

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. <u>08-1395</u>
vs.	:	On Appeal from the Cuyahoga County Court of Appeals, Eight Appellate District
RICKY PALMER,	:	Court of Appeals
Defendant-Appellant.	:	Case No. CA 89957
	:	

NOTICE OF APPEAL OF APPELLANT RICKY PALMER

Ricky Palmer
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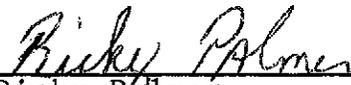
COUNSEL FOR APPELLEE

Notice of Appeal of Appellant Ricky Palmer

Appellant Ricky Palmer hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eight Appellate District, entered in Case No. 89957 on June 5, 2008.

This case raises a substantial constitutional question, is one of public and great general interest and involves a felony.

Respectfully submitted,



 Ricky Palmer
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RICKY PALMER, : County Court of Appeals
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MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT RICKY PALMER

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Opinion of the Ohio Court of Appeals, Eight Appellate District (No. CA 89957, entered on June 5, 2008)

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

This cause presents several critical federal constitutional issues relevant to procedural due process during the material stages of the trial process, equal protection of law as it involves the application of Ohio statutory criminal law as a protected liberty interest and that of sufficiency of evidence necessary to prove guilt beyond a reasonable doubt.

The first issue presents a substantial constitutional question as to whether due process of law, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, regards the definition of burglary under Ohio Revised Code 2911.12(A)(2) to require proof beyond a reasonable doubt of the element of "likely to be present" in order to convict. The ruling of the court of appeals errs with the well settled precedent of this Court where, although having acknowledged the State's burden to "adduce specific evidence that people were present or likely to be present at the time of the burglary", nonetheless proceeded to affirm the judgment of conviction irrespective of the fact that the State so failed to meet this burden of proof. In actuality, the decision of the appellate court goes further to announce its own separate legal rationale that runs in direct contradiction to the stare decisis of this Court, as well as the collective body of Ohio appellate jurisprudence. If allowed to stand, this ruling would jeopardize judicial interpretation of the legislative intent regarding this essential statutory element under R.C. 2911.12(A)(2).

Secondly, this case presents a federal due process issue of sufficiency of evidence where the monetary value of property relevant to prove the degree of a theft offense must be proven beyond a reasonable doubt. Where the element and degree of an offense remains contingent upon the monetary value of the items that

thereby serve as the enhancing factor, it becomes imperative that said monetary value be proven beyond a reasonable doubt. Here the decision of the court of appeals erroneously holds this burden to be that of the criminal defendant and not the State. This rationale errs where the appellate court shifted the burden of proof to the defense, by holding that where trial counsel failed to request a bill of particulars to determine the extent of the monetary value of those items associated with the theft then the State thereby had no obligation to prove the value of the items beyond a reasonable doubt.

Thirdly, this case presents that substantial constitutional question in regards to the Sixth and Fourteenth Amendments to the United States Constitution and Section 5, Article I of the Ohio Constitution, which guarantees a criminal defendant a jury trial by a fair and impartial fact finder that is free from outside considerations that would taint the verdict. Given judicial review of Evid.R. 404(B) of the Ohio Rules of Evidence, in light of its application as a state created liberty interest consistent with the Due Process and Equal Protection Clauses of the United States Constitution, Appellant Palmer was entitled to the grant of a mistrial where the prosecutor elicited prior bad acts testimony intended solely to impugn appellant's character. Although the court of appeals correctly identified the damaging impact the other bad acts testimony would have toward influencing the jury verdict, its decision errs where it held the curative admonition of the trial court to have sufficed to correct the otherwise irreparable damage that required declaration of a mistrial.

Additionally, this case is one of the substantial denial of federal and state constitutional rights as it relates to the Confrontation Clause of the Sixth Amendment of the United States Constitution. The appellate court again identified the case to involve the denial of a substantial constitutional right, where it held "that the trial court improperly allowed hearsay testimony when it permitted a detective to testify..." that amounted to impermissible hearsay.

However, the decision of the court of appeals reviewed the due process violation under the plain error doctrine and held that where the improper hearsay could not be viewed to have affected the outcome of the trial no plain error existed. If allowed to stand, the Eight District's interpretation of the well settled case precedent relevant to plain error, as so defined by this Court, is so far removed from the judicial mark as to endanger its consistent application among the appellate judiciary in Ohio.

Finally, although the court of appeals found the plain error standard set forth above to have arose from the ineffective assistance of court appointed trial counsel to properly object at the trial stage of the proceedings, it went forth to incredulously hold that said deficiency of trial counsel failed to amount to that ineffective assistance of counsel as would arise to a violation of the Sixth Amendment to the United States Constitution. Wherefore, the decision of the court of appeals threatens that well settled application of the Strickland two-prong prejudice test as it relates to the grant of this critical federal Sixth Amendment right to counsel as it impacts criminal defendants of Ohio citizenry.

STATEMENT OF THE CASE AND FACTS

On December 18, 2006, the Cuyahoga County Grand Jury indicted the defendant-appellant, Ricky Palmer, in a three-count indictment. Count one charged burglary, R.C. 2911.12, and alleged that he trespassed in an occupied structure at a time when a person was present or likely to be present, making the crime a felony of the second degree. Count two charged theft of a firearm, R.C. 2913.02, a felony of the third degree. Count three charged theft of property worth more than five hundred dollars but less than five thousand dollars, a felony of the fifth degree. On March 28, 2007, the jury convicted Appellant Palmer on all three counts. On May 1, 2007, the trial court imposed a six-year sentence on count one, a consecutive one-year sentence on count two, and a concurrent one-year sentence on count three, for a total term of imprisonment of seven years.

