

**IN THE SUPREME COURT OF OHIO**

**STATE OF OHIO**

**CASE NO. 07-375**

Plaintiff-Appellant,

**ON APPEAL FROM THE  
MONTGOMERY COUNTY COURT  
OF APPEALS, SECOND  
APPELLATE DISTRICT**

vs.

**REGINALD GARDNER, JR.**

**COURT OF APPEALS  
CASE NO. 21357**

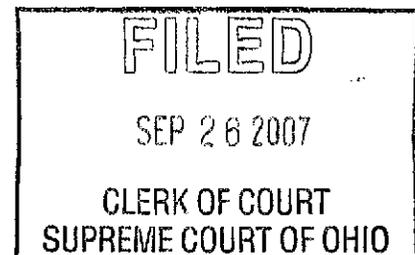
Defendant-Appellee.

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**APPELLANT'S REPLY BRIEF**

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**MATHIAS H. HECK, JR.**  
PROSECUTING ATTORNEY  
By **R. LYNN NOTHSTINE**  
REG. NO. 0061560  
Assistant Prosecuting Attorney  
Montgomery County Prosecutor's Office  
Appellate Division  
P.O. Box 972  
301 W. Third Street, Suite 500  
Dayton, Ohio 45422  
(937) 225-4117



**COUNSEL FOR APPELLANT, STATE OF OHIO**

**RICHARD A. NYSTROM**  
1502 Liberty Tower  
120 West Second Street  
Dayton, Ohio 45402

**COUNSEL FOR APPELLEE, REGINALD GARDNER, JR.**

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## REPLY TO GARDNER'S ARGUMENT

Due process does not require that the jury reach agreement on the preliminary factual issues which underlie a verdict. *Schad v. Arizona* (1991), 501 U.S. 624, 632 111 S.Ct. 2491, 115 L.Ed.2d 555. In Gardner's view the outcome in *Schad*, and other cases wherein courts concluded that jury unanimity as to a single means of commission of an offense is not required, resulted from the fact that the juries were limited to choosing between a few, statutorily defined alternative means. However, Gardner's contention is not supported by the case law. On the contrary, the number of possible means of committing an offense appears to be of no import. Regardless of the number of alternative means for committing an offense, the jury does not have to unanimously agree upon which means were involved in a particular case to satisfy due process.

In essence, the "any criminal offense" language of the aggravated burglary statute provides that a defendant may have any one of several purposes for trespassing into the occupied structure. Thus, as with the kidnapping statute, there are several alternative means of satisfying the mental element of the single offense of aggravated burglary, and due process does not require the jurors to unanimously agree upon which crime the defendant intended to commit to find that he acted with the requisite purpose. See, *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio 6391, 819 N.E.2d 215, at ¶55.

To the extent that Gardner argues the jury's acquittal on the felonious assault charge means the jury could not have found that he trespassed into Ebony Lee's apartment for the purpose of committing a felonious assault, his argument lacks merit. The jury's verdicts were not necessarily inconsistent in this case. The aggravated burglary statute does not require that the defendant complete the crime he intends to commit when he trespasses into an occupied

structure. The jury's finding that the State failed to prove Gardner committed a felonious assault does not preclude a finding that Gardner intended to commit a felonious assault when he trespassed into Ms. Lee's apartment. Therefore, Gardner's assertion that there is no way of knowing what purpose the jury found he had for trespassing into the apartment is unfounded.

Gardner encourages this Court to follow the rationale of various cases, some from Ohio's intermediate appellate courts and some from courts in other states, and hold that the trial judge's aggravated burglary instructions were inadequate in this matter. Regarding the decisions from Ohio courts that have concluded a trial court must identify and define the crime that a defendant has purpose to commit in order to properly instruct on aggravated burglary, the State contends those decisions are wrongly decided and asks this Court to reject them for the reasons set forth in the State's merit and reply briefs.

As for the cases from other jurisdictions cited by Gardner, most, if not all of them, fail to advance his cause. The cases from Florida cited in Gardner's brief all involve situations where the trial courts identified burglary itself as the underlying offense the defendants intended to commit when they allegedly violated Florida's burglary statute. Thus, reversals were warranted because the trial judges identified an offense that could not, under Florida law, have been the underlying offense involved. More importantly, the *Puskac* case actually undermines Gardner's own argument; in *Puskac* the court stated that it was *not* necessary for the trial court to instruct the jury on the specific offense which the defendant intended to commit in the structure he burglarized. *Puskac v. State* (1999), 735 So.2d 522, 523.

Similarly, the Illinois and Kansas cases are factually distinguishable from this case and therefore do not support Gardner's argument. In *People v. Palmer* (1980), 83 Ill. App.3d 732, 404 N.E.2d 853 and *State v. Rush* (1994), 255 Kan. 672, 877 P.2d 386, the courts were dealing

with burglary statutes that, unlike Ohio's aggravated burglary statute, specified that only certain crimes could qualify as the underlying offense a defendant intended to commit when he trespassed into a structure. Thus, the trial judge's failure to identify specific offenses that might have fit the facts could have led the jury to convict based upon a belief that the defendants intended to commit some offense that was not included in the statutory definition of burglary. Here, there is no similar concern because Ohio's aggravated burglary statute does not limit the type of criminal offense that a defendant must have the purpose to commit when he trespasses into an occupied structure. Finally, *State v. Finley* (1971), 208 Kan. 49, 490 P.2d 630 is distinguishable because, in that case, the trial judge completely failed to instruct the jury that the defendant could only be convicted of burglary under Kansas law if he specifically intended to commit a crime inside the structure he entered. The reversal was not based upon the judge's failure to identify and define the crime that Finley intended to commit.

**CONCLUSION**

A jury is not required to unanimously agree upon a single means of commission of aggravated burglary. Therefore, the trial court need not use its jury instructions to effectively narrow the "any criminal offense" language of R.C. 2911.11(A)(2) in order to safeguard the defendant's right to due process, and the trial court's failure to identify the criminal offense that Gardner intended to commit when he trespassed into Ebony Lee's apartment was not error. In any event, the record on appeal shows that Gardner had a purpose to commit felonious assault, and the jury was instructed on the elements of that offense. For these reasons, Appellant State of Ohio respectfully requests that the Second District Court of Appeals' decision be reversed and Gardner's conviction for aggravated burglary be reinstated.

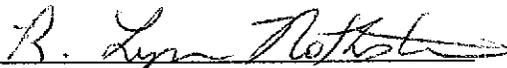
Respectfully submitted,

MATHIAS H. HECK, JR.  
PROSECUTING ATTORNEY

BY *R. Lynn Nothstine*  
**R. LYNN NOTHSTINE**  
REG. NO. 0061560  
Assistant Prosecuting Attorney  
APPELLATE DIVISION

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Reply Brief was sent by first class on this 25<sup>th</sup> day of September, 2007, to Opposing Counsel: Richard A. Nystrom, 1502 Liberty Tower, 120 West Second Street, Dayton, Ohio 45402.

By: 

**R. LYNN NOTHSTINE**

REG. NO. 0061560

Assistant Prosecuting Attorney

APPELLATE DIVISION