opinion which are mere dicta).

V. This Court should affirm the court of appeals' decision reversing Mr. Wamsley's conviction and granting him a new trial because the court of appeals reached the correct result.

Even if this Court agrees with the State's Propositions of Law, it should affirm the court of appeals' decision, as the result is correct. *State ex rel. McGrath v. Ohio Adult Parole Authority et al.*, 100 Ohio St.3d 72, 2003-Ohio-5062, at ¶8 ("Reviewing courts are not authorized to reverse a correct judgment on the basis that some or all of the lower court's reasons are erroneous."), citing *State ex rel. Johnson v. Ohio Dept. of Rehab. & Corr.*, 95 Ohio St.3d 70, 72, 2002-Ohio-1629. Applying the plain-error analysis to the facts of Mr. Wamsley's case evidences that the trial court's error was prejudicial.

A reviewing court must apply a four-prong test in a plain-error inquiry:

First and most fundamentally, there must be error, i.e., a deviation from a legal rule. *United States v. Olano* (1993), 507 U.S. 725, 732-733. Second, the error must be plain. To be plain, the error must be “clear” or, equivalently, “obvious.” *Id.* at 734, citing *United States v. Young* (1985), 470 U.S. 1, 17. Third, the error must affect substantial rights. In most cases, this means that the error must have affected the outcome of the trial. *Olano*, 507 U.S. at 734.

If a party satisfies the three foregoing conditions, a reviewing court then has the discretion to correct the plain error [if the error “seriously affects the fairness, integrity, or public reputation of judicial proceedings.” *Johnson v. United States*, 520 U.S. at 467. Internal citations omitted].

State v. Hill, 2001-Ohio-141, at 206 (Cook, J., concurring in judgment).

In Mr. Wamsley’s case, all four prongs are met. A trial court has the duty to instruct the jury on each and every element which must be proven to establish the crime charged. (See Roman Numeral II, *supra*). The trial court deviated from that deep-rooted legal principle in Mr. Wamsley’s trial. (See Roman Numerals II and III, *supra*). Furthermore, since the Ohio Jury Instructions state the exact instructions that a trial court must give before allowing a jury to deliberate, the error was plain. *Id.*

Moreover, Mr. Wamsley’s culpable mental state with respect to trespass was an issue at trial. *Wamsley* at ¶40. Considerable evidence was presented concerning Mr. Wamsley’s prior access to the apartment, whether he paid rent, how often he stayed at the apartment, and his prior living arrangements with Ms. Stoddard. *Id.* Therefore, it was essential for the jury to decide whether Mr. Wamsley “knowingly” committed a trespass, or whether Mr. Wamsley believed that he had the right to enter the apartment. And the fact that the jury was not instructed regarding the culpable mental state that is required to have found that Mr. Wamsley committed a trespass was prejudicial, plain error. Since the trial court’s error affected the integrity and the fairness of

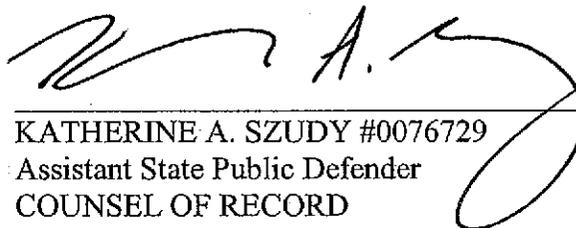
Mr. Wamsley's trial, the court of appeals had the discretion to reverse Mr. Wamsley's conviction. *State v. Hill*, 92 Ohio St.3d at 206.

CONCLUSION

For the foregoing reasons, this Court should dismiss the State's appeal as being improvidently accepted. In the alternative, this Court should affirm the court of appeals' decision reversing Mr. Wamsley's conviction and granting him a new trial.

Respectfully submitted,

DAVID H. BODIKER #0016590
State Public Defender



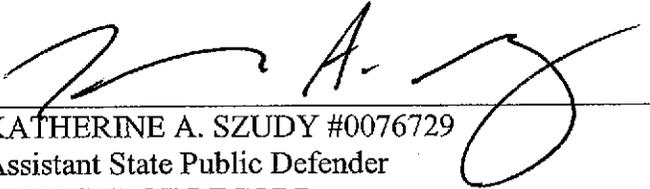
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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing **Merit Brief Appellee Timothy M. Wamsley** was sent by regular U.S. Mail, postage prepaid to Tammie M. Jones, Assistant Prosecuting Attorney, Columbiana County Courthouse, 105 South Market Street, Lisbon, Ohio 44432, this 27th day of June, 2007.


