ORIGINAL

IN THE SUPREME COURT OF OHIO 10-0251

STATE OF OHIO	**CASE NO. 10-**
Plaintiff-Appellant,	
vs.	**ON APPEAL FROM THE MONTGOMERY COUNTY COURT OF APPEALS, SECOND APPELLATE DISTRICT**
JEFFREY L. LYNN	
Defendant-Appellee.	**COURT OF APPEALS CASE NO. 22946**

MEMORANDUM IN SUPPORT OF JURISDICITON OF APPELLANT STATE OF OHIO DISCRETIONARY APPEAL

MATHIAS H. HECK, JR.
PROSECUTING ATTORNEY
By R. LYNN NOTHSTINE (COUNSEL OF RECORD)
REG. NO. 0061560
Assistant Prosecuting Attorney
Montgomery County Prosecutor's Office
Appellate Division
P.O. Box 972
301 West Third Street, Suite 500
Dayton, Ohio 45422
(937) 225-4117

ATTORNEY FOR APPELLANT, STATE OF OHIO

MICHAEL L. WRIGHT (COUNSEL OF RECORD)
1600 First National Plaza
130 West Second Street
Dayton, Ohio 45402

COUNSEL FOR APPELLEE, JEFFREY L. LYNN

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SUPREME COURT OF OHIO

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EXPLANATION OF WHY LEAVE TO APPEAL SHOULD BE GRANTED AND WHY THIS CASE PRESENTS QUESTIONS OF PUBLIC OR GREAT GENERAL INTEREST

This felony case concerns a question of public or great general interest. Specifically, the question presented by this case is whether a defendant's right to due process is violated when the jury instructions in an aggravated burglary case permit a finding of guilt based upon evidence the defendant intended to commit an assault in the occupied structure, even though theft was mistakenly named as the underlying offense in the indictment.

STATEMENT OF THE CASE AND FACTS

Jeffrey Lynn was indicted by a Montgomery County Grand Jury for one count of aggravated burglary in violation of R.C. 2911.11(A)(1) on May 22, 2008. The charge arose on April 28, 2008 when Jeffrey Lynn kicked in the door of the apartment where his then-girlfriend, Juanita Turnage, was living and threatened to assault her. Lynn was angry because Ms. Turnage had not answered his calls the day before and had not responded to his repeated knocking on the apartment windows on two prior occasions during the day of April 28th. He returned around 11:00 p.m. on the 28th, and Ms. Turnage decided to go to the door and tell him that she wanted to end their relationship.

Lynn told Turnage, "Bitch, I'm about to fuck you up," and then grabbed her, ripping her shirt. Marion Jefferson, with whom Juanita Turnage lived, came out into the hallway and told Juanita to go back inside and call the police. Ms. Turnage went back into their apartment and shut and locked the apartment door. Outside, Lynn was yelling, "Bitch, you better open up the fucking door. You're going to make things worse for yourself."

He kicked the apartment door several times until he eventually kicked it off its hinges and entered the apartment. Once inside, Lynn slammed Juanita Turnage against a wall and slammed

a door on her left foot, which chipped a bone in her foot. When the police arrived, Lynn was observed moving toward Turnage, who was backing up toward a wall, with fists clenched. He was arrested and taken to jail where he told Officer Dustin Phillips that he was going to go back and kick the door in again as soon as he posted bail.

In relevant part, the indictment returned by the Grand Jury stated that: "JEFFREY L. LYNN, on or about April [28], 2008 in the County of Montgomery *** and State of Ohio, by force, stealth or deception, did trespass in an occupied structure, to-wit: residence, located at 1207 W. Fairview Avenue, Apt. #1, 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 purpose to commit in the structure or in the separately secured or separately occupied portion of the structure, any criminal offense, to-wit: theft, and did recklessly inflict, or attempt or threaten to inflict physical harm on another, to-wit: Juanita Turnage; contrary to the form of the statue (in violation of Section 2911.11(A)(1) of the Ohio Revised Code ***)."

