

IN THE SUPREME COURT OF OHIO

08-2127

STATE OF OHIO

Plaintiff-Appellant,

ON APPEAL FROM THE LOGAN  
COUNTY COURT OF APPEALS, THIRD  
APPELLATE DISTRICT

v.

JOHN ROHRBAUGH,

Defendant-Appellant.

COURT OF APPEALS

CASE NO.: 8-07-28

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MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT STATE OF OHIO

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## WHY LEAVE TO APPEAL SHOULD BE GRANTED

This case involves a felony and raises issues of great public and general interest in the wake of *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624.

In *State v. Colon*, the Supreme Court decided that structural error occurs when a defendant is tried by the State with a defective indictment, and the defective indictment leads to numerous errors throughout the trial proceeding which in turn results in prejudice to the Defendant. The dicta in *Colon* raised many questions and concerns across the courts of Ohio.

In the case at hand, the Third Appellate District considered *Colon* when it decided that plain error is committed when a charge in the indictment is amended by agreement of the parties and the amendment changes the name or identity of the crime charged. The Third District determined that amendments to charges in the indictments which change the substance of the charge must be considered by the grand jury or the defendant must waive his right to have the amended charge considered by the grand jury.

The Third District's decision throws into question the validity of thousands of plea bargains that have occurred in the State of Ohio. Plea bargains are struck every day to attain efficient resolution of criminal cases. It is a process that has long been practiced because it exercises no prejudice to either party, but rather creates a mutually beneficial resolution. During the plea bargaining process, indictments are amended to reduced charges which the grand jury did not consider. Indictments are amended to completely different charges which the grand jury did not consider. However, of utmost

consideration in this process is that the Defendant does not suffer prejudice by the amendments, rather he or she is benefitted by the amendments.

When there is no prejudice to the Defendant, how can a plain error analysis apply? A plain error analysis requires a showing that the Defendant suffered actual prejudice, that the prejudice affected the outcome of the entire proceedings. In this case the Defendant agreed to the amended charge to his own benefit. The amended charge contained each and every element that the State would have had to prove if the case had gone to trial. As there was no prejudice to the Defendant, a plain error analysis should not apply.

Furthermore, there is a conflict among the appellate courts over this issue. While the Third District found plain error in the amended indictment, the Eighth District, when confronted with the same issue, declined to use a plain error analysis. The Eighth District found that if there was any error in amending a charge in an indictment it only amounts to invited error. *State v. Robinson*, 2008 Ohio 3972.

Clarification of this issue will create uniformity throughout the State of Ohio on how to proceed in plea bargaining. For these reasons, the State requests the Court to accept this case on discretionary appeal.

## PROPOSITION OF LAW

### Proposition of Law I:

When the parties agree to amend a charge in an indictment pursuant to a plea agreement and the amendment changes the name or identity of the crime charged, but the defendant has not been misled or prejudiced by the amendment, a plain error analysis does not apply, and if there is error, it is only invited error.

## STATEMENT OF THE CASE

On March 13, 2007 the Defendant was indicted by the Logan County Grand Jury on two counts of Breaking & Entering, two felony counts of Theft, three misdemeanor counts of Theft, and one count of possession of cocaine.

Count I of the indictment charged the Defendant with Breaking and Entering, in violation of R.C.2911.13(A) for breaking into First Check Cash Advance at 1447 S. Main St. in Bellefontaine and stealing the deposits.

On July 3, 2007, the Defendant entered a guilty plea to Count I which was amended by agreement of the parties to Receiving Stolen Property in violation of R.C. 2913.51, a felony of the fifth degree. The Defendant also pled guilty to Count VIII, possession of cocaine, a felony of the fifth degree.

On July 30, 2007, the Defendant was sentenced to eleven months in prison on both counts which were ordered to run concurrent. The Defendant was also ordered to pay restitution in the amount of \$4,145.81 to the victim, First Check Cash Advance.

On December 24, 2007, the Defendant filed a notice of appeal along with a motion for leave to file a delayed appeal. On January 10, 2008, the Court of Appeals granted the Defendant's motion to file a delayed appeal. The Defendant's sole assignment of error alleged that the trial court erred in ordering the Defendant to pay the amount of \$4,145.81 in restitution.

