

IN THE SUPREME COURT OF OHIO
2007

STATE OF OHIO,

Plaintiff-Appellant,

-vs-

THOMAS L. VENEY,

Defendant-Appellee

Case Nos. 07-656
07-657

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

Court of Appeals
Case No. 06AP-523

REPLY BRIEF OF PLAINTIFF-APPELLANT STATE OF OHIO

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STATEMENT OF FACTS

The State incorporates by reference its “Statement of Facts” from its initial merit brief.

ARGUMENT

Proposition of Law No. 1. A substantial compliance standard applies to the advisement required by Crim.R. 11(C)(2)(c) regarding the State’s burden of proving guilt beyond a reasonable doubt at trial.

Proposition of Law No. 2. The failure to give the beyond-reasonable-doubt oral advisement required by Crim.R. 11(C)(2)(c) is subject to harmless-error review and does not always require reversal.

Certified Question: Whether a trial court must strictly comply with the requirement in Crim.R. 11(C) that it inform the defendant that by entering a plea, the defendant waives the right to have the state prove guilt beyond a reasonable doubt.

Defendant Veney acknowledged that he had signed the Entry of Guilty Plea and that he had reviewed his constitutional rights with his counsel. (T. 3, 4) By signing the Entry of Guilty Plea, defendant was acknowledging that “I further understand that by pleading ‘Guilty’, I waive a number of important and substantial constitutional, statutory and procedural rights,” including the right “to require the State to prove my guilt beyond a reasonable doubt on each crime herein charged at a trial * * *.” (See Entry, at p. 1) Defendant signed both pages of the Entry.

Defendant’s counsel also signed the document twice. Counsel also certified on the second page that he had counseled defendant to the best of his professional ability as to the facts and law and that defendant was “act[ing] knowingly, voluntarily, and intelligently in such matter.” (Id. at p. 2)

Despite defendant's personal written waiver, and despite the other indications that the plea was knowing, voluntary, and intelligent as to the beyond-reasonable-doubt right, defendant contends that the lack of an *oral* advisement of that right is "structural" so that it *always* requires reversal. In the process of making these arguments, defendant mixes up concepts, misapplies the "structural error" doctrine in this context of forfeited error, and, most importantly, overlooks much of the case law arrayed against him, including case law from this Court.

No real showing or claim of prejudice is present here. Defendant was represented by counsel. Counsel advised defendant of his constitutional rights, and defendant approved an Entry summarizing his waiver of those rights, including his right to proof beyond a reasonable doubt. To find prejudice or plain error under these circumstances would be unwarranted, particularly given that the defense never objected in the trial court and defendant was content to accept the benefits of the plea until the sentence did not turn out to be the minimum.

"Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." *Neder v. United States* (1999), 527 U.S. 1, 18 (quoting Traynor, *The Riddle of Harmless Error*). "There is danger that the criminal law will be brought into contempt -- that discredit will even touch the great immunities assured by the Fourteenth Amendment -- if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free." *State v. Diehl* (1981), 67 Ohio St.2d 389, 396, quoting *Snyder v. Massachusetts* (1934),

291 U.S. 97, 122. “[I]t is of vital importance to the system of criminal justice that guilty pleas not be lightly set aside on fanciful arguments that exalt form over substance * * *.” *United States v. Akinsola* (C.A. 7, 1997), 105 F.3d 331, 332-33.

A.

The initial parts of the defense argument are taken up with broadside attacks on the purported “coercion” and “unfairness” and “overcharging” of the criminal justice system, which, according to the defense, often cause innocent defendants to plead guilty. These arguments need not detain the Court long, as they bear no relevance to the legal issue involved here, which is what standard of review should apply to Rule 11 error in the failure to give an oral beyond-reasonable-doubt advisement.

Nor do defendant’s overstated claims justify doing away with the regular modes of appellate review. Defendant’s claims are inapplicable here. Defendant was appropriately charged with kidnapping and felonious assault, having restrained Nicole by holding a gun on her and threatening harm and by then firing shots at her, as corroborated in substantial respects by eyewitnesses.

