IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Plaintiff-Appellant,

vs.

REGINALD GARDNER, JR.

Defendant-Appellee.

CASE NO. 07-375

ON APPEAL FROM THE MONTGOMERY COUNTY COURT OF APPEALS, SECOND APPELLATE DISTRICT

COURT OF APPEALS CASE NO. 21357

APPELLANT'S MERIT BRIEF

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STATEMENT OF THE FACTS

On April 25, 2005, Ebony Lee called Appellee Reginald Gardner, Jr., known as "Little Reggie," ("Gardner") because she wanted to purchase marijuana from him. (Transcript of Jury Trial, ("Tr.") 193-194). Gardner arrived at her house about thirty minutes later with his friend, and Ebony's mutual acquaintance, Turell Justice. (Tr. 195). Ebony, a daily marijuana user, had purchased marijuana from Gardner in the past. (Tr. 195).

Gardner and Justice came up to Ebony's porch and began arguing. (Tr. 196). Gardner was angry because he had just "lost a spank" (a stash amount of drugs), and said, "these niggers got me for $150." Ebony's boyfriend James Pippins ("Pippins"), who was in the residence, heard the yelling and came out onto the porch believing that the men were yelling at Ebony. (Tr. 198-199). When she told him that they were yelling at each other, not at her, he turned to go back into the house. (Id).

Before he could get to the door, Gardner and Justice jumped up onto the porch. (Id). Gardner said, "Nigger, this is my mother-fuckin' 'hood, I run this 'hood. I run these projects." (Id). Pippins went into the house followed by Gardner's continued invective. (Id). Gardner screamed, "I'll kill that nigger." (Id). At that point Ebony decided that she did not want any marijuana and turned to go back into the house. (Id). Gardner grabbed the screen door out of her hand as she opened it and rushed past her pushing her out of the way. (Tr. 200). He entered the house swinging at Pippins. (Id). Justice followed Gardner in. (Id). Gardner and Pippins started fighting. (Tr. 201). When Justice tried to get involved in the fight, Ebony grabbed him by the back of his T-shirt. (Id). He stepped back, pulled out a gun and pointed it at Pippins' back. (Id).

Ebony's three small children, ages 4, 5 and 9, watched the fight from the kitchen table where they were eating dinner. (Tr. 202, 305). The table went flying with their dinner still on it. (Id). Gardner said something to Pippins about nobody wanting that bitch (referring to Ebony), and Pippins hit him in the mouth. (Tr. 203). Justice said, "Jump again and I'll shoot. Jump again." (Id). Before they left, Gardner asked Justice for the gun but Justice refused to give it to him. (Id). Justice said, "no, we got three kids in here. I got three kids, I know how it is. We going to catch this nigger in the "hood. We going to kill him." (Tr. 203)

Ebony was scared. She called her mother to come get her so that she and her children could spend the night somewhere else. (Tr. 205). As they were preparing to leave, Gardner crossed the street from DeSoto Bass toward Ebony's apartment. (Id.) He was walking in front of a group of approximately eight people. (Id). Gardner exchanged words with Pippins on the porch. (Tr. 209). James wanted to discuss the problem but Gardner did not. (Tr. 209, 350). Gardner kicked in the back door of Ebony's apartment. (Tr. 209). As Ebony was putting her kids into the car, she turned and saw Justice chasing Pippins down the sidewalk shooting at him. (Tr. 211). Ebony's neighbor, Laquita Hart, and her nine-year-old son Lamar Lee both saw Gardner and Justice shooting at Pippins. (Tr. 281, 317-318). Ms. Hart estimated that each man shot between four and five times. (Id).

The jury convicted Gardner of aggravated burglary with a firearm specification, and acquitted him of felonious assault and burglary. He was sentenced to a prison term of three years for aggravated burglary and three years for the firearm specification, to be served consecutively. Gardner appealed to the Second District Court of Appeals, which determined the trial court committed plain error when it failed to instruct the jury on a specific underlying criminal offense

as part of the instructions on aggravated burglary. Thus, the court of appeals reversed Gardner's conviction and ordered a new trial.

ARGUMENT

Proposition of Law:

The trial court's jury instructions regarding aggravated burglary were proper, and Gardner's conviction was valid because the language tracked R.C. 2911.11(A)(2); Gardner was charged with, and the jury was instructed on, another criminal offense stemming from the same incident; and Gardner failed to object to the jury instructions.

Introduction

Among other crimes, Gardner was charged with aggravated burglary in violation of R.C. 2911.11(A)(2). That statute states:

> (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.

The trial court's instruction to the jury was identical to the language of both the indictment and the statute, which does not demand that the State identify and prove the elements of the underlying criminal offense. The judge instructed the jury:

> In Count Three of the indictment, Mr. Reginald Gardner is charged with aggravated burglary. Before you can find Mr. Gardner guilty of this offense, you must find beyond a reasonable doubt that on or about April 25, 2005, in Montgomery County, Ohio, he did, by force, stealth or deception, trespass in an occupied structure, to-wit, a residence located at 1024 Danner Avenue, Apartment B, or in a separately secured or separately occupied portion of the occupied structure, when another person, other than an accomplice of the offender, was present, with the purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, and did have a deadly weapon or dangerous ordnance, to-wit, a handgun, on or about his person

> or under his control. I have already defined for you all the terms used in this charge.

(Tr. 502) Gardner did not object to the aggravated burglary instruction.

Count Four of the indictment charged Gardner with felonious assault in violation of R.C. 2903.11(A)(2), and at trial the State's theory was that Gardner proposed to commit felonious assault when he trespassed into Ebony's apartment. The trial court's jury instruction regarding felonious assault went as follows:

> In Count Four, Mr. Gardner is charged with the offense of felonious assault. Before you can find Mr. Gardner guilty of this offense, you must find beyond a reasonable doubt that on or about April 25, 2005, in Montgomery County, Ohio, he did knowingly cause or attempt to cause physical harm to another, to-wit, James Pippins, by means of a deadly weapon or dangerous ordnance, to-wit, a handgun.

(Tr. 503) While the trial court did not make an explicit statement that declared the assault to be the underlying criminal offense of the burglary, it was clearly the court's intent.

On appeal, Gardner claimed that he was denied a fair trial and due process because the trial court failed to properly instruct the jury on aggravated burglary. The court of appeals agreed and held the trial court's failure to identify, and to instruct the jury on the elements of, the underlying criminal offense was plain error.

Law and Argument

In this case, the Second District Court of Appeals erroneously held the trial judge's failure to identify and define the criminal offense Gardner had a purpose to commit inside Ebony Lee's apartment violated his right to due process. Despite acknowledging that the "any criminal offense" language in R.C. 2911.11(A) "modifies the word 'purpose' to define the nature of that element of the offense of aggravated burglary," the court of appeals ignored case precedent from this Court establishing that jurors are not required to unanimously agree upon any one purpose

for commission of a crime. Consequently, the court of appeals' determination that the trial court's jury instructions, which tracked the language of the aggravated burglary statute, amounted to plain error should be reversed and Gardner's conviction reinstated.

