[Cite as *State v. Fine*, 2010-Ohio-2637.]

IN THE COURT OF APPEALS OF MIAMI COUNTY, OHIO

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STATE OF OHIO		
Plaintiff-Appellee	:	**C.A. CASE NO. 09CA00032**
vs.	:	**T.C. CASE NO. 08CRB1707**
	:	**(Criminal Appeal from**
SCOTTY D. FINE		**Municipal Court)**
Defendant-Appellant	:	

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O P I N I O N

Rendered on the 11th day of June, 2010.

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GRADY, J.:

{¶ 1} Defendant, Scotty D. Fine, appeals from his conviction and sentence for violating Section 304.7 of the Property Maintenance Code of the City of Piqua.

{¶ 2} In June of 2006, Defendant was served notice that the condition of his building at 312 E. North Street in Piqua violated Section 304.7 of the Property Maintenance Code of the City of Piqua.

A final notice was sent to Defendant on August 28, 2007. The notice informed Defendant that he must abate the code violation.

{¶ 3} On April 30, 2008, a criminal complaint was filed against Defendant in the Municipal Court of Miami County. (Dkt. 1). Defendant filed proposed jury instructions on June 5, 2009. (Dkt. 38). Following a June 8, 2009 jury trial, Defendant was found guilty of violating Section 304.7 of the Property Maintenance Code. (Dkt. 40). The trial court sentenced Defendant to sixty days in jail. The sixty days were suspended on the conditions that Defendant (1) commit no like offenses; (2) pay a fine of $150; and (3) pay $670.92 in past fines and court costs. Defendant filed a timely notice of appeal.

FIRST ASSIGNMENT OF ERROR

{¶ 4} "THE TRIAL COURT ERRED BY GIVING CORRECT AND INCORRECT INSTRUCTIONS ON THE SAME SUBJECT."

SECOND ASSIGNMENT OF ERROR

{¶ 5} "THE TRIAL COURT ERRED BY AMENDING THE ORDINANCE."

{¶ 6} Defendant argues that the instruction given by the trial court to the jury relating to Section 304.7 of the Property Maintenance Code incorrectly stated the finding the jury was required to make in order to convict Defendant. We agree.

{¶ 7} The portion of Piqua's Property Maintenance Code that Defendant was charged with and convicted of violating states:

{¶ 8} "304.7 Roofs and drainage. The roof and flashing shall be sound, tight and not have defects that admit rain."

{¶ 9} The instruction that the trial court gave to the jury stated, in pertinent part:

{¶ 10} "Section 304.7 of the International Property Maintenance Code, which has been adopted by the City of Piqua, and reads in pertinent part as follows: the roof and flashing shall be sound, tight and not have defects that admit rain. . . . The defendant must be acquitted or found not guilty unless the prosecution produces evidence that convinces you beyond a reasonable doubt of every essential element of the crime charged. Therefore, if you find that the City of Piqua proved beyond a reasonable doubt that the defendant's roof was not sound, not tight or had defects that admitted rain, then you must find the defendant guilty. On the contrary, if you find that the defendant's roof was sound, tight and had no defects that admitted rain, then you must find the defendant not guilty." (Tr. 62) (Emphasis supplied.)

{¶ 11} The trial court's instruction correctly stated the three conjunctive elements of Section 304.7: that the roof and flashing are sound and tight and that the roof and flashing not have defects that admit rain. But the trial court then misstated the elements as being disjunctive, which would allow a guilty verdict on a finding that the roof was not sound, or was not tight, or had a

defect that admitted rain. Instead, the trial court should have instructed the jury that a guilty verdict could only be returned if the jury found that the roof was not sound, not tight, and had a defect that admitted rain. By instructing the jury the way it did, the trial court relieved the State of its burden to prove the requisite three elements contained in Section 304.7, instead allowing a conviction if the jury found just one of the three elements was proved. That is error that prejudiced Defendant, and is therefore reversible.

{¶ 12} Although the trial court committed reversible error, the State argues that Defendant waived this error for purposes of appeal when he failed to object to the error. We do not agree. Crim.R. 30(A) states:

{¶ 13} "At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. Copies shall be furnished to all other parties at the time of making the requests. The court shall inform counsel of its proposed action on the requests prior to counsel's arguments to the jury and shall give the jury complete instructions after the arguments are completed. The court also may give some or all of its instructions to the jury prior to counsel's arguments. The court shall reduce its final instructions

to writing or make an audio, electronic, or other recording of those instructions, provide at least one written copy or recording of those instructions to the jury for use during deliberations, and preserve those instructions for the record.

{¶ 14} "On appeal, a party may not assign as error the giving or the failure to give any instructions unless the party objects before the jury retires to consider its verdict, stating specifically the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury."

{¶ 15} Defendant submitted proposed jury instructions (Dkt. 38) to the trial court on June 5, 2009, which stated, in pertinent part:

{¶ 16} "The defendant was charged with violating Section 304.7 of the International Property Maintenance Code as adopted by the City of Piqua. Before you can find the Defendant guilty of the offense you must find beyond a reasonable doubt that the Defendant's roof was not sound, not tight and had defects that admitted rain. The portion of the Section 304.7 that the defendant was charged with violating states:

{¶ 17} "304.7 Roofs and drainage. The roof and flashing shall be [s]ound, tight and not have defects that admit rain.

{¶ 18} "Therefore, if you found that the State failed to show

beyond a reasonable doubt that the Defendant's roof was not sound, not tight and had defects that admitted rain, then you must find for Defendant."

{¶ 19} The purpose of the Crim.R. 30(A) requirement that the party object to a jury instruction before the jury retires to consider its verdict is to give the trial court an opportunity to correct an erroneous instruction before the jury begins its deliberations on the instructions the court gave. In *State v. Colons* (1989), 44 Ohio St.3d 64, at paragraph one of the syllabus, the Supreme Court stated:

{¶ 20} "A party does not waive his objections to the court's charge by failing to formally object thereto (1) where the record affirmatively shows that a trial court has been fully apprised of the correct law governing a material issue in dispute, and (2) the requesting party has been unsuccessful in obtaining the inclusion of that law in the trial court's charge to the jury. (Crim.R. 30[A], construed.)"

{¶ 21} Defendant's proposed jury instruction, which was submitted to the court prior to trial, correctly stated that the State had to prove beyond a reasonable doubt that Defendant's roof was not sound, not tight, and admitted rain. Therefore, Defendant notified the trial court of the correct law, but was unsuccessful in obtaining the inclusion of the correct law in the trial court's

instruction to the jury. Defendant therefore preserved the right to assign as error on appeal the trial court's incorrect jury instruction.

{¶ 22} The first and second assignments of error are sustained.

THIRD ASSIGNMENT OF ERROR

{¶ 23} "THE JURY ERRED IN FINDING APPELLANT GUILTY AT THE TIME OF TRIAL INSOFAR AS THAT FINDING WAS AGAINST THE MANIFEST WEIGHT OF EVIDENCE PRESENTED AT TRIAL."

{¶ 24} Our disposition of the first two assignments of error renders the third assignment of error moot. Therefore, we need not decide the error assigned. App.R. 12(A)(1)(c).

{¶ 25} The judgment of the trial court will be reversed and the cause is remanded for further proceedings consistent with this opinion.

DONOVAN, P.J. and RINGLAND, J. concur.

(Hon. Robert P. Ringland, 12th District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.)

Copies mailed to:

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