As for the purported “unfairness” of things, one wonders how “fair” it was that defendant restrained, threatened, and shot at his wife. The State could have proceeded on the more serious charges, but it agreed at the victim’s behest to allow defendant to plead guilty to a stipulated lesser included offense with firearm specification, a plea which capped defendant’s maximum possible sentence for the count and specification at eight years. Defendant could have faced a total of 21 years for the kidnapping (max. 10 years), felonious assault (max. 8 years), and firearm specification (3 consecutive

years), since the kidnapping and felonious assault offenses would not have merged under the allied-offenses doctrine. See *State v. Blankenship* (1988), 38 Ohio St.3d 116; *State v. Parker*, 2nd Dist. No. 21599, 2007-Ohio-1512, at ¶¶ 27-37; *State v. Cruz*, 9th Dist. No. 03CA0031-M, 2003-Ohio-4782, at ¶ 30. The “system” thus provided a substantial benefit to defendant, and it was not required to be any more “fair” to him.

Defendant’s claim of “coercion” is particularly inapt in a case in which defendant made bail and then absconded for over a year. Once he was back in custody, and represented by counsel, defendant struck a plea bargain and acknowledged at the plea hearing that he was acting of his own free will. (T. 4)

In any event, the specific question is whether the lack of an oral beyond-reasonable-doubt advisement somehow supports reversal. On this score, the State reiterates that there was no apparent reasonable-doubt defense. This was not an *Alford* plea, as defendant unreservedly pleaded guilty. Indeed, defendant twice stated that he understood the nature of this offense, (T. 3, 4), and still he proceeded with the guilty plea, which constituted a complete admission of guilt. Crim.R. 11(B)(1). The prosecution also recited facts supportive of guilt, to which the defense took no exception. (T. 6-8) There is no indication that defendant was an “innocent” defendant merely pleading guilty in order to avoid a possible heavier sentence later. Even if defendant had some potential reasonable-doubt defense, the record adequately shows that defendant pleaded guilty with knowledge of that right, in light of the Entry of Guilty Plea and the indications that counsel advised him of his constitutional rights.

B.

Defendant mixes apples and oranges by contending that Crim.R. 11 requires an oral advisement on the beyond-reasonable-doubt right and that “[t]his is unquestionably a federal constitutional right.” Defendant’s Brief, at 13. The inexact word “this” hides the chief flaw in defendant’s argument. While the right to proof beyond a reasonable doubt at a trial is “unquestionably a federal constitutional right,” it is a fundamentally different question whether a guilty-pleading defendant must be orally advised of such right as a constitutional matter. This Court has already stated that a beyond-reasonable-doubt advisement is not constitutionally required. *State v. Sturm* (1981), 66 Ohio St.2d 483, 484 n. 2 (“it is not required by *Boykin*”). Case law from other states concurs with this view, see State’s Merit Brief, at 11, as does language from United States Supreme Court cases indicating that there are only *three Boykin* rights. See *id.* at 13.

C.

Even if some advisement of the beyond-reasonable-doubt right were constitutionally required for a valid plea, defendant mistakenly assumes that such advisement could only occur through an oral colloquy. This Court has recognized that “specific oral interrogation” is not constitutionally required for even the three *Boykin* rights. *State v. Billups* (1979), 57 Ohio St.2d 31, 36-37 (“there is no constitutional mandate that such be done”; acceptance of written plea document can be enough). “Specific articulation of the *Boykin* rights is not the sine qua non of a valid guilty plea.” *Wilkins v. Erickson* (C.A. 9, 1974), 505 F.2d 761, 763, 764. *Boykin* only requires that the record in some way show the waiver of the three *Boykin* rights. *State v. Nero* (1990), 56

Ohio St.3d 106, 107 (“requires the record to show” waiver of the three *Boykin* rights). A “wholly silent” record is not enough, see *Boykin v. Alabama* (1969), 395 U.S. 238, 240, but a record with a written waiver can be enough.

The outcome in *State v. Stone* (1975), 43 Ohio St.2d 163, confirms that a guilty plea can be constitutionally valid without an oral advisement on the right to proof beyond a reasonable doubt. *Stone* recognized that “[t]he *Boykin* decision did not specifically require that a defendant’s rights be enumerated and explained by the trial court in all cases in order for a waiver to be knowing and voluntary.” *Id.* at 165. *Stone* addressed and rejected the dissent in *Johnson v. Ohio* (1974), 419 U.S. 924, upon which the Tenth District majority mistakenly relied in its opinion below.

D.

Defendant wrongly contends that the omission of the beyond-reasonable-doubt oral advisement under Crim.R. 11(C)(2)(c) amounts to “structural error” requiring automatic reversal. Non-constitutional requirements simply cannot rise to the level of “structural error,” see *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, at ¶ 55, and, as stated above, an oral beyond-reasonable-doubt advisement is not constitutionally required for various reasons.

