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## STATEMENT OF THE CASE AND FACTS

Janet Sue Stoddard, the victim in this matter, and appellant had been involved in an on-again, off-again romantic relationship for approximately six years prior to the incident. The victim had rented an apartment at 800 Dresden Avenue apartment on her own as a result of problems in the relationship. (Tr., p. 95) Appellant never resided at the Dresden Avenue apartment, did not pay rent, did not have a key to the apartment and was not welcome at the apartment on May 29, 2004. (Tr., p. 95, 103, 109) Appellant had stayed at the apartment several nights prior to the incident, but did not reside with the victim. (Tr., p.104,109) Earlier in the day on May 29, 2004, the victim had called police to remove appellant from the apartment. (Tr., p. 97) According to the testimony of the landlord, Mr. Scott, appellant was not permitted to be at the apartment, did not pay rent, was not part of the verbal lease agreement and had been removed from the apartment on a couple of occasions. (Tr., p. 57-59).

On May 29, 2004 at about 10 p.m., the victim was awakened by appellant who had broken into her apartment at 800 Dresden Avenue and kicked and beat her about the head. (Tr., p. 105) When police arrived, they heard a woman screaming for help. (Tr., p. 44) Upon his arrival, Officer Patrick Wright encountered the appellant coming down the steps of the apartment (Tr., p. 47) and also saw the victim on the steps with her face and hair covered in blood. (Tr., p. 47). The victim told Officer Wright that appellant had broken into her apartment and "kicked the hell out of me." (Tr., p. 48). Additionally, two other individuals were standing near the

scene, including the victim's landlord, Ronald Scott. Mr. Scott had observed the appellant use his shoulder to shatter the wooden door to the apartment and break the lock (Tr., p. 67) Mr. Scott also heard the victim screaming, "he's trying to kill me." (Tr., p. 64) Ambulance personnel were summoned and the victim advised them that her ex-boyfriend had attacked her. (Tr., p. 80) The ambulance attendant, Marty Thorn, described the victim's injuries as being a strike to the upper back and back of her head resulting in bleeding and a gash leaving a flap of skin loose. (Tr., p. 77) Mr. Thorn testified that the injuries appeared consistent with a kick to the head and that the victim was also choked. (Tr., p. 82) Further testimony by the victim's ex-husband, Richard Stoddard, revealed that the appellant had been in a fight with Mr. Stoddard shortly before the attack in the victim's home wherein Richard Stoddard had knocked the appellant out. (Tr., p. 115) Despite her testimony at trial as an adverse witness, the victim did testify that the appellant stated "See what Richard did to me? Now, you're gonna get yours." during the attack. (Tr., p. 102)

Appellant, Timothy M. Wamsley, was indicted by the Columbiana County Grand Jury for one count of Aggravated Burglary, ORC Section 2911.11(A)(1), a felony one, on or about June 24, 2004. The case finally proceeded to jury trial on December 7, 2004.

Following a full trial by jury, the defendant was convicted as charged of Aggravated Burglary, ORC Section 2911.11(A)(1), a felony one. A sentencing hearing was conducted on February 25, 2005. After that hearing and by judgment entry dated February 28, 2005, appellant was sentenced to a definite four-year term of incarceration in a state correctional facility. Appellant timely appealed his conviction to the Seventh District Court of Appeals setting forth six assignments of error. On October 3, 2006, the Seventh District Court of Appeals reversed

appellant's conviction and remanded the matter for retrial. The appellate court held that the appellant's third assignment of error was dispositive, finding that the trial court's failure to instruct on the culpable mental state required for trespass and to define the underlying crime of assault warranted reversal. The State of Ohio timely filed a notice of appeal to this Honorable Court on November 17, 2006. The appeal was accepted by this Honorable Court on March 2, 2007.

#### REPLY TO 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.

The Criminal Rules provide that errors in jury instructions may not be challenged absent a timely objection. *Criminal Rule 30(A)*. Absent an objection at trial, appellate review of an error is limited to review under the plain error doctrine. *State v. Adams* (1980) 62 Ohio St.2d 151; *Johnson v. United States* (1997), 520 U.S. 461. As appellee notes, this legal standard is well established. The plain error rule provides that "plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." *Criminal Rule 52(B)*.

