

**IN THE SUPREME COURT OF OHIO
2008**

STATE OF OHIO,

Plaintiff-Appellee,

-vs-

ROBERT L. HILLMAN,

Defendant-Appellant.

Case No. 08-1163

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

Court of Appeals
Case No. 08-1163

MEMORANDUM OF PLAINTIFF-APPELLEE OPPOSING JURISDICTION

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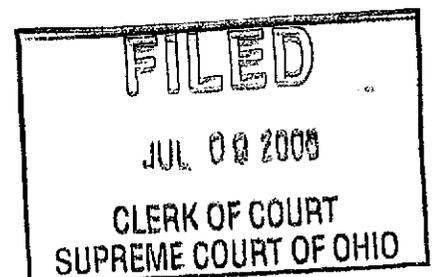


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EXPLANATION OF WHY THIS COURT SHOULD DECLINE JURISDICTION

The instant case does not present questions of such constitutional substance nor of such great public interest as would warrant further review by this Court. It is respectfully submitted that jurisdiction should be declined.

STATEMENT OF THE CASE AND FACTS

Defendant Robert L. Hillman was indicted on May 16, 2006, on one count of burglary, a felony of the second degree and one count of theft, a felony of the fifth degree. The charges arose from an incident on May 7, 2006. Derek Haggerty, a resident of 186 E. 16th Avenue, was awakened at two o'clock in the morning to the sound of someone walking around in his house. Derek's bedroom was on the first floor of the house. He testified that he could see the back door to his home as well as the parking lot of his apartment complex from his bedroom window. He was home alone and thought that he heard one of his roommates, so he went down to talk to him. Instead of finding his roommate, however, Mr. Haggerty found Defendant exiting the house through the rear door, carrying a white bag.

Mr. Haggerty then called 911 and told the dispatcher that he saw one guy carrying something out with him. He provided a description of the suspect and stated that he was a male black. He told the dispatcher to tell the police to go to the back of the house because the suspect exited the house at the back. Mr. Haggerty stated that he could hear sirens coming towards him at that time and told the dispatcher to tell the police that the suspect was behind the house.

Derek stayed on the phone with the dispatcher and told her that the suspect was walking towards 17th Avenue. He testified that he could still see the suspect at that time. He told the dispatcher that the suspect was wearing dark clothing, carrying a white bag and had on a white hat. The cap that was later seized from the Appellant was a light gray cap. At that time, Mr. Haggerty

could also see the police officer, who had arrived at the scene, looking for the suspect with a flashlight.

At that time, Mr. Haggerty went outside. He stated that he lost sight of the suspect for approximately twenty seconds. He approached the officer and they went around the corner to 17th Avenue and observed a person in front of a blue dumpster wearing dark clothing and a light or “whitish colored” hat or toboggan. He approximated that the dumpster was less than 100 yards away from his back door. He stated that the man at the dumpster “absolutely” was the person that he saw going into his residence and leaving the residence with his white bag.

When police arrested the defendant behind Mr. Haggerty’s residence, Derek identified the property in the bags as belonging to him and his roommates. The property included an assortment of DVDs, video games, a Play Station II, an X-Box and miscellaneous food items.

Mr. Haggerty testified that when he went to bed that night, the windows in the house were all closed, but that after the burglary, a window had been opened. Mr. Haggerty stated that neither he nor his roommates gave Appellant permission to be in their house that night.

Sergeant Steve Shinaver of the Columbus Police Department testified that he was dispatched to a burglary call at 186 East 16th Avenue in Columbus, Ohio. He stated he was approximately seven or eight blocks away from the scene when he was dispatched. Upon arriving at the scene, he began looking for a black male wearing a white hat and dark clothing. He stated that he observed Appellant, who matched the description at a dumpster close to the location of 186 East 16th Avenue. When he first observed Appellant, Appellant was at the dumpster with a white bag in his hand. When Appellant saw the officer, he threw the bag down. The bag contained the items later identified by Mr. Haggerty as belonging to him and his roommates.

Detective Ronald Love of the Columbus Police Department testified that Appellant did not live anywhere near 16th Avenue at the time of the burglary. Upon trying to secure the clothing that Appellant was wearing that night as evidence, the detective was informed that a person who came to visit him in jail had traded Appellant's clothing that was with him on the night of the burglary for clothing for court. He was convicted of one count of Burglary, a felony of the second degree. The trial court imposed a seven year prison term.

