

IN THE SUPREME COURT OF OHIO

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| Michael Jaros, | : | On appeal from the Lucas |
| | : | County Court of Appeals, |
| Appellant, | : | Sixth Appellate District |
| | : | |
| v. | : | Court of Appeals |
| | : | Case No. L-10-1101 |
| State of Ohio, | : | |
| | : | |
| Appellee. | : | |

11 - 2117

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT MICHAEL JAROS**

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

This appeal allows this Honorable Court to correct a flawed handling of applications to reopen appeals and to establish the correct analysis to be used by appellate courts in such case.

Mr. Michael Jaros litigated an appeal to completion before the Sixth District Court of Appeals. The decision that resulted from that appeal is the subject of a timely appeal to this Honorable Court in Case No. 2011-1859, notice of appeal filed in that case on November 3, 2011. Case No. 2011-1859 is pending.

Meanwhile, on November 4, 2011, Mr. Jaros also timely filed a motion with the Sixth District to reopen the appeal, pursuant to App.R. 26(B). Mr. Jaros sought leave to argue the following additional six (6) assignments of error:

Assignment of Error #4: The Trial Court erred by instructing the jury and answering a series of questions by the jury so as to imply to the jury that the "sexual activity" aspect of the Kidnapping charge could be consensual sexual activity and not sexual activity against her will.

Assignment of Error #5: Trial counsel was ineffective for not objecting to the jury instructions that caused the error described in Assignment of Error #4 and in not seeking clarification of the need that the sexual activity be "against her will" when the jurors asked questions exposing this misunderstanding by the jury of the elements of the Kidnapping charge.

Assignment of Error #6: The inconsistent verdict for Kidnapping was a result of juror belief that the sexual activity as consensual nonetheless sufficed and as such was against the manifest weight of the evidence as interpreted by the jury, namely that the sexual activity was in fact consensual.

Assignment of Error #7: The Trial Court erred by not instructing the jury as to the specific criminal offense means rea element in the Aggravated Burglary charge and in not using special verdicts or separate verdicts, as this case involved non-grouped theories by the prosecution, such that Mr. Jaros was denied due process of law.

Assignment of Error #8: Trial counsel was ineffective for not objecting to

the jury instructions that caused the error described in Assignment of Error #7 and in not seeking clarification of the specific criminal offense by way of jury questionnaires, special verdict forms, or separate verdict forms.

Assignment of Error #9: Because of the inconsistent verdict for Kidnapping that was a result of juror belief that the sexual activity as consensual nonetheless sufficed and as such was against the manifest weight of the evidence as interpreted by the jury, namely that the sexual activity was in fact consensual, and because the Trial Court failed to explain which "any criminal offense" applied, the conviction for Aggravated Burglary was against the manifest weight of the evidence.

On November 29, 2011, the Sixth District denied that motion to reopen the appeal. The Court ruled that all six proposed Assignments of Error were "without merit."

Mr. Jaros's appellate attorney made several mistakes, as identified above. However, the Sixth District refused to allow this reopening, for the reasons described above and in the entry.

As this appeal technically deals with the decision to disallow reopening and not as to the merits of the issues intended to be litigated by Mr. Jaros upon reopening, those issues are technically secondary. They will, however, be explained as support for the reopening.

On point, however, we must consider what App. R. 26(B) actually says. (See attached copy of the same.) According to the Rules, "An application for reopening shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal." Mr. Jaros' reopening, however, despite being timely and complete, was denied without any ruling as to the effectiveness of appellate counsel. Instead, the Sixth District focused on the merits of the claimed six additional assignments of error, finding the assignments themselves without merit. The only lawful reason for denying a timely and complete reopening request is if there in fact is no genuine issue as to whether Appellant was deprived of the effective assistance of counsel on appeal. A denial of a motion to reopen the appeal operates as *res judicata* on the issue of the effectiveness of appellate counsel, which is only possible if the

appellate court rules on that question.

The First Proposition of Law, therefore, is as follows:

Proposition of Law #1: An appellate court cannot deny a timely and complete motion to reopen an appeal without ruling upon whether there is or is not a genuine issue as to the effectiveness of appellate counsel.

Related to the first, the Sixth District instead focused solely on the merits of the six proposed new assignments of error. This is unfair and not appropriate under the rules.

