

Ohio Judicial Conference
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FAX MEMO

Date: May 5, 2008

To: All Common Pleas and Appellate Court Judges

From: Ohio Jury Instructions Committee
Judge John F. Bender; co-chair
Judge H.F. Inderlied, Retired; co-chair
Judge John A. Enlow; criminal law subcommittee

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Re: Ohio Jury Instructions met on May 2-3 and now issues this fax

On April 9, 2008 the Supreme Court of Ohio announced its decision in State v. Colon, Slip Opinion No. 2008-Ohio-1624; 2008 Ohio Lexis 874. A motion to reconsider has been filed. The accompanying provisional jury instructions revise 4 OJI 511.01 (A), "Aggravated robbery;" 511.02, "Robbery;" and 511.11, "Aggravated Burglary;" to comport with the Colon decision.

511.01(A) Aggravated robbery R.C. 2911.01(A) (provisional) [Rev. 5-03-08]

1. The defendant is charged with aggravated robbery. Before you can find the defendant guilty, you must find beyond a reasonable doubt that on or about the _____ day of _____, _____, and in _____ County, Ohio, the defendant, while (committing) (attempting to commit) (fleeing immediately after [committing] [attempting to commit]) (*insert name of applicable theft offense under R.C. 2913.01[K]*),

(Use appropriate alternative)

(A)(1) had a deadly weapon (on or about his/her person) (under his/her control) and (displayed) (brandished) (indicated that he/she possessed) (used) the weapon.

COMMENT

It is permissible to infer the possession of a deadly weapon from the defendant's words and conduct. *State v. Green* (1996), 117 Ohio App.3d 644. The jury may also infer the operability of a firearm. R.C. 2923.11(B)(2).

It is not necessary to prove "recklessness" or any specific mental state with regard to the deadly weapon element of the offense of robbery. *State v. Wharf*, 86 Ohio St.3d 375, 1999-Ohio-112. The Committee believes this decision applies by analogy to R.C. 2911.01(A)(1).

(or)

(A)(2) had dangerous ordnance (on or about his/her person) (under his/her control).

COMMENT

It is not necessary to prove "recklessness" or any specific mental state with regard to the deadly weapon element of the offense of robbery. *State v. Wharf*, 86 Ohio St.3d 375, 1999-Ohio-112. The Committee believes this decision applies by analogy to the dangerous ordnance element set forth in R.C. 2911.01(A)(2).

(or)

(A)(3) recklessly (inflicted) (attempted to inflict) serious physical harm on (*insert name of victim*).

COMMENT

It is necessary to prove “recklessness” with regard to the serious physical harm element of the offense of aggravated robbery. *State v. Colon*, Slip Opinion No. 2008-Ohio-1624 (construing analogous R.C. 2911.02(A)(2)); *State v. Crawford* (1983), 10 Ohio App.3d 207 (construing former R.C. 2911.01(A)(2), now R.C. 2911.01(A)(3)).

2. **ATTEMPT.** An “attempt” occurs when a person (*insert applicable culpable mental state*) engages in conduct that, if successful, would result in (*insert appropriate offense*).

3. **UNDERLYING THEFT OFFENSE.** Before you can find that the defendant was (*committing*) (*attempting to commit*) (*insert name of applicable theft offense under R.C. 2913.01[K]*) you must find beyond a reasonable doubt that the defendant (*describe each element of applicable theft offense*).

COMMENT

The court must instruct the jury on the elements of the applicable theft offense as charged in the indictment, together with the meaning of pertinent words and phrases.

The Committee believes that the state must prove the culpable mental state of the underlying theft offense.

4. **CONCURRENCE.** The act of (having the deadly weapon on or about his/her person or under his/her control and [displaying] [brandishing] [indicating possession of] it) ([inflicting] [attempting to inflict] serious physical harm) (possessing dangerous ordinance) must occur during or immediately after the (*insert name of applicable theft offense*).

COMMENT

See *State v. Ballard* (1984), 14 Ohio App.3d 59.

5. **DEADLY WEAPON.** “Deadly weapon” means any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon.

