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EXPLANATION OF WHY THIS CASE IS A CASE OF
PUBLIC OR GREAT GENERAL INTEREST AND
INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This case involves a substantial Constitutional Question because the State violated the Appellant's Due process Rights. The State erred in its supplemental instruction to the jury following indication by the jury that it could not reach a unanimous verdict. Courts have held that trial courts should provide the Howard charge only when "a determination has been made that the jury is deadlocked in its decision." *State v. Fannin* (Dec. 12, 1995), Franklin App. No. 95APA05-560, quoting *State v. Minnis* (Feb. 11, 1992), Franklin App. No. 91AP-844. In this case the trial court rushed to give the Howard charge and did not present the third paragraph of the charge, otherwise known as the Martens charge stated in *State v. Martens* (1993), 90 Ohio App.3d 388.

The Appellant's conviction is also against the Manifest Weight Of The Evidence. In this case, there is no physical evidence to speak of. There is no fingerprints and the Appellant was not in possession of any stolen property. It is clear in this case that the jury lost its way and a new trial should be ordered.

Eyewitness testimony in this case was tainted from the very beginning of this entire process.

It is clear by convincing evidence that the Appellant's Sixth and Fourteenth Amendment Rights were violated. The Appellant asks that this Honorable Court accept jurisdiction to hear this case and review the decisions of the trial court and the Appellate Court and protect the Appellant's Due Process Rights.

STATEMENT OF THE CASE AND FACTS

On April 19th, 2006. Ray Keller's house was robbed.(TRp.26). Mr. Keller interrupted the robbers in progress and the robbers fled. (TR p.28-9). Mr. Keller informed the police of the burglary and an officer inspected his house. (TR p.35-38). Mr. Keller never informed the officer that he had any idea who the two robbers were. (TR p. 35-39). The next day Mr. Keller went to a local store named Gibson's where he saw Appellant and Bradley Steele eating. (TR p.41-2). Mr. Keller confronted the two, Appellant became defensive and they left. (TR p. 42-3). Mr. Keller then drove to Appellant's mother's house and saw a car in the driveway. (TR p. 43). The next day Mr. Keller identified Appellant and Bradley Steele as the robbers at the police station by using a photographic lineup. (TR p. 44).

This case is before the court pursuant to an appeal of the conviction of Jeremie Nutt. It is an action by Jeremie Nutt to reverse his conviction rendered in Ross County Case No. 06 CR 163.

On June 5th, 2006, Jeremie Nutt was arraigned on the count of Burglary, a felony of the second degree. Mr. Nutt entered a plea of not guilty.

The trial commenced on September 11th & 12th, 2006. The jury returned a verdict of guilty and Mr. Nutt was sentenced to six (6) years in prison. Appellant filed a timely notice of appeal.

The Fourt District Courts Of Appeals denied the Appellant relief.

The Appellant now appelas to this Honorable Court for relief of his Due Process Rights.

In Support of his position on these issues, the Appellant presents the following argument.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: Appellant's conviction is
against the manifest weight of the evidence

At trial, Jeremie Nutt proved, through the testimony of two individuals, that he was not present at the robbery of Ray Keller. In convicting Appellant the jury clearly lost its way and this court's only option is to grant Appellant a new trial.

When evaluating whether a verdict is against the manifest weight of the evidence, the court sits as the "thirteenth juror" and reevaluates the evidence presented at trial. "In determining whether the verdict was against the manifest weight of the evidence, the court reviewing the entire record, weighs the evidence and all reasonable inferences, consider the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. **STATE V. SCHLEE** (Dec. 23rd, 1994), 11th Dist. No. 93-L-082, 1994 Ohio App. Lexis 5862, at 14-15, quoting, **STATE V. DAVIS** (1998), 49 Ohio App. 3d 109, 113. A weight of the evidence challenge indicates that a greater amount of credible evidence supports one side of the issue than supports the other. **STATE V. THOMPkins** (1997), 78 Ohio St. 3d 380, 387.