George Todorovich testified that on the morning of November 16, 2006 he heard a loud banging coming from his brother Jason's house, which prompted him to look out a window onto his brother's house where he witnessed two men kicking in the back door of his brother's house (T. 145-148).

On cross-examination, George Todorovich said that when the break-in occurred, his brother had already gone to work. He also testified that his brother left to go to work based on his usual work habit patterns and that the break-in did not occur until his brother's house had been empty for twenty or more minutes (T. 162-163).

Jason Todorovich described the property which was taken from his house. A Colt .9mm pistol, which was kept in a blue case along with an extra clip and a fast loader, was taken (T. 195-196). A white fire case which contained a coin collection was also taken. Jason's mother had purchased the fire case for him and he believed it cost twenty to twenty-five dollars (T. 196-197). He testified that he received the coins from his grandfather (T. 197). He also testified that he was not sure of the value of the coins (T. 199). He once bought a book so that he could self-appraise the coin collection, but never had the opportunity to appraise the collection (T. 199). The State asked Jason whether he believed the value of what was taken to be over five hundred dollars. Mr. Todorovich stated that the value of everything on the exhibit table was over five hundred dollars. The State clarified that "everything on the table" included coins, the gun, the gun box, and the fire case (T. 199).

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW I:

RICKY PALMER WAS DEPRIVED OF HIS RIGHT TO DUE PROCESS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, WHERE HIS CONVICTION FOR BURGLARY AND FELONY THEFT WAS PRODUCT OF INSUFFICIENT EVIDENCE.

R.C.2911.12 states: A) No person, by force...shall do any of the

following: ***

(2) Trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure that is a permanent or temporary habitation of any person when any person other than an accomplice of the offender is present or likely to be present, with purpose to commit in the habitation any criminal offense;

The indictment refined the language of the statute by specifically alleging that the other person who was likely to be present was Jason Todorovich. Thus, in order to convict Mr. Palmer of the second-degree burglary, the State had to prove that Jason Todorovich was present or likely to be present in his house at the time of the burglary.

In the case at bar it is clear that no one was present in the house at the time of the burglary. Jason Todorovich testified that both he and his girlfriend were at work and the house was empty (T. 191). Thus, Mr. Palmer could only be guilty of the crime as charged if Mr. Todorovich was likely to be present in his house at the time of the burglary.

The Supreme Court of Ohio established the general rule regarding “likely to be present” thirty years ago in *State v. Kilby* (1977) 50 Ohio St.2d 21 when it held that if persons were not in the house at the time of the burglary, but “the family was in and out of the house on the day in question,” then someone was likely to be present. *Id.* at 25. Since *Kilby* several courts in Ohio have refined when a person is likely to be present. The Supreme Court of Ohio noted in *State v. Fowler* (1983) 4 Ohio St.3d 16, 18 that merely showing that the house was a residence does not satisfy the element and the State must produce some additional evidence that one or more of the inhabitants of the house were likely to be present at the time of the burglary. This Court has held that when the inhabitants are gone from the house for an extended period of time and no one is checking on the house at the time of a burglary, then no one was likely to be present. *State v. Cantin* (1999) 132 Ohio App.3d 808. When, for example, the residents are on vacation and no one is checking on the house, then no one was likely to be present. *State v. Beasley* (Aug. 12, 1994) Ross App. No. 893.

Courts look at the “usual schedule” or intention of the residents to determine whether they are likely to be home. *State v. Bateman* (Jun. 26, 1997) Franklin App. No. 96APA09-1159. Under this usual schedule approach, this Court held more than thirty years ago that when a

person's usual and ordinary work habits regularly take him out of his home during certain hours of the day and the burglary occurs during those hours, no one was likely to be present. *State v. Durham* (1976) 49 Ohio App.2d 231. This Court still adheres to the *Durham* rule. In *State v. Lockhart* (1996) 115 Ohio App.3d 370, this Court held that when the victim testified that a burglary occurred at a time when she was regularly at work and she did not testify that she was in and out of the house on that day, the State had not proven that someone was likely to be present at the time of the burglary. *Id.* at 373-374.

This Court is not the only court to have adopted the *Durham* rule: *State v. Frock* (Mar. 17, 2006) Clark App. No. 2004 CA 76, 2006-Ohio-1254 at ¶¶ 22 & 23 (when burglary occurs at 1:00p.m. and victim testifies that she regularly goes to work at 7:15 a.m. but returns to the house at 2:00 p.m. to feed her dogs no one was likely to be present at the time of the burglary); *State v. Miller* (May 11, 2007) Clark App. No. 2006 CA 98, 2007-Ohio-2361 ¶ 17 (victim testified she regularly worked the 11:00 p.m. to 7:00 a.m. shift and burglary occurred at 4:00 a.m., thus no reasonable jury could have concluded that someone was likely to be present at time of burglary).

In the case at bar, the uncontroverted testimony of both George and Jason Todorovich was that no one was likely to be present at the time of the burglary. Jason testified that he left for work at 8:15 and did not testify either that he regularly returned home from work or was going to be returning home from work at unexpected times on November 16, 2006. George Todorovich testified that the break-in did not occur until the house had been empty for twenty minutes (T. 162). Because of Mr. Todorovich's usual work habits, it was not likely that anyone would have been present in his house at the time of the burglary. Thus, under *Durham*, *Lockhart*, *Frock*, and *Miller*, the evidence did not support the jury's finding that someone was likely to be present at the time of the burglary.