Prior to trial, on August 25, 2008, the State moved to amend the indictment seeking to remove theft as the alleged predicate offense and to allege instead that Lynn intended to commit the offense of assault in Ms. Turnage's apartment. The trial court denied the State's motion to amend the indictment. However, at trial the court instructed on the elements of both theft and assault and submitted an interrogatory to the jury by which they could indicate which underlying offense they unanimously agreed Jeffrey Lynn intended to commit inside the apartment.

The jury found Lynn guilty of aggravated burglary and further found that he had a purpose to commit the underlying offense of assault inside the apartment. The Hon. Frances McGee sentenced Lynn to serve a three-year prison term. On appeal, the Second District Court of Appeals held Jeffrey Lynn's right to due process was violated and reversed his conviction.

Specifically, the court of appeals stated, "The action taken by the trial court in instructing on assault, as well as theft, broadened the possible basis for conviction beyond that considered and specified by the grand jury. Lynn was convicted of a crime by a mode of commission different than what was presented to the grand jury." *State v. Lynn*, Montgomery App. No. 22946, 2009-Ohio-6812, at¶20. The dissenting judge noted that insertion of theft as the underlying offense was an obvious drafting error, because no evidence was presented at trial that Jeffrey Lynn had a purpose to commit theft when he trespassed into the apartment, and stated that the trial court erred in not permitting the State to amend the indictment. *Lynn*, at ¶23 (Brogan, J., dissenting)

The State now appeals to this Honorable Court.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law:

Where there is a clerical error in an aggravated burglary indictment regarding the name of the underlying offense, and the defense is notified of the error, the court does not violate due process by instructing the jury on the underlying offense that was demonstrated by the evidence at trial.

There is no question that every defendant has a due process right to notice of the specific charge against him. *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044, 781 N.E.2d 88, citing *Cole v. Arkansas* (1948), 333 U.S. 196, 201, 68 S.Ct. 514, 92 L.Ed.644. "[A] criminal offense must be charged with reasonable certainty in the indictment so as to apprise the defendant of that which he may expect to meet and be required to answer; so that the court and jury may know what they are to try, and the court may determine without unreasonable difficulty what evidence is admissible." *Horton v. State* (1911), 85 Ohio St. 13, 19, 96 N.E. 797.

An indictment meets constitutional requirements if it contains the elements of the offense charged, fairly informs a defendant of the charge against which he must defend, and enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense. *State v.*

Buehner, 110 Ohio St.3d 403, 2006-Ohio-4707, 853 N.E.2d 1162, at ¶9, citations omitted. Under Crim.R. 7(B), an indictment may be made in ordinary and concise language without technical averments or allegations not essential to be proved. The statement may be in the words of the applicable section of the statute, provided the words of that statute charge an offense, or in words sufficient to give the defendant notice of all the elements of the offense with which the defendant is charged. *Buehner*, at ¶8.

In this case, the aggravated burglary indictment tracked the language of R.C. 2911.11(A)(1), thereby notifying Jeffrey Lynn of the elements of the charge against him. The inclusion of the name of the underlying offense in the indictment was mere surplusage because the specific crime an offender intended to commit inside the occupied structure is not, itself, an element of aggravated burglary. *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, 889 N.E.2d 995, at ¶71, citation omitted. Consequently, the indictment could have been amended prior to trial to change the name of the underlying offense Lynn had a purpose to commit inside the victim's apartment without changing the name or identity of the offense. Crim.R. 7(D). Thus, when the trial court effectively permitted an amendment to the indictment during the trial, by instructing the jury on the elements of assault, no error occurred.

What's more, Lynn was not prejudiced by the trial court's decision to instruct the jury on assault as a predicate offense for the aggravated burglary charge. As the State argued below, the defense was on notice of what the State intended to prove in this case from the time discovery was first provided in May of 2008, which included the reports generated by the police who investigated this incident.[1] And, Lynn was on notice that theft would not be the predicate

[1] As the court of appeals was well-aware, the Montgomery County Prosecutor's Office participates in the open discovery required by the local rules of the Common Pleas Court.

offense proven at trial in this case from the moment the State moved to amend the indictment, on August 25, 2008, seeking to remove "theft" from the indictment and to add "assault."