In this case, there were no physical evidence, no fingerprint evidence, and none of the stolen items were recovered. Appellant's

conviction rested solely on the eyewitness testimony on the victim, Ray Keller. Mr. Keller testified that he saw two individuals taking guns from his house. (TR p. 28). Mr. Keller saw these two individuals at a distance for only a few minutes (TR p. 50-1) as they were loading guns into what he initially described as a white Firebird without license plates. (TR p. 40). It is not surprising that Mr. Keller did not make any effort to inform the police about who he believed the two individuals identities were. (TR p. 35-39).

The day after the alleged burglary, Mr. Keller went out to do some investigation of his own. (TR p. 40). Mr. Keller went to a local store named Gibson's (TR p. 41) where he saw Appellant and Bradley Steele eating. (TR p. 41-2). Mr. Keller confronted the two, Appellant became defensive and they left. (TR p. 42-3). Mr. Keller then drove to Appellant's mother's house and saw a car in the driveway. (TR p. 43). However, this car was not a Firebird like Mr. Keller initially identified the robbers to be driving, but it was a white car without license plates. (TR p. 43). Only after these events did Ray Keller go to the police to identify the robbers. (TR p. 44).

Mr. Keller picked Appellant and Mr. Steele out of a lineup at the police station. (TR p. 45). However, at this time Mr. Keller's eyewitness testimony is tainted. There is no way of knowing whether Mr. Keller really did suddenly recognize the two people who robbed him or instead if Mr. Keller was merely picking out the pictures of the two people who became defensive at Gibson's and owned a white car without license plates.

Mr. Keller was not the only person to testify at trial. Bradley Steele admitted that he was involved in the burglary but testi-

fied that Appellant was not. (TR p. 74). In addition, Diamond Ritter, Appellant's sister, testified that Appellant was at her house that night and he had just left her house when she had seen a four wheeler driving by. (TR p. 87-8).

The jury clearly lost its way when it put excessive weight on the testimony of the victim and ignored the credible testimony of Bradley Steele and Diamond Ritter. Had the jury correctly weighed the evidence they would have seen that reasonable doubt exist as to whether Jeremy Nutt committed this crime.

A lawful conviction cannot occur until the prosecution overcomes the presumption of innocence by proving every essential element of the crime charged beyond a reasonable doubt. R.C. 2901.05 (A). A conviction based on insufficient evidence violates the Constitutional right to Due Process of law, under the Fourteenth Amendment to the Constitution of the United States. *In re Winship* (1970), 397 U.S. 358, 90 S.Ct. 1068; *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781; *Taylor v. Kentucky* (1978), 436 U.S. 478, 98 S.Ct. 1930; Art I. § 16 of the Ohio Constitution; *State v. Eley* (1978), 56 Ohio St.2d 169, 383 N.E.2d 132. "It is well settled that an appellate court will not reverse a trial court's finding of fact based upon insufficient evidence where the finding is supported by some competent, credible evidence." *State v. Canton* (1st Dist. 2000), 137 Ohio App. 3d 742, 750, 739 N.E. 2d 1176, 1181.

First, the most powerful evidence in the Appellant's favor comes from Bradley Steele, who admits to being involved with the robbery. Mr. Steele clears the Appellant. Mr. Steele stated that the Appellant was not there and that he did not commit any crime. It is clear that if the Appellant had been with Mr. Steele, Mr. Steele would have said so, especially after admitting that he was

guilty of the crime. Mr. Steele had nothing to lose at this point after admitting his own guilt. Infact it would have helped Mr. Steele if he had indicated that the Appellant was part of the crime, but Mr Steele did not implicate the Appellant. Mr. Steele proved that the Appellant was not with him and that the Appellant did not commit any sort of robbery. (See Mr. Steele's Statement at Appx. Pg 12)

Second, the Appellant's sister Diamond Ritter testified that the Appellant was at her home the evening of the robbery. There was not one witness presented to refute Diamond Ritter's tesimony.

Third, Mr. Keller, the victim, claimed he saw the robbers leave his home in a white firebird without license plates on the car. Mr. Keller then went to the Appellant's mothers home and saw a white car sitting in the driveway. However this car was not a Firebird like Mr. keller described. Infact the State did even prove that the car in the driveway was in running condition.