COMMENT

R.C. 2923.11(A).

The use of an unloaded gun in the course of a robbery is sufficient for conviction of aggravated robbery. *State v. Vondenberg* (1980), 61 Ohio St.2d 285; *State v. Meek* (1978), 53 Ohio St.2d 35.

6. CAPABILITY OF DEADLY WEAPON. A deadly weapon is any instrument, device or thing which has two characteristics. The first characteristic is that it is capable of inflicting or causing death. The second characteristic is in the alternative: either the instrument, device or thing was designed or specially adapted for use as a weapon, or it was possessed, carried or used in this case as a weapon. These are questions of fact for you to decide.

7. DANGEROUS ORDNANCE. R.C. 2923.11(K) and (L).

COMMENT

In defining “dangerous ordnance,” the court may have to define other terms such as “automatic firearm,” “sawed-off firearm,” “zip gun,” “ballistic knife,” “explosive device,” or “incendiary device.” These terms are included within the definition of “dangerous ordnance” and are defined in R.C. 292311(E) through (J).

8. RECKLESSLY. 4 OJI 409.21; R.C. 2901.22(C).

9. SERIOUS PHYSICAL HARM TO PERSONS. R.C. 2901.01.

10. SUBSTANTIAL RISK. “Substantial risk” means a strong possibility, as contrasted with a remote or (even a) significant possibility, that a certain result may occur or that certain circumstances may exist.

COMMENT

Drawn from R.C. 2901.01.

11. BRANDISH. “Brandish” means to wave or exhibit in a menacing or challenging way.

AU: SJ; EA: BG

5-2-08

12. CONCLUSION. 4 OJI 413.01.

13. CONCLUSION WITH LESSER INCLUDED OFFENSE. 4 OJI 413.21, 413.23.

511.02 Robbery R.C. 2911.02 (provisional) [Rev. 5-03-08]

1. The defendant is charged with robbery. Before you can find the defendant guilty, you must find beyond a reasonable doubt that on or about the ____ day of ____, ____, and in ____ County, Ohio, the defendant, in (committing) (attempting to commit) (fleeing after [committing] [attempting to commit]) the offense of (*insert name of applicable theft offense under R.C. 2913.01[K]*),

(Use appropriate alternative[s])

(A)(1) had a deadly weapon (on or about his/her person) (under his/her control).

COMMENT

It is permissible to infer the possession of a deadly weapon from the defendant's words and conduct. *State v. Green* (1996), 117 Ohio App.3d 644.

It is not necessary to prove "recklessness" or any specific mental state with regard to the deadly weapon element of the offense of robbery. *State v. Wharf*, 86 Ohio St.3d 375, 1999-Ohio-112.

(or)

(A)(2) recklessly (inflicted) (attempted to inflict) (threatened to inflict) physical harm on another.

COMMENT

It is necessary to prove "recklessness" with regard to the physical harm element of the offense of robbery. *State v. Colon*, Slip Opinion No. 2008-Ohio-1624.

(or)

(A)(3) recklessly (used) (threatened the immediate use of) force against (*insert name of victim*).

COMMENT

The Ohio Supreme Court has held that it is necessary to prove "recklessness" with regard to the physical harm element of the offense of robbery. *State v. Colon*, Slip Opinion No. 2008-Ohio-1624. The Committee believes that the rationale underlying this holding applies by analogy to the force element of the offense of robbery.

2. ATTEMPT. An “attempt” occurs when a person (*insert applicable culpable mental state*) engages in conduct that, if successful, would result in (*insert name of offense*).

3. UNDERLYING THEFT OFFENSE. Before you can find that the defendant was (committing) (attempting to commit) (*insert name of applicable theft offense under R.C. 2913.01[K]*) you must find beyond a reasonable doubt that the defendant (*describe each element of applicable theft offense*).

COMMENT

The court must instruct the jury on the elements of the applicable theft offense as charged in the indictment, together with the meaning of pertinent words and phrases.