A defendant bears the burden of proof with regard to plain error and must show (1) that the trial court erred, (2) that the error was plain or obvious and (3) that the error affected his substantial rights. *State v. Martin* (2004) 103 Ohio St. 3d 385 citing *State v. Barnes* (2002) 94 Ohio St. 3d 21. Once plain error is shown, an appellate court maintains discretion and does not have to notice the plain error. *Id.* In fact, such error is only to be noticed "with the utmost

caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Id.*, quoting *State v. Long* (1978) 53 Ohio St.2d 91, syllabus paragraph 3. Reversal is only appropriate when, after review of the entire record, the reviewing court finds that the outcome of the proceedings would have clearly been different but for the error. *Long*, *supra*. See also, *State v. Underwood* (1983) 3 Ohio St.3d 12.

This Court has held that failure to instruct on all the elements of an offense is not necessarily reversible as plain error. *State v. Adams* (1980) 62 Ohio St.2d. 151. Jury instructions are to be read as a whole and any errors or omissions are to be interpreted in the context of the entire charge. *State v. Madrigal* (2000) 87 Ohio St. 3d 378, 396. If error is found in the instructions, and no objection has been raised at trial, an appellate court must review the entire record and determine whether there has been a manifest miscarriage of justice. *Adams*, *supra*.

Appellee does not dispute the appellant's first proposition concerning the inapplicability of the structural error doctrine in cases where no objection has been made at the trial level. In fact, appellee acknowledges the *Adams* standard as being the appropriate and applicable standard here. But, appellee's assertion that the appellate court's review of the structural error doctrine was merely dicta is incorrect. (See Reply to Appellee's Second Proposition of Law, *infra*.)

Contrary to this Court's cautions in *State v. Hill* (2001) 92 Ohio St.3d 191, the court of appeals applied the structural error doctrine absent any objection to the jury instructions to find reversible error. The result is an unwarranted expansion of the plain error rule wherein a finding of prejudicial reversible error can be made without a finding of manifest injustice. Stated another way, the appellate court created a per se plain error rule despite this Court's rejection of same in

*Hill*, supra.

REPLY TO APPELLEE'S SECOND PROPOSITION OF LAW

A court of appeals errs by applying the structural error doctrine in a plain error analysis.

Appellee erroneously contends that the court of appeals' reference to the structural error doctrine was merely dicta that came after the court had concluded that the trial court had committed prejudicial and plain error. (Appellee's Merit Brief, p.6). As reflected throughout the appellate opinion, the analysis of the structural error doctrine and its presumption of prejudice was the foundation of the appellate court's review. That is not dicta.

Appellee also erroneously argues that the appellate court correctly applied *Adams* to the case at bar. The appellate court did not review the entire record to determine if a manifest miscarriage of justice occurred that clearly affected the outcome of the trial. Rather, the appellate court presumed prejudice unduly expanding the plain error rule.

Finally, in this proposition, the appellee argues in the alternative that appellate court reached the correct result even if its reasoning was flawed. However, a complete review of the record reflects no manifest miscarriage of justice thereby making the reversal erroneous.

**A. The structural error analysis is not dicta.**

As noted by appellee, 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 (6<sup>th</sup> Ed. 1990).

From the commencement of its review of Wamsley's third assignment of error, the appellate court focused on structural error noting initially that the "appellant argues that the failure of the trial court to instruct the jury as to certain elements of the crime of aggravated burglary constitute *structural and reversible error*." *Wamsley*, at paragraph 14. Then the appellate court acknowledged that the standard of review was plain error. The appellate court began an analysis for plain error under Criminal Rule 52(B), noting that its review was discretionary and was to be undertaken with the utmost caution and in exceptional circumstances designed only to prevent a manifest miscarriage of justice. *Wamsley*, at paragraph 33. After concluding that the jury instructions were erroneous and that the errors with regard to the failure to define the culpable mental state for trespass and to define the underlying offense were plain, the appellate court analyzed structural error.

Appellee's assertion that the references to structural error followed a finding that the plain error was prejudicial is incorrect. Prejudice was presumed following the appellate court's efforts to distinguish *Adams* on the facts and reference and reliance upon the Eleventh appellate district's holding in *Smith*. *State v. Smith*, 1989 WL 4275 (Ohio App. 11<sup>th</sup> Dist., Jan.20, 1989). The *Smith* court relied on federal precedent in concluding that the failure to instruct the jury on the element of culpable mental state for trespass in a burglary offense was such a fundamental error that prejudice is presumed. *Wamsley* at paragraph 46 citing to *Smith* at 9. The appellate court stated that the Sixth Circuit cases dealing with structural error were "very significant persuasive authority". *Wamsley*, at paragraph 52. The appellate court then reviewed other appellate district decisions stating that such districts agreed that failure to instruct the jury on an essential element of the crime warrants reversal, whether as plain error or as automatically reversible structural

error. *Wamsley*, at paragraph 53.