On November 30, 2006, defendant filed a postconviction petition pursuant to R.C. 2953.21, claiming 1) that his trial counsel ineffectively failed to file any motions; 2) that his trial counsel ineffectively excluded exculpatory evidence; 3) that trial counsel ineffectively allowed state's witnesses to commit perjury; 4) that trial counsel ineffectively failed to request jury instructions on lesser included offenses; 5) that the prosecutor engaged in misconduct by making false statements to the jury and by presenting false evidence as to defendant's weight; 6) that the prosecutor engaged in misconduct by committing discovery violations; and 7) that the trial court abused its discretion in sentencing defendant to a term of seven years incarceration. On December 15, 2006, Defendant filed a motion to amend his petition, requesting to withdraw his claims of ineffective assistance and trial court misconduct, leaving only the issue of prosecutorial misconduct for consideration by the court.

On August 10, 2007, the trial court denied Defendant's postconviction petition, finding that Defendant failed to specify what exculpatory evidence was excluded or how the State failed to provide full discovery. Moreover, the court found that Defendant failed to establish any discovery violation under Crim. R. 16(B)(1)(f). Additionally, Defendant failed to demonstrate that the state knowingly presented false evidence or that a constitutional violation occurred. The appellate court combined Appellant's appeals from his conviction and from the denial of his

post-conviction petition. The appellate court affirmed the trial court's decision on all counts regarding both appeals. Appellant filed a motion for reconsideration on May 23, 2008. That motion was denied by the appellate court.

ARGUMENT

RESPONSE TO PROPOSITION OF LAW NO. ONE:

APPELLANT RECEIVED THE EFFECTIVE ASSISTANCE OF COUNSEL.

Ohio law recognizes that error cannot be recognized on appeal unless the appellate record actually supports a finding of error. A defendant claiming error has the burden of proving that error by reference to matters in the appellate record. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199. "[T]here must be sufficient basis *in the record* * * * upon which the court can *decide* that error." *Hungler v. Cincinnati* (1986), 25 Ohio St.3d 338, 342 (emphasis *sic*).

Appellant contends his counsel was ineffective for: (1) failing to file a motion to suppress; (2) allowing and contributing to perjured testimony; (3) failing to object during trial and closing arguments; (4) aiding in excluding exculpatory evidence from trial; (5) not requesting a lesser-included degree of burglary; and (6) failing to request an eyewitness expert. Appellant did not raise the indigency issue on direct appeal and therefore the matter is res judicata. Following established precedent, the Tenth District rejected each of Appellant's claims. Trial counsel is not required to file futile motions. See *State v. McDonall* (Dec. 16, 1999), Cuyahoga App. No. 75245. There was no evidence in the record to support appellant's blanket assertion regarding perjured testimony. Appellant's contention that his counsel was ineffective because she tried to bully him into taking a plea and she did not prepare for trial. The record, including the trial court's finding of appropriate and professional conduct by appellant's counsel, clearly refutes appellant's position. Moreover, this court has declined to find

ineffective assistance of counsel based on the failure to employ an eyewitness identification expert because the argument was purely speculative since “nothing in the record indicates what kind of testimony an eyewitness identification expert could have provided. Establishing that would require proof outside the record, such as affidavits demonstrating the probable testimony. Such a claim is not appropriately considered on a direct appeal.” *State v. Madrigal* (2000), 87 Ohio St.3d 378, 2000-Ohio-448. Accordingly, Appellant’s First Proposition of Law merits no further review.

RESPONSE TO PROPOSITION OF LAW NO. TWO:

THE PROSECUTOR DID NOT ENGAGE IN MISCONDUCT.

Appellant asserts the prosecutor used false evidence, elicited perjured testimony, made improper closing arguments, and concealed favorable evidence. The test for prosecutorial misconduct is whether the remarks were improper and, if so, whether they prejudicially affected the accused's substantial rights. *State v. Smith* (1984), 14 Ohio St.3d 13, 14-15. Generally, prosecutorial misconduct is not a basis for overturning a criminal conviction, unless, on the record as a whole, the misconduct can be said to have deprived the defendant of a fair trial. The focus of that inquiry is on the fairness of the trial, not the culpability of the prosecutor. *State v. Bey* (1999), 85 Ohio St.3d 487, 495.