Defendant seems to assume that the violation of a state statute or rule somehow creates a constitutional violation. But a “mere error of state law” is not a violation of due process. *Engle v. Isaac* (1977), 456 U.S. 107, 121 n. 21. A violation of a statutory advisement requirement does not perforce constitute a violation of due process. *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894, at ¶ 30 (statute’s immigration-advisement

requirement not constitutionally required); see, also, *State v. Martin*, 103 Ohio St.3d 385, 2004-Ohio-5471, at ¶ 38 (“written waiver provision of Crim.R. 44 is not a constitutional requirement”). Violation of Crim.R. 11 does not necessarily amount to a violation of due process. *Riggins v. McMackin* (C.A. 6, 1991), 935 F.2d 790, 794-95 (the “sole inquiry should have been * * * whether Riggins’ guilty plea comported with the protections of due process.”). Moreover, Crim.R. 11(C)(2)(c) cannot be construed to raise the constitutional bar for accepting such pleas because such a constitutional matter would be “substantive” and therefore would fall outside this Court’s rule-making power under Article IV, Section 5(B), Ohio Constitution. See *Francis*, at ¶¶ 27, 29 (statute’s immigration-advisement requirement creates “substantive right” that supplements and prevails over Criminal Rules).

Even if the oral beyond-reasonable-doubt advisement in Crim.R. 11(C)(2)(c) somehow rose to the level of a constitutional command, a violation of that command still would not amount to “structural error.” The United States Supreme Court has already rejected a similar contention. “The omission of a single Rule 11 warning without more is not colorably structural.” *United States v. Dominguez-Benitez* (2004), 542 U.S. 74, 81 n. 6.

Nor does the omission of the oral beyond-reasonable-doubt advisement under Crim.R. 11(C)(2)(c) meet the general requirements to qualify as “structural error.” Most constitutional errors can be harmless, and there is a strong presumption that constitutional error will be subject to harmless-error analysis. *Neder*, 527 U.S. at 8. “[W]e have found an error to be ‘structural’ and thus subject to automatic reversal, only in a ‘very limited

class of cases.” Id. at 8, quoting *Johnson v. United States* (1997), 520 U.S. 461, 468.

“Those cases, we have explained, contain a defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself. Such errors infect the entire trial process, and necessarily render a trial fundamentally unfair. Put another way, these errors deprive defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence * * * and no criminal punishment may be regarded as fundamentally fair.” *Neder*, 527 U.S. at 8-9 (citations and internal quotation marks omitted).

The omission of an oral advisement under Crim.R. 11 does not necessarily render the plea-taking process fundamentally unfair. As shown in *State v. Strawther* (1978), 56 Ohio St.2d 298, syllabus, the execution of a written plea of guilty can provide a reliable substitute showing that an oral advisement would have made no difference. See *Dominguez-Benitez*, 542 U.S. at 85 (plea agreement “tends to show that the Rule 11 error made no difference to the outcome here.”); *Akinsola*, 105 F.3d at 334. Other proceedings in the same case could show that the defendant was already advised of the matter that would have been covered by the advisement. See, e.g., *United States v. Vonn* (2002), 535 U.S. 55. Other circumstances, such as undisputed or overwhelming evidence of guilt or an eagerness to accept a plea bargain, could show that an oral advisement would have had no effect on the defendant’s decision to plead guilty. See *Dominguez-Benitez*, 542 U.S. at 85 (“it is hard to see here how the warning could have had an effect on Dominguez’s assessment of his strategic position.”); *Stone*, 43 Ohio St.2d 163, at syllabus (defendant motivated by desire to avoid more severe penalty).

In the end, the absence of the advisement does not “infect” the entire plea-taking process so as to make it impossible to have a knowing, voluntary, and intelligent plea. There is no reason to make this advisement error “structural” and thereby immune to all harmless-error review. Courts can address the issue on a case-by-case basis to determine whether the omission of the advisement was harmless. See *Neder*, 527 U.S. at 14. This Court has said as much by citing Crim.R. 52(A) in the review of plea cases. *Billups*, 57 Ohio St.2d at 39 n. 6; *State v. Stewart* (1977), 51 Ohio St.2d 86, 92.