The Rules call for 10-page briefing as to the effectiveness of counsel and the proposed assignments of error, with insufficient space as to the merits of the proposed assignments of error. If appellant meets the burden of establishing a "genuine issue," then the case is reopened and full briefing on the merits allowed. The Sixth District skipped over all of this and ruled on the merits not on the basis of "genuine issue" but rather on whether Mr. Jaros should prevail, without full briefing in support. The Second Proposition of Law, therefore, is as follows:

Proposition of Law #2: An appellate court cannot deny a timely and complete motion to reopen an appeal by reviewing the propositions of law on the merits but must instead limit its review before full briefing to the lesser standard of whether the appellant has shown a "genuine issue."

By ruling on the ultimate merits, it appears that the Sixth District functionally granted reopening and then ruled on the merits. If so, then such a ruling is appealable as of right on the merits raised. The remaining Propositions of Law are therefore as follows:

Proposition of Law #3: If an appellate court denies a timely and complete motion to reopen an appeal by reviewing the propositions of law on the merits, this operates as if reopening was granted but the merit arguments denied, such that a full right to appeal the proposed assignments or error arises.

Proposition of Law #4: The Trial Court erred by instructing the jury and answering a series of questions by the jury so as to imply to the jury that the "sexual activity" aspect of the Kidnapping charge could be consensual sexual activity and not sexual activity against her will.

Proposition of Law #5: Trial counsel was ineffective for not objecting to the jury instructions that caused the error described in Assignment of Error #4 and in not seeking clarification of the need that the sexual activity be "against her will" when the jurors asked questions exposing this misunderstanding by the jury of the elements of the Kidnapping charge.

Proposition of Law #6: The inconsistent verdict for Kidnapping was a result of juror belief that the sexual activity as consensual nonetheless sufficed and as such was against the manifest weight of the evidence as interpreted by the jury, namely that the sexual activity was in fact consensual.

Proposition of Law #7: The Trial Court erred by not instructing the jury as to the specific criminal offense means rea element in the Aggravated Burglary charge and in not using special verdicts or separate verdicts, as this case involved non-grouped theories by the prosecution, such that Mr. Jaros was denied due process of law.

Proposition of Law #8: Trial counsel was ineffective for not objecting to the jury instructions that caused the error described in Assignment of Error #7 and in not seeking clarification of the specific criminal offense by way of jury questionnaires, special verdict forms, or separate verdict forms.

Proposition of Law #9: Because of the inconsistent verdict for Kidnapping that was a result of juror belief that the sexual activity as consensual nonetheless sufficed and as such was against the manifest weight of the evidence as interpreted by the jury, namely that the sexual activity was in fact consensual, and because the Trial Court failed to explain which "any criminal offense" applied, the conviction for Aggravated Burglary was against the manifest weight of the evidence.

STATEMENT OF THE CASE AND FACTS

Mr. Michael Jaros was indicted on July 2, 2009, for the following five (5) counts, all alleged to have occurred on June 17, 2009:

| | |
|------------------|---|
| Count I | Rape |
| Count II | Rape |
| Count III | Aggravated Burglary F1 |
| Count IV | Kidnapping per R.C. §2905.01(A)(4) |
| Count V | Aggravated Robbery F1 |

The accuser and the accused disagreed as to what happened between Mr. Jaros (the accused) and his estranged wife (the accuser). His wife claimed that Michael broke into her

home, kidnapped her at knifepoint so that he could rape her twice, and then stole her car as his means of fleeing the scene. Michael demanded a trial by jury because the real incident was much different. Whereas Michael was in his wife's home in violation of a protection order, and whereas he did take her car when he left her home, no rape occurred. Rather, after consensual sex between husband and wife, and argument developed at which time he committed domestic violence against her, which coupled with the violation of the protection order explained his actions in taking her car and fleeing the area.

The jury heard both sides and acquitted Mr. Jaros of the alleged rape, despite agreement and clear proof that the sex occurred, obviously because the sex was deemed consensual. However, strangely the jury concluded that Mr. Jaros was nonetheless guilty of the kidnapping charge, which requires that the sexual activity be done against her will. This inconsistent verdict seems to have resulted by a series of errors at the trial court, albeit subtle.

First, the State in its opening statement accidentally misled the jury as to the elements of a violation of R.C. §2905.01(A)(4), claiming as follows:

Count 4 in the indictment is kidnapping. And again, on or about June 17th, 2009, in Lucas County, Ohio, that Mr. Jaros did knowingly, by force, stealth, or deception, knowingly -- again, knowingly -- restrain another person of their liberty, hold them against their will, with the purpose to engage in sexual activity.