Then, without finding a manifest miscarriage of justice in the noted error(s), the appellate court incorrectly concluded that the error was so fundamental that prejudice was presumed and reversal required. *Wamsley*, at paragraphs 55, 70.

The appellate court's determination of prejudicial, reversible error was clearly based upon structural error as there was no finding that the errors were outcome determinative. Specifically, the appellate court stated :

It would appear from the numerous authorities cited above that failure to instruct the jury on all the elements of the crime is a type of fundamental error that satisfies the requirements of the plain error rule and, in the vast majority of cases, necessitates a reversal of the judgment. *Martin*, supra, 103 Ohio St.3d 385, 2004-Ohio-5471, 816 N.E.2d 227, at paragraph 53. For all these reasons, we sustain Appellant's third assignment of error and hold 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 paragraph 55.

The appellate court relied on the same reasoning with regard to the alleged error in the definition of the underlying offense. *Wamsley*, at paragraph 70. Clearly, the structural error review was not dicta.

In a decision issued subsequent to the filing of appellant's merit brief, the appellate court followed its reasoning in *Wamsley*. See *State v. Howard*, 2007 WL 1806077 (Ohio App. 7<sup>th</sup> Dist, 6-19-2007). No objection to the jury instructions was made and although the appellate court did not find a manifest miscarriage of justice, the appellate court relied on *Wamsley* in finding that the trial court's failure to instruct on the element of a deadly weapon in a felonious assault offense was plain error warranting reversal. In addition to demonstrating that the structural error

doctrine was not merely dicta, this reliance supports the appellant's contention that the Seventh District has, in effect, created a per se plain error rule that obviates the requirement to find a manifest miscarriage of justice and mandates reversal absent an objection at trial.

**B. The appellate court did not conduct a plain error analysis**

Despite appellee's contention to the contrary, the appellate court did not apply *Adams* and conduct a plain error review. Nothing in the record reflects that the appellate court reviewed the entire record to determine whether a manifest miscarriage of justice occurred that clearly affected the outcome of the trial. Instead, the appellate court skewed its plain error analysis with the structural error doctrine and presumed prejudice creating a per se plain error rule. This court rejected such a per se approach as inconsistent with the plain error rule and unsupported by legal precedent. *Hill*, supra. Moreover, the *Hill* court held that a complete review of all relevant assignments of error must be done when conducting a plain error analysis in order to determine manifest miscarriage of justice. Here, the appellate court found Wamsley's remaining five assignments of error, including assignments challenging the manifest weight of the evidence on the very elements which are the subject of the erroneous jury instructions, moot. This disposition of the other assignments conflicts with *Hill* and undermines the allegation that a plain error analysis was conducted. The mootness disposition supports the State's contention that the appellate court broadly applied structural error.

**C. The appellate court's result is not correct as no manifest miscarriage of justice occurred.**

Appellee argues in the alternative that the appellate court reached the correct result even if the reasoning was flawed. In so arguing, appellee erroneously suggests that the requisite

prongs of the plain error test have been satisfied. However, in order to reverse based on plain error, a reviewing court must find a manifest miscarriage of justice. *Martin*, supra. In other words, the court, after review of the entire record, must find that the outcome of the trial would have been different but for the error. *Long*, supra. No such finding can be made here. A review of the entire record here clearly shows that the outcome would not have been different if the court had instructed on the definition of knowingly related to trespass or further defined the underlying offense.

As set forth in the dissenting opinion, appellant's culpable mental state regarding the trespass was not a genuine issue at trial. Actually, at issue was the element of privilege as it related to the trespass. And, the extensive testimony and evidence clearly established that Wamsley did not have any privilege with regard to entry into the victim's apartment. Even the majority opinion acknowledges the testimony and evidence related to the appellant's access to the victim's residence, stating that the facts relate to privilege to be in the apartment. *Wamsley*, at paragraph 40. Review of the entire record clearly reflects that although Wamsley may have been a guest at the victim's residence on occasion following their break-up, he did not live at the victim's apartment and was not welcome as a guest on the date in question. In fact, the police had been called earlier in the day to remove him from the premises. Privilege does not exist simply because of a prior relationship or even prior overnight stay(s) at another person's apartment. Nothing in the record supports a finding that Wamsley was a tenant or household member at the time of the offense.