The evidence may have been sufficient to prove Mr. Palmer guilty of burglary under R.C. 2911.12(A)(3), a felony of the third degree, but not the second-degree felony defined under R.C. 2911.12(A)(2). See, eg. *Miller* at ¶¶ 19-20. This Court must, therefore, reverse and vacate Mr. Palmer's conviction for burglary or, in the alternative, reverse his conviction for burglary under R.C. 2911.12(A)(2) and enter a conviction for burglary under R.C. 2911.12(A)(3).

THEFT

In counts two and three, Mr. Palmer was charged with theft. Count two charged him with theft of a firearm. Under R.C. 2913.02(B)(4), theft of a firearm is a felony of the third degree. Count three charged him with theft of a coin collection and a gun case, which was worth more than five hundred dollars and less than five thousand dollars. Under R.C. 2913.02(B)(2), theft is ordinarily a misdemeanor of the first degree. When the value of the property stolen is more than five hundred dollars but less than five thousand dollars, R.C. 2913.03(B)(2) elevates the crime to a felony of the fifth degree. In order for Mr. Palmer to have been convicted of a felony in count three, the State had to prove that the value of the coin collection and the gun case was more than five hundred dollars. It should be noted that the indictment did not include the fire case or the firearm in the list of stolen property, so their cost cannot be included in the calculations of value.

There was no testimony that the coin collection and the gun case were worth more than five hundred dollars. Jason Todorovich testified that the fire case cost approximately twenty dollars or twenty-five dollars (T. 197). Mr. Palmer was not charged with stealing the fire case, so the question of its value was not pertinent to any issue before the jury. Jason did not assess an individual value to the gun case at all.

Jason testified that he did not know the value of the coin collection. He testified that he did not build the collection himself, he received it from his grandfather (T. 199). Thus he had no first-hand knowledge of how much money it took to build the collection. He also testified that he "was not sure of the value" of the coin collection (T. 199). He once purchased a book so that he could appraise the value, but "never had the chance" to make the self-appraisal (T. 199). There was, thus no testimony about the value of the coin collection.

It would have been a simple matter for the State to have secured the testimony of an expert numismatist to establish the value. The State did not do this. Moreover, Mr. Todorovich was not himself qualified to testify about the value of the coins. As the coins were, apparently, rare coins, their value would not be readily apparent to someone who did not have a numismatist's expert knowledge. A lay witness may not give expert or opinion testimony about something which is not "rationally based on [his] perceptions." Evid.R. 701. Mr. Todorovich had

already testified that he had no idea of the coins' value, so any opinion he offered was not based on his own perceptions.

PROPOSITION OF LAW II:

RICKY PALMER WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL BEFORE AN UNBIASED FACT FINDER BY THE INTRODUCTION OF IMPROPER OTHER ACTS EVIDENCE IN THE STATE'S CASE IN CHIEF.

Both the Sixth Amendment to the United States Constitution and Section 5, Article I, Ohio Constitution guarantee defendants a fair and impartial fact finder; one that is free from outside considerations. See *Sheppard v. Maxwell* (1966) 384 U.S. 333. When outside influences improperly bias the fact finder and taint the deliberations, then the defendant is denied a fair trial. *Sheppard*. One of the most-common ways in which a fact finder can be prejudiced against a criminal defendant is when the fact finder is informed of other bad acts which the defendant has allegedly committed; acts for which the defendant is not on trial.

In Ohio, evidence about a defendant's prior bad acts or bad character is not generally admissible. Evid.R. 404(B) states:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith.

The policy reason supporting the rule of inadmissibility was explained fully in the case *State v. Curry* (1975), 43 Ohio St.2d 66, 68 as:

(1) the overstrong tendency to believe the defendant guilty of the charge, merely because he is a person likely to do such acts; (2) the tendency to condemn not because he is believed guilty of the present charge but because he had escaped punishment from other offenses; (3) the injustice of attacking one who is not prepared to demonstrate the attacking evidence is fabricated; and (4) the confusion of issues which might result from bringing in evidence of other crimes.

The Supreme Court of Ohio has continued to adhere to its *Curry* standard. In *State v. Allen* (1987), 29 Ohio St.3d 53, 55 the court said,

The existence of a prior offense is such an inflammatory fact that ordinarily it should not be revealed to the jury unless specifically permitted under statute or rule. The *undeniable effect* of such information is to incite the jury to convict *based on past misconduct rather than to restrict their attention to the offense at hand.* (Emphasis added)

In addition, the Supreme Court of Ohio has held that other acts rule "must be construed *against*

admissibility, and the standard for determining admissibility of such evidence is *strict*.” *State v. Coleman* (1989) 45 Ohio St.3d 298, 299 (Emphasis added).

In direct testimony, the State asked Jason Todorovich, “do you know an individual named Ricky Palmer?” (T. 201). Mr. Todorovich testified that he did know of Mr. Palmer and explained that his girlfriend was friends with Mr. Palmer’s girlfriend (T. 202). The State used the question as introductory to asking a series of questions as to whether Mr. Todorovich had given Mr. Palmer permission to enter his house or take any of his property (T. 202).

On cross-examination, Mr. Todorovich said that he had never met Mr. Palmer but that he knew about him (T. 203). He explained that Mr. Palmer just showed up at Tish’s house and moved in (T. 204). Defense counsel asked “Just so happens to be her boyfriend, a big coincidence, this boyfriend is breaking into our house, of all houses, and you know this guy via your girlfriend?” Mr. Todorovich answered, “Well, I never met him.” Defense counsel then asked, “You know of him?” (T. 204), a fact which Mr. Todorovich had already testified about in direct examination.