Gardner's right to a unanimous verdict does not include a right to a unanimous theory of culpable conduct supporting the verdict. This Court so held in *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, 819 N.E.2d 215, a case in which the trial court failed to instruct on which of the purposes enumerated in R.C. 2905.01 formed the basis of a kidnapping charge against Skatzes. Following the rationale of *Schad v. Arizona* (1991), 501 U.S. 624, 111 S.Ct. 2491, 115 L.Ed.2d 555, this Court determined that no plain error occurred regarding the jury instructions because the jurors were not required to unanimously agree upon any one purpose for the victim's kidnapping. *State v. Skatzes*, at ¶55.

In discussing *Schad*, this Court stated:

> In *Schad*, the defendant was convicted of first-degree murder after the prosecution advanced theories of premeditated murder and felony murder. The jury was not instructed to unanimously find defendant guilty based on one of the proposed theories of guilt. The *Schad* court found that different mental states of moral and practical equivalence (premeditated and felony murder) may serve as alternative means to satisfy the mens rea element for the single offense of murder, without infringing upon the constitutional rights of the defendant.

State v. Skatzes, at ¶53, citing *Schad*, at 643. Quoting *Schad* directly, this Court continued:

> We have never suggested that in returning general verdicts in [cases proposing multiple theories] the jurors should be required to agree upon a single means of commission, any more than the indictments were required to specify one alone. In these cases, as in litigation generally, "different jurors may be persuaded by different pieces of evidence, even when they agree upon the bottom line. Plainly there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict."

State v. Skatzes, at ¶54, citing, inter alia, *Schad*, at 631-632. Thus, this Court concluded, "we hold that because all the jurors in Skatzes's case agreed on the verdict, they were not required to

unanimously agree upon any one purpose for [the victim's] kidnapping. The trial court did not commit plain error in failing to give such an instruction." *State v. Skatzes*, at ¶55, citations omitted; see also, *State v. Johnson*, 112 Ohio St.3d 210, 2006-Ohio-6406, 858 N.E.2d 1144.

Here, as plainly acknowledged by the Second District Court of Appeals, the phrase "any criminal offense" found in the aggravated burglary statute defines the nature of "purpose," the mens rea element of aggravated burglary. *State v. Gardner*, Montgomery App. No. 21357, 2007-Ohio-182, ¶60. In essence then, there are alternative means of satisfying the mental element for the single offense of aggravated burglary; a defendant may have a purpose to commit felonious assault, as in this case, or some other crime inside the occupied structure. Therefore, no due process violation would have resulted, even if the jurors did not unanimously agree on the purpose that Gardner had for trespassing into Ebony Lee's apartment.

Moreover, the court of appeals' determination that plain error occurred finds no support in this record. The jury was instructed as to the crime of felonious assault with a deadly weapon, and the evidence demonstrated that felonious assault was the crime Gardner intended to commit. (Tr. 503) The first time Gardner forced his way into the apartment he was screaming, "I'll kill that nigger," referring to Pippins. (Tr. 198-199) Gardner started a physical fight with Pippins and eventually demanded Turrell Justice's (Gardner's co-defendant) gun to shoot Pippins. (Tr. 200-201, 203) On the second occasion, when Gardner kicked open the back door, he had a gun in his possession and ultimately fired shots at Pippins. (Tr. 209, 276-280) Thus, the court of appeals' concern that an instruction which merely tracked the language of R.C. 2911.11(A) necessarily caused the jury to speculate on the identity of the underlying criminal offense is unfounded in this case.

CONCLUSION

A jury is not required to unanimously agree upon a single means of commission of aggravated burglary. Therefore, the trial court's failure to identify the criminal offense that Gardner intended to commit when he trespassed into Ebony Lee's apartment was not a due process violation. In any event, the record on appeal shows that Gardner had a purpose to commit felonious assault, and the jury was instructed on the elements of that offense. For these reasons, Appellant State of Ohio respectfully requests that the Second District Court of Appeals' decision be reversed and Gardner's conviction for aggravated burglary be reinstated.

Respectfully submitted,

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BY R. Lynn Nothstine
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief was sent by first class on this 13th day of August, 2007, to Opposing Counsel: Richard A. Nystrom, 1502 Liberty Tower, 120 West Second Street, Dayton, Ohio 45402.

By: R. Lynn Nothstine

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IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Plaintiff-Appellant,

VS.

REGINALD GARDNER, JR.

Defendant-Appellee.

CASE NO. 07-0375

ON APPEAL FROM THE MONTGOMERY COUNTY COURT OF APPEALS, SECOND APPELLATE DISTRICT

COURT OF APPEALS CASE NO: 21357

NOTICE OF APPEAL OF APPELLANT, THE STATE OF OHIO

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NOTICE OF APPEAL OF APPELLANT, THE STATE OF OHIO

Appellant, the State of Ohio, through the Office of the Prosecuting Attorney for Montgomery County, hereby gives notice of appeal to the Supreme Court of Ohio, from the judgment of the Montgomery County Court of Appeals, Second Appellate District, entered in *State of Ohio v. Reginald Gardner, Jr.*, Case No. 21357 on January 19, 2007.

This case involves a felony and presents a substantial constitutional question that is of public or great general interest.

Respectfully submitted,

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I hereby certify that a copy of this notice of appeal was sent by first class mail on this 28th day of March, 2007, to the following: Alan Gabel, P.O. Box 1423, 411 East Fifth Street, Dayton, Ohio 45401 and David H. Bodiker, Ohio Public Defender Commission, 8 East Long Street – 11th Floor, Columbus, OH 43266-0587.

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IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 21357
v.	:	T.C. NO. 05 CR 1785/2
REGINALD GARDNER, JR.	:	**FINAL ENTRY**
Defendant-Appellant	:	
	:	

. . . . . .

Pursuant to the opinion of this court rendered on the 19th day of January, 2007 the judgment is reversed and the matter is remanded for further proceedings consistent with this court's opinion.

Costs to be paid as stated in App.R. 24.

THOMAS J. GRADY, [redacted] Judge

MIKE FAIN, Judge

MARY E. DONOVAN, Judge

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IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 21357
v.	:	T.C. NO. 05 CR 1785/2
REGINALD GARDNER, JR.	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	:	
	:	

. . . . . .

OPINION

Rendered on the 19th day of January, 2007.

. . . . . .

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. . . . . .

DONOVAN, J.