The Pattern Jury Instructions provide, in pertinent part, that to find one guilty of trespass, the jury must find that the defendant, *without privilege to do so*, knowingly entered or remained

on the land or premises of another. 4-511 OJI Section 511.21 (2005). (Emphasis added). Thus, the mens rea in trespass relates to the act or conduct of entering onto the land or premises. The record here clearly establishes that Wamsley knowingly entered the victim's apartment. As noted by the dissent, "no jury could have found that the trespass was not knowing." *Wamsley*, at dissenting opinion, page 1. Further definition of knowingly would not have been outcome determinative and therefore the omission of the definition of knowingly did not constitute prejudicial plain error. The trial court's failure to define knowingly with regard to the trespass element of aggravated burglary was not prejudicial plain error as no manifest miscarriage of justice resulted.

The same is true with regard to the underlying offense. While the trial court provided the statutory definition of "any criminal offense", the appellate court found that to be insufficient distinguishing this case from *State v. Dimitrov* (Feb. 15, 2001), 2001 Ohio 4133 8<sup>th</sup> Dist. No. 76986. Appellant contends, as did the dissent, that this case is similar to *Dimitrov*. (finding the instruction on the underlying offense to be adequate). In both cases, the trial court defined the element of "any criminal offense" leaving to the jury's common sense the definition of the underlying offense. As noted in the dissent, "the trial court could reasonably expect the jury to use its common sense definition of assault" in determining the underlying offense. *Wamsley*, at Dissenting Opinion, page 1, 3. When the charge is read as a whole, the instructions provided by the trial court regarding the underlying offense did not rise to the level of plain error resulting in a manifest miscarriage of justice. The record succinctly reflects Wamsley's purpose in breaking into the apartment with the undisputed statements "See what Richard did to me? Now, you're gonna get yours." made by Wamsley during the attack. (Tr., p. 102). Further definition of "any

criminal offense” would not have altered the outcome of the trial in this matter. Absent such a finding, reversal as plain error is not warranted.

### CONCLUSION

It is well settled that absent a timely objection to jury instructions, the plain error rule must be applied and a manifest miscarriage of justice found to warrant reversal. In the instant matter, the appellate court departed from the plain error rule applying a structural error analysis to presume prejudice. After concluding that the first two prongs of the plain error rule had been satisfied (that there was an error in the jury instructions and that the error was plain), the appellate court changed course and conducted a structural error analysis, ultimately presuming prejudice.

Appellee's suggestion that the analysis of structural error conducted by the appellate court was merely dicta is unfounded. The appellate court held that the error(s) was so fundamental that reversal was warranted. The appellate court did not review the entire record for a manifest miscarriage of justice or otherwise determine the outcome would have been different but for the error. This Court's holding in *Adams* clearly requires the reviewing court to make such a determination in order to find reversible plain error. Stopping short of finding that the outcome would have been different but for the error, the appellate court skewed the structural error rule and the plain error rule in effect creating a per se rule whereby prejudice is presumed. Not only does such finding conflict with *Adams*, it disregards the Court's cautions in *Hill* wherein the Court strongly suggested that absent an objection at trial, structural error does not apply.

Appellee's argument in the alternative that the result was correct even if the reasoning was flawed must also fail. The appellate court's discretion to reverse for plain error is only present upon a finding of a manifest miscarriage of justice. As argued above, review of the entire record clearly demonstrates that the outcome would not have been different.

Accordingly, appellant respectfully requests this Court to reverse the decision of the appellate court and affirm the appellee's conviction.

Respectfully Submitted,

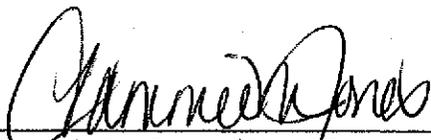
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing REPLY BRIEF OF APPELLANT was served by ordinary U.S. mail/personal service upon Attorney Katherine A. Szudy, Assistant State Public Defender, Counsel for Appellee, at 8 East Long Street, 11<sup>th</sup> Floor, Columbus, Ohio 43215 this 1<sup>st</sup> day of July, 2007.

  
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