The false evidence according to appellant is the prosecutor's use of a falsely documented weight of appellant. Appellant asserts the prosecutor used a previous arrest sheet of appellant stating appellant's weight was 180 pounds when at the time of his arrest appellant weighed only 149 pounds, and at the time of trial he weighed 189 pounds. In order to meet the test for prosecutorial misconduct under these circumstances, appellant must show that: (1) the statement was false, (2) the statement was material, and (3) the prosecutor knew it was false. *Columbus v.*

Joyce, Franklin App. No. 00AP-1486, 2001 Ohio 3989. Even if a prosecutor engaged in such misconduct, an appellate court should not reverse a conviction if the error was harmless. *Id.*

The Tenth District noted and the record contains no evidence that the prosecutor knew the weight of appellant was "false," if in fact it was. Secondly, there was no objection to the above testimony at trial; therefore, appellant has waived all but plain error. *State v. Keenan* (1998), 81 Ohio St.3d 133, 1998 Ohio 459. Plain error does not exist unless it can be said that but for the error, the outcome of the trial would clearly have been otherwise. *State v. Moreland* (1990), 50 Ohio St.3d 58. Given the evidence in the record establishing appellant was arrested in close proximity to the scene with the victim's property, and the victim positively identified appellant, we cannot find an instance of plain error, such that the outcome of the trial would have been different without the alleged error.

Appellant also asserts the prosecutor elicited false testimony because the witnesses gave inconsistent testimony regarding the color of pants appellant was wearing the night of his arrest. To the extent it can be said any of the witnesses gave inconsistent testimony in this matter, there is nothing in the record to suggest it was the result of the prosecutor's actions. As discussed previously, the determination of weight and credibility of the evidence is for the trier of fact. The rationale is that the trier of fact is in the best position to take into account inconsistencies, along with the witnesses' manner and demeanor, and determine whether the witnesses' testimony is credible. *Williams*, *supra*. The trier of fact is free to believe or disbelieve all or any of the testimony. *Jackson*, *supra*. This proposition of law merits no further review.

RESPONSE TO PROPOSITIONS OF LAW NOS. THREE AND FIVE:

**SUFFICIENT EVIDENCE EXISTED TO CONVICT
APPELLANT OF BURGLARY.**

When analyzing a claim of whether a conviction is supported by sufficient evidence, a reviewing court is required to construe the evidence in favor of the prosecution. The reviewing court must further determine whether such evidence permits any rational trier of fact to find the essential elements of the offense beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St. 3d 259, paragraph two of the syllabus, citing *Jackson v. Virginia* (1979), 443 U.S. 307. Unless reasonable minds could not have reached the conclusion reached by the trier of fact, the verdict must remain undisturbed. *State v. Goodwin* (1999), 84 Ohio St. 3d 331, 334.

Conversely, in determining whether a verdict is against the manifest weight of the evidence, the reviewing court sits as a “thirteenth juror.” *State v. Thompkins* (1997), 78 Ohio St.3d 380, at 387. Thus, a reviewing court should review the entire record, weigh the evidence and all reasonable inferences, and consider the credibility of the witnesses to determine “whether in resolving conflicts in the evidence, the [trier of fact] clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.” *Id.* quoting *State v. Martin* (1983), 20 Ohio App.3d

Reversing a conviction as being against the manifest weight of the evidence is one reserved for only the most “exceptional case in which the evidence weighs heavily against the conviction.” *Thompkins*, at 387. When substantial evidence exists upon which the trier of fact has based its verdict, a reviewing court abuses its discretion in substituting its judgment for that of the jury as to weight and sufficiency of the evidence. See *State v. Nicely* (1988), 39 Ohio St.3d 147.

The facts support a conviction for burglary and are incorporated as set forth in Appellee's Statement of the Facts above. Appellant implies that Mr. Haggerty was scared and therefore possibly could not have identified him correctly. However, Sergeant Shinaver stated that the victim was "pretty calm" when he approached him. Additionally, physical evidence is not needed to corroborate a victim's testimony. Circumstantial evidence alone is sufficient to support a conviction. *State v. McKnight* (2005), 107 Ohio St.3d 101 (holding that circumstantial evidence is sufficient to sustain a conviction if that evidence would convince the average mind of the defendant's guilt beyond a reasonable doubt).

RESPONSE TO PROPOSITION OF LAW NO. FOUR:

THE TRIAL COURT ACTED WITHIN ITS DISCRETION.