This matter is before the court on the Notice of Appeal of Reginald Gardner, Jr., filed November 10, 2005. On May 18, 2005, Gardner was indicted by a Montgomery County

grand jury on one count of aggravated burglary, in violation of R.C. 2911.11(A)(2), with a firearm specification, one count of felonious assault, in violation of R.C. 2903.11(A)(2), with a firearm specification, and one count of burglary, in violation of R.C. 2911.12(A)(2). On July 21, 2005, Gardner filed a motion to suppress, which the trial court overruled on August 24, 2005, after a hearing. Following a jury trial, Gardner was found not guilty of felonious assault and burglary and convicted of aggravated burglary with a firearm specification. The trial court sentenced Gardner to three years for aggravated burglary and three years for the firearm specification, to be served consecutively.

The events giving rise to this matter began on Monday, April 25, 2005, when Ebony Lee phoned Gardner and asked to buy some marijuana from him. Gardner and Turell Justice arrived at Lee's home 30 minutes later, at 1024 Danner Ave. in Dayton, and Lee was sitting on her porch. According to Lee, when Gardner displayed an amount of marijuana to her, Justice asked Gardner to give some of it to him. Gardner refused, stating, "'Man, nah, I just lost a spank. These niggers just got me for $150.00,' screaming and hollering." Lee's boyfriend, James Pippins, was inside Lee's home, along with Lee's three young children. Upon hearing yelling outside, Pippins, concerned that Gardner was yelling at Lee, came out on the porch and told Gardner to back away. Lee testified that she asked Pippins whom he was speaking to, and Pippins indicated that he was speaking to Gardner. Lee then told Pippins that Gardner was addressing Justice, and not her. Before Pippins could get back inside, Gardner and Justice jumped onto the porch and Gardner began to yell at Pippins. According to Lee, Pippins said, "Man, if you wasn't talking to my girl, it don't even matter." Pippins went inside, and Lee testified that Gardner said, "I'll kill that nigger."

Lee decided she did not want any marijuana and opened the door to go inside.

Gardner forcefully grabbed the screen door from her hand, and Lee testified that she told him not to come inside. Gardner continued to yell at Pippins, and Lee testified "then [Pippins] made a comment to him, 'I ain't no bitch. You ain't going to keep standing there talking to me like that.'" Gardner pushed Lee out of the way and took a swing at Pippins. Justice also entered the residence. Pippins slammed Gardner to the floor, and Justice attempted to join the fight. Lee stated she grabbed Justice's shirt, and "[w]hen he couldn't get past me to jump in the fight, that's when he stepped back and lifted up his white tee-shirt and pulled a gun out of the front of his pants." According to Lee, Justice pointed the gun at Pippins' back while Pippins was on top of Gardner.

Pippins got off of Gardner and went upstairs. Lee's children were running through the residence screaming. Pippins then started back downstairs with an iron in his hand. Lee stated that she told him to stay upstairs because Justice had a gun. According to Lee, Gardner said, "'Man, don't nobody want that bitch. You think somebody wants her. Don't nobody want that bitch." Pippins, back downstairs, hit Gardner in the mouth with his fist.

Gardner repeatedly asked Justice to give him the gun. Justice refused, and according to Lee, Justice said, "'No, we got three kids in here. I got three kids, I know how it is. We going to catch this nigger in the 'hood. We going to kill him." Gardner and Justice then departed. The police were called and responded to Lee's residence. After the police left to look for Gardner and Justice, Lee called her mother, her brother, and her father, all of whom came to Lee's home, along with Lee's cousin, Melissa. Lee decided to take her children to her mom's house because she did not feel safe.

Lee put her children in Melissa's car, but before they could leave, she testified that she observed Gardner and Justice returning to her apartment complex with a group of

eight people. According to Lee, Gardner said, "'Yeah, I'm back now mother-fucker. I got my killers with me, we going to kill you tonight. You don't know who you can fuck with, nigger." Lee's mother called the police. Pippins remained in the apartment, and he and Gardner exchanged words. Lee and her mother got into Melissa's car with the children and drove to a nearby parking lot to wait for the police. Pippins closed the door, and according to Lee, she observed Gardner forcefully kick her door in. Gardner entered Lee's home and chased Pippins out the front door.

The other people with Gardner ran to the front of the apartment. Melissa drove onto Danner Ave. and Lee observed Justice fire five or six shots at Pippins as he fled. Lee's neighbor, Laquita Hart, also testified that she observed Gardner shooting at Pippins.

Gardner asserts five assignments of error. His first assignment of error is as follows: "APPELLANT'S CONVICTIONS FOR AGGRAVATED BURGLARY AND THE GUN SPECIFICATION ASSOCIATED WITH THE AGGRAVATED BURGLARY ARE AGAINST THE SUFFICIENCY AND/OR MANIFEST WEIGHT OF THE EVIDENCE."

Although both are raised by Gardner in a single assignment of error, "a challenge to the sufficiency of the evidence differs from a challenge to the manifest weight of the evidence." *State v. McKnight*, 107 Ohio St.3d 101,112, 837 N.E.2d 315, 2005-Ohio-6046. "In reviewing a claim of insufficient evidence, [t]he relevant inquiry is whether, after reviewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.' (Internal citations omitted). A claim that a jury verdict is against the manifest weight of the evidence involves a different test. 'The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and

determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." Id. (Internal citations omitted).

The credibility of the witnesses and the weight to be given to their testimony are matters for the trier of facts to resolve. *State v. DeHass* (1967), 10 Ohio St.2d 230, 231, 227 N.E.2d 212. "Because the factfinder * * * has the opportunity to see and hear the witnesses, the cautious exercise of the discretionary power of a court of appeals to find that a judgment is against the manifest weight of the evidence requires that substantial deference be extended to the factfinder's determinations of credibility. The decision whether, and to what extent, to credit the testimony of particular witnesses is within the peculiar competence of the factfinder, who has seen and heard the witness." *State v. Lawson* (Aug. 22, 1997), Montgomery App. No. 16288.

This court will not substitute its judgment for that of the trier of facts on the issue of witness credibility unless it is patently apparent that the trier of fact lost its way in arriving at its verdict. *State v. Bradley* (Oct. 24, 1997), Champaign App. No. 97-CA-03.

Aggravated burglary is defined as follows:

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

"(1) The offender * * * threatens to inflict physical harm on another;

"(2) The offender has a deadly weapon * * * on or about his person."

The firearm specification required the State to prove that while committing the aggravated burglary offense, Gardner had a firearm on or about his person and displayed the firearm or used it to facilitate the offense. R.C. 2941.145.

If a person acting with the kind of culpability required for the offense aids or abets another in committing the offense, that person is guilty of complicity and may be prosecuted and punished the same as the principal offender. R.C. 2923.03(A)(2), (F). Intent can and must be inferred from the circumstances surrounding the crime. *State v. Johnson,* 93 Ohio St.3d 240, 2001-Ohio-1336. Aid or abet means to support, help, assist, cooperate with or encourage. Id.