On September 22, 2008, the Court of Appeals didn't address the Defendant's sole assignment of error, but instead used a plain error analysis to determine whether the Defendant's plea to an amended charge was proper. The Court of Appeals found that the trial court was without authority to amend the charge the Defendant pled guilty

to and remanded the case back to the trial court with an instruction to vacate the Defendant's guilty plea.

### **STATEMENT OF FACTS**

On February 2, 2007, the First Check Cash Advance store in Bellefontaine was broken into in the middle of the night. (Suppr. Tr. at 42). Cash and checks totaling over \$16,000.00 were stolen. (Sent. Tr. at 9). An alarm went off in the store and the alarm company notified the police department at 2:47 AM. (Suppr. Tr. at 45). A witness at the scene told law enforcement that he saw a male suspect flee the scene in a dark colored Ford Mustang. (Suppr. Tr. at 42, 47). Based on evidence found at the scene, Detectives suspected that the perpetrator had some inside knowledge about the business prior to committing the offense. (Suppr. Tr. at 42). The investigation eventually led the Detectives to the Defendant because he had a friend, Heather Pulfer, that worked at the store. (Suppr. Tr. at 42-43).

Detectives continued gathering evidence and then obtained an arrest warrant for the Defendant. (Suppr. Tr. at 47). After filing the arrest warrant with the Bellefontaine Municipal Court on February 2, 2007, the Municipal Court called Detective Sebring with the Bellefontaine Police Department and told him that the Defendant was at Municipal Court paying a fine in another case. (Suppr. Tr. at 47). Detective Sebring went back to the Municipal Court and placed the Defendant under arrest. (Suppr. Tr. at 48). During a search incident to arrest, the police found \$1,176 in cash and a National City Bank money wrapper on the Defendant's person. (Suppr. Tr. at 48). The money wrapper was of the same type that First Check Cash Advance has on their bundles of cash.

Detectives learned that the Defendant had driven a friend's Toyota to Municipal Court. (Suppr. Tr. at 50). When the Detectives looked through the driver's side window of the Toyota, they saw a large amount of cash underneath the driver's seat spilling out onto the floorboard in front of the seat. (Suppr. Tr. at 50-52). The money was also wrapped in National City Bank money wrappers. (Suppr. Tr. at 51, 52). The vehicle was towed and inventoried. (Suppr. Tr. at 51). Officers recovered \$5,227 in cash from inside the vehicle. (Suppr. Tr. at 52). First Check Cash Advance was able to identify the money as theirs, due to the fact that one of their employees had written their initials on one of the \$50.00 dollar bill money wrappers. All of this was money was recovered from the Defendant just hours after the break-in occurred.

Because the Defendant did not dispute that he had the stolen money on his person, he negotiated a plea to receiving stolen property (F5) rather than breaking and entering (F5).

## ARGUMENT

### PROPOSITION OF LAW :

When the parties agree to amend a charge in an indictment pursuant to a plea agreement and the amendment changes the name or identity of the crime charged, but the defendant has not been misled or prejudiced by the amendment, a plain error analysis does not apply, and if there is error, it is only invited error.

**A. *A plain error analysis does not apply when the Defendant does not suffer prejudice.***

On June 25, 2007, a plea hearing was held in this case. The Defendant negotiated to plead guilty to receiving stolen property (F5) and possession of cocaine (F5) and have the remainder of the charges dismissed. By agreement of the parties, the State moved to amend count 1 of the indictment from breaking and entering to receiving stolen property. The trial court granted the motion. The Defendant did not object to the amendment, and did not appeal his conviction to the amended charge.

The appellate court decided that plain error is committed when a charge in the indictment is amended by agreement of the parties without a grand jury waiver and the amendment changes the name or identity of the crime charged. The appellate court looked at the amended charge and analyzed the procedure using Criminal Rule 7(D).