The error in the State opening statement is that the term "against her will" modifies the restraint rather than the sexual activity, implying that this statute is violated if the sex is consensual but unlawful restraint occurs. The Trial Court also made this same error when reading the jury instructions to the jury:

Count 4, kidnapping. The defendant is charged with kidnapping. Before you can find the defendant guilty, you must find beyond a reasonable doubt that on or about the 17th day of June, 2009, in Lucas County, Ohio, the defendant Michael Jaros knowingly by force, threat, or deception, did knowingly remove another from the place where she was found, or restrain another of her liberty, with the

purpose to engage in sexual activity, as defined in Ohio Revised Code 2907.01, and against her will.

This inclusion of the word "and" suggests that the purpose was to engage in sexual activity, even if consensual, if the restraint was against her will. Removing the "and" makes clear that the sexual activity must be against her will. Adding the "and" renders a sentence that is meaningless unless "against her will" qualifies the restraint and not the sexual activity.

These two points also seem to be a stretch except for the reaction of the actual jury. The jury during deliberations had a question:

How does sexual activity relate to the kidnapping charge?

This is an unclear question, until one reads further into the discussion between the judge and the jurors. One of the jurors tried to clarify the question:

JUROR: Look at the first paragraph of the kidnapping charge. Right under kidnapping, the first paragraph and read under the --

THE COURT: With the purpose to engage in sexual activity.

The juror was cut off before explaining the concern. However, something was bothering the jury. So, they clarified further, with very interesting language:

It doesn't imply from saying yes kidnapping from sexual activity if it could be on her consent, so it is right it wouldn't be. He had full intent.

It appears that the unexplained inconsistency between the acquittals as to rape and the conviction for kidnapping for nonconsensual sexual activity was that the jury, because of the errors, thought that the "against her will" modified the unlawful restraint and that the "sexual activity" could be consensual without affecting guilt or innocence, a clear error. Thus, the jury likely would have acquitted Mr. Jaros of the Kidnapping charge as well had they understood the law. As both the Trial Court and the prosecutor also left the predicate offense for the Aggravated Burglary unclear, that acquittal for the Kidnapping may also have translated into an acquittal of

the Aggravated Burglary (or a lesser offense conviction if properly presented to the jury).

Mr. Jaros appealed and lost. That is being appealed separately to this Honorable Court. Several other issues, as described above, were made the subject of an application to reopen the appeal, as described above. That was denied on November 29, 2011. This appeal followed.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: An appellate court cannot deny a timely and complete motion to reopen an appeal without ruling upon whether there is or is not a genuine issue as to the effectiveness of appellate counsel.

According to App.R. 26(B)(5), "An application for reopening shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal." Jaros' reopening, despite being timely and complete, was denied without any ruling as to the effectiveness of appellate counsel.

Instead, the Sixth District focused on the merits of the six additional assignments of error, finding the assignments themselves without merit. The only reason for denying a timely and complete reopening request is if there in fact is no genuine issue as to whether Appellant was deprived of the effective assistance of counsel on appeal. A denial of reopening of an appeal operates as *res judicata* on the issue of the effectiveness of appellate counsel, which is only possible if the appellate court rules on that question.

Because the Sixth District did not make any ruling as to the effectiveness of appellate counsel, the decision must be remanded with instruction to consider the question of whether appellate counsel was or was not ineffective and to issue a decision accordingly.

Granting this appeal on this basis will allow this Honorable Court to reinforce the requirement in the Rule that a ruling on that question is mandatory.

Proposition of Law No. 2: An appellate court cannot deny a timely and complete motion to reopen an appeal by reviewing the propositions of law on the merits but must instead limit its review before full briefing to the lesser standard of whether the appellant has shown a "genuine issue."

Rule 26(B)(2) provides the technical requirements in a motion to reopen an appeal, which includes as relevant *argument* or *briefing* only "A sworn statement of the basis for the claim that appellate counsel's representation was deficient with respect to the assignments of error or arguments raised pursuant to division (B)(2)(c) of this rule and the manner in which the deficiency prejudicially affected the outcome of the appeal, which may include citations to applicable authorities and references to the record." If by this briefing it appears that "there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal," then App.R. 26(B)(5) requires that the appeal be reopened. When the appeal is reopened pursuant to subsection (B)(5), then App.R. 26(B)(7) provides for full briefing on the merits.