Mr. Keller picked the Appellant out of a lineup after he had confronted the Appellant earlier. Mr. Keller's eyewitness testimony was clearly tainted at this point and could not be relied upon to be accurate at that stage.

Fourth, the Appellant was not found to be in possession of any stolen property at all. There is no physical evidence at all that points to the Appellant period. Property was taken from Mr. Keller's home but no fingerprints found at the crime scene matched the fingerprints of the Appellant.

It is clear that the jury lost its way in this case. the Appellant's Sixth and Fourteenth Amendment Rights were violated in this case. The Appellant asks this Court to reverse the Jury's verdict and remand for a new trial. This case contains insufficient evidence and the verdict is against the manifest weight of evidence.

Proposition of Law No. II The trial court erred in its supplemental instruction to the jury following indication by the jury that it could not reach a unanimous verdict

At trial, after about an hour and a half of deliberations the court gave the jury indicated that it might not be able to return a unanimous decision. In reply to this the court gave a charge similar to the one set forth in *STATE V. HOWARD* (1989) 42 Ohio St. 3d 18:

This is a new and difficult assignment for you. The process of discussion and deliberation in the jury room is necessarily slow and requires considerate -- consideration and aptience. The secrecy which surrounds your effort pre -- prevents others -- including the court -- from knowing when your efforts will result in a verdict. In a large proportion of cases absolute certainty cannot be obtained or expected. Although the verdict must reflect the verdict of each individual juror and not mere acquiescence in conclusion of other jurors, each question submitted to you should be examined with proper regard and indifference to the opinions of others. It is desirable that the case be decided. You were selected in the same manner and from the same source as any future jury would be. There is no reason to believe the case will ever be submitted to a jury more capable, impartial or intelligent than this one. Likewise, there is no reason to believe that more or clearer evidence will be produced by either side. It is your

duty to decide the case -- if you can conscientiously do so. You should listen to one another's opinions with the disposition to be persuaded. Do not hesitate to reexamine your views and change your position if you are convinced it is erroneous. If there is disagreement, all jurors should reexamine their positions, given that a unanimous verdict has not been reached, Jurors for acquittal should consider whether their doubt is reasonable considered -- considering that it is not shared by others, equally honest, who have heard the same evidence with the same desire to arrive at the truth and under the same oath. Likewise, jurors for conviction should ask themselves whether they might not reasonably doubt the correctness of a judgment not concurred in by all other jurors. (TR p. 123-5)

In **STATE V. BALLEW** (Feb. 26th, 1999), 1st Dist. No. C-980442, the First District noted approvingly that the trial court had not proceeded straight to the Howard charge at the jury's first mention of deadlock three and one-half hours into its deliberations. The court allowed the jury to deliberate another four hours before giving the Howard charge. Courts have held that trial courts should provide the Howard charge only when " a determination has been made that the jury is deadlocked in its decision." **STATE V. FANNIN** (Dec. 12th, 1995), Franklin App.No. 95APA05-560, quoting **STATE V. MINNIS** (Feb. 11th, 1992), Franklin App. No. 91AP-844.

The trial court in the present case rushed to give the Howard charge at the first sign of possible issue. Not only did the trial court rush to give the Howard charge, but it failed to give the third paragraph of the charge, otherwise known as the **MARTENS** charge stated in **STATE V. MARTENS** (1993), 90 Ohio App. 3d 338.

The trial court failed to instruct the jury of an event of when reaching a verdict is impossible. The instruction, contained in Ohio Jury Instructions, is as follows:

"It is conceivable that after a reasonable length of time honest differences of opinion on the evidence may prevent an agreement upon a verdict. when that condition exist you may consider whether further deliberations will serve a useful purpose. If you decide that you cannot agree and that further deliberations will not serve a useful purpose you may ask to be returned to the courtroom and report that fact to the court. If there is a possibility of reaching a verdict you should continue your deliberations."
4 Ohio Jury Instructions (2006), Section 415.50(3).