Every other time Mr. Todorovich was asked the question did he “know of” Ricky Palmer, his response did not address any alleged other acts. The last time Mr. Todorovich answered the question he expanded his response and said,

I knew of him. After the fact, after my house was broken into, after I called a few people, he is *notorious for doing this*. (Emphasis added)

(T. 204). Defense moved for a mistrial based on Mr. Todorovich’s non-responsive answer injecting prejudicial testimony that Mr. Palmer was notorious for breaking into people’s houses. (T. 205). The court denied the motion and answered that the defense invited the response by “dancing around” and “going way into a tangent.” (T. 205). Although the trial court did give the jury an instruction that it should disregard the answer (T. 208), defense counsel objected to the remedy, as the error was so prejudicial that no jury instruction could cure it (T. 207).

The trial court was incorrect to rule that the defense had invited the evidentiary harpoon which Mr. Todorovich launched into the trial. He had already testified—more than once—that he knew of Mr. Palmer. He had never before indicated that he had allegedly researched Mr. Palmer

and had determined that Mr. Palmer was “notorious” for breaking into people’s homes or burglarizing them. Defense counsel had no way of anticipating such a response, when the exact same question had not produced the response earlier in the trial.

Defense counsel was also correct to objecting to the court’s remedy of a curative instruction as being inadequate. Mr. Palmer was charged with breaking into Jason Todorovich’s house and burglarizing it. Once the jury had heard he was “notorious” for doing the same in other people’s houses, there was no way it could judge Mr. Palmer’s guilt solely on the evidence before it and not allow the other acts testimony to influence it.

In *State v. Matthews* (1984), 14 Ohio App.3d 440, this Court analyzed the prejudice that introduction of a defendant’s other crimes has in the defendant’s present trial. The *Matthews* court ruled when other acts evidence does not meet one of the criteria of admissibility contained in Evid.R. 404(B), the evidence is inadmissible and prejudicial. *Id.* at 442. The *Matthews* court also found the error to be prejudicial despite the trial court’s having given a limiting instruction as to the use of the evidence. *Id.* at 443. In *Allen, supra*, the Supreme Court also reversed a conviction, because of the introduction of other acts evidence. It believed the information of the defendant’s prior crimes was so damaging, that it prejudiced the defendant despite the trial court’s giving the jury a curative instruction about how to use the evidence. *Id.* at 55. If a curative instruction would not actually cure the problem in either *Allen* or *Matthews*, it would not cure the problem in the case at bar, either. This Court should reverse Mr. Palmer’s convictions and remand his matter for a new trial before a fair, impartial, and unbiased jury.

RICKY PALMER WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO CONFRONT THE WITNESSES AGAINST HIM BY THE INTRODUCTION OF HEARSAY EVIDENCE.

In a criminal case, the introduction of hearsay evidence creates problems, because it deprives the defendant of his opportunity to cross-examine the true witness against him, the actual declarant of the hearsay. The Confrontation Clause in the Sixth Amendment to the United States Constitution provides that in all criminal prosecutions, the accused has the right to be confronted with the witnesses against him. That guarantee includes the right to cross-examine witnesses. *Pointer v. Texas* (1965) 380 U.S. 400, 404 (applying the Sixth Amendment to the states through the Fourteenth Amendment to the United States Constitution). Cross-examination has been characterized as the “greatest legal engine ever invented for the discovery of truth.” *White v. Illinois* (1992) 502 U.S. 346. The right of an accused to meet his accusers face-to-face predates the Constitution, finds roots in the King James Bible, is endorsed in the writings of the Hebrews and Romans, has been reflected on in the works of Shakespeare, and invoked in early British common law. *Lilly v. Virginia* (1990) 527 U.S. 116, 141 (Breyer, J., concurring)

The right of confrontation is primarily directed at ensuring the “reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.” *Maryland v. Craig* (1990) 497 U.S. 836, 845; *accord, Lilly, supra* (noting that such reliability testing should occur at trial). Ultimately, the Confrontation Clause serves two objectives. First, it allows a criminal defendant the right to confront his or her accusing witness face-to-face in open court for truth-testing cross-examination. Second, it gives the jury an opportunity to judge the credibility of the witness through observation of the witness’s demeanor. *Id.*, citing *Mattox v. United States* (1895) 156 U.S. 237, 242-43.

At its core, confrontation fosters,

a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face-to-face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is

worthy of belief.

Mattox, at 242-243.

In 2004, the United States Supreme Court ruled, not for the first time, that the Confrontation Clause bars the introduction of testimonial out-of-court statements made by a witness not present at trial unless the declarant is unavailable *and* the defendant had a prior opportunity to cross-examine. *Crawford v. Washington* (2004) 541 U.S. 36, 68-70. According to *Crawford*, notwithstanding a reliability determination under the Rules of Evidence, the Sixth Amendment's Confrontation Clause requires independent safeguards on the use of out-of-court testimony. *Crawford*, 541 U.S. 36 at 62, noting that the admission of "statements deemed reliable by a judge is fundamentally at odds with the right of confrontation."

In the case at bar, Detective Carl Biegacki testified that when he was processing the Grand Prix, a cell phone which was in the car (State's Exhibit # 24) rang. The caller ID on the phone indicated the call originated from "CAT". Biegacki testified that later a woman named Catherine Fleegle called him to tell him that Mr. Palmer had taken the Gray Grand Prix from 6619 Chambers Avenue that morning. She also said that she had been trying to call him all morning on his cell phone. Biegacki asked her whether Mr. Palmer's cell phone caller ID indicated a call from "CAT" when she called it. She said that it did. (T. 286-287).

