

IN THE SUPREME COURT OF OHIO

08-2249

STATE OF OHIO
Plaintiff-Appellant,

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

v.

COURT OF APPEALS
CASE NO.: 8-07-28

JOHN ROHRBAUGH,
Defendant-Appellee.

NOTICE OF CERTIFIED CONFLICT
S.C.T. PRAC. R. IV, § 1

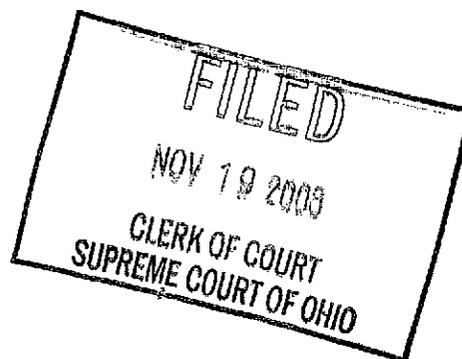
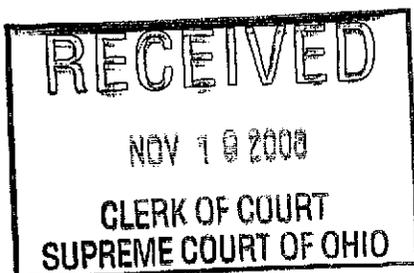
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NOTICE OF CERTIFIED CONFLICT

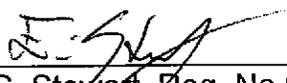
Pursuant to S.Ct. Prac. R. IV., §1, Appellant State of Ohio hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Logan County Court of Appeals, Third Appellate District, entered in *State v. Rohrbaugh*, case number 8-07-28 on November 13, 2008.

The Third Appellate District has certified this case to be in conflict with *State v. Robinson*, 8th Dist. No. 90411, 2008-Ohio-3972. Attached is a copy of the court of appeals order certifying a conflict and copies of the conflicting court of appeals opinions.

Respectfully submitted,

GERALD L. HEATON
Logan County Prosecuting Attorney

By:


Eric C. Stewart, Reg. No 0071094
Chief Assistant Prosecutor
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PROOF OF SERVICE

This is to certify that a copy of this Notice of Certified Conflict was served upon Attorney Marc S. Triplett, Counsel for Appellee, by placing it in the box provided for such service in the Common Pleas Court of Logan County, Ohio on November 17, 2008.


Eric C. Stewart,
Chief Assistant Prosecutor

IN THE COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF OHIO

LOGAN COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE, COURT OF APPEALS

CA
CASE NO. 8-07-28

v.

JOHN ROHRBAUGH,

FILED
NOV 13 2008
DOTTIE TUTTLE
CLERK, LOGAN COUNTY, OHIO

J U D G M E N T
E N T R Y

DEFENDANT-APPELLANT.

This cause comes on for determination of appellee's motion to certify a conflict as provided in App.R. 25 and Article IV, Sec. 3(B)(4) of the Ohio Constitution, and appellant's memorandum in opposition.

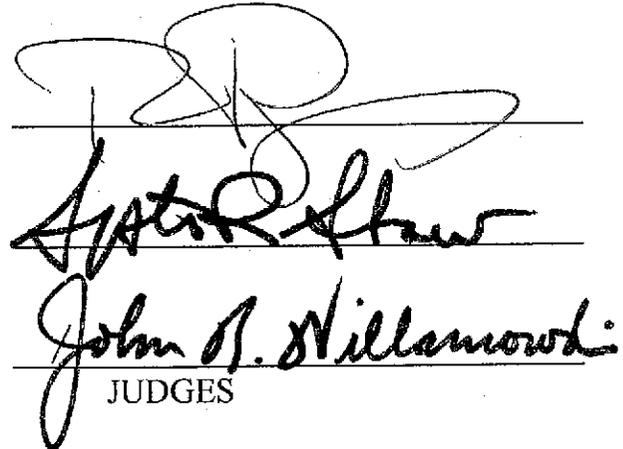
Upon consideration the court finds that the judgment in the instant case is in conflict with the judgment rendered in *State v. Robinson*, 8th Dist. No. 90411, 2008-Ohio-3972.

Accordingly, the motion to certify is well taken and the following issue should be certified pursuant to App.R. 25:

May a defendant consent to a negotiated plea to an offense that was neither indicted, nor a lesser included offense of the indicted offense, without a waiver of indictment pursuant to Criminal Rule 7(A) and Section 10, Article I of the Ohio Constitution?

34-122

It is therefore **ORDERED** that appellee's motion to certify a conflict be, and hereby is, granted on the certified issue set forth hereinabove.



John A. Hillamowd

JUDGES

DATED: November 13 , 2008

/jlr

1 of 1 DOCUMENT

STATE OF OHIO, PLAINTIFF-APPELLEE, v. JOHN ROHRBAUGH, DEFENDANT-APPELLANT.

CASE NO. 8-07-28

COURT OF APPEALS OF OHIO, THIRD APPELLATE DISTRICT, LOGAN COUNTY

2008 Ohio 4781; 2008 Ohio App. LEXIS 4020

September 22, 2008, Date of Judgment Entry

PRIOR HISTORY: [**1]

CHARACTER OF PROCEEDINGS: An Appeal from Common Pleas Court.

DISPOSITION: Judgment Reversed and Cause Remanded.

COUNSEL: MARC S. TRIPLETT, Attorney at Law, Bellefontaine, Ohio, For Appellant.

ERIC S. STEWART, Chief Assistant Prosecuting Attorney, Bellefontaine, Ohio, For Appellee.

JUDGES: ROGERS, J. SHAW, P.J., and WILLAMOWSKI, J., concur.

OPINION BY: ROGERS

OPINION

ROGERS, J.,

[*P1] 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.

[*P2] 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 [**2] 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.

[*P3] 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.

[*P4] 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)*; [**3] Counts Five, Six, Seven -- three misdemeanor counts of theft in violation of *R.C. 2913.02(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.

[*P5] Subsequently, Rohrbaugh entered a plea of not guilty to all of the counts in the indictment.

[*P6] In July 2007, the State moved to amend the indictment to change Count One from breaking and en-

tering 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.

[*P7] Thereafter, the trial court held a sentencing hearing and heard testimony from a representative of First Check Cash Advance, [**4] 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.

[*P8] 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).

[*P9] In August [**5] 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.¹ The trial court also ordered Rohrbaugh to pay restitution to First Check Cash Advance in the amount of \$ 4,733.81.²

1 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.

2 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 [**6] the balance that Rohrbaugh was ordered to pay the victim to \$ 4,145.81.

[*P10] It is from this judgment that Rohrbaugh appeals,³ 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.**

3 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.

[*P11] 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 have apportioned the amount of restitution between all of the individuals allegedly involved in the crime

[*P12] Initially, before we review this assignment of [**7] 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, 2007,⁴ Rohrbaugh changed his plea of not guilty to a plea of guilty to a reduced count.

4 This Court was not provided with a transcript of the change of plea hearing.

[*P13] 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 lan-

guage 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.

[*P14] 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.

[*P15] 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 [**8] shall be held to answer for a capital, or 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 P17, 885 N.E.2d 917; Harris v. State (1932), 125 Ohio St. 257, 264, 181 N.E. 104.

[*P16] 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 [9] 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 va-**

riance 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 [10] of the whole proceedings, the reviewing court finds that a failure of justice resulted.**

(Emphasis added).

[*P17] "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, 876 N.E.2d 1293, citing Middletown v. Blevins (1987), 35 Ohio App.3d 65, 67, 519 N.E.2d 846.* 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 P12; State v. Headley (1983), 6 Ohio St.3d 475, 478-479, 6 Ohio B. 526, 453 N.E.2d 716.*

[*P18] 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. Dukes, 3d Dist. Nos. 1-02-64, 1-02-92, 1-02-93, 2003 Ohio 2386, P10.*

[*P19] In the present case, Rohrbaugh was initially indicted for Breaking and Entering in violation of *R.C. 2911.13(A)*, which [**11] 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.

[*P20] 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, 652 N.E.2d 1000; *State v. Skatzes*, 104 Ohio St.3d 195, 2004 Ohio 6391, 819 N.E.2d 215.⁵

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

[*P21] 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, 759 N.E.2d 1240. The Ohio 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).

[*P22] 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, 372 N.E.2d 804, at paragraph three of the syllabus.

[*P23] In the present case, we find that the improper amendment of the indictment rises to the level of [**13] 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, 82 S. Ct. 1038, 8 L. Ed. 2d 240.

[*P24] 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 [**14] 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.

[*P25] 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.

10 of 14 DOCUMENTS

STATE OF OHIO, PLAINTIFF-APPELLEE vs. YOLANDA ROBINSON, DEFENDANT-APPELLANT

No. 90411

COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT, CUYAHOGA COUNTY

2008 Ohio 3972; 2008 Ohio App. LEXIS 3342

August 7, 2008, Released

PRIOR HISTORY: [**1]

Criminal Appeal from the Cuyahoga County Court of Common Pleas. Case No. CR-489558.

DISPOSITION: Judgement affirmed.

COUNSEL: FOR APPELLANT: John H. Carlin, Lakewood, OH; John P. Parker, Cleveland, OH.

FOR APPELLEE: William D. Mason, Cuyahoga County Prosecutor, BY: Mark J. Mahoney, Assistant County Prosecutor, Cleveland, OH.

JUDGES: BEFORE: Stewart, J., Cooney, P.J., and Gallagher, J. COLLEEN CONWAY COONEY, P.J., and SEAN C. GALLAGHER, J., CONCUR.

OPINION BY: MELODY J. STEWART

OPINION

JOURNAL ENTRY AND OPINION

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)*.

MELODY J. STEWART, J.:

[*P1] Defendant-appellant Yolanda Robinson appeals from her guilty plea to involuntary manslaughter

and felonious assault. She complains [**2] that the court had no authority to accept a guilty plea to involuntary manslaughter, as amended from the originally charged count of murder, and that the state impermissibly controlled sentencing by insisting that its plea offer was contingent on her serving a minimum eight-year sentence. We find no error and affirm.

[*P2] The grand jury returned a four-count indictment against Robinson in connection with the stabbing death of her boyfriend. Count 1 charged aggravated murder; count 2 charged murder; and counts 3 and 4 charged felonious assault. As part of a plea bargain, the state agreed to amend count 2 to involuntary manslaughter and dismiss counts 1 and 4. The court recognized that manslaughter is not a lesser included offense of murder, but "[i]t is, nevertheless, routinely used as a legal fiction for purposes of facilitating plea agreements." The state told the court that its offer included an "agreed minimum term of eight years with the possibility of the Court to go as high as eighteen years pursuant to the agreement." Robinson accepted the plea, but objected to the state's "negotiating in bad faith." The court accepted the plea and sentenced Robinson to eight years on each count, [**3] both sentences to be served concurrently.

I

[*P3] Robinson first argues that the court erred by amending the indictment from murder to involuntary manslaughter. She claims that because involuntary manslaughter is not a lesser included offense of murder, any attempt to amend the indictment would have been "a legal fiction." She maintains that the indictment for murder could only be amended in writing by the grand jury in conformity with *Crim.R. 7(D)*.

[*P4] *Crim.R. 7(A)* states in part:

[*P5] "(A) Use of Indictment or information. A felony that may be punished by death or life imprison-

ment shall be prosecuted by indictment. All other felonies shall be prosecuted by indictment, except that after a defendant has been advised by the court of the nature of the charge against the defendant and of the defendant's right to indictment, the defendant may waive that right in writing and in open court." (Emphasis sic.)

[*P6] This rule applies to "a waiver of the right to be prosecuted by indictment." See *State v. Williams, Cuyahoga App. No. 88737, 2007 Ohio 5073, P8*. The state prosecuted Robinson by indictment. The parties expressly amended the indictment as part of the plea agreement, so *Crim.R. 7(A)* has no application [**4] to this case. *Id.*

[*P7] Even had there been error, it would have been invited by Robinson. The invited error doctrine states that "a party is not entitled to take advantage of an error that he himself invited or induced." *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, Robinson invited the error she has raised on appeal. See *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).

[*P8] We likewise reject Robinson's assertions that the state improperly insisted on a minimum term of incarceration as part of the plea bargain. A criminal plea bargain has been characterized as a "contract," *State v. Butts (1996), 112 Ohio App.3d 683, 686, 679 N.E.2d 1170*, but the reality is that the parties begin negotiations from very uneven bargaining positions. These unequal [**5] bargaining positions do not, however, affect the conscionability of the negotiations. Even though the state may have held a superior bargaining position by virtue of its ability to offer Robinson the chance to plead to a lower degree of offense, Robinson had the ability to reject the terms of any plea bargain that she thought was inherently unfair to her and go to trial as charged. A plea bargain is not a "right" for a defendant and the state had no obligation to offer a plea deal. *State v. Williams (1993), 89 Ohio App.3d 288, 294, 624 N.E.2d 259*. As in any contract case, the favorability of the terms are dictated in large part by the motivation of each party. Robinson faced the possibility of a life sentence for aggravated murder -- the minimum eight-year sentence offered by the state was a substantial reduction from a life sentence and likely played a substantial part in her agreeing to the plea deal. The state did not force the plea deal on Robinson and her *Crim.R. 11* colloquy with the court

confirms this fact. Robinson cannot take advantage of an alleged error when she was "actively responsible" for it. *State v. Campbell, 90 Ohio St.3d 320, 324, 2000 Ohio 183, 738 N.E.2d 1178*. We find no infirmity with the conditions [**6] of the plea bargain.

II

[*P9] Robinson next complains that the court allowed the state to dictate the terms of the sentence. The state told the court that it would agree to the plea bargain only on condition that Robinson receive an eight-year minimum sentence, with the maximum sentence being left open to the court's discretion. Robinson argues that the court's acceptance of these terms violated the separation of powers because the state, in essence, set her sentence in derogation of the court's statutory responsibility.

[*P10] The record shows that the state expressed the terms of the plea agreement as follows:

[*P11] "The defendant will plead to involuntary manslaughter and the felonious assault. And she would agree that there is a minimum term of eight years, with a possibility of it going to eighteen years.

[*P12] "There would be no judicial release, and the parties, both the defense, and the State could argue at sentencing as to the appropriate sentence.

[*P13] "Meaning the defense could argue that the eight year minimum should be imposed, and the Court -- pardon me. I mean, the State would be free to argue that a higher sentence should be imposed."

[*P14] Robinson agreed with those terms, but with some reservations as [**7] to the open-ended maximum term that could be imposed:

[*P15] "In addition, the prosecutor is indicating that they want eight years as a minimum. Our position is that we would like probation. However, it is my belief under this pattern, they are putting us in an unfair position by the prosecuting attorney to suggest a plea bargain with an open ended sentence for the high end on their behalf. But not on the low end for the defendant.

[*P16] "Should the Court agree, for plea bargaining purposes, and sentencing purposes, we would ask that there be no more than eight years of punishment for the defendant and the family would be amenable to accept the plea."

[*P17] When the parties convened for sentencing, the state did not request a specific prison term above the eight-year minimum, and in fact made no mention of any prison term. The court imposed eight-year terms on each count, to be served concurrently. Robinson therefore received that which she agreed to in the plea bargain -- a minimum eight-year sentence.

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 [**8] this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any

bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to *Rule 27 of the Rules of Appellate Procedure*.

MELODY J. STEWART, JUDGE

COLLEEN CONWAY COONEY, P.J., and

SEAN C. GALLAGHER, J., CONCUR