By providing the Howard charge at the first sign of a potential problem and failing to ever give the Martens charge the trial court acted coercively in forcing the jury to make a verdict and end deliberations. The Ohio Supreme Court has stated that in using supplemental instructions to a jury, a court must not act in a coercive manner. **HOWARD**, 42 Ohio St. at 23-24.

It is true that trial counsel did not object to this charge. Crim.R. 30 provides in pertinent part: " 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." Accordingly, the failure to object to the instruction constitutes a waiver of the objection, absent plain error. **STATE V. WILLIFORD** (1990), 49 Ohio St. 3d 247, 251. The plain error doctrine allows an appeals court to take note of plain errors or defects affecting substantial rights, even though such error

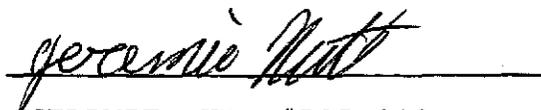
was not brought to the attention of the trial court. See Crim.R. 52(B); **STATE V. LONG** (1978), 53 Ohio St. 2d 91. Plain error will be found with regard to improper jury instructions if the outcome of the trial would clearly have been different. **WILLIFORD**, 49 Ohio St. 3d, at 253; **STATE V. COOPERRIDER** (1983), 4 Ohio St. 3d 226, 227; **STATE V. JOSEPH**, 1995-Ohio-288, 73 Ohio St. 3d 450,455.

The Appellant believes that the Common pleas Court and the Appellate Court violated his Constitutional Right to Due Process and he asks that this Court find the same.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interests and a substantial constitutional question. The Appellant requests that this Honorable Court accept jurisdiction in this case so that the important issues will be reviewed on the merits.

Respectfullt Submitted,



JEREMIE NUTT #535-018
ROSS CORRECTIONAL INSTITUTION
PO BOX 7010
CHILLICOTHE, OHIO 45601

Certificate of Service

I certify a copy of this Memorandum in Support of Jurisdiction was sent by ordinary U.S. mail to counsel for appellees, Scott W. Nusbaum, Ross County Prosecuting Attorney, 72 North Paint Street, Chillicothe, Ohio 45601 on July 19th, 2007.


JEREMIE NUTT #525-018
Appellant, Pro se

Attachment not scanned

APPENDIX

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IN THE COURT OF COMMON PLEAS
ROSS COUNTY, OHIO

FILED

SEP 25 2006

STATE OF OHIO,

PLAINTIFF,

WITH THE JUDGE OF
THE ROSS COUNTY
COMMON PLEAS COURT
CASE NO. 06033

VS

JUDGE CORZINE

JEREMIE W. NUTT,

JUDGMENT ENTRY OF SENTENCE

DEFENDANT.

* * * * *

On the 19th day of September 2006, came the Assistant Prosecuting Attorney, Elizabeth Simmons, on behalf of the State of Ohio, and the defendant, Jeremie W. Nutt, appearing in Court and represented by his attorney, Gary McCleese.

The defendant, having previously been found guilty by a jury of Burglary, Ohio Revised Code Section 2911.12 a Felony of the Second Degree, was now given an opportunity to speak in his own behalf and to present information in mitigation. Counsel for the defendant was permitted to make a statement on behalf of the defendant.

The Court has considered the pre-sentence investigation, the file in this matter, statements of counsel and the Defendant, the negotiations that were entered into in this matter, the purposes and principles of felony sentencing under Ohio Revised Code Section 2929.11, and the seriousness and

recidivism factors contained in Ohio Revised Code Section 2929.12.

The court finds defendant is not amenable to available community control sanctions and a sentence to prison is consistent with the purposes and principles of felony sentencing.

It is therefore the ORDER of the Court that as to Burglary, Ohio Revised Code Section 2911.12 a Felony of the Second Degree, defendant serve a term of incarceration of six (6) years in an Ohio penal facility to be served consecutively with the sentences imposed in Case No. 06 CR 210 and Case No. 04 CR 214.