“Our reading of the statute leads us to conclude that the General Assembly intended that a theft offense, committed while an offender was in possession or control of a deadly weapon, is robbery and no intent beyond that required for the theft offense must be proven.” *State v. Wharf*, 86 Ohio St.3d 375, 1999-Ohio-112.

4. CONCURRENCE. The act of (having the deadly weapon [on or about his/her person] [under his/her control]) ([inflicting] [attempting to inflict] [threatening to inflict] physical harm) ([using] [threatening the immediate use of] force) must occur during or immediately after the (*insert name of applicable theft offense*).

5. DEADLY WEAPON. “Deadly weapon” means any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon.

A deadly weapon is any instrument, device or thing that has two characteristics. The first characteristic is that it is capable of inflicting or causing death. The second characteristic is in the alternative: either the instrument, device, or thing was designed or specially adapted for use as a weapon, or it was possessed, carried, or used in this case as a weapon. These are questions of fact for you to decide.

COMMENT

R.C. 2923.11(A). The operability of a firearm may also be inferred by the jury.
R.C. 2923.11(B)(2).

The use of an unloaded gun in the course of a robbery is sufficient for conviction of aggravated robbery. *State v. Vondenberg* (1980), 61 Ohio St.2d 285; *State v. Meek* (1978), 53 Ohio St.2d 35.

6. RECKLESSLY. 4 OJI 409.21; R.C. 2901.22(C).

7. PHYSICAL HARM. "Physical harm to persons" means any injury, illness, or other physiological impairment, regardless of its gravity or duration.

COMMENT

R.C. 2901.01.

8. FORCE. "Force" means any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing.

COMMENT

R.C. 2901.01.

9. FEAR OR APPREHENSION. Although the state is not required to present proof of fear or apprehension on the part of the victim, evidence has been admitted to prove that *(insert name of victim)* was put in fear. This evidence was offered by the state to prove that the defendant (used) (threatened the immediate use of) force. If you find that *(insert name of victim)* was placed in fear and that his/her fear was reasonable under the circumstances and that it would cause a reasonable person to give up his/her property against his/her will, then you may find that the state has proved the element of force.

COMMENT

Drawn from *State v. Bush* (1997), 119 Ohio App.3d 146.

The threat of violence, compulsion or constraint need not be explicit; rather, it can be implied from the perpetrator's demeanor and tone of voice. *State v. Davis* (1983), 6 Ohio St.3d 91.

10. CONCLUSION. 4 OJI 413.01.

11. CONCLUSION WITH LESSER INCLUDED OFFENSE. 4 OJI 413.21, 413.23.

511.11 Aggravated burglary R.C. 2911.11 (provisional) [Rev. 5-03-08]

1. The defendant is charged with aggravated burglary. Before you can find the defendant guilty, you must find beyond a reasonable doubt that on or about the _____ day of _____, _____, and in _____ County, Ohio, the defendant, with purpose to commit the offense of *(insert name of offense)*, trespassed by (force) (stealth) (deception) in (an occupied structure) (a separately secured or separately occupied portion of an occupied structure) when another person (other than an accomplice of the defendant) was present in that (structure) (separately secured or separately occupied portion of the occupied structure) and the defendant

(Use appropriate alternative[s])

(A)(1) recklessly (inflicted) (attempted to inflict) (threatened to inflict) physical harm on that person.

COMMENT

It is necessary to prove “recklessness” with regard to the physical harm element of the offense of robbery. *State v. Colon*, Slip Opinion No. 2008-Ohio-1624. The Committee believes that the rationale underlying this holding applies by analogy to the physical harm element of the offense of aggravated burglary.

(or)

(A)(2) had a (deadly weapon) (dangerous ordnance) on or about his/her person or under his/her control.

COMMENT

It is permissible to infer the possession of a deadly weapon from the defendant’s words and conduct. *State v. Green* (1996), 117 Ohio App.3d 644. The jury may also infer the operability of a firearm. R.C. 2923.11(B)(2).