The trial court has broad discretion and its decision in evidentiary matters will not be disturbed by a reviewing court absent an abuse of discretion that has caused material prejudice. *State v. Noling*, 98 Ohio St.3d 44, 2002 Ohio 7044. An abuse of discretion means more than a mere error of law or an error in judgment. It implies an arbitrary, unreasonable, unconscionable attitude on the part of the court. *State v. Adams* (1980), 62 Ohio St.2d 151.

The trial court properly denied Appellant's Rule 29 motion. The standard for reviewing a Crim. R. 29 motion is whether, when viewing the evidence in the light most favorable to the prosecution, reasonable minds could differ as to the outcome of the trial. Crim. R. 29. If reasonable minds can differ, then the matter must go to the jury. Clearly, in the present case, there was sufficient evidence to convict Appellant under R.C. 2911.12, and accordingly, the trial court properly overruled Appellant's motion for acquittal at the close of the state's case.

Regarding the admissibility of the police report, police reports are considered hearsay and are typically inadmissible in criminal trials. See Evid. R. 801. The State will note, however, that

defense counsel stated that the report should not come in because “the things that were written in that report are not helpful to Mr. Hillman.” Moreover, the police report is not a part of the appellate record, and therefore the court cannot assume that exculpatory information was in the report.

Appellant next contends that the trial court should have given a lesser-included instruction on the felony four burglary. R.C. 2911.12(A)(4). Conceivably, the (A)(4) section of R.C. 2911.12 is a lesser included offense of 2911.12(A)(2); however, a jury instruction on a lesser included offense “is required only where the evidence presented would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense.” *State v. Thomas* (1988), 40 Ohio St.3d 213. No such instruction was requested in the trial court; therefore this court must determine whether the trial court committed plain error in not giving that instruction because issues not raised in the lower courts cannot be raised on appeal; such issues are deemed waived. *State v. Williams* (1977), 51 Ohio St.2d 112. Ohio appellate courts “may take notice of waived errors only if they can be characterized as ‘plain errors.’” *State v. Murphy* (2001), 91 Ohio St.3d 516, 532.

For an error to be plain, it must not only be plain in the sense of being obvious, it must also be so serious as to indicate that, but for the error, the outcome clearly would have been different. *State v. Barnes* (2002), 94 Ohio St.3d 21, 27; *State v. Long* (1978), 53 Ohio St.2d 91, paragraph two of the syllabus. A claimed error will be “plain error” only if it was “‘plain’ at the time that the trial court committed it.” *Barnes*, 94 Ohio St.3d at 28. No such error can be demonstrated in this case. The jury convicted Appellant of burglary under R.C. 2911.12(A)(2) and as such, Appellant cannot successfully argue that the evidence would have supported an acquittal on the greater charge.

Appellant's next claim, that the trial court failed to inquire into collusion between the state and the defense attorney, merits no further review. The defendant raised this complaint at trial and the trial court did listen to his complaint. Defense counsel assured the court that "there has not been any information shared." The prosecutor additionally added that they had not suborned perjury and that the inconsistencies in the complained about statements were the officer "making a color contrast."

In Appellant's sixth claim, he states that his sentence is contrary to law, but proceeds to argue that the indictment is defective. Appellee will merely add that double jeopardy concerns are not properly invoked where a defendant has not been twice charged with and prosecuted for the same crime. See *State v. Johnson* (1990), 68 Ohio App.3d 272.

The evidence presented shows that Appellant was identified by the victim at the scene and that Appellant had the victim's property with him when he was apprehended moments after leaving the victim's house. The circumstantial evidence of Appellant's guilt is overwhelming, and Appellant cannot demonstrate that any perceived error caused a material prejudice affecting the outcome of this case. This proposition of law merits no further review.

RESPONSE TO PROPOSITION OF LAW NO. SIX:

THE COURT HAD JURISDICTION TO HEAR APPELLANT'S CASE.

Subject matter jurisdiction connotes the authority of a court to decide particular types of cases on their merits and to render judgments on those cases. *Morrison v. Steiner* (1972), 32 Ohio St.2d 86, 87. A common pleas court has original jurisdiction in felony cases, and its jurisdiction is invoked by the return of an indictment. *Click v. Eckle* (1962), 174 Ohio St. 88, 89. See also R.C. 2901.11. Moreover, the County Prosecutor has jurisdiction over all crimes committed within its territory, and upon presentation of a case to the grand jury, the grand jury

will indict cases where it has deemed there is probable cause to proceed with said charges. R.C. 309.08; see also R.C. 2939.08. Accordingly, the Franklin County Court of Common Pleas had jurisdiction over the burglary committed within its territory and as set out in the indictment in this case.