It is the further order of the court that the defendant is subject upon his release from prison to a mandatory period of post-release control of three (3) years after the Defendant's release from imprisonment, unless reduced by the parole board pursuant to Ohio Revised Code Section 2967.28(D). If defendant were to violate any post release control rule or condition, he is subject to a more restrictive rule or condition, a longer duration under supervision, or could be sent back to prison, even though he had done all of the time to which he has been sentenced. He could get up to nine months in prison for each rule violation. The total for all rule violations cannot be any more than one-half of the sentence that he has been given, unless the rule violation is for committing a new felony, in

which case he could receive a prison term of the greater of one year or the time remaining on post release control in addition to any time that he received for that new felony. Additionally, this time must be served consecutively to any time on the new felony.

Whereupon the Court advised the Defendant of his right to appeal, of the right to have counsel appointed for him, of the right to have the record of his proceedings transcribed at no cost to him and of the right to have a notice of appeal timely filed.

The Court finding that defendant is indigent, no fine is warranted and no fine is imposed.

Costs waived.

Restitution is ordered in the amount of \$1,324.00.

Jail Time Credit for 4 days is granted as of September 22nd, 2006. No jail time credit for time awaiting transportation to the Ohio Department of Rehabilitation and Corrections as this is granted in Case No. 06 CR 210.

Any bond previously posted is hereby released.

ENTER: 9-22, 2006.

The Clerk of this Court is hereby directed to serve a copy of this Judgement Order, and its date of entry, on all counsel or to be served on all parties not represented by counsel, by personal service or by U.S. Mail, and to file a return on the docket.

Judge



WILLIAM J. CORZINE
JUDGE, Common Pleas Court
Ross County, Ohio

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IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

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ROSS COUNTY COURT OF APPEALS
CLERK OF COURTS
17000 100

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 06CA2926
	:	
vs.	:	
	:	
JEREMIE W. NUTT,	:	<u>DECISION AND JUDGMENT</u>
	:	<u>ENTRY</u>
Defendant-Appellant.	:	

APPEARANCES:

Laura Adkins Bogrees, Columbus, Ohio, for the Appellant.

Michael M. Ater, Ross County Prosecuting Attorney, and Elizabeth A. Simmons, Assistant Ross County Prosecuting Attorney, Chillicothe, Ohio, for the Appellee.

McFarland, P.J.:

{¶1} Jeremie Nutt (“Appellant”) appeals the judgment of the Ross County Court of Common Pleas finding him guilty of burglary in violation of R.C. 2911.12. The Appellant contends that his conviction was against the manifest weight of the evidence and that the trial court erred when it gave the jury an improper supplemental instruction. Because we determine that the State of Ohio (“Appellee”) presented substantial evidence upon which the jury could reasonably conclude that all essential elements of burglary had been established beyond a reasonable doubt, and because the Appellant

waived any claim of error relative to the instruction in question, we affirm the judgment of the trial court.

{¶2} On the evening of April 19, 2006, Ray Keller interrupted a robbery in progress at his home. Mr. Keller encountered two men stealing his guns from his home. When he confronted the men, they fled from the scene. One individual fled in a car, and the other on an all-terrain vehicle. Mr. Keller recognized one of the men as the Appellant, as he had been a student in Mr. Keller's class some years earlier. Mr. Keller informed the police of the burglary, and an officer came out to the scene and inspected his home.

{¶3} The next day, Mr. Keller went to a local store named Gibson's where he saw the Appellant and Bradley Steele eating. While at Gibson's, Mr. Keller confronted the Appellant, asking where he had been the evening before. At this point, the Appellant became very agitated and left the store. After encountering the Appellant and Mr. Steele at Gibson's, Mr. Keller drove to the Appellant's mother's house, where he saw in the driveway the same car that had fled from his residence the night before. Mr. Keller also saw the Appellant sitting with Mr. Steele on the front porch at the residence.

{¶4} Later that day, Mr. Keller went to the police station, where he related to officials a statement of what had taken place and viewed a photo

line-up. Mr. Keller identified the Appellant and Bradley Steele from the photo line-up as the individuals who had broken into his home and stolen his property the night before.