Gardner argues that the force element necessary to prove a burglary was not established by the State. The evidence presented by the State, when viewed in a light most favorable to it, shows that Gardner got into a verbal argument with Pippins and began threatening him, and that Lee told him to leave. Gardner then forcefully grabbed the door from Lee, shoving her out of the way, entering the residence and attacking Pippins. After leaving the residence, Gardner soon returned, kicked in the door, and fired shots at Pippins as he fled. A rational trier of fact could find all of the essential elements of aggravated burglary proven beyond a reasonable doubt, including the force element; Gardner grabbed the door, shoved Lee, attacked Pippins, and he later kicked in the door. In other words, Gardner's conviction is supported by legally sufficient evidence.

Gardner's conviction is also not against the manifest weight of the evidence. The credibility of the witnesses and the weight to be given their testimony are matters for the jury to resolve. Gardner presented no evidence, and the jurors did not lose their way simply

because they chose to believe the State's witnesses, which they had a right to do. Having reviewed the entire record, we cannot clearly find that the evidence weighs heavily against a conviction, or that a manifest miscarriage of justice has occurred. Gardner's first assignment of error is overruled.

Gardner's second assignment of error is as follows:

"APPELLANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL"

"Claims of ineffective assistance of counsel are assessed according to the two part test articulated in *Strickland v. Washington* (1984), 466 U.S. 668. "In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's representation fell below an objective standard of reasonableness and that, but for counsel's errors, the result of the proceeding would have been different." *State v. Kidd*, Clark App. No. 2005-CA-37, 2006-Ohio-4008. Trial counsel is entitled to a strong presumption that his conduct falls within the wide range of reasonable assistance. * * * Hindsight is not permitted to distort the assessment of what was reasonable in light of counsel's perspective at the time, and a debatable decision concerning trial strategy cannot form the basis of a finding of ineffective assistance of counsel." *State v. Parrish*, Montgomery App. No. 21206, 2006-Ohio-4161.

"(A) single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *State v. Price* (1979), 60 Ohio St.2d 136, 141, 398 N.E.2d 772 (internal citations omitted).

A. Failure to Request Appropriate Jury Instructions

1. Other Acts Limiting Instruction

Gardener argues that he "was deprived of effective assistance of counsel through Defense Counsel's failure to request an 'other acts' limiting instruction and for failing to object when the Trial Court intentionally omitted it from the jury charge." Specifically, Gardner argues that the evidence before the jury that Gardner planned to sell marijuana to Lee indicated that Gardner has a propensity to commit crime.

Counsel's decision not to request a limiting instruction may have been a strategic decision in order to avoid drawing further attention to Gardner's criminal conduct. Even if counsel should have requested a limiting instruction, Gardner still must prove that he was prejudiced by counsel's failure before he can prevail on a claim of ineffective assistance of counsel. The fact that Gardner was not convicted of felonious assault and burglary indicates that the jury did not convict him of aggravated burglary simply because his possession of marijuana shows a propensity to commit crime. Given the evidence discussed above, we conclude that it is unlikely that the lack of a limiting instruction caused the jury to convict Gardner of aggravated burglary. In other words, it is unlikely that Gardner would have been acquitted had his counsel requested and received a limiting instruction.

2. Instruction Relating to Aggravated Burglary

For the reasons discussed in response to Gardner's Fourth Assignment of Error, the trial court committed plain error when it instructed the jury on the law of aggravated burglary. Because this matter is reversed and remanded for a new trial on that basis, we need not reach the merits of Gardner's argument herein.

3. Instruction Relating to Juror's Note Taking

Gardner complains about counsel's failure to object to the trial court's jury instruction

regarding note taking by the jurors. Gardner argues that the trial court "invited jurors to entirely disregard the opinions of note takers."

A review of the record reveals that Gardner's claim is a misrepresentation of the meaning of the court's instruction. The court's instruction on note taking in its entirety is as follows:

"Do not hesitate to change an opinion if convinced that it is wrong. However, you may not surrender honest convictions in order to be congenial or to reach a verdict solely because of the opinion of other jurors.

"The court permitted those jurors who desired to take notes to do so. The taking of notes should not have diverted your attention from what was said or what happened in the courtroom during the trial, since some people believe that the taking of notes distracts a person's attention and interferes with hearing all of the evidence. No juror was required to take notes and this was entirely a matter of personal choice for each juror. The jurors who chose not to take notes must not be influenced by those who did take notes.

"The fact that the notes taken by a juror support his or her recollection in no way makes that juror's memory more reliable than that of the jurors who did not take notes. Notes are merely a memory aid and must not take precedence over your independent memory of the facts. You will be allowed to take your notes to the jury room, and all notes will be returned to the bailiff to be destroyed when the jury is discharged."

When properly viewed in the context of the entire charge, the court's instruction did not say that jurors who did not take notes should entirely disregard the opinions of those who did. Rather, the instruction simply indicated that the mere fact that a particular juror took notes should not cause other jurors who did not to give that person's opinion any extra

or added weight. Accordingly, counsel's failure to object did not fall below an objective standard of reasonableness and cannot form the basis of a claim of ineffective assistance.

B. Failure to Correct the Prosecutor's Misstatements of the Law During Voir Dire and Closing Argument

During voir dire, the Prosecutor told the jury that they were "here only to decide what the elements of the crime are, whether or not we've proven them by proof beyond a reasonable doubt." Gardner argues that he received ineffective assistance when his counsel failed to object to the State's misstatement of the jury's role. The trial court, however, instructed the jury as follows before voir dire began: "You will receive the facts from the witness stand and through exhibits. The rules of law, or the instructions of law as they are called, will be given to you by the Court, and it is your sworn duty to accept and apply these rules as given to you." The trial court's instructions, not counsel's statements, govern the law to be applied in the case, and it is presumed that the jury will follow the trial court's instructions. *State v. Loza* (1994), 71 Ohio St.3d 61, 75, 641 N.E.2d 1082; *State v. Henderson* (1988), 39 Ohio St.3d 24, 33, 528 N.E.2d 1237. Accordingly, counsel's failure to object did not fall below an objective standard of reasonableness.

Gardner also argues that his counsel was ineffective for failing to object to a misstatement of the law by the prosecutor during closing argument regarding aiding and abetting. The prosecutor explained the principle of aiding and abetting to the jury as follows:

"There's an aggravated burglary there committed with a firearm. The judge is going to charge you on aiding and abetting. He's going to tell you aiding and abetting basically means to help or to assist, and what one does, that equally applies to the other, and vice-

versa. Remember we talked about that. So what one does, we can apply to the other and what the other does, we can apply that to the other one. That's the law in the State of Ohio that you're sworn to accept."

Gardner argues that the prosecutor misstated the law of aiding and abetting because he neglected to mention that the aider and abettor must "knowingly" help, assist, or encourage another in committing the offense. In other words, the complicitor must act with the kind of culpability required for the commission of the offense. R.C. 2923.03(A)(2). More specifically, Gardner claims that the witnesses did not see Gardner with a gun "at the scene of the aggravated burglary," but only Justice, and that Gardner was not aiding and abetting Justice. According to Gardner, absent objection by counsel, the jury could have been led to believe that "either of the parties were aiders and abettors whether or not they had the requisite intent and whether or not they were acting in concert."