Anything Ms. Fleegle told Detective Biegacki about Mr. Palmer having taken the car or about her calling his cell phone or that her caller ID screen name was "CAT" was an out-of-court statement. The statements were offered by the State for their truth as a way of establishing that Mr. Palmer was driving the Grand Prix and the cell phone found in it belonged to Mr. Palmer. Thus the statements of Ms. Fleegle were hearsay under Evid.R. 801. As the hearsay evidence did tend to establish an important point in the State's case, that Mr. Palmer and his cell phone were in the Gray Grand Prix on the morning of November 16, 2006, the hearsay was not some meaningless statement that did not impact on the verdict. Rather, it was key evidence which tended to place Mr. Palmer in the get-away vehicle and, by extension, at the scene of the crime.

Mr. Palmer was prejudiced by the improper hearsay testimony introduced in his case. He was denied the ability to cross-examine the witness against him, Catherine Fleegle, and

prejudiced under *Crawford*. This Court should reverse Mr. Palmer's convictions and remand his matter for a new trial, in which he *will* be able to cross-examine the witnesses against him.

Trial counsel did not object to either of the two hearsay statements introduced by the State in the case at bar, its admission so unfairly tainted the outcome of Mr. Glass's trial that it withstands plain error review. Plain error is one that is obvious and affects a substantial right. *State v. Yarbrough* (2002) 95 Ohio St. 3d 227, 244. Plain error is intended to temper the harsh consequences attending the failure to object. Crim.R. 52(B) states that, "plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." The rule mirrors Federal Rule Crim.Pro. 52(B), which the United States Supreme Court has called a "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." *United States v. Young* (1985) 470 U.S. 1, 15.

Recently, this Court had occasion to reverse a conviction based on a *Crawford* violation. *State v. Babb* (May 4, 2006) Cuyahoga App. No. 86294, 2006-Ohio-2209. This Court reversed, despite the dissenting opinion which argued that there was no objection to the hearsay testimony and that the hearsay did not rise to the level of plain error. *Babb* at ¶32. As this Court rejected the dissenting opinion's argument, it believed that a *Crawford* error does rise to the level of plain error. In the same way, the improper hearsay testimony in the case at bar rises to the level of plain error and requires this Court to reverse Mr. Palmer's conviction.

PROPOSITION OF LAW IV:

RICKY PALMER WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, BY TRIAL COUNSEL'S PRESERVE ISSUES FOR APPEAL.

In Assignment of Error III, Ricky Palmer argued that inadmissible hearsay prejudiced him by establishing that he was at the scene of the crime an in the get-away vehicle on November 16, 2006. Mr. Palmer also argued this error was plain error. Should this court find that the error was not plain error under Crim.R. 52(B), then this Court must address whether Mr. Palmer was deprived of his right to the effective assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution.

The test established by the United States Supreme Court for determining whether an appellant received effective assistance of counsel is articulated in *Strickland v. Washington* (1984), 466 U.S. 668 and asks “whether counsel’s conduct so undermined the function of the adversarial process that the trial cannot be relied on as having produced a just result.” *Id.* at 686. An appellant must bear the burden of showing that counsel’s performance was deficient and prejudiced the defendant. *Id.* at 687.

This court has noted that the standard in Ohio is “nearly identical” to the standard announced in *Strickland*, declaring:

The test in Ohio is “whether the accused, under all the circumstances *** had a fair trial and substantial justice was done.” [citations omitted] In applying this test, the court must determine whether defense counsel substantially violated a substantial duty owed to the defendant and whether such violation prejudiced the defendant.

State v. Blagajevic (1985), 21 Ohio App.3d 297, 299.

Here, Mr. Palmer did not receive effective assistance of counsel because of his counsel’s failure to object to the issues raised in Assignment of Error III and thereby preserve the issues for appellate review. There was neither any conceivable strategic or tactical reason for, nor any advantage in, counsel not objecting to the hearsay.

Many courts have shown reluctance to second guess the trial strategy or tactics of defense counsel in determining the effectiveness of counsel. Ohio courts have, however, ruled that some

so-called "trial tactics" are so egregious and foredoomed to failure that they cannot be excused under the umbrella of "trial tactics." Such deficient tactics must be regarded as ineffective assistance of counsel and reversible error. *State v. Burgins* (1988), 44 Ohio App.3d 158.

The failure to object to the alleged errors was an egregious tactic similar to those condemned in *Burgins*. Counsel had absolutely nothing to lose by making the objections. On the other hand, counsel had everything to gain, because, if the objections had been granted, Mr. Palmer would not have been prejudiced by the improper evidence. Under the circumstances, no reasonable tactical explanation can justify counsel's failure to make the required objections.

Trial counsel's failure to object to did prejudice Mr. Palmer. Were it not for defense counsel's inexcusable inaction, Ricky Palmer would not have been tied to the scene of the crime and the get-away vehicle by improper hearsay evidence Counsel's failure to preserve the issue was, therefore, ineffective assistance of counsel under *Burgins* and not an excusable trial tactic. When counsel fails to preserve a meritorious appellate issue, then counsel is ineffective, because he has improperly waived his client's appeal rights. *State v. Reed* (1996) 74 Ohio St.3d 535, 535-536.

Defense counsel violated his essential duty to represent Mr. Palmer zealously. In so doing, counsel prejudiced Mr. Palmer requiring this court to reverse his convictions for ineffective assistance of counsel.

CONCLUSION

WHEREFORE, based on the foregoing, this Court should grant jurisdiction and reach the substantial constitutional issues set forth herein on their merits.