{¶5} On May 5, 2006, the Appellant was indicted on a charge of burglary in violation of R.C. 2911.12. He was arraigned on June 5, 2006. A trial on the matter took place on September 11 and 12, 2006. The jury found the Appellant guilty of burglary, and he was sentenced to a term of six years in prison. The Appellant presently appeals his conviction, asserting the following assignments of error:

- {¶6} 1. APPELLANT'S CONVICTION IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.
- {¶7} 2. THE TRIAL COURT ERRED IN ITS SUPPLEMENTAL INSTRUCTION TO THE JURY FOLLOWING INDICATION BY THE JURY THAT IT COULD NOT REACH A UNANIMOUS VERDICT.

{¶8} In his first assignment of error, the Appellant argues that the trial court's judgment is against the manifest weight of the evidence. When considering an appellant's claim that a conviction is against the manifest weight of the evidence, our role is to determine whether the evidence produced at trial "attains the high degree of probative force and certainty required of a criminal conviction." *State v. Getsy* (1998), 84 Ohio St.3d 180, 193, 702 N.E.2d 866. The reviewing court must dutifully examine the entire

record, weighing the evidence and considering the credibility of witnesses, keeping in mind that credibility generally is an issue for the trier of fact to resolve. *State v. Thomas* (1982), 70 Ohio St.2d 79, 80, 434 N.E.2d 1356; *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus. The reviewing court may reverse the conviction if it appears that the fact finder, in resolving evidentiary conflicts, “clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.” *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, 678 N.E.2d 541. On the other hand, we will not reverse a conviction if the state presented substantial evidence upon which the trier of fact could reasonably conclude that all essential elements of the offense had been established beyond a reasonable doubt. *State v. Eley* (1978), 56 Ohio St.2d 169, 383 N.E.2d 132, syllabus.

{¶9} Having thoroughly reviewed the evidence presented, we find that the Appellee has presented substantial evidence upon which the jury could reasonably conclude that the Appellant trespassed in Mr. Keller’s home with the purpose to commit a criminal offense therein. Thus, we do not find that the Appellant’s conviction was against the manifest weight of the evidence. The Appellant’s first assignment of error is, therefore, without merit.

{¶10} In his second assignment of error, the Appellant argues that the trial court erred when it gave a supplemental instruction to the jury after the jury indicated it could not reach a unanimous verdict. We initially note that Appellant did not object to the court's jury instructions. The failure to object to a jury instruction waives any claim of error relative to that instruction unless, but for the error, the outcome of the trial clearly would have been otherwise. *State v. Barrett*, Scioto App. No. 03CA2889, 2004-Ohio-2064; citing *State v. Noling* (2002), 98 Ohio St.3d 44, 2002-Ohio-7044, 781 N.E.2d 88.

{¶11} In *State v. Howard* (1989), 42 Ohio St.3d 18, 537 N.E.2d 188, the Supreme Court of Ohio approved a supplemental charge to be given to juries that have become deadlocked on the question of conviction or acquittal. The *Howard* charge states:

"The principal mode, provided by our Constitution and laws, for deciding questions of fact in criminal cases, is by jury verdict. In a large proportion of cases, absolute certainty cannot be attained or expected. Although the verdict must reflect the verdict of each individual juror and not mere acquiescence in the conclusion of your fellows, each question submitted to you should be examined with proper regard and deference to the opinions of others. You should consider it desirable that the case be decided. You are selected in the same manner, and from the same source, as any future jury would be. There is no reason to believe the case will ever be submitted to a jury more capable, impartial, or intelligent than this one. Likewise, there is no reason to believe that more or clearer evidence will be produced by either side. It is your duty to decide the case, if you can conscientiously do so. You should listen to one another's arguments with a disposition to be persuaded. Do not

hesitate to reexamine your views and change your position if you are convinced it is erroneous. If there is disagreement, all jurors should reexamine their positions, given that a unanimous verdict has not been reached. Jurors for acquittal should consider whether their doubt is reasonable, considering that it is not shared by others, equally honest, who have heard the same evidence, with the same desire to arrive at the truth, and under the same oath. Likewise, jurors for conviction should ask themselves whether they might not reasonably doubt the correctness of a judgment not concurred in by all other jurors."