A review of the record shows that the prosecutor told the jurors that the court would instruct them on aiding and abetting. The trial court did in fact correctly instruct the jury on the law of aiding and abetting. The trial court's instructions, not counsel's statements during closing argument, govern the law to be applied in the case, and it is presumed that the jury will follow the trial court's instructions. *Loza*; *Henderson*, supra. Accordingly, counsel's failure to object to the prosecutor's description of aiding and abetting did not fall below an objective standard of reasonableness.

C. Failure to Object to Inappropriate Argument by the State

Gardner argues that the prosecutor's suggestion in closing that Gardner had been drinking was not established by the evidence and that, given counsel's failure to object, "jurors were invited to impermissibly speculate about the circumstances of the incident to

Appellant's prejudice."

Lee testified that Justice responded to Gardner's claim that he had lost some "spank" by saying, "Man, you drunk." During closing argument, the prosecutor discussed Pippins' concerns for Lee when he heard Gardner arguing with Justice, stating, "The problem was with Reginald Gardner. That didn't set well with him. He took issue with it. He felt this was an affront on him. Maybe it was because he had been drinking or liquored up or whatever the reason. Maybe that's his personality. Maybe his personality is to be aggressive." The prosecutor's suggestion that Gardner had been drinking was based upon evidence presented at trial and fell within the wide latitude afforded to prosecutors during closing argument. *State v. Smith*, 97 Ohio St.3d 367, 2002-Ohio-6659, 780 N.E.2d 221. (Internal citation omitted).

Gardner's second assignment of error is overruled.

Gardner's third assignment of error is as follows:

"APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIAL THROUGH PROSECUTORIAL MISCONDUCT."

Gardner argues that the prosecutor misstated the law with respect to aiding and abetting in his closing argument. Gardner also argues that, "during voir dire, the Prosecutor informed the jury that its function was to decide what the elements of the offense are."

In analyzing claims of prosecutorial misconduct, the test is "whether remarks were improper and, if so, whether they prejudicially affected substantial rights of the accused." *State v. Jones*, 90 Ohio St.3d 403, 420, 2000-Ohio-187. (Internal citations omitted). "The touchstone of analysis 'is the fairness of the trial, not the culpability of the prosecutor.'" Id.,

quoting *Smith v. Phillips* (1982), 455 U.S. 209, 219, 102 S.Ct. 940, 947, 71 L.Ed.2d 78. Where it is clear beyond a reasonable doubt that a jury would have found the defendant guilty even absent the alleged misconduct, the defendant has not been prejudiced, and his conviction will not be reversed. See *State v. Loza* (1994), 71 Ohio St.3d 61, 78, 1994-Ohio-409. In reviewing allegations of prosecutorial misconduct, we review the alleged wrongful conduct in the context of the entire trial. *Darden v. Wainwright* (1986), 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144.

Generally, prosecutors are entitled to considerable latitude in opening statement and closing argument. *State v. Ballew*, 76 Ohio St.3d 244, 255, 1996-Ohio-81; *State v. Stevens*, Montgomery App. No. 19572, 2003-Ohio-6429. In closing argument, a prosecutor may comment freely on "what the evidence has shown and what reasonable inferences may be drawn therefrom." *State v. Lott* (1990), 51 Ohio St.3d 160, 165, 555 N.E. 2d 293, quoting *State v. Stephens* (1970), 24 Ohio St. 2d 76, 82, 263 N.E.2d 773. "Moreover, because isolated instances of prosecutorial misconduct are harmless, the closing argument must be viewed in its entirety to determine whether the Defendant has been prejudiced." *Stephens*, supra, citing *Ballew* and *State v. Lorraine* (1993), 66 Ohio St.3d 414, 420, 613 N.E.2d 212. Failure to object to alleged misconduct waives all but plain error for purposes of appellate review. *State v. Wickline* (1990), 50 Ohio St.3d 114, 119-20, 552 N.E.2d 913.

A. Misstatement of the Law

Counsel for Gardner failed to object to the prosecutor's remarks, waiving all but plain error herein. The trial court properly instructed the jury on the law of aiding and abetting. Given the context of the entire trial, it is clear beyond a reasonable doubt, for the

reasons discussed in response to Gardner's first assignment of error, that the jury would have found Gardner guilty of aggravated burglary in the absence of the prosecutor's remarks regarding aiding and abetting. Further, we cannot say that the prosecutor's remark during voir dire, in the context of the entire trial and the court's instructions, prejudiced Gardner's substantial rights. There being no plain error, Gardner's argument lacks merit.

B. Inappropriate Argument

Gardner argues that it was prosecutorial misconduct for the State to suggest in its closing argument that Gardner had been drinking. As discussed above, Lee provided testimony that Justice accused Gardner of being drunk. There being no plain error, Gardner's argument lacks merit.

C. Failure to Correct Inaccurate Jury Instructions

According to Gardner, "certain errors were present in the jury instructions. It was incumbent upon the State to call the Trial Court's error to its attention." As discussed in response to Gardner's Fourth Assignment of Error, the trial court committed plain error when it instructed the jury on the law of aggravated burglary. Because this matter is reversed and remanded for a new trial on that basis, we need not reach the merits of Gardner's argument herein.

Gardner's fourth assignment of error is as follows:

"THE TRIAL COURT DEPRIVED APPELLANT OF A FAIR TRAIL AND DUE PROCESS OF LAW BY FAILING TO PROPERLY INSTRUCT THE JURY."

Gardner argues that the trial court improperly instructed the jury regarding the offense of aggravated burglary. The trial court instructed the jury on aggravated burglary

as follows:

"In Count Three of the indictment, Mr. Reginald Gardner is charged with aggravated burglary. Before you can find Mr. Gardner guilty of this offense, you must find beyond a reasonable doubt that on or about April 25, 2005, in Montgomery County, Ohio, he did by force, stealth or deception, trespass in an occupied structure, to-wit, a residence located at 1024 Danner Avenue, Apartment B, or in a separately secured or separately occupied portion of the occupied structure, when another person, other than an accomplice of the offender, was present, with the purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, and did have a deadly weapon or dangerous ordnance, to-wit, a handgun, on or about his person or under his control."

The trial court's instruction tracked the language of the aggravated burglary section, R.C. 2911.11(A)(2), which prohibits trespass in an occupied structure with a purpose to commit "any criminal offense" while inside. Gardner agues that by failing to specify the underlying criminal offense he had a purpose to commit, the court's instruction permitted the jurors to return a verdict of guilty on a finding that he had a purpose to commit some criminal offense, but without necessarily arriving at a unanimous agreement about what that offense was, depriving Defendant of his due process right to a unanimous verdict required by Crim. R. 31(A).