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#253958

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case No. 2006-2135
Plaintiff-Appellant,	:	
	:	On Appeal from the Columbiana
vs.	:	County Court of Appeals
	:	Seventh Appellate District
TIMOTHY M. WAMSLEY,	:	
	:	C.A. Case No. 05CO11
Defendant-Appellee.	:	

APPENDIX TO

MERIT BRIEF OF APPELLEE TIMOTHY M. WAMSLEY

ORC Ann. 2923.12

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*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL
ASSEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH JUNE 24,
2007 ***

*** ANNOTATIONS CURRENT THROUGH APRIL 1, 2007 ***

*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JUNE 4, 2007 ***

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2945. TRIAL
TRIAL PROCEEDINGS

ORC Ann. 2923.12

§ 2923.12. Carrying concealed weapons.

(A) No person shall knowingly carry or have, concealed on his or her person or concealed ready at hand any deadly weapon or dangerous ordnance.

(B) This section does not apply to officers, agents, or employees of this or any other state or the United States, or to a law enforcement officers, authorized to carry concealed weapons or dangerous ordnance, and acting within the scope of the officer's, agent's, or employee's duties.

(C) It is an affirmative defense to a charge under this section of carrying or having control of a weapon other than dangerous ordnance that the actor was not otherwise prohibited by law from having the weapon, and that any of the following applies:

(1) The weapon was carried or kept ready at hand by the actor for defensive purposes, while the actor was engaged in or was going to or from the actor's lawful business or occupation, which business or occupation was of a character or was

necessarily carried on in such manner or at such a time or place as to render the actor particularly susceptible to criminal attack, such as would justify a prudent person in going armed.

(2) The weapon was carried or kept ready at hand by the actor for defensive purposes, while the actor was engaged in a lawful activity and had reasonable cause to fear a criminal attack upon the actor or a member of the actor's family, or upon the actor's home, such as would justify a prudent person in going armed.

(3) The weapon was carried or kept ready at hand by the actor for any lawful purpose and while in the actor's own home.

(4) The weapon was being transported in a motor vehicle for any lawful purpose, and was not on the actor's person, and, if the weapon was a firearm, was carried in compliance with the applicable requirements of division (C) of section 2923.16 of the Revised Code.

(D) Whoever violates this section is guilty of carrying concealed weapons, a misdemeanor of the first degree. If the offender previously has been convicted of a violation of this section or of any offense of violence, if the weapon involved is a firearm that is either loaded or for which the offender has ammunition ready at hand, or if the weapon involved is dangerous ordnance, carrying concealed weapons is a felony of the fourth degree. If the weapon involved is a firearm and the violation of this section is committed at premises for which a D permit has been issued under Chapter 4303. of the Revised Code or if the offense is committed aboard an aircraft, or with purpose to carry a concealed weapon aboard an aircraft, regardless of the weapon involved, carrying concealed weapons is a felony of the third degree.

HISTORY:

134 v H 511 (Eff 1-1-74); 135 v H 716 (Eff 1-1-74); 141 v H 51 (Eff 7-30-86); 146 v S 2.

Eff 7-1-96;

ORC Ann. 2945.11

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2945. TRIAL
TRIAL PROCEEDINGS

ORC Ann. 2945.11 (2007)

§ 2945.11. Charge to the jury as to law and fact

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. The court must also inform the jury that the jury is the exclusive judge of all questions of fact. The court must state to the jury that in determining the question of guilt, it must not consider the punishment but that punishment rests with the judge except in cases of murder in the first degree or burglary of an inhabited dwelling.

HISTORY:

GC § 13442-9; 113 v 123(181), ch 21, § 9; Bureau of Code Revision. Eff 10-1-53.

Ohio Crim. R. 30

OHIO RULES OF COURT SERVICE
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OHIO RULES OF CRIMINAL PROCEDURE

Ohio Crim. R. 30 (2006)

Rule 30. INSTRUCTIONS

(A) *Instructions; error; record.* --At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. Copies shall be furnished to all other parties at the time of making the requests. The court shall inform counsel of its proposed action on the requests prior to counsel's arguments to the jury and shall give the jury complete instructions after the arguments are completed. The court also may give some or all of its instructions to the jury prior to counsel's arguments. The court shall reduce its final instructions to writing or make an audio, electronic, or other recording of those instructions, provide at least one written copy or recording of those instructions to the jury for use during deliberations, and preserve those instructions for the record.

On appeal, a party may not assign as error the giving or the failure to give any instructions unless the party objects before the jury retires to consider its verdict, stating specifically the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.

(B) *Cautionary instructions.* --At the commencement and during the course of the trial, the court may give the jury cautionary and other instructions of law relating to trial procedure, credibility and weight of the evidence, and the duty and function of the jury and may acquaint the jury generally with the nature of the case.

HISTORY: Amended, eff 7-1-75; 7-1-82; 7-1-92; 7-1-05