Criminal Rule 7(D) states in pertinent part:

(D) Amendment of indictment, information, or complaint. The court may at any time before, during, or after a trial amend the indictment, information, complaint, or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged. If any amendment is made to the substance of the indictment, information, or complaint, or to cure a variance between the indictment, information, or complaint and the proof, the defendant is entitled to a discharge of the jury

on the defendant's motion, if a jury has been impanelled, and to a reasonable continuance, unless it clearly appears from the whole proceedings that the defendant has not been misled or prejudiced by the defect or variance in respect to which the amendment is made, or that the defendant's rights will be fully protected by proceeding with the trial, or by a postponement thereof to a later day with the same or another jury.

The appellate court found that the trial court was without authority to amend the indictment because amending count I from breaking and entering to receiving stolen property changed the name or identity of the crime charged.

The appellate court did not analyze the rest of the rule which addresses a defendant's right when an amendment does change the name or identity of the crime charged. The rule goes on to state that if an amendment is made to the substance of the indictment, the defendant is entitled to a discharge of the jury on the defendant's motion or to a reasonable continuance, **"unless it clearly appears from the whole proceedings that the defendant has not been misled or prejudiced by the defect or variance in respect to which the amendment is made . . ."** Criminal Rule 7(D) (emphasis added). The rule recognizes the fact that an amendment can be made to an indictment that changes its name or identity and that a trial court does not err in continuing with the proceedings as long as the defendant does not suffer any prejudice from the amendment.

In the case at hand, the amendment to the indictment was by agreement of the parties. The Defendant was not misled or prejudiced by the amended indictment. Rather, the Defendant received the benefit of his plea bargain by having some of the charges dismissed. It is clear from the whole proceedings that the Defendant was not

mised or prejudiced by the amendment. Where the Defendant has not suffered any prejudice, how can there be a miscarriage of justice?

Criminal Rule 52(B) states: "Plain error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." The United States Supreme Court explained that errors affecting substantial rights means the defendant suffered prejudice. *United States v. Olano*, 507 U.S. 725, 733 (U.S. 1993). Specifically, the Court found that "[t]he third and final limitation on appellate authority under Rule 52(b) is that the plain error "affect substantial rights." *Id.* "This is the same language employed in Rule 52(a), and in most cases it means that the error must have been prejudicial: It must have affected the outcome of the district court proceedings." *Id.* "Normally, although perhaps not in every case, the defendant must make a specific showing of prejudice to satisfy the "affecting substantial rights" prong of Rule 52(b)." *Id.*

In this case the amendment did not affect the outcome of the proceedings. Rather, the defendant was benefitted by the amendment to the indictment, not prejudiced. The State respectfully requests this Court to take jurisdiction to consider this issue. When the parties agree to amend the indictment by plea agreement, and the Defendant does not suffer any prejudice, no error has occurred. It has been a fundamental practice between the State and Defense bar to negotiate pleas in criminal cases. It has also been the practice for trial courts all around the state to amend the charges in the indictment by motion of the parties to the agreed upon criminal charge in a plea agreement. The appellate court's ruling throws into question thousands of plea agreements all over the State.

**B. *If there is any error in amending the indictment it only amounts to invited error.***

The Third District's decision is in conflict with the Eighth Appellate District's recent decision in *State v. Robinson*, 2008 Ohio 3972. The Eighth District declined to use a plain error analysis when considering the issue of a plea to an amended indictment.

In *State v. Robinson*, 2008 Ohio 3972, the State made a motion to amend the indictment pursuant to a plea agreement. The defendant was originally charged in the indictment with murder. By agreement of the parties, the charge in the indictment was amended to involuntary manslaughter. On appeal, the defendant argued that only the grand jury could amend the indictment and that the trial court erred by amending the indictment from murder to involuntary manslaughter. The Eighth Appellate District found that because the parties expressly amended the indictment as part of the plea agreement Crim.R. 7 doesn't apply. *Id.* Furthermore, the Eighth District found that even had there been error, it was invited by the defendant. The invited error doctrine states that "a party is not entitled to take advantage of an error that he himself invited or induced." *State v. Robinson*, 2008 Ohio 3972, citing *State ex rel. Kline v. Carroll*, 96 Ohio St.3d 404, 2002 Ohio 4849, 775 N.E.2d 517; *State v. Smith*, 148 Ohio App.3d 274, 2002 Ohio 3114, P30, 772 N.E.2d 1225. By agreeing to plead to a crime that was not a lesser included offense of the originally-charged crime, the Defendant invited the error she has raised on appeal. *Id.* See also *State v. Keaton* (July 14, 2000), Clark App. No. 98 CA 99 (rejecting argument that plea to robbery which is not a lesser included offense