{¶12} The Appellant argues that the trial court acted coercively by providing the *Howard* charge after approximately two hours of jury deliberations and by failing to give the third paragraph of the *Howard* charge, otherwise known as the *Martens* charge, as stated in *State v. Martens* (1993), 90 Ohio App.3d 338, 629 N.E.2d 462. This Court has previously acknowledged that the better practice is to give the precise *Howard* instruction as approved by the Supreme Court of Ohio. See *Barrett*, supra; See, also, *State v. Mulhern*, Vinton App. No. 02CA565, 2002-Ohio-5982; citing *State v. Lopez* (1993), 90 Ohio App.3d 566, 582, 630 N.E.2d 32; *State v. Willis* (Jul. 29, 1996), Stark App. No. 95CA202. However, as aptly noted by the Eighth District Court of Appeals, the *Howard* charge is not an absolute mandate for trial courts to follow, but rather a suggestion. *State v. Williams* (Jul. 5, 1995), Cuyahoga App. No. 66864, 1995 WL 396369. If a court deviates from the *Howard* language, the court must ensure that the charge satisfies the concerns of the *Howard* opinion. In particular, a court

must ensure that the instruction (1) encourages a unanimous verdict only when one can conscientiously be reached, leaving open the possibility of a hung jury and resulting mistrial; and (2) calls for all jurors to reevaluate their opinions, not just the minority members. *Id.*; See, also, *State v. Matyas*, Jefferson App. No. 98-JE-14, 2000-Ohio-2671; *State v. McClendon* (Jan. 20, 1998), Stark App. No. 97CA71, 1998 WL 518524; *State v. Dixon* (Mar. 13, 1997), Cuyahoga App. No. 68338, 1997 WL 113756.

{¶13} After reviewing the trial court's jury instructions in this case, we conclude that the court's charge complied with *Howard*. Thus, we find no error in the trial court's charge, let alone plain error. Likewise, we do not find that the trial court provided the *Howard* charge in a coercive manner. At the point at which the trial court judge issued the charge, the jury had indicated it could not return a unanimous decision. Thus, the charge was properly issued. The Appellant's second assignment of error is overruled.

{¶14} In our view, the trial court appropriately issued its supplemental *Howard* instruction. Likewise, we find the trial court's judgment was not against the manifest weight of the evidence. Accordingly, we affirm its judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and that the Appellee recover of Appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ross County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Ohio Supreme Court an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Ohio Supreme Court in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

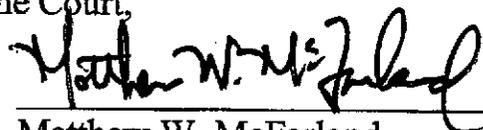
A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.
Exceptions.

Harsha, J.: Concurs in Judgment and Opinion.

Abele, J.: Concurs in Judgment Only.

For the Court,

BY:



Matthew W. McFarland
Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

I Bradley M Steele did burglarize Ray Kellers home and John Mitchle was with me. Mr Keller falsely accused and falsely indentafied Jeremy Nutt in a photo line up. There was absolutely nobody other than Mr Mitchle and myself who committed this crime! Since Jeremys trial I have thought this situation and my decision through! The reason I did not mention John Mitchles full name at trial is because at the time I felt that if I did that, than I would be breaking a unspoken code of honor! Now I loose sleep because Mr. Nutt is doing time for a crime that he did not committ and if I would had been more straight foward at Jeremys Trial. Maybe the Jury would of seen the truth unfold in front of them. IF you have any questions please contact me!

Thank You!
Bradley Steele

Bradley Steele # 528-549
P.O Box 7010
Chillicothe, OH
45601

SWORN BEFORE ME THIS 14TH DAY
OF MAY 2007

J. L. Dorrill
JAMES L. DORRILL
MY COMMISSION
EXPIRES 12-18-2008