Even if “structural,” the absence of the advisement would be subject to plain-error review because there was no objection in the trial court. *Vonn*, supra. “The failure to object to any error, even a structural one, leaves the appellate court with the power to notice only plain error.” *Rahn v. Hawkins* (C.A. 8, 2006), 464 F.3d 813, 819. The United States Supreme Court has specifically ruled that “structural error” is subject to plain-error standards under federal Crim.R. 52(b). *Johnson*, 520 U.S. at 466. “We [have] cautioned against any unwarranted expansion of Rule 52(b) * * * because it would skew 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. Even less appropriate than an unwarranted expansion of the Rule would be the creation out of wholecloth of an exception to it, an exception we have no authority to make.” *Id.* at 466 (citations and internal quotation marks omitted). Thus, unobjected-to “structural error” does not result in “automatic reversal” but rather results in plain-error review that may or may not result in reversal. *Id.* at 469-70 (even if “structural,” no reversal); *United States v. Cotton* (2002), 535 U.S. 625, 632-33 (same).

This Court has seemed to accept the view that unobjected-to structural error is subject to plain-error review. In *State v. Hill* (2001), 92 Ohio St.3d 191, 199 & n. 2, this Court favorably summarized the *Johnson* Court's rejection of a "structural error" exception to plain-error review and noted that the federal and Ohio versions of Crim.R. 52(B) are "exact counterparts." There was no need to firmly rule on the issue, however, because the Court held that the issue being reviewed did not amount to structural error.

In *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, at ¶ 23, this Court endorsed *Hill* and *Johnson* on this point:

We emphasize that both this court and the United States Supreme Court have cautioned against applying a structural-error analysis where, as here, the case would be otherwise governed by Crim.R. 52(B) because the defendant did not raise the error in the trial court. See *Hill*, 92 Ohio St.3d at 199; *Johnson*, 520 U.S. at 466. This caution is born of sound policy. For to hold that an error is structural even when the defendant does not bring the error to the attention of the trial court would be to encourage defendants to remain silent at trial only later to raise the error on appeal where the conviction would be automatically reversed. We believe that our holdings should foster rather than thwart judicial economy by providing incentives (and not disincentives) for the defendant to raise all errors in the trial court -- where, in many cases, such errors can be easily corrected.

See, also, *Conway*, at ¶ 55. Although some language in *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, at ¶ 18, appears to allow review of unobjected-to structural error without regard to plain-error limits, the passage in question was citing *Perry* and *Johnson*, and those cases clearly recognize that unobjected-to structural error should be reviewed under plain-error standards.

In the final analysis, the failure to give an oral beyond-reasonable-doubt

advisement under Crim.R. 11(C)(2)(c) is not structural. Even if the error were “structural,” defendant forfeited the issue by failing to object. “In order to overcome the waiver, a complaining party must demonstrate plain error.” *State v. Mundt*, 115 Ohio St.3d 22, 2007-Ohio-4836, at ¶ 169. “[T]he test for plain error is stringent.” *State v. Frazier*, 115 Ohio St.3d 139, 2007-Ohio-5048, at ¶ 206. “An alleged error is plain error only if the error is ‘obvious,’ and but for the error, the outcome of the trial clearly would have been otherwise.” *Mundt*, at ¶ 169 (citations and internal quotation marks omitted). Reversal is not justified here under stringent plain-error review. See State’s Merit Brief, at 19-22.

E.

Defendant also contends that his approval of the Entry of the Guilty Plea “does not demonstrate that the defendant necessarily read or understood the plea form.” Defendant’s Brief, at 12. But the courts are not required to indulge such speculation. Defendant acknowledged that he signed the Entry and that his counsel had reviewed his constitutional rights with him. By approving the Entry, defendant was acknowledging, *inter alia*, that:

- “*I have reviewed* the facts and law of my case with my counsel.”
- “*I understand* that my guilty plea to the crime specified constitutes both an admission of guilt and a waiver of any and all constitutional, statutory, or factual defenses with respect to such crime and this case.”
- “*I further understand* that by pleading ‘Guilty’, I waive a number of important and substantial constitutional, statutory, and procedural rights * * *”
- “*I understand* that the Court upon acceptance of my plea(s) of ‘Guilty’ may proceed with judgment and sentence.” (Emphasis added)

Defendant's signature on the Entry reflected an adoption of these statements, see Evid.R. 801(D)(2)(a) & (b), and thus reflected that he understood the rights that he was waiving.

If defendant did not really understand the rights he was purporting to waive, his statements to the contrary in the Entry would represent a fraud on the court and would be his own fault. Under the invited-error doctrine, reversal would be barred because defendant's fraud would have contributed to the trial court's decision to accept the plea. "A party will not be permitted to take advantage of an error which he himself invited or induced the trial court to make." *Lester v. Leuck* (1943), 142 Ohio St. 91, paragraph one of the syllabus.

F.