Respectfully submitted,



Ricky Palmer
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Certificate Of Service

I hereby certify that a copy of the foregoing and notice of appeal was sent to counsel for Appellee, William D. Mason, 1200 Ontario St., Cleveland, OH 44113 on this 14th day of July, 2008.


Ricky Palmer

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 89957

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

RICKY PALMER

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-489665

BEFORE: Blackmon, J., McMonagle, P.J., and Boyle, J.

RELEASED: June 5, 2008

JOURNALIZED:

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**ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED**

JUN 5 - 2008

**GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY: _____ DEP.**

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

PATRICIA ANN BLACKMON, J.:

Appellant Ricky Palmer appeals his convictions for one count of burglary and one count of aggravated theft.¹ He sets forth the following four errors for our review:

“I. Ricky Palmer has been deprived of his liberty without due process of law by his conviction for burglary and felony theft as neither crime was supported by sufficient evidence to prove all of the essential elements beyond a reasonable doubt.”

“II. Ricky Palmer was deprived of his constitutional right to a fair trial before an unbiased fact finder by the introduction of improper other acts evidence in the state’s case in chief.”

“III. Ricky Palmer was deprived of his constitutional right to confront the witness against him by the introduction of hearsay evidence.”

“IV. Ricky Palmer was deprived of his constitutional right to effective assistance of counsel, by trial counsel’s failure to preserve issues for appeal.”

Having reviewed the record and pertinent law, we affirm Palmer’s convictions. The apposite facts follow.

¹Palmer was also convicted for aggravated theft arising out of his theft of a weapon. However, he does not appeal that conviction.

Jury Trial

George Todorovich lived next door to his brother, Jason, who lived at 4882 East 81st Street in Garfield Heights, Ohio. At approximately 8:15 a.m. on November 16, 2006, he heard loud noises coming from his brother's house. He looked out the window and saw two men kicking in the back door. He grabbed his cell phone and went outside while he called the police. He saw the two men run from his brother's home carrying his brother's gun case and a fire box. The men jumped into a silver Grand Prix that was parked in front of the home. As they drove off, George attempted to rip the license plate off the car while he relayed the plate number to the dispatcher.

The police arrived shortly after the men left the scene. A chase ensued. The police located the Grand Prix in the parking lot of an apartment complex a few blocks away. The doors were open and in the back seat was a gun case and a fire box. Witnesses in the parking lot told the police they saw an African-American male in a red shirt jump the fence and run into the woods. This description matched one of the suspects. Officers located Palmer hiding in the woods. He was brought back to the scene of the crime, where George Todorovich positively identified him as one of the men who entered his brother's home and as the driver of the get-away car.

A black coat was found in the laundry room of the apartment building. In the jacket's pocket, the police found a hand gun and collector's coins. A cell phone was also recovered from the Grand Prix. The caller identification revealed that a "Cat" had attempted to call the telephone. Later, at the police station, a Catherine Fleegle called. She informed Detective Beigacki that she had attempted to call Palmer because he had her car. The officer asked her if her name appeared as "Cat" on Palmer's cell phone, to which she responded, "yes."

Jason Todorovich testified that he never met Ricky Palmer; however, his girlfriend worked with and was friends with Palmer's girlfriend. He testified that his gun case, containing a registered nine millimeter hand gun, was stolen, along with a fire box, containing his coin collection and his girlfriend's checks. He estimated the total value of the items taken was over \$500.

The jury found Palmer guilty of one count of burglary and two counts of aggravated theft. The trial court sentenced Palmer to a total of ten years in prison.

Insufficient Evidence

In his first assigned error, Palmer argues that his burglary and theft convictions are not supported by sufficient evidence.

The sufficiency of the evidence standard of review is set forth in *State v. Bridgeman*² as follows:

“Pursuant to Criminal Rule 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt.”³

Bridgeman must be interpreted in light of the sufficiency test outlined in *State v. Jenks*,⁴ in which the Ohio Supreme Court held:

“An appellate court’s function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence submitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant’s guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. (*Jackson v. Virginia* [(1979)], 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, followed.)”

Regarding his second-degree burglary conviction, Palmer contends the state failed to produce evidence to prove, beyond a reasonable doubt, that a

²(1978), 55 Ohio St.2d 261, syllabus.

³See, also, *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 23; *State v. Davis* (1988), 49 Ohio App.3d 109, 113.

⁴(1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

person was "present or likely to be present" when he trespassed in Jason Todorovich's home.

R.C. 2911.12(A)(2), provides in pertinent part:

"No person, by force, stealth, or deception, shall * * * :

"(2) Trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure that is the permanent or temporary habitation of any person when any person other than an accomplice of the offender is present or likely to be present, with purpose to commit in the habitation any criminal offense * * * ."

"A person is likely to be present when a consideration of all the circumstances would seem to justify a logical expectation that a person could be present."⁵ In determining whether persons were present or likely to be present under R.C. 2911.12(A)(2), "the defendant's knowledge concerning habitation is not material. The issue is not whether the burglar subjectively believed that persons were likely to be there, but whether it was objectively likely."⁶ Merely showing that people dwelled in the residence is insufficient; the state must

⁵*State v. Green* (1984), 18 Ohio App.3d 69, 72.

⁶*State v. Brown* (Apr. 28, 2000), Hamilton App. No. C-980907.

adduce specific evidence that the people were present or likely to be present at the time of the burglary.⁷

We are aware of the case law that concludes that when the burglary occurs while the inhabitants are at work, and there is evidence of a consistent work pattern, there is a minimal likelihood someone would be present in the home.⁸ However, in the instant case, although the burglary occurred while the inhabitants were at work, the break-in occurred close to the time of their departure; thus, there was a likelihood that the inhabitants could have been at home during that time. Therefore, we conclude there was sufficient evidence presented that the break-in occurred while someone other than the offender was "likely to be present."