of originally-charged count of aggravated robbery was error on grounds that petitioner's conduct by pleading guilty while represented by counsel constituted a waiver of his right to a corrected indictment). Accordingly, the Eighth District implicitly found that a plain error analysis does not apply when the parties agree to amend the indictment, even when the amendment changes the name and identity of the charge.

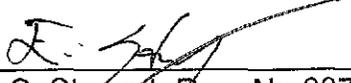
### CONCLUSION

The Appellant, State of Ohio, respectfully request this Court to grant discretionary appeal. A decision from the Supreme Court will resolve an issue left over from *State v. Colon* and give guidance to the State, Defense Counsel, and the Trial Courts in the plea bargaining process.

Respectfully submitted,

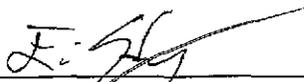
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### CERTIFICATE OF SERVICE

This is to certify that a copy of this Memorandum was served upon Marc S. Triplett, Attorney at Law, 332 S. Main St., Bellefontaine, Ohio 43311, by first class mail on this 31<sup>st</sup> day of October, 2008.

  
Eric C. Stewart,  
Chief Assistant Prosecutor

## APPENDIX

1. Appellate Court decision

COURT OF APPEALS  
THIRD APPELLATE DISTRICT  
LOGAN COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE,

*CA*  
CASE NO. 8-07-28

v.

JOHN ROHRBAUGH,

OPINION

DEFENDANT-APPELLANT.

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CHARACTER OF PROCEEDINGS: An Appeal from Common Pleas Court

JUDGMENT: Judgment Reversed and Cause Remanded

DATE OF JUDGMENT ENTRY: September 22, 2008

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**FILED**  
COURT OF APPEALS  
SEP 24 2008

DOTTIE TUTTLE  
CLERK, LOGAN COUNTY, OHIO

**ROGERS, J.,**

{¶1} Defendant-Appellant, John Rohrbaugh, appeals the judgment of conviction and sentence of the Logan County Court of Common Pleas which, in part, ordered him to pay restitution in conjunction with his conviction for receiving stolen property relative to a theft from First Check Cash Advance. On appeal, Rohrbaugh claims that the trial court wrongly attributed damages to him beyond the scope of his crime when calculating restitution. Based upon the following, Rohrbaugh's guilty plea should be vacated and the matter remanded to the trial court for further proceedings consistent with this opinion.

{¶2} The charges pertinent to this appeal arose out of the theft of over \$16,000 in cash, checks, and money orders from the First Check Cash Advance Store in Bellefontaine, Ohio. In February 2007, someone broke into the store in the middle of the night. A witness told law enforcement that he saw a male suspect leave the scene in a dark colored vehicle. Based on evidence found at the scene, detectives suspected that the perpetrator had inside knowledge about the business prior to committing the offense. The investigation led the detectives to Rohrbaugh, whose girlfriend, Heather Pulfer, worked at the store.

{¶3} The police arrested Rohrbaugh and found \$1,176 on his person and \$5,227 in cash inside his vehicle, along with money wrappers that identified the cash in the vehicle as money that was taken from First Check Cash Advance. Rohrbaugh claimed that Pulfer had given him the \$5,227 and that the \$1,176 was

money he received from cashing his paycheck. Police recovered the \$5,227 and returned it to First Check Cash Advance, and held the \$1,176 in evidence.