Gardner failed to object at trial to the trial court's jury instruction on aggravated burglary. Thus, for purposes of appellate review Gardner has waived all but plain error. *Wickline*, supra; *State v. Parrish* (Aug. 11, 2006), Montgomery App. No. 21206, 2006-Ohio-4161.

In *State v. Wamsley* (Oct. 2, 2006), Columbiana App . No. 05CO11, 2006-Ohio-5303, the court held that the trial court's failure in its jury instructions on aggravated burglary to include any instructions identifying the underlying criminal offense Defendant allegedly had a purpose to commit when he trespassed in the occupied structure constitutes plain error. In *Wamsley*, as in this case, the trial court's instruction on aggravated burglary closely tracked the statutory language in R.C. 2911.11(A), requiring that a person have a purpose to commit any criminal offense in the occupied structure. Neither in *Wamsley* nor in this case, however, did the trial court specify any particular underlying criminal offense the defendant had a purpose to commit or define its elements for the jury.

Wamsely pointed out that the standard Ohio Jury Instructions relating to aggravated burglary, Section 511.11, require the trial court to instruct the jury on the elements of the applicable underlying criminal offense. *Wamsley* also distinguished on its facts the only other case found discussing this issue, *State v. Dimitrov* (Feb. 15, 2001), Cuyahoga App. No. 76986, 2001-Ohio-4133. *Dimitrov* held that the trial court did not err when it failed to include in its instructions on burglary an instruction identifying the specific underlying criminal offense that Defendant had a purpose to commit when he trespassed in the occupied structure. Although the trial court did not instruct the jury on the elements of any particular underlying offense, the court in *Dimitrov* nevertheless stated in its instructions:

"Now, I haven't defined any criminal offense but you can use your common sense of theft. Anything can be a criminal offense, anything. Theft is sufficient here to find in this case."

The *Wamsley* court determined that this instruction in *Dimitrov* explained what the

jury needed to find: that theft could constitute the underlying criminal offense, and therefore the instruction gave the jury sufficient information to determine the criminal offense that Defendant had a purpose to commit. The trial court's instruction in this case, like the instruction in *Wamsley,* does not satisfy even the minimal requirements of *Dimitrov*, because there was no explanation or suggestion by the court as to what crime could constitute the underlying criminal offense that would prove the "purpose to commit * * * any criminal offense" element of aggravated burglary.

As it is used in R.C. 2911.11(A), the phrase "any criminal offense" has a dual role. It functions to allow any statutory offense to serve as the underlying offense a trespasser had the purpose to commit. And, it modifies the word "purpose" to define the nature of that element of the offense of aggravated burglary. In order to find a violation of R.C. 2911.11(A)(1) or (2), the jury must find that the required purpose existed, and in order to make that finding the jury must unanimously agree on the particular underlying offense which the purpose concerned. Therefore, the court's instructions must identify the underlying offense and its elements. If the instruction merely tracks the language of R.C. 2911.11(A) to permit a guilty verdict on a finding of a purpose to commit "any criminal offense," the jury necessarily must speculate on what the underlying criminal offense was.

The failure of the trial court in its instructions to the jury to designate and define the elements of the underlying criminal offense Defendant had a purpose to commit constitutes a failure to instruct the jury on all of the essential elements of the offense charged, which violates his right to due process and constitutes reversible error, even in the absence of an objection. *Wamsley*, supra; *State v. Smith* (Jan. 20, 1989), Portage App. No. 1720; *Hoover v. Garfield Heights Mun. Ct.* (C.A. 6, 1986), 802 F.2d 263. The Due Process

Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *In re Winship* (1970), 397 U.S. 358, 90 S. Ct. 1068, 25 L.Ed. 2d 368. If the jury is not instructed on every essential element of the offense charged, it cannot find beyond a reasonable doubt every fact necessary to constitute the crime charged, and the *Winship* principle is violated. *Hoover*, supra.

In *State v. Griffin* (July 15, 2005), Montgomery App. No. 20681, 2005-Ohio-3698, we recognized that the jury's verdict as to which underlying offense Defendant had a purpose to commit for purposes of aggravated burglary must be unanimous, although we held that the failure to give a special unanimity instruction in that regard does not constitute plain error where the court gave a general unanimity instruction, and although the court instructed the jury on alternative underlying offenses that might apply, the evidence was sufficient to support a conviction based upon at least one of them.

The State of Ohio asserts that the holding in *Shad v. Arizona*, 501 U.S. 624, 632, 111 S.Ct. 2491, 115 L.Ed. 555, that "there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict," applies to the trial court's failure in *Gardner* to instruct the jury on the particular underlying offense that the defendant had a purpose to commit when he trespassed in an occupied structure.

The statute in issue in *Shad* specifically enumerated several means by which first degree murder may be committed, providing, "A murder which is perpetrated by means of poison or lying in wait, torture or by any other kind of wilful, deliberate or premeditated killing, or which is committed in avoiding or preventing lawful arrest or effecting an escape from legal custody, or in the perpetration of or attempt to perpetrate, arson, rape in the first

degree, robbery, burglary, kidnaping, or mayhem, or sexual molestation of a child under the age of thirteen years, is murder of the first degree." *Shad,* at 629.

The *Shad* court determined that the issue before it was "one of the permissible limits in defining criminal conduct, as reflected in the instructions to jurors applying the definitions, not one of jury unanimity." *Shad* at 631. In determining that the jury in *Shad* was not required to agree on one of the alternative theories of premeditated and felony murder, it was significant to the Supreme Court that "the Arizona Supreme Court has effectively decided that, under state law, premeditation and the commission of a felony are not independent elements of the crime, but rather are mere means of satisfying a single *mens rea* element." *Shad,* at 637. There has been no authoritative determination by the Ohio Supreme Court that "any criminal offense" that a defendant had a purpose to commit is a mere means of satisfying the mens rea of aggravated burglary. "Any criminal offense" is an underlying criminal act with independent elements that must be proven beyond a reasonable doubt to satisfy a defendant's right to due process. In other words, the issue before us in *Gardner,* unlike in *Shad,* is precisely one of jury unanimity. "[N]othing in our history suggests that the Due Process Clause would permit a State to convict anyone under a charge of 'Crime' so generic that any combination of jury findings of embezzlement, reckless driving, murder, burglary, tax evasion, or littering, for example, would suffice for conviction." *Shad,* at 633. The requirement of unanimity would not attach to the alternative means by which aggravated burglary may be committed (i.e. force with screw driver vs. force with a hammer) but does attach to the elements of the specific crime the accused had the purpose to commit in the dwelling. In order to find a violation of R.C. 2911.11, the jury must unanimously agree on the particular underlying offense which the

defendant had a purpose (a specific mens rea) to commit. The holding in *Shad* has no application to the trial court's failure to properly instruct the jury on the elements of Gardner's underlying offense, as it is not a form of alternative means (such as force, stealth or deception) but rather purposeful conduct to commit an underlying crime defined by specific elements. To conclude otherwise would be a departure from "an American tradition that is deep and broad and continuing." *Shad*, at 650 (Scalia, concurring in part and concurring in the judgment).