CONCLUSION

The court of appeals erred when it determined that Jeffrey Lynn's right to due process was violated in this case. The appellate court's concern that the trial court's decision to instruct the jury on the elements of assault as one underlying offense for the jury to consider "broadened the possible basis for conviction beyond that considered and specified by the grand jury" was unfounded. From the evidence presented at trial, it was obvious the inclusion of theft as the underlying offense for the crime of aggravated burglary was a mistake. Since the underlying criminal offense is not, in itself, an element of aggravated burglary, the indictment could have been amended to correct the error without violating due process.

Jeffrey Lynn was fully aware of the nature of the charge against him in this matter, and he knew, prior to trial, what the State intended to prove regarding the crime he had a purpose to commit in Ms. Turnage's residence on April 28, 2008. Therefore, the trial court did not err by instructing the jury on the elements of assault as the underlying offense even though the indictment mistakenly identified theft as the predicate offense. Appellant requests that this Court accept jurisdiction to reverse the judgment of the Second District Court of Appeals.

Respectfully submitted,

MATHIAS H. HECK, JR.
PROSECUTING ATTORNEY

BY
R. LYNN NOTHSTINE
REG. NO. 0061560
Assistant Prosecuting Attorney
APPELLATE DIVISION

Case: CA 022946
00014662349
Dkt: CAORO

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IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 22946
v.	:	T.C. NO. 08 CR 1714
JEFFREY L. LYNN	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
	:	

. . . . . .

OPINION

Rendered on the 23rd day of December, 2009.

. . . . . .

R. LYNN NOTHSTINE, Atty. Reg. No. 0061560, Assistant Prosecuting Attorney, 301 W. Third Street, 5th Floor, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

MICHAEL L. WRIGHT, Atty. Reg. No. 0067698, First National Plaza, 130 W. Second Street, Suite 1600, Dayton, Ohio 45402
Attorney for Defendant-Appellant

. . . . . .

DONOVAN, P.J.

Jeffrey Lynn appeals from his conviction of aggravated burglary after a jury trial. In his first assignment of error, Lynn contends the trial court denied him due process because

the indictment was misleading. In the second assignment, Lynn contends that his conviction is against the manifest weight of the evidence.

The incident giving rise to the indictment occurred on April 28, 2008. At that time, Lynn's girlfriend, Juanita Turnage, was living with Marion Jefferson at her apartment on West Fairfield Avenue in Dayton. On occasion, Lynn would stay overnight with Turnage but he did not have a key to Jefferson's apartment. In the early morning of April 28th, Lynn came to Jefferson's apartment and began knocking on the apartment windows. When Turnage and Jefferson did not respond, Lynn left and returned at 5:30 that evening, but again Turnage did not respond to Lynn's repeated knocking on the apartment windows. Later, at 11:00 p.m. Lynn returned to the apartment and began knocking on the apartment windows. Turnage went to the front door of the apartment to talk to Lynn.

Lynn told Turnage, "Bitch, I'm about to fuck you up," and then grabbed her, ripping her shirt. (Tr. 58.) Marion Jefferson, with whom Juanita Turnage lived, came out into the hallway and told Juanita to go back inside and call the police. (Tr. 58, 104.) Ms. Turnage went back into their apartment, shut and locked the apartment door and called the police. Outside, Lynn was yelling, "Bitch, you better open up the fucking door. You're going to make things worse for yourself." (Tr. 58.)

Lynn kicked the apartment door several times until he eventually kicked it off its hinges and entered the apartment. (Tr. 58-59, 105-106.) Once inside, Lynn slammed Juanita Turnage against a wall and slammed a door on her left foot, which chipped a bone in her foot. (Tr. 59-60.) When the police arrived, they observed Lynn moving toward Turnage, who was backing up toward a wall, with fists clenched. (Tr. 127.) He was arrested and taken to jail where he told Officer Dustin Phillips that he was going to go back

and kick the door in again as soon as he posted bail. (Tr. 132.)