{¶4} In March 2007, the Logan County Grand Jury indicted Rohrbaugh on the following: Count One – breaking and entering in violation of R.C. 2911.13(A), a felony of the fifth degree; Count Two – theft in violation of R.C. 2913.02(A)(1), a felony of the fourth degree; Count Three – theft from the elderly or disabled in violation of R.C. 2913.02(A)(1); Count Four – breaking and entering in violation of R.C. 2911.13(A); Counts Five, Six, Seven – three misdemeanor counts of theft in violation of R.C. 2913.13.02(A)(1); and, Count Eight – possession of cocaine in violation of R.C. 2925.11(A), a felony of the fifth degree. Only Counts One and Two are relative to the break-in and theft at First Check Cash Advance; Counts Three through Eight pertain to unrelated incidents.

{¶5} Subsequently, Rohrbaugh entered a plea of not guilty to all of the counts in the indictment.

{¶6} In July 2007, the State moved to amend the indictment to change Count One from breaking and entering in violation R.C. 2911.13(A), to receiving stolen property in violation of R.C. 2913.51, a felony of the fifth degree, and included language alleging that the value of the property was more than \$500 but less than \$5,000. As part of a plea agreement, Rohrbaugh then entered a guilty plea to the amended count of receiving stolen property in violation of R.C. 2913.51, and to the count of possession of drugs in violation of R.C. 2925.11(A),

also a felony of the fifth degree. The remaining counts in the indictment were dismissed.

{¶7} Thereafter, the trial court held a sentencing hearing and heard testimony from a representative of First Check Cash Advance, Jason Stonerock, concerning the amount of losses the business suffered as a result of the break-in and theft. Stonerock testified that the total losses were \$16,374.79, including cash, checks, and money orders; plus, \$179.70 to repair the broken glass in the front door and a \$5 stop payment fee. After subtracting the \$5,227 cash recovered from Rohrbaugh and the value of some of the checks that were reissued, Stonerock testified that the store's remaining net loss was \$4,733.81, including the cost of repairs.

{¶8} Rohrbaugh then addressed the trial court and apologized for his actions, but claimed that he was only guilty of receiving the stolen property, and that someone else had committed the break-in and theft. Rohrbaugh's attorney objected to the matter of restitution at the hearing, stating that "[w]ith respect to the money that was in the car, it's Mr. Rohrbaugh's position that that is the money that he received, that is the money that he is guilty of receiving, and it is Mr. Rohrbaugh's position that there should not be any restitution beyond those funds for the reasons that I've outlined; that he was not involved in the breaking and entering \* \* \*." (Sent. Tr., p. 4).

{¶9} In August 2007, the trial court sentenced Rohrbaugh to an eleven-month prison term on each of the two remaining counts, receiving stolen property and possession of cocaine. The trial court ordered Rohrbaugh to serve the sentences concurrently, with credit for one hundred eighty-eight days already served.<sup>1</sup> The trial court also ordered Rohrbaugh to pay restitution to First Check Cash Advance in the amount of \$4,733.81.<sup>2</sup>

{¶10} It is from this judgment that Rohrbaugh appeals,<sup>3</sup> presenting the following assignment of error for our review.

**THE TRIAL COURT ERRED WHEN IT ORDERED APPELLANT TO MAKE RESTITUTION IN THE AMOUNT OF \$4,733.81.**

{¶11} On appeal, Rohrbaugh claims that the trial court made several errors in determining the amount of restitution he should pay. Rohrbaugh maintains that the trial court did not determine his ability to pay restitution; that it failed to limit restitution to the amount of damages caused by the offense; and, that it should

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<sup>1</sup> The trial judge noted that Rohrbaugh was subject to community control in Franklin County at the time of his offenses. The trial court stated that, if Franklin County revoked his community control, this current sentence would be consecutive to any sentence imposed by Franklin County. The trial court also informed Rohrbaugh that he would be subject to a three-year period of post release control.

<sup>2</sup> The State and Rohrbaugh had previously agreed that the \$1,176 found on his person represented the proceeds from his paycheck; that Rohrbaugh would be permitted to retain one half of that money; and, that the other half would be allocated as directed by the trial court. The trial court stated that this half of those funds, \$588, should be applied to the \$4,733.81 restitution, reducing the balance that Rohrbaugh was ordered to pay the victim to \$4,145.81.

<sup>3</sup> The original Sentencing Entry was filed on August 6, 2007. On August 21, 2007, this judgment entry was amended to correct a typographical error. Rohrbaugh appealed from the amended judgment entry on September 20, 2007. In October 2007, this Court dismissed this untimely appeal from the nunc pro tunc entry for lack of jurisdiction. Rohrbaugh subsequently filed a motion for leave to file a delayed appeal, which this Court granted in January 2008.

have apportioned the amount of restitution between all of the individuals allegedly involved in the crime

{¶12} Initially, before we review this assignment of error, we must address the issue of whether Rohrbaugh pled to a properly amended indictment, with respect to the receiving stolen property count. On July 3, 2007,<sup>4</sup> Rohrbaugh changed his plea of not guilty to a plea of guilty to a reduced count.

{¶13} In the Judgment Entry/Change of Plea, the trial court notes that the State moved to amend the indictment to Receiving Stolen Property in violation of R.C. 2913.51(A), a felony of the fifth degree. The language of the amendment itself does not specify what count is being amended. However, later in the Judgment Entry/Change of Plea, after the trial court has informed Rohrbaugh of the rights he is waiving by pleading, the trial court refers to the Receiving Stolen Property count as Count One.

{¶14} Rohrbaugh entered a guilty plea to Count One, Receiving Stolen Property and Count Eight, Possession of Drugs. The trial court accepted the plea and found Rohrbaugh guilty. All remaining charges were dismissed.

{¶15} To determine if the amendment of the indictment was proper, we first turn to a defendant's right to an indictment by a grand jury. The Ohio Constitution provides that "no person shall be held to answer for a capital, or

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<sup>4</sup> This Court was not provided with a transcript of the change of plea hearing.

otherwise infamous, crime, unless on presentment or indictment of a grand jury.”

Section 10, Article I, Ohio Constitution.

The material and essential facts constituting an offense are found by the presentment of the grand jury; and if one of the vital and material elements identifying and characterizing the crime has been omitted from the indictment such defective indictment is insufficient to charge an offense, and cannot be cured by the court, as such a procedure would not only violate the constitutional rights of the accused, but would allow the court to convict him on an indictment essentially different from that found by the grand jury.

*State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, at ¶17; *Harris v. State* (1932), 125 Ohio St. 257, 264.

{¶16} Additionally, Criminal Rule 7(D) provides the proper procedure for amendment of an indictment, including when an indictment can be amended without additional involvement of the grand jury, as follows:

The court may at any time before, during, or after a trial amend the indictment, information, complaint, or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, *provided no change is made in the name or identity of the crime charged*. If any amendment is made to the substance of the indictment, information, or complaint, or to cure a variance between the indictment, information, or complaint and the proof, the defendant is entitled to a discharge of the jury on the defendant's motion, if a jury has been impaneled, and to a reasonable continuance, unless it clearly appears from the whole proceedings that the defendant has not been misled or prejudiced by the defect or variance in respect to which the amendment is made, or that the defendant's rights will be fully protected by proceeding with the trial, or by a postponement thereof to a later day with the same or another jury. Where a jury is discharged under this division, jeopardy shall not attach

to the offense charged in the amended indictment, information, or complaint. No action of the court in refusing a continuance or postponement under this division is reviewable except after motion to grant a new trial therefore is refused by the trial court, and no appeal based upon such action of the court shall be sustained nor reversal had unless, from consideration of the whole proceedings, the reviewing court finds that a failure of justice resulted.

(Emphasis added).

{¶17} “An amendment to the indictment that changes the name or identity of the crime is unlawful whether or not the defendant was granted a continuance to prepare for trial; further, a defendant need not demonstrate that he suffered any prejudice as a result of the forbidden amendment.” *State v. Fairbanks*, 172 Ohio App.3d 766, 771, 2007-Ohio-4117, citing *Middletown v. Blevins* (1987), 35 Ohio App.3d 65, 67. The court in *Fairbanks* continued, finding that “[a] trial court commits reversible error when it permits an amendment that changes the name or identity of the crime charged.” *Fairbanks*, 172 Ohio App.3d at 771, citing *State v. Kittle*, 4th Dist. No. 04CA41, 2005-Ohio-3198, at ¶12; *State v. Headley* (1983), 6 Ohio St.3d 475, 478-479.

{¶18} Finally, this Court has previously held that, where “two offenses contain different elements” requiring independent proof, the identity of the crime has been changed. *State v. Duke*, 3d Dist. Nos. 1-02-64, 1-02-92, 1-02-93, 2003-Ohio-2386, ¶10.

{¶19} In the present case, Rohrbaugh was initially indicted for Breaking and Entering in violation of R.C. 2911.13(A), which provides: “No person by force, stealth, or deception, shall trespass in an unoccupied structure, with purpose to commit therein any theft offense, as defined in section 2913.01 of the Revised Code, or any felony.” This count was amended to Receiving Stolen Property in violation of R.C. 2913.51, which provides: “No person shall receive, retain, or dispose of property of another knowing or having reasonable cause to believe that the property has been obtained through commission of a theft offense.” Not more than a cursory analysis is required to determine that these two counts contain different elements, requiring independent proof.

{¶20} In the present case, we note that Rohrbaugh pled guilty to the counts in the defective indictment. Rohrbaugh did not raise any objection to the validity of the indictment prior to pleading guilty. Where a defendant fails to object to the form of the indictment before trial as required by Crim.R. 12(C), he waives all but plain error. *State v. Frazier* (1995), 73 Ohio St.3d 323, 332, 1995-Ohio-235; *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391.<sup>5</sup>

{¶21} Pursuant to Crim.R. 52(B), “[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” *State v. Barnes* (2002), 94 Ohio St.3d 21, 2002-Ohio-68. The Ohio

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<sup>5</sup> We note that these cases were decided under a prior version of Crim.R. 12, citing specifically to Crim.R. 12(B)(2). However, Crim.R. 12(C)(2) now contains a substantially similar provision.

Supreme Court, in *Barnes*, articulated a three part test for the finding of plain error.

**First, there must be an error, *i.e.*, a deviation from a legal rule. Second, the error must be plain. To be “plain” within the meaning of Crim.R. 52(B), an error must be an “obvious” defect in the trial proceedings. Third, the error must have affected “substantial rights.” We have interpreted this aspect of the rule to mean that the trial court's error must have affected the outcome of the trial.**

*Barnes*, 94 Ohio St.3d at 27 (internal citations omitted).

{¶22} Thus, “[o]nly extraordinary circumstances and the prevention of a miscarriage of justice warrant a finding of plain error.” *State v. Brown*, 3d Dist. No. 8-02-09, 2002-Ohio-4755, citing *State v. Long* (1978), 53 Ohio St.2d 91, at paragraph three of the syllabus.

{¶23} In the present case, we find that the improper amendment of the indictment rises to the level of an obvious defect. Moreover, we believe that Rohrbaugh had a constitutional right to be indicted by the grand jury. That right was violated by the amendment to the indictment, changing Count One of Breaking and Entering to the completely different offense of Receiving Stolen Property. As stated by the United States Supreme Court:

**To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him.**

*Russell v. United States* (1962), 369 U.S. 749, 770.

{¶24} Finally, we note that the Judgment Entry/Change of Plea contains no waiver of Rohrbaugh's right to be properly indicted by the grand jury on the Receiving Stolen Property count. Just as a defendant can waive his constitutional rights under Crim.R. 11, a defendant may waive his right to a grand jury indictment. Moreover, we recognize that, had Rohrbaugh pled to a Bill of Information, instead of to an amended indictment, he would have waived his right to be indicted by the grand jury. However, we find no evidence of a waiver in the present case.

{¶25} Accordingly, Rohrbaugh's guilty plea should be vacated and the matter remanded to the trial court for further proceedings consistent with this opinion.

*Judgment Reversed and  
Cause Remanded.*

**SHAW, P.J., and WILLAMOWSKI, J., concur.**