The practical effect of applying *Shad* to *Gardner* would permit a trial judge to instruct a jury on a plethora of possible underlying offenses, such as theft, domestic violence, arson, rape or murder. Then any combination of jury findings supporting the distinct underlying offense would suffice for conviction, regardless of whether or not the findings were unanimous. Such a result is clearly prohibited by a defendant's guarantee of due process, as well as the specific intent implicit in the defendant's purpose for entering.

Because the trial court did not instruct the jury concerning any underlying offense Gardner may have had a purpose to commit, and where, as here, the verdict form does not contain a separate finding regarding that matter, the record does not demonstrate that the jury unanimously agreed upon the identity of that underlying offense Gardner had a purpose to commit. Under those circumstances, a manifest injustice occurred and plain error exists. *State v. Adams* (1980), 62 Ohio St.2d 151, 404 N.E.2d 144. Accordingly, the judgment of the trial court will be reversed and this cause remanded for a new trial.

Gardner's fifth assignment of error is as follows:

"THE TRIAL COURT ERRED IN FAILING TO SUPPRESS APPELLANT'S INVOLUNTARY

STATEMENT."

Gardner moved to suppress the statements that he made to Detective Bullens on May 11, 2005, arguing that Gardner did not voluntarily waive his Miranda rights and that the statements were not made voluntarily. At the hearing on the motion to suppress, Gardner testified that he contacted Bullens after learning that a warrant had been issued for his arrest. According to Gardner, Bullens told him that if he would come to the jail and speak with him about the incident, Bullens would have the warrant withdrawn. Gardner testified that he was read the pre-interview form and that he understood his rights and agreed to waive them. Gardner argued that Bullens did not withdraw the warrant and arrested Gardner. Bullens testified that he did not tell Gardner that the warrant would be withdrawn.

As the trial court correctly noted, "[t]he voluntariness of a suspect's statement has always been the basic constitutional test for admissibility." "'To be knowing, intelligent and voluntary, the relinquishment of [*Miranda*] rights must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception, and the waiver must have been made with full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.'" *State v. Abner*, Montgomery App. No. 20661, 2006-Ohio-4510. "A suspect's decision to waive his privilege against self-incrimination is made voluntarily, absent evidence that his will is overborne and his capacity for self-determination was critically impaired because of coercive police conduct." *State v. Otte*, 74 Ohio St.3d 555, 562, 660 N.E.2d 711,1996-Ohio-108. "In deciding whether a defendant's confession is involuntarily induced, the court should consider the totality of the circumstances, including the age, mentality, and prior

criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement." *State v. Winterbotham*, Greene App. No. 05CA100, 2006-Ohio-3989.

As the trial court correctly indicated, even if Gardner's version of his interview with Bullens is accurate, Gardner voluntarily reported to Bullens, acknowledged and waived his rights, and made a statement to Bullens. There was nothing before the trial court to suggest that Gardner's will was "overborne and his capacity for self-determination was critically impaired" due to Bullens' conduct. We agree with the trial court that, considering the totality of the circumstances, the State established that Gardener's statements were voluntary. Gardner's fifth assignment of error is overruled.

Judgment reversed and remanded for proceedings consistent with this opinion.

. . . . . .

FAIN, J., and GRADY, J., concur.

Copies mailed to:

R. Lynn Nothstine
Alan Gabel
Hon. Jeffrey E. Froelich

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*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH FILE 24, APPROVED 7/19/2007 ***

*** WITH THE EXCEPTION OF FILE 15 (HB 119) ***

*** ANNOTATIONS CURRENT THROUGH 4/1/07 ***

*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH 6/11/07 ***

TITLE 29. CRIMES -- PROCEDURE

CHAPTER 2903. HOMICIDE AND ASSAULT

ASSAULT

Go to the Ohio Code Archive Directory

ORC Ann. 2903.11 (2007)

§ 2903.11. Felonious assault

(A) No person shall knowingly do either of the following:

(1) Cause serious physical harm to another or to another's unborn;

(2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance.

(B) No person, with knowledge that the person has tested positive as a carrier of a virus that causes acquired immunodeficiency syndrome, shall knowingly do any of the following:

(1) Engage in sexual conduct with another person without disclosing that knowledge to the other person prior to engaging in the sexual conduct;

(2) Engage in sexual conduct with a person whom the offender knows or has reasonable cause to believe lacks the mental capacity to appreciate the significance of the knowledge that the offender has tested positive as a carrier of a virus that causes acquired immunodeficiency syndrome;

(3) Engage in sexual conduct with a person under eighteen years of age who is not the spouse of the offender.

(C) The prosecution of a person under this section does not preclude prosecution of that person under *section 2907.02 of the Revised Code.*

(D) (1) Whoever violates this section is guilty of felonious assault, a felony of the second degree. If the victim of a violation of division (A) of this section is a peace officer or an investigator of the bureau of criminal identification and investigation, felonious assault is a felony of the first degree. If the victim of the offense is a peace officer, or an investigator of the bureau of criminal identification and investigation, and if the victim suffered serious physical harm as a result of the com-

mission of the offense, felonious assault is a felony of the first degree, and the court, pursuant to division (F) of *section 2929.13 of the Revised Code*, shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(2) In addition to any other sanctions imposed pursuant to division (D)(1) of this section for felonious assault committed in violation of division (A)(2) of this section, if the deadly weapon used in the commission of the violation is a motor vehicle, the court shall impose upon the offender a class two suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege as specified in division (A)(2) of *section 4510.02 of the Revised Code*.

(E) As used in this section:

(1) "Deadly weapon" and "dangerous ordnance" have the same meanings as in *section 2923.11 of the Revised Code*.

(2) "Motor vehicle" has the same meaning as in *section 4501.01 of the Revised Code*.

(3) "Peace officer" has the same meaning as in *section 2935.01 of the Revised Code*.

(4) "Sexual conduct" has the same meaning as in *section 2907.01 of the Revised Code*, except that, as used in this section, it does not include the insertion of an instrument, apparatus, or other object that is not a part of the body into the vaginal or anal opening of another, unless the offender knew at the time of the insertion that the instrument, apparatus, or other object carried the offender's bodily fluid.

(5) "Investigator of the bureau of criminal identification and investigation" means an investigator of the bureau of criminal identification and investigation who is commissioned by the superintendent of the bureau as a special agent for the purpose of assisting law enforcement officers or pro-

viding emergency assistance to peace officers pursuant to authority granted under *section 109.541 [109.54.1] of the Revised Code.*

(6) "Investigator" has the same meaning as in *section 109.541 [109.54.1] of the Revised Code.*

HISTORY:

134 v H 511 (Eff 1-1-74); 139 v S 199 (Eff 7-1-83); 139 v H 269 (Eff 7-1-83); 140 v S 210 (Eff 7-1-83); 146 v S 2 (Eff 7-1-96); 146 v S 239 (Eff 9-6-96); 148 v S 142 (Eff 2-3-2000); 148 v H 100. Eff 3-23-2000; 151 v H 95, § 1, eff. 8-3-06; 151 v H 347, § 1, eff. 3-14-07; 151 v H 461, § 1, eff. 4-4-07.