In regards to his theft conviction, Palmer contends there was no evidence that the stolen items exceeded the value of \$500. He argues that although Jason Todorovich testified the total value of the items stolen was over \$500, Palmer was only indicted for stealing the coin collection and gun case, not the fire box or gun. The indictment does delineate the theft felony Palmer allegedly

⁷*State v. Fowler* (1983), 4 Ohio St.3d 16, 18.

⁸*State v. Meisenhelder* (Oct. 12, 2000), Cuyahoga App. No. 76764; *State v. Lockhart* (1996), 115 Ohio App.3d 370; *State v. Colon* (Dec. 17, 1992), Cuyahoga App. No. 61253; *State v. Johnson* (Oct. 10, 1991), Cuyahoga App. No. 59096; *State v. Durham* (1976), 49 Ohio App.2d 231.

committed and sets forth the "value of said property or services being \$500 or more but less than \$5,000."

An indictment need not be in the exact language of the statute defining the offense so long as all the essential elements of the crime are contained in language equivalent to that used in the statute and the accused is advised in the indictment of the nature and cause of the accusation he is expected to meet.⁹ The indictment meets this notice requirement.

Although the indictment fails to list all the items Palmer stole, the state is under no duty to list the items defendant supposedly stole in connection with the theft.¹⁰ If Palmer was unsure of the items for which he was being charged for stealing, he could have filed a bill of particulars to obtain more specifics on the nature of the offense.¹¹ Todorovich testified that the total value of the items stolen exceeded \$500. Therefore, there was sufficient evidence presented to support the theft conviction. Accordingly, Palmer's first assigned error is overruled.

Evidence of Other Acts

⁹*State v. Oliver* (1972), 32 Ohio St.2d 109; *State v. Reyna* (1985), 24 Ohio App.3d 79.

¹⁰*State v. Smith* (Mar. 12, 1998), Cuyahoga App. No. 72027; R.C. 2941.08; Crim.R. 7(B).

¹¹Crim.R. 7(B).

In his second assigned error, Palmer argues the trial court erred in failing to declare a mistrial after Jason Todorovich stated that Palmer was “notorious for doing this.” We disagree.

The standard of review for evaluating a trial judge's decision to grant or deny a motion for a mistrial is abuse of discretion.¹² An “abuse of discretion” is more than an error of law or of judgment; rather, it implies the trial court’s decision is unreasonable, arbitrary or unconscionable.¹³

A mistrial should not be ordered in a criminal case merely because some error or irregularity has intervened, unless the substantial rights of the accused or the prosecution are adversely affected; this determination is made at the discretion of the trial court.¹⁴ The granting of a mistrial is only necessary when a fair trial is no longer possible.¹⁵ Thus, the essential inquiry on a motion for mistrial is whether the substantial rights of the accused are adversely or materially affected.

¹²*State v. Garner*, 74 Ohio St.3d 49, 59, 1995-Ohio-168; *State v. Glover* (1988), 35 Ohio St.3d 18; *City of Cleveland v. Gonzalez*, Cuyahoga App. No. 85070, 2005-Ohio-4413.

¹³*State v. Adams* (1980), 62 Ohio St.2d 151, 157.

¹⁴*State v. Reynolds* (1988), 49 Ohio App.3d 27, 33, 55.

¹⁵*State v. Franklin* (1991), 62 Ohio St.3d 118, 127, citing *Illinois v. Somerville* (1973), 410 U.S. 458, 462-463, 93 S.Ct. 1066, 35 L.Ed.2d 425.

In the instant case, Palmer argues that Jason Todorovich improperly tainted the jury when he stated Palmer was "notorious for doing this."¹⁶ Todorovich stated this in response to defense counsel's question, "You knew of him?" in reference to Palmer. Defense counsel objected to Todorovich's answer, and the trial court instructed the jury as follows: "Jurors disregard the last comment. Go ahead." Defense counsel then requested a side bar to request a mistrial, which the court denied. When defense counsel continued questioning, he was the one who brought it up again. He stated:

"So this comment you just threw in for the hell of it, the Court has asked the jury to disregard, you have no basis for that opinion other than what other people might have said to you, correct?"¹⁷

The court reacted by stating:

"Wait a minute now. Let's drop the subject. Ladies and gentlemen, the jury will disregard his comment about whatever hearsay information, good or bad or indifferent, that he received about the man's past. The man's past, good or bad, isn't relevant to the case. Doesn't matter to a jury whether somebody has been in the seminary his whole life or the opposite end of the spectrum. It matters if the State has the evidence to prove that the defendant violated the State statute on the day in question. Not any other day, just the day in question."¹⁸

¹⁶Tr. at 204.

¹⁷Tr. at 207.

¹⁸Tr. at 208.

A jury is presumed to follow instructions, including curative instructions, given to it by a trial judge.¹⁹ Moreover, it can be argued that defense counsel was the one that exacerbated the situation by continuing to comment on the statement. Additionally, given the evidence linking Palmer to the crime and George Todorovich's reliable and confident identification of him as one of the men he saw breaking into his brother's home, we find any error was not prejudicial. Accordingly, Palmer's second assigned error is overruled.

Hearsay

In his third assigned error, Palmer argues that the trial court improperly allowed hearsay testimony when it permitted a detective to testify that Catherine Fleegle called him and told him that Palmer had her car and that she had tried to call Palmer on his cell phone. The detective also stated that Fleegle admitted her name appeared as "Cat" on Palmer's cell phone caller identification, providing the detective with evidence that the cell phone found in the car belonged to Palmer.