The Montgomery County Grand Jury issued the following indictment in this matter:

"**THE GRAND JURORS** of the County of Montgomery, in the name, and by the authority of the State of Ohio, upon their oaths do find and present that **JEFFREY L. LYNN**, *on or about* **April 298** [sic], **2008** *in the County of Montgomery, aforesaid, and State of Ohio,* by force, stealth or deception, did trespass in an occupied structure, to-wit: **residence, located at 1207 W. Fairview Avenue, Apt. #1** 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 purpose to commit in the structure or in the separately secured or separately occupied portion of the structure, any criminal offense, to wit: **theft**, and did recklessly inflict, or attempt or threaten to inflict physical harm on another, to-wit: **Juanita Turnage**; contrary to the form of the statute (in violation of Section 2911.11(A)(1) of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio."

Because there was no evidence that Lynn trespassed into Ms. Jefferson's apartment with the intent to steal, the State moved prior to trial to amend the indictment to remove the word "theft" as superfluous language. Lynn objected to the motion because he contended the amendment would change the name or identity of the charge. The trial court overruled the State's motion, stating it would ask the jury to determine what criminal offense Lynn intended to commit when he allegedly trespassed into Jefferson's apartment. (Tr. 3.) At the conclusion of the trial, the jury signed a verdict form stating it had found Lynn guilty of aggravated burglary as charged in the indictment. In a separate interrogatory, the jury found that Lynn had not committed the offense of theft as set forth

specifically in the indictment. In an additional interrogatory, the jury found that Lynn had committed the criminal offense of assault "as charged in the aggravated burglary indictment."

In his first assignment of error, Lynn argues that the trial court erred by violating his due process rights to receive an adequate notice of the charges against him as a result of a misleading indictment and erroneous jury instructions.

R.C. 2911.11(A)(1) provides as follows:

"(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."

Lynn concedes that the additional language of the underlying offense was not required to be included in the indictment but once there, the State was required to prove that his purpose in committing the trespass into the apartment was to commit a theft offense. He further argues that the court should not have instructed the jury that it could consider assault as the underlying offense in the aggravated burglary charge. He argues that the jury instruction concerning the assault permitted the jury to convict him on a charge different from that found by the Grand Jury.

The State argues that Lynn waived his right to raise a defect in the indictment because he did not raise an objection to it in the trial court. The State also argues that its motion to amend the indictment placed Lynn on notice it did not intend to prove he broke

into Jefferson's apartment to commit a theft offense. The State also argues the Ohio Supreme Court has held that changing the identity of the predicate offense does not change the nature of the aggravated burglary charge because the specific crime an offender intended to commit inside the occupied structure is not an element of the aggravated burglary, citing *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787. Thus, the State argues the jury could be instructed to consider as the predicate offense any crime that is supported by the facts in the case without changing the nature of the offense of aggravated burglary. The State argues that the trial court properly instructed the jury regarding the specific criminal acts which would support the criminal offense element of the aggravated burglary charge. Further, the State argues that Lynn's due process rights were protected by having the jury indicate by their answer to an interrogatory the specific crime they found was committed by Lynn, to-wit, assault.

Lynn objected to the State's request to amend the indictment to allege that he trespassed with a purpose to commit assault because the grand jury had found that he had a different purpose. The allegation that Lynn caused harm to another satisfies the aggravated burglary element in R.C. 2911.11(A)(1), but it does not address the purpose element found in R.C. 2911.11(A).

The difference between the act of "theft" and "assault" is significant. Although the trial court initially denied the State's request to amend the indictment, it later instructed the jury on "assault" language which is an amendment of substance. We note that the appellant appropriately preserved the issue of lack of notice of such a change. Clearly, the facts the State intended to prove would differ from the indictment's language regarding theft.