The 10-page page limits set by App.R.26(B)(4) is substantially lower than the page limits for full briefing pursuant to App.R.26(B)(7), especially as the 10-page limit includes many subsection (B)(2) requirements that are not merits related.

The Sixth District, however, did not rule upon the effectiveness of appellate counsel and did not decide whether a "genuine issue" was presented. Rather, despite the lack of subsection (B)(7) full briefing, the Sixth District denied Mr. Jaros' reopening by ruling on the greater question of the ultimate merits of Mr. Jaros' proposed assignments of error. This was improper and unfair, because Mr. Jaros never was allowed to actually brief the issues fully. This Honorable Court should remand this case with instruction to consider solely the question of whether a "material issue" of ineffectiveness has been shown and not the higher standard of the ultimate merits of each proposition of law by the higher standard required for a full appeal unless and until Mr. Jaros is allowed, per App.R.26(B)(7) to actually brief these assignments of error.

Proposition of Law No. 3: If an appellate court denies a timely and complete motion to reopen an appeal by reviewing the propositions of law on the merits, this operates as if reopening was granted but the merit arguments denied, such that a full right to appeal the proposed assignments or error arises.

The Sixth District effectively collapsed App.R. 26(B)(5) and (B)(7) into one proceeding, ruling upon the application reopening as if the same were granted under (B)(5) and merits reached under (B)(7). When this happens, Appellant Jaros should therefore be entitled to an appeal of the proposed assignments of error as an appeal of right. Therefore, as to this proposition of law, Mr. Jaros requests the remedy of considering his next six propositions of law, which follow, on the merits.

Proposition of Law #4: The Trial Court erred by instructing the jury and answering a series of questions by the jury so as to imply to the jury that the "sexual activity" aspect of the Kidnapping charge could be consensual sexual activity and not sexual activity against her will.

Proposition of Law #5: Trial counsel was ineffective for not objecting to the jury instructions that caused the error described in Assignment of Error #4 and in not seeking clarification of the need that the sexual activity be "against her will" when the jurors asked questions exposing this misunderstanding by the jury of the elements of the Kidnapping charge.

Proposition of Law #6: The inconsistent verdict for Kidnapping was a result of juror belief that the sexual activity as consensual nonetheless sufficed and as such was against the manifest weight of the evidence as interpreted by the jury, namely that the sexual activity was in fact consensual.

These fourth, fifth, and sixth propositions of law are argued together as related. The Kidnapping charge arose from R.C. §2905.01(A)(4):

2905.01 Kidnapping.

(A) No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall remove another from the place where the other person is found or restrain the liberty of the other person, for any of the following purposes:

(4) To engage in sexual activity, as defined in section 2907.01 of the Revised Code, with the victim against the victim's will.

The inconsistent conviction for this offense, while acquitting Jaros of Rape, is explained

by an error by the prosecutor and the Trial Court which convinced the jury that Kidnapping can occur if the sexual activity is consensual, such that the phrase "against the victim's will" is either not in the statute or modifies the "restraint" only, which is what happened. This jury was led to believe that Mr. Jaros would be guilty of Kidnapping if the "sexual activity" was consensual, despite what the law actually provides, which explains the inconsistency of the verdicts.

It appears that the unexplained inconsistency between the acquittals as to the two rapes and the conviction for kidnapping for the purpose of nonconsensual sexual activity was that the jury, because of the subtle errors of the prosecutor and the Trial Court, thought that the "against her will" modified the unlawful restraint and that the "sexual activity" could be consensual without affecting guilt or innocence, a clear error.

As both the Trial Court and the prosecutor also left the predicate offense for the Aggravated Burglary unclear, that acquittal for the Kidnapping may also have translated into an acquittal of the Aggravated Burglary.

Proposition of Law #7: The Trial Court erred by not instructing the jury as to the specific criminal offense means rea element in the Aggravated Burglary charge and in not using special verdicts or separate verdicts, as this case involved non-grouped theories by the prosecution, such that Mr. Jaros was denied due process of law.

Proposition of Law #8: Trial counsel was ineffective for not objecting to the jury instructions that caused the error described in Assignment of Error #7 and in not seeking clarification of the specific criminal offense by way of jury questionnaires, special verdict forms, or separate verdict forms.

Proposition of Law #9: Because of the inconsistent verdict for Kidnapping that was a result of juror belief that the sexual activity as consensual nonetheless sufficed and as such was against the manifest weight of the evidence as interpreted by the jury, namely that the sexual activity was in fact consensual, and because the Trial Court failed to explain which "any criminal offense" applied, the conviction for Aggravated Burglary was against the manifest weight of the evidence.