It is not necessary to prove “recklessness” or any specific mental state with regard to the deadly weapon element of the offense of aggravated burglary. Cf. *State v.*

Wharf, 86 Ohio St.3d 375, 1999-Ohio-112. The Committee believes *Wharf* applies by analogy to the dangerous ordnance element set forth in R.C. 2911.11(A)(2).

2. ATTEMPT. An “attempt” occurs when a person (*insert applicable culpable mental state*) engages in conduct that, if successful, would result in (*insert name of offense*).

3. PURPOSE. 4 OJI 409.01; R.C. 2901.22(A).

COMMENT

Depending on the facts in evidence, an instruction may be needed to advise the jury that only a purpose to commit a criminal offense is necessary and not the actual commission thereof.

Purpose to commit an offense can be formed at any point during the trespass. *State v. Fontes* (2000), 87 Ohio St.3d 527.

4. CRIMINAL OFFENSE.

COMMENT

The court must instruct the jury on the elements of the underlying criminal offense together with the meaning of pertinent words and phrases.

5. TRESPASS. 4 OJI 511.21; R.C. 2911.21.

COMMENT

Trespass is an element of the offense of aggravated burglary. A trespass can be committed with a knowing, reckless or negligent culpable mental state. See R.C. 2911.21. The court must instruct on the elements of trespass including the appropriate culpable mental state as indicated by the facts of the case. See 4 OJI 511.21.

A spouse may be criminally liable for trespass and/or burglary in the dwelling of the other spouse who is exercising custody or control over that dwelling. *State v. Lilly* (1999), 87 Ohio St.3d 97.

Where a defendant lawfully entered a residential premises, the privilege to be in or upon those premises can be inferred to have been revoked where the defendant thereafter committed a violent felony directed against another person in the premises who had the ability and authority to revoke the privilege. *State v. Steffen* (1987), 31 Ohio St.3d 111. Privilege is defined in R.C. 2901.01(L).

6. FORCE. "Force" means any violence, compulsion, effort or constraint (exerted) (used) by any means upon or against a person or thing to gain entrance.

COMMENT

Drawn from R.C. 2901.01(A)(1).

Force may properly be defined as "effort" rather than "violence" to gain entrance into a residence including opening an unlocked door. *State v. Lane* (1976), 50 Ohio App.2d 41.

7. STEALTH. "Stealth" means any secret or sly act to gain entrance.

COMMENT

State v. Lane (1976), 50 Ohio App.2d 41.

8. DECEPTION. R.C. 2913.01.

9. OCCUPIED STRUCTURE. 4 OJI 509.02 § 7; R.C. 2909.01.

10. RECKLESSLY. 4 OJI 409.21; R.C. 2901.22(C).

11. PHYSICAL HARM. "Physical harm to persons" means any injury, illness or other physiological impairment regardless of its gravity or duration.

COMMENT

R.C. 2901.01(A)(3).

12. DEADLY WEAPON. "Deadly weapon" means any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon.

A deadly weapon is any instrument, device or thing that has two characteristics. The first characteristic is that it is capable of inflicting or causing death. The second characteristic is in the alternative: either the instrument, device or thing was designed or specially adapted for use as a weapon, or it was possessed, carried or used in this case as a weapon. These are questions of fact for you to decide.

COMMENT

R.C. 2923.11(A).

It is permissible to infer the possession of a deadly weapon from the defendant's words and conduct. *State v. Green* (1996), 117 Ohio App.3d 644. The operability of a firearm may also be inferred by the jury. R.C. 2923.11(B)(2).

13. DANGEROUS ORDNANCE. R.C. 2923.11(K).

COMMENT

In defining "dangerous ordnance," the court may have to define other terms such as "automatic firearm," "sawed-off firearm," "zip gun," "ballistic knife," "explosive device," or "incendiary device." These terms are included within the definition of "dangerous ordnance" and are defined in R.C. 2923.11(E) through (J).

14. ON OR ABOUT HIS/HER PERSON OR UNDER HIS/HER CONTROL. 4 OJI 413.37 § 7.

15. CONCLUSION. 4 OJI 413.01.

16. CONCLUSION WITH LESSER INCLUDED OFFENSE. 4 OJI 413.21, 413.23.