Crim. R. 7 controls the sufficiency of and amendments to criminal indictments. Crim. R. 7(B) deals with sufficiency of indictments and provides in pertinent part:

"The indictment * * * shall contain a statement that the accused has committed some public offense therein specified. Such statement may be made in ordinary and concise language without any technical averments or any allegations not essential to be proved. It may be in the words of the applicable section of the statute as long as the words of that statute charge an offense, **or in any words sufficient to give the accused notice of all the elements of the offense with which he is charged.** * * *." (Emphasis added.)

The State in the indictment specified Lynn's purpose as one to commit theft. This was part of the grand jury's determination of probable cause for issuance of the indictment. Lynn had a right to rely upon the act alleged as constituting the offense and rest his defense upon a lack of proof by the State of the conduct specified in the indictment.

In *State v. Gardner*, supra, the Supreme Court held that a jury need not agree unanimously which criminal offense a defendant intended to commit during a burglary. *Gardner*, being a plurality decision is open to just criticism. It leads to harmful consequences as evidenced by the record in this case.

Gardner dealt with juror unanimity not a grand jury probable cause determination. Theft and assault are clearly distinct acts. The action taken by the trial court in instructing on assault, as well as theft, broadened the possible basis for conviction beyond that considered and specified by the grand jury. Lynn was convicted of a crime by a mode of commission different than what was presented to the grand jury. Accordingly, appellant's first assignment of error is sustained.

In his second assignment of error, Lynn contends his conviction is against the

manifest weight of the evidence. This is rendered moot by resolution of the first assignment of error.

The judgment of the trial court is reversed and the matter is remanded for further proceedings consistent with this court's opinion.

. . . . . .

FAIN, J., concurs.

BROGAN, J., dissenting:

I respectfully dissent from the majority opinion. The Ohio Supreme Court held in *State v. Gardner*, supra, that the "elements" of the offense of aggravated burglary under R.C. 2911.11(A)(2) are that no person by force, stealth, or deception, shall trespass into an occupied structure with purpose to commit in the structure **any criminal offense** if the offender inflicts or attempts or threatens to inflict physical harm on another, or the offender has a dangerous weapon or ordnance on or about his person. The underlying criminal offense the defendant intended to commit during the trespass is not an element of the aggravated burglary offense. See *Gardner* at 435. It is obvious from the trial record that the prosecutor's insertion of the underlying offense as "theft" was a drafting error because there was no evidence presented by the State at trial that Lynn had a purpose to commit theft when he trespassed into the apartment where his former girlfriend was staying. The insertion of theft as the underlying criminal offense was mere surplusage and the trial court erred in not permitting the State to amend the indictment. Crim.R. 7(D) allows the amendment of the indictment at any time before, during or after the trial consistent with due process. The amendment did not change the identity of the aggravated burglary charge. The record discloses that Lynn and his counsel received the extensive discovery packet

provided by the State which includes the police offense reports surrounding the alleged aggravated burglary. Undoubtedly, in light of the trial record, they included no reference to any alleged theft by the defendant. Lynn would not have been prejudiced by the trial court permitting the State to amend the indictment. I would affirm the Appellant's convictions.

. . . . . .

Copies mailed to:

R. Lynn Nothstine
Michael L. Wright
Hon. Frances E. McGee

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Dkt: CAORFE

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v.	:	T.C. NO. 08 CR 1714
JEFFREY L. LYNN	:	**FINAL ENTRY**
Defendant-Appellant	:	
	:	

. . . . . .

Pursuant to the opinion of this court rendered on the 23rd day of December, 2009, the judgment of the trial court 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.

Mary E. Donovan

MARY E. DONOVAN, Presiding Judge

JAMES A. BROGAN, Judge

Mike Fain

MIKE FAIN, Judge

Copies mailed to:

R. Lynn Nothstine
Assistant Prosecuting Attorney
301 W. Third Street, 5th Floor
Dayton, Ohio 45422

Michael L. Wright
First National Plaza
130 W. Second Street, Suite 1600
Dayton, Ohio 45402

Hon. Frances E. McGee
Common Pleas Court
41 N. Perry Street
Dayton, Ohio 45422

CERTIFICATE OF SERVICE