NOTES:

Section Notes

Governor Taft's veto of HB 347 was overridden by the Ohio General Assembly.

Not analogous to former RC § 2903.11 (126 v 1039; 130 v 658), repealed 133 v H 84, § 2, eff 9-15-70.

EFFECT OF AMENDMENTS

151 v H 461, effective April 4, 2007, added (D)(2); and inserted (E)(2) and redesignated the remaining subdivisions accordingly.

151 v H 347, effective March 14, 2007, in (D), inserted "or an investigator of the bureau of criminal identification and investigation" twice, and deleted "as defined in *section 2935.01 of the Revised Code*" following "offense is a peace officer"; and added (E)(4) and (5).

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TITLE 29. CRIMES -- PROCEDURE

CHAPTER 2905. KIDNAPPING AND EXTORTION

KIDNAPPING AND RELATED OFFENSES

Go to the Ohio Code Archive Directory

ORC Ann. 2905.01 (2007)

THIS SECTION HAS MORE THAN ONE DOCUMENT WITH VARYING EFFECTIVE DATES.

§ 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:

(1) To hold for ransom, or as a shield or hostage;

(2) To facilitate the commission of any felony or flight thereafter;

(3) To terrorize, or to inflict serious physical harm on the victim or another;

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

(5) To hinder, impede, or obstruct a function of government, or to force any action or concession on the part of governmental authority.

(B) 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 knowingly do any of the following, under circumstances that create a substantial risk of serious physical harm to the victim or, in the case of a minor victim, under circumstances that either create a substantial risk of serious physical harm to the victim or cause physical harm to the victim:

(1) Remove another from the place where the other person is found;

(2) Restrain another of the other person's liberty;

(3) Hold another in a condition of involuntary servitude.

(C) Whoever violates this section is guilty of kidnapping. Except as otherwise provided in this division, kidnapping is a felony of the first degree. Except as otherwise provided in this division, if the offender releases the victim in a safe place unharmed, kidnapping is a felony of the second degree. If the victim of the offense is less than thirteen years of age and if the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, kidnapping is a felony of the first degree, and, notwithstanding the definite sentence provided for a felony of the first degree in *section 2929.14 of the Revised Code*, the offender shall be sentenced pursuant to *section 2971.03 of the Revised Code* as follows:

(1) Except as otherwise provided in division (C)(2) of this section, the offender shall be sentenced pursuant to that section to an indefinite prison term consisting of a minimum term of fifteen years and a maximum term of life imprisonment.

(2) If the offender releases the victim in a safe place unharmed, the offender shall be sentenced pursuant to that section to an indefinite term consisting of a minimum term of ten years and a maximum term of life imprisonment.

(D) As used in this section, "sexual motivation specification" has the same meaning as in *section 2971.01 of the Revised Code*.

HISTORY:

134 v H 511 (Eff 1-1-74); 139 v S 199 (Eff 1-5-83); 146 v S 2. Eff 7-1-96; 152 v S 10, § 1, eff. 1-1-08.

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TITLE 29. CRIMES -- PROCEDURE

CHAPTER 2911. ROBBERY, BURGLARY, TRESPASS AND SAFECRACKING

BURGLARY

Go to the Ohio Code Archive Directory

ORC Ann. 2911.11 (2007)

§ 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:

(1) The offender inflicts, or attempts or threatens to inflict physical harm on another;

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

(B) Whoever violates this section is guilty of aggravated burglary, a felony of the first degree.

(C) As used in this section:

(1) "Occupied structure" has the same meaning as in *section 2909.01 of the Revised Code.*

(2) "Deadly weapon" and "dangerous ordnance" have the same meanings as in *section 2923.11 of the Revised Code.*

HISTORY:

134 v H 511 (Eff 1-1-74); 139 v S 199 (Eff 1-5-83); 140 v S 210 (Eff 7-1-83); 146 v S 2 (Eff 7-1-96); 146 v S 269. Eff 7-1-96.

NOTES:

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

Articles in addition to, and amendments of the Constitution of the United States of America, proposed by Congress, and ratified by the Legislatures of the several States, pursuant to the fifth article of the original Constitution.

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
(Effective 1791)

Comparative Legislation

Freedom of speech, press, OConst art I, § 11
Rights of assembly petition, OConst art I, § 3

AMENDMENT II

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.
(Effective 1791)

Comparative Legislation

Right to bear arms, OConst art I, § 4

AMENDMENT III

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.
(Effective 1791)

Comparative Legislation

Quartering of troops, OConst art I, § 13

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
(Effective 1791)

Comparative Legislation

Search and seizure, OConst art I, § 14

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.
(Effective 1791)

Comparative Legislation

Compensation for taking for public use, OConst art I, § 19
Double jeopardy, OConst art I, § 10
Due process, OConst art I, § 16
Indictment by grand jury, OConst art I, § 10
Self-incrimination, OConst art I, § 10

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.
(Effective 1791)

Comparative Legislation

Compulsory process, OConst art I, § 10
Confronting witnesses, OConst art I, § 10
Nature of charge, OConst art I, § 10
Right to counsel, OConst art I, § 10
Right to trial by jury, OConst art I, § 5
Speedy and public trial by jury, OConst art I, § 10

AMENDMENT VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.
(Effective 1791)

Comparative Legislation

Trial by jury, OConst art I, § 5

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.
(Effective 1791)

Comparative Legislation

Bail, OConst art I, § 9

AMENDMENT IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.
(Effective 1791)

Comparative Legislation

Powers reserved to people, OConst art I, § 20

AMENDMENT X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.
(Effective 1791)

Comparative Legislation

Powers reserved to people, OConst art I, § 20

AMENDMENT XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

(Effective 1798)

AMENDMENT XII

The Electors shall meet in their respective states and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives; open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice President shall act as President, as in the case of the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice President, shall be the Vice President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice President of the United States.

(Effective 1804)

AMENDMENT XIII

SECTION 1. Neither slavery nor involuntary servitiude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

(Effective 1865)

Comparative Legislation

Slavery and involuntary servitude, OConst art I, § 6

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Comparative Legislation

Due process, OConst art I, § 16

Equal protection, OConst art I, § 2

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Comparative Legislation

Apportionment, OConst art XI, §§ 1, 2, 3

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Comparative Legislation

Qualification for office, OConst art II, § 5

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Comparative Legislation

Public debt, OConst art VIII, §§ 1, 3

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

(Effective 1868)