We note that counsel failed to object to the detective's testimony. Thus, we review this error under the plain error doctrine. Plain error does not exist unless the appellant establishes that the outcome of the trial clearly would have

¹⁹*State v. Elko*, Cuyahoga App. No. 83641, 2004-Ohio-5209. See, also, *State v. Hardwick*, Cuyahoga App. No. 79701, 2002-Ohio-496.

been different but for the trial court's allegedly improper actions.²⁰ We conclude plain error did not occur.

The detective's statements did not constitute hearsay. The statements were not admitted to prove the truth of the matter asserted, but to prove Palmer's link to the get-away car. Moreover, defense counsel opened the door to this line of questioning when on cross-examination he accused the detective of assuming the cell phone found in the car was Palmer's. On redirect, the state asked Palmer to explain how he knew the cell phone was Palmer's and the detective responded by detailing his conversation with Ms. Fleegle. Therefore, the hearsay was not used to prove the truth of the matter, i.e. that Palmer was using Fleegle's car or that her name appeared as "Cat" on the caller ID. Instead, it was used to prove that the phone was Palmer's. Because the statements were not hearsay, Palmer's right to confrontation was not implicated; therefore, *Crawford v. Washington*²¹ does not apply.²²

Even if the statements were deemed to be hearsay, they were not prejudicial. George Todorovich had positively identified Palmer as the man he observed break into his brother's house and who he saw getting into the driver's

²⁰*State v. Waddell*, 75 Ohio St.3d 163, 166, 1996-Ohio-100.

²¹(2004), 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177.

²²*State v. Smith, Jr.*, 162 Ohio App.3d 208, 2005-Ohio-35.

side of the Grand Prix. Therefore, given the overwhelming evidence against Palmer, we conclude the statement, even if hearsay, did not influence the jury. Accordingly, Palmer's third assigned error is overruled.

Ineffective Assistance of Counsel

In his fourth assigned error, Palmer argues his counsel was ineffective for failing to object to the detective's hearsay testimony. We disagree.

We review a claim of ineffective assistance of counsel under the two-part test set forth in *Strickland v. Washington*.²³ Under *Strickland*, a reviewing court will not deem counsel's performance ineffective unless a defendant can show his lawyer's performance fell below an objective standard of reasonable representation and that prejudice arose from the lawyer's deficient performance.²⁴ To show prejudice, a defendant must prove that, but for his lawyer's errors, a reasonable probability exists that the result of the proceedings would have been different.²⁵ Judicial scrutiny of a lawyer's performance must be highly deferential.²⁶

²³(1984), 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052.

²⁴*State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph one of syllabus.

²⁵*Id.* at paragraph two of syllabus.

²⁶*State v. Sallie*, 81 Ohio St.3d 673, 674, 1998-Ohio-343.

We already addressed Palmer's argument regarding the hearsay and have determined counsel's failure to object to the hearsay did not result in prejudicial error. Therefore, Palmer has not shown but for his attorney's error, the result of the proceedings would have been different. Accordingly, Palmer's fourth assigned error is overruled.

Judgment affirmed.

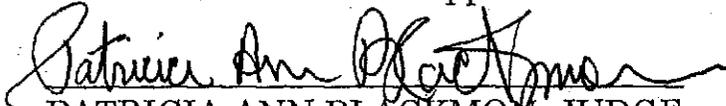
It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

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

A certified copy of this entry shall constitute the mandate pursuant to

Rule 27 of the Rules of Appellate Procedure.


PATRICIA ANN BLACKMON, JUDGE

MARY J. BOYLE, J., CONCURS;
CHRISTINE T. McMONAGLE, P.J., DISSENTS
(SEE ATTACHED DISSENTING OPINION.)

CHRISTINE T. McMONAGLE, J., DISSENTING:

Respectfully, I dissent as to the finding of guilt in count three, theft, in violation of R.C. 2913.02.

Palmer was charged in a three-count indictment. The first count was burglary in violation of R.C. 2911.12; the second count was theft in violation of R.C. 2913.02, specifically, a 9mm handgun; and the third count was again theft in violation of R.C. 2913.02, specifically, a coin collection and a gun case. As part of count three, it was alleged that the value of the property was more than \$500 but less than \$5,000. The defendant was found guilty of all three counts.

The only testimony at trial as to the value of the coin collection and gunbox is found in the testimony of the owner, Jason Todorovich, at Tr. 199, as follows:

"Q. How long had you been building this collection?

"A. I really haven't been building it. I got it from my grandfather, so I just put it away. I'm not sure of the value of them, but they are all silver.

"Q. Do you know if your grandfather ever estimated the value of them?

"A. There is some prices on some of them. I bought a book to take a look at the value of some of them, but never had a chance.

"Q. Would you say that the value of this is over \$500?

"A. Of everything on the table? Oh, yeah.

"Q. On the table, we have got the coins, your gun, the gunbox and a lockbox, right?

"A. Yes."

In short, Todorovich's estimate that his property was worth over \$500 included the 9mm handgun that was the subject of the theft in count two, and for which Palmer was convicted and sentenced.

There is no testimony as to the value of the coin collection and the gunbox; we know only that those items *plus* a 9mm handgun and a lockbox are worth over \$500. That is insufficient to prove the felony. Therefore, pursuant to *State v. Reese*, 165 Ohio App.3d 21, 2005-Ohio-7075, 844 N.E.2d 873, I would find that the State did not present sufficient evidence as to the value of the coins and the gunbox, would reduce the conviction in count three to a first degree misdemeanor theft, and remand the matter for resentencing only.