Finally, defendant contends that the reversal of the conviction should be upheld because "[a]n average fourth grader could comply with the rule with minimal training" and because, without enforcement of the rule, the rule would become "merely advisory." See Defendant's Brief, at 13-14. Apparently, defendant believes that rigid enforcement of the rule will ensure discipline by the trial courts so that those courts will follow the rule. See *id.* at 13.

This argument should fail for several reasons. First, the same simplicity that would allow a fourth grader to give the advisement also would have allowed defendant here to understand the advisement as written in the Entry and as part of his consultation with his counsel. Simplicity thus cuts *against* defendant's claim.

Second, Crim.R. 11(C)(2)(c) does not exist in a vacuum. While the Criminal Rules set forth this oral-advisement requirement, they also indicate that appellate

reversals are not handed out merely to teach lessons to lower courts. No appellate reversal shall occur if the error was harmless. Crim.R. 52(A). In the absence of timely objection in the trial court, no appellate reversal shall occur unless plain error is shown. Crim.R. 52(B). Defendant's advocacy for rigid adherence to the Criminal Rules apparently goes only so far.

Third, the United States Supreme Court addressed a similar argument in *Vonn*, in which the defendant contended that application of the plain-error standard would discount the trial judge's duty to give the advisement. The *Vonn* Court rejected that argument: "Rhetoric aside, that is always the point of the plain-error rule: the value of finality requires defense counsel to be on his toes, not just the judge * * *." *Vonn*, 535 U.S. at 73. "[C]ounsel is obliged to understand the Rule 11 requirements. It is fair to burden the defendant with his lawyer's obligation to do what is reasonably necessary to render the guilty plea effectual and to refrain from trifling with the court." *Id.* at 73 n. 10. "It therefore makes sense to require counsel to call a Rule 11 failing to the court's attention." *Id.* This Court has also recognized that the law should not encourage the defense to trifle with the trial court. *Stewart*, 51 Ohio St.2d at 92. But see *State v. Campbell* (2000), 90 Ohio St.3d 320, 325 (no waiver through lack of objection regarding allocution right in capital case).

Of course, the oral beyond-reasonable-doubt advisement required by Crim.R. 11(C)(2)(c) is a simple one. But it represents one of many things that the law imposes on a judge taking a guilty plea. In addition, trial judges are often addressing several cases on the same day. Given the sheer volume of cases, mistakes in occasionally failing to give

an advisement are bound to happen. It does a disservice to the trial bench to criticize trial judges with derogatory “fourth grader” references for occasionally making those mistakes. No “fourth grader” could manage these dockets and flawlessly recall every requirement every time. Indeed, even with the luxury of many weeks or months to ponder particular cases, appellate judges make occasional mistakes too, and so their trial-court colleagues should not be too severely criticized.

In any event, the issue is what standard of review applies when mistakes are made, not whether the mistake was “simple” or “complex.” As between the standards of “strict compliance” and “substantial compliance,” the standard is substantial compliance, and the State’s first proposition of law should be adopted.

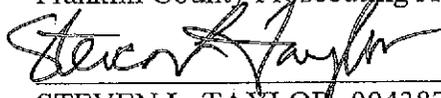
Even if the standard were “strict compliance,” such “strict compliance” would be incorrect if it would lead to automatic reversal. Plea-advisement errors are subject to harmless-error or plain-error standards of review depending on whether the error was sufficiently preserved in the trial court. Even after finding “error” under a “strict compliance” mode of analysis, an appellate court should still be able to conclude that the error was harmless or that the error does not warrant a finding of plain error warranting reversal. The State’s second proposition of law therefore should be adopted.

CONCLUSION

For the foregoing reasons, plaintiff-appellant State of Ohio requests that this Court reverse the judgment of the Tenth District Court of Appeals and remand the case to that court so that it can address defendant's argument that the record was insufficient to show that he understood the nature of the charge.¹

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was hand delivered on this 8th day of Nov., 2007, to the office of John W. Keeling, 373 South High Street, 12th Floor, Columbus, Ohio 43215, counsel for defendant-appellee.



STEVEN L. TAYLOR
Assistant Prosecuting Attorney

¹ If this Court contemplates a decision upon an issue not briefed, the State respectfully requests notice of that intention and requests an opportunity to brief the issue before this Court makes its decision. *Miller Chevrolet v. Willoughby Hills* (1974), 38 Ohio St.2d 298, 301 & n. 3; *State v. 1981 Dodge Ram Van* (1988), 36 Ohio St.3d 168, 170.