Each of the remaining three propositions of law are argued together as related. Mr. Jaros was alleged to have broken and entered into his wife's house for the purpose to commit therein

any criminal offense, in violation of R.C. §2911.11(A)(2):

2911.11 Aggravated burglary.

(A) No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if any of the following apply:

(2) The offender has a deadly weapon or dangerous ordnance on or about the offender's person or under the offender's control.

With no Bill of Particulars and an Indictment silent about the "any criminal offense" that was contemplated, the State theory during Opening Statement and Close was the Rape, the Kidnapping, or the Robbery. (Transcript, Vol. I, p. 210, 567) The jury was left with three possibilities, but "any criminal offense" might also mean anything that the jury thought to be Mr. Jaros' purpose and that the jury thought to be criminal.

The Trial Court did not explain the term "any criminal offense" and did not tie that to any specific offense, let alone with description of the elements of the same (except as otherwise described for the charged potential predicates). (Transcript, Vol. III, p. 634)

This was a flawed handling of Aggravated Burglary. One Comment to the Ohio Jury Instructions notes that "[t]he court must instruct the jury on the elements of the applicable criminal offense as charged in the indictment, together with the meaning of the pertinent words and phrases." OHI §CR 511.11. This did not occur, and no "applicable criminal offense" was charged in the Indictment as to the intended "any criminal offense" forming the predicate basis for the Aggravated Burglary charge. Additionally, the verdict forms were not special verdicts and thus did not include identification of the "any criminal offense" contemplated.

Furthermore, consider the problem of having three or more possibilities as to the "any criminal offense." The Ohio Jury Instructions discuss this issue and note the decision of the

Ohio Supreme Court in *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787. In *Gardner*, the issue was the effect of the failure by the Trial Court to instruct the jury as to the contemplated "any criminal offense," let alone to instruct on the elements of the same, and the risk of a lack of unanimity, which is the precise issue in this case.

In the lead plurality opinion, the plurality of three determined that a somewhat amorphous rule should apply in cases where the "any criminal offense" issue is relevant:

"We do agree, however, that the state must prove the defendant's intent to commit a crime—"any criminal offense" -beyond a reasonable doubt. The breadth of the phrase "any criminal offense" is such that in some cases, it may invite a fatally "patchwork" verdict based on conceptually distinct groupings of crimes or on multiple acts. We believe that in such cases, due process requires that the jurors must be instructed as to the specific criminal act(s) that the defendant intended to commit inside the premises. See [*State v.*] *Johnson*, 46 Ohio St.3d [96] at 105, 545 N.E.2d 636 ("where there appears a possibility of jury confusion in light of the allegations made and the statute charged, an augmented general instruction may be necessary to ensure that the jury understands its duty to unanimously agree to a particular set of facts " [emphasis added]). We believe that in such cases, the usual general instruction on unanimity "would provide too little protection in too many instances." *United States v. Beros* (C.A.3, 1987), 833 F.2d 455, 461. A specific charge instructing the jury that it must be unanimous as to each component of the criminal offense the defendant had "purpose to commit" once inside the premises will help ensure against improper juror divergence.

"We think that it is preferable for the trial judge to instruct the jury in all aggravated-burglary cases as to which criminal offense the defendant is alleged to have intended to commit once inside the premises and the elements of that offense. Such instructions provide an important road map for the jury in its deliberations and help ensure that jurors focus on specific conduct that constitutes a criminal offense.

"Nevertheless, we do not require this instruction in every case. Prudence may strongly suggest such a precaution, but we are not persuaded that it is appropriate in all circumstances. Trial judges are in the best position to determine the content of the instructions based on the evidence at trial and on whether the case presents an alternative-means or multiple-acts scenario." *Id.*, at 435-436.

The idea includes a distinguishing of "groupings" of offenses, a vague requirement that the contemplated "any criminal offense" that would be possible for the *mens rea* element be

related. The plurality opinion is troubling in the situation where a contemplated "any criminal offense" is not articulated and defined, as the jury cannot know whether an act is "criminal" without a definition of the elements of that crime. This very case illustrates the problem. If the jury believed that the *mens rea* was, as the prosecutor in part argued, to commit the act of Kidnapping, then juror confusion as to what was required for a Kidnapping offense might result in the errant verdict for the Kidnapping charge (errant in that it was based in a critical misunderstanding of the elements of that offense) that infected equally the Aggravated Burglary conviction. In other words, if the jury believed the "any criminal offense" was the Kidnapping, but if the Kidnapping was not a criminal offense as the jury believed that it was, then the Aggravated Burglary conviction would also be flawed and errant for this reason, as trespassing to commit an act that is rude but not criminal is not Aggravated Burglary.

For the reason of this problem, Mr. Jaros believes that the plurality decision is wrong and/or incomplete. That said, even applying the plurality decision means that the instruction *in this case* was fatally errant, for two reasons. First, as the Rape and Kidnapping charges were not in the same "grouping" as the Robbery charge, the plurality logic would seem to require resolution of that dispute by way of instruction and possibly special verdicts. If the "any criminal offense" was the Kidnapping (or the Rape in theory), then the Aggravated Burglary would likely be early in the event, whether entry or remaining *prior to the Kidnapping (or Rape) being complete*. If the "any criminal offense" was the Robbery, then the facts (Jaros took the car as a means of escape) mean that the Aggravated Burglary was a "remaining" type of trespass, commenced and completed *after the Kidnapping (or Rape)*. Hence, in the analysis of the plurality, the offenses would be separate acts, and special instructions with possible separate verdict forms or juror interrogatories would be needed. Second, in the context of inconsistent

verdicts and flawed instructions as to the other counts in the Indictment that could have been the "any criminal offense" contemplated, this seems to be that type of special case where this plurality could have agreed with Mr. Jaros' contention that the specificity of "any criminal offense" was required. Justice O'Donnell concurred only in the judgment, as a result of which we cannot discern his position.

The Dissent would have held that "this phrase ["any criminal offense"] defines the mens rea that the state must prove beyond a reasonable doubt, and therefore, I would require as a matter of due process that the jury be instructed on the elements of the particular crime that a defendant intended to commit "in the structure or in the separately secured or separately occupied portion of the structure" Before it may convict for the offense of aggravated burglary."

Id. at 440. The Dissent noted a concern seen by Mr. Jaros and relevant to this instant case:

"Jurors must have guidance on whether certain behavior is criminal; that is why we instruct jurors on what the state must prove beyond a reasonable doubt Before they may reach a verdict of guilty. Without further instruction on which crime the defendant is alleged to have had the purpose to commit, the jury is left to its own devices and may conceivably convict based upon subjective and incorrect beliefs that certain behavior is a crime, even when it is not. As noted in *Richardson [v. United States]* (1999), 526 U.S. 813, 817, 119 S.Ct. 1707, 143 L.Ed.2d 9850], there is concern that attempting to prove a defendant's involvement in numerous underlying violations "significantly aggravates the risk (present at least to a small degree whenever multiple means are at issue) that jurors, unless required to focus upon specific factual detail, will fail to do so, simply concluding from testimony, say, of bad reputation, that where there is smoke there must be fire." Id., 526 U.S. at 819, 119 S.Ct. 1707, 143 L.Ed.2d 985." Id. at 441-442.

The problem noted by the Dissent occurred here. The jury was directly misinformed about one possible "any criminal offense," the Kidnapping. Moreover, the jurors could have had differing views, some thinking the Kidnapping was the intent, some the Robbery, and some a completely different and unknown act that might not even be a crime. We cannot know.

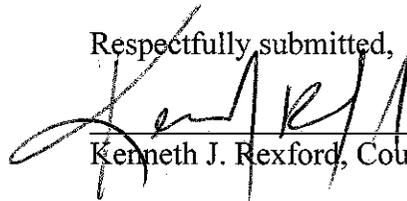
Much of the plurality opinion in *Gardner* has been accepted in Ohio, now, as seen in the

decision of the Ohio Supreme Court in *State v. Fry*, 2010-Ohio-1017, 125 Ohio St.3d 163, 926 N.E.2d 1239 (Ohio 2010). If this appeal is reopened, Mr. Jaros intends to argue that *Gardner* was improperly decided or that *Gardner* should be expanded to deal with this sort of situation. However, as this is a reopening issue, Mr. Jaros also argues that *Gardner* clearly applies to this specific case to render the instruction to the jury on Aggravated Burglary to be fatally defective, without any need to revisit *Gardner*

CONCLUSION

For these reasons, this case involves matters of public and great general interest and several substantial constitutional questions. The appellant requests that this court grant jurisdiction and allow this case so that the important issues presented in this case will be reviewed on the merits.