It is a separate issue as to whether an indictment is proper. An indictment is proper under Ohio Crim. R. 7(B), when it is signed, and contains a statement that the defendant has committed a public offense specified in the indictment. The statement may be made in ordinary and concise language or may be in the words of the applicable section of the statute, provided the words of that statute charge an offense, or in words sufficient to give the defendant notice of all the elements of the offense with which the defendant is charged.

The indictment need only give a defendant adequate notice of the crime with which he has been charged. See generally *State v. Landrum* (1990), 53 Ohio St. 3d 107, 119. In this case, the indictment informed Appellant that he did by force, stealth, or deception, on May 7, 2006, trespass in 186 East Sixteenth Avenue in Columbus, Ohio, the property of another (Derek Haggerty) and that the structure was occupied by someone other than the defendant. Further, the indictment informed Appellant that the crime charged stated that he was present with the purpose to commit a criminal offense and cited the relevant code section of R.C. 2911.12.

The indictment did put defendant on notice of the crime with which he was charged. The indictment was not amended, as Appellant claims; count 2 was nolle by the State and that nolle was accepted by the court, though it does not appear in the record before this court. A nolle prosequi is permitted, pursuant to Ohio Crim. R. 48 at any time by the State with leave of court. See also R.C. 2941.33. This proposition merits no further review.

RESPONSE TO PROPOSITIONS OF LAW NOS. SEVEN AND EIGHT:

THE APPELLATE COURT FOLLOWED THE LAW.

The appellate court reviewed the evidence presented, followed the law and applied controlling precedent. Nothing in the court's decisions contradict established law. Moreover, Appellant chose to dismiss court appointed appellate counsel at his own risk. On April 6, 2007, Appellant requested to dismiss court-appointed counsel. The Tenth District deferred ruling on April 11, 2007, and in an entry informed Appellant that if counsel was dismissed, substitute counsel would not be appointed to represent appellant. Appellant was required to inform the court by April 20, 2007, if he wished to dismiss counsel. Appellant did not do so at that time and appellate counsel filed a brief on Appellant's behalf. On June 19, 2007, Appellant again requested to dismiss court appointed counsel and requested new counsel. The court granted Appellant's motion to dismiss counsel, but denied Appellant's motion for new counsel on June 20, 2007. Appellant cites no compelling argument as to how this violates the law, as "an indigent defendant has the right to competent counsel, not a right to counsel of his own choosing." *State v. Blankenship* (1995), 102 Ohio App. 3d 534, 558. Thus, "[a] defendant has only a presumptive right to *employ* his own chosen counsel." *State v. Keenan* (1998), 81 Ohio St. 3d 133, 137. This proposition of law merits no further review.

RESPONSE TO PROPOSITION OF LAW NO. NINE:

**RES JUDICATA BARS APPELLANT'S CLAIM AND
SUMMARY JUDGMENT IS AN INAPPROPRIATE REQUEST
FOR RELIEF IN CRIMINAL PROCEEDINGS.**

Appellant failed to raise this issue in a direct appeal to the Tenth District Court of Appeals and therefore this argument is barred by res judicata. Moreover, summary judgment is not available in criminal proceedings. *State v. Tipton* (1999), 135 Ohio App.3d 227, 228. If trial

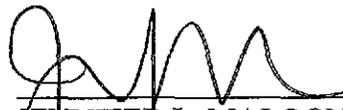
courts were to entertain such motions, “trial courts would soon be flooded with pretrial motions to dismiss alleging factual predicates in criminal cases,” and “[a]ready overburdened prosecutors would be forced to respond to such attacks with specific evidence in advance of trial.” *State v. Varner* (1991), 81 Ohio App.3d 85, 86-87. Accordingly, this proposition of law merits no further review.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the within appeal does not present questions of such constitutional substance nor of such great public interest as would warrant further review by this Court. It is respectfully submitted that jurisdiction should be declined.

Respectfully submitted,

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Prosecuting Attorney

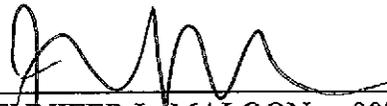


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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail, this day, July 9th, 2008, to Robert L. Hillman, #529-955, Chillicothe Correctional Institution, P.O. Box 5500, Chillicothe, Ohio 45601.



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