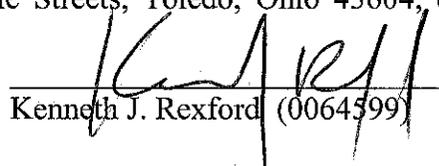
Respectfully submitted,



Kenneth J. Rexford, Counsel for Michael Jaros

Proof of Service

I certify that a copy of this Memorandum in Support of Jurisdiction was sent by ordinary U.S. mail to counsel for appellee, Julia R. Bates, Esq., Prosecuting Attorney for Lucas County, Lucas County Courthouse, Adams and Erie Streets, Toledo, Ohio 43604, on the 16th day of December, 2011.



Kenneth J. Rexford (0064599)

APP.R. 26(B) Application for reopening.

(1) A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time.

(2) An application for reopening shall contain all of the following:

(a) The appellate case number in which reopening is sought and the trial court case number or numbers from which the appeal was taken;

(b) A showing of good cause for untimely filing if the application is filed more than ninety days after journalization of the appellate judgment.

(c) One or more assignments of error or arguments in support of assignments of error that previously were not considered on the merits in the case by any appellate court or that were considered on an incomplete record because of appellate counsel's deficient representation;

(d) A sworn statement of the basis for the claim that appellate counsel's representation was deficient with respect to the assignments of error or arguments raised pursuant to division (B)(2)(c) of this rule and the manner in which the deficiency prejudicially affected the outcome of the appeal, which may include citations to applicable authorities and references to the record;

(e) Any parts of the record available to the applicant and all supplemental affidavits upon which the applicant relies.

(3) The applicant shall furnish an additional copy of the application to the clerk of the court of appeals who shall serve it on the attorney for the prosecution. The attorney for the prosecution, within thirty days from the filing of the application, may file and serve affidavits, parts of the record, and a memorandum of law in opposition to the application.

(4) An application for reopening and an opposing memorandum shall not exceed ten pages, exclusive of affidavits and parts of the record. Oral argument of an application for reopening shall not be permitted except at the request of the court.

(5) An application for reopening shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal.

(6) If the court denies the application, it shall state in the entry the reasons for denial. If the court grants the application, it shall do both of the following:

(a) appoint counsel to represent the applicant if the applicant is indigent and not currently represented;

(b) impose conditions, if any, necessary to preserve the status quo during pendency of the reopened appeal.

The clerk shall serve notice of journalization of the entry on the parties and, if the application is granted, on the clerk of the trial court.

(7) If the application is granted, the case shall proceed as on an initial appeal in accordance

with these rules except that the court may limit its review to those assignments of error and arguments not previously considered. The time limits for preparation and transmission of the record pursuant to App. R. 9 and 10 shall run from journalization of the entry granting the application. The parties shall address in their briefs the claim that representation by prior appellate counsel was deficient and that the applicant was prejudiced by that deficiency.

(8) If the court of appeals determines that an evidentiary hearing is necessary, the evidentiary hearing may be conducted by the court or referred to a magistrate.

(9) If the court finds that the performance of appellate counsel was deficient and the applicant was prejudiced by that deficiency, the court shall vacate its prior judgment and enter the appropriate judgment. If the court does not so find, the court shall issue an order confirming its prior judgment.

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COMMON PLEAS COURT
BERNIE QUILTER
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-10-1101

Appellee

Trial Court No. CR0200902293

v.

Michael W. Jaros

DECISION AND JUDGMENT

Appellant

Decided:

NOV 29 2011

Julia R. Bates, Lucas County Prosecuting Attorney, and
Michael D. Bahner, Assistant Prosecuting Attorney, for appellee.

Kenneth J. Rexford, for appellant.

OSOWIK, J.

{¶ 1} This matter is pending before the court upon appellant's application to reopen this appeal pursuant to App.R. 26(B). On September 30, 2011, we denied appellant's direct appeal, which asserted that the trial court erred in the admission of

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evidence, erred in not declaring a mistrial, and erred in convictions against the manifest weight of the evidence in the underlying aggravated burglary and kidnapping case. On November 3, 2011, appellant filed for reopening pursuant to App.R. 26(B).

{¶ 2} In support of the application, counsel for appellant submitted a brief setting forth seven proposed assignments of error. All of the proposed assignments of error stem from two determinative, underlying assumptions set forth by appellant. Appellant assumes and claims that the jury was confused and misled regarding the phrase, "against the victim's will" in connection to the kidnapping conviction, and appellant similarly assumes and claims that the jury was confused and misled regarding the phrase, "any criminal offense" in connection to the burglary conviction. The veracity of all proposed assignments of error is rooted in these conclusions.

{¶ 3} On March 25, 2010, following a jury trial, appellant was found guilty of aggravated burglary, kidnapping, and aggravated robbery. All convictions were felonies of the first degree. Appellant was simultaneously found not guilty of two counts of rape. Appellant was sentenced to a total term of incarceration of 27 years. All charges brought against appellant involved appellant's estranged wife with whom he no longer lived and who had secured a restraining order against appellant at the time of the events.

{¶ 4} On June 17, 2009, appellant unlawfully entered the home of his wife and minor son when no one was home in direct violation of the restraining order. When the victim and her son arrived home, they entered the son's bedroom, unaware of the presence of an intruder. Appellant followed them into the bedroom, restrained the victim

at knife point, and demanded sexual activity from the victim. Faced with these circumstances, the victim cooperated with her estranged husband. Appellant then stole the victim's vehicle, and fled the state.

{¶ 5} In appellant's first three proposed assignments of error in the application for reopening, captioned by appellant as assignments of error Nos. 4, 5, and 6, appellant asserts that the trial court and/or prosecutor confused and misled the jury regarding the language, "against the victim's will," in the kidnapping statute, claims that the failure to object to this alleged misstep constituted ineffective assistance of counsel, and all of this culminated in a kidnapping conviction against the manifest weight of the evidence, "as interpreted by the jury."

{¶ 6} Appellant goes to great lengths to establish trial court error with respect to the jury instructions and a clarification question by the jury on the kidnapping count. Appellant's theory and entire line of reasoning is premised upon wholly unsupported conjecture set forth in a series of sweeping conclusions based upon same.

{¶ 7} In essence, appellant asserts, without objective supporting evidence from the record, that the trial court's usage of an additional "and" in the jury instruction on the kidnapping charge misled and confused the jury, thereby prejudicing appellant.

{¶ 8} R.C. 2905.01(A)(4), the kidnapping statute, utilizes the language, "against the victim's will." When instructing the jury on this point, the trial court utilized the language, "and against her will." Because the jury had a brief clarification question on the kidnapping charge, appellant unilaterally concludes the jury was confused and misled.

There is no objective evidence to support this theory. The question was answered and the process continued without any indicia of confusion.

{¶ 9} Notably, appellant's own arguments on this point utilize phrases such as, "that conclusion might seem stretched," "these two points also seem to be a stretch," and "it appears," in reference to his own arguments. Appellant's entire argument in connection to the kidnapping conviction is rooted solely in his speculation regarding what the jury believed and understood. It is simply not supported by any objective evidence in the record. We find appellant's proposed assignments of error Nos. 4, 5, and 6 to be without merit.

{¶ 10} Appellant similarly argues jury confusion and resulting prejudice against appellant regarding the term, "any criminal offense" contained in the language of the burglary statute, R.C. 2911.11. Appellant's proposed assignments of error captioned #7, #8, and #9, similarly argue trial court error resulting in jury confusion with respect to the aggravated burglary charge, ineffective assistance for not objecting to same, and a verdict against the manifest weight of the evidence because of same.

{¶ 11} In support of this series of assertions, appellant again engages in conjecture as to what the jury believed and understood in connection to the statutory language, "any criminal offense" without any objective supporting evidence in the record. While appellant appears to suggest that the adverse result itself is somehow supportive of his arguments, we do not concur.

{¶ 12} Appellant's speculation as to what the jury might have thought, as reflected in portions of his argument such as, "might also mean anything the jury thought to be criminal," and "if the jury believed the 'any criminal offense' was the kidnapping," does not establish appellant's claims. On the contrary, these assertions do not constitute objective, persuasive legal evidence. Wherefore, we find appellant's proposed assignments of error Nos. 7, 8, and 9 to be without merit.

{¶ 13} We have carefully reviewed and considered appellant's application to reopen and brief in support. We find that appellant has set forth no substantive grounds for relief.

{¶ 14} On consideration whereof, we find appellant's application for reopening is without merit and is denied.

APPLICATION DENIED.

Peter M. Handwork, J.

Arlene Singer, J.

Thomas J. Osowik, P.J.
CONCUR.

Peter M. Handwork

JUDGE

Arlene Singer

JUDGE

Thomas J. Osowik

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <http://www.sconet.state.oh.us/rod/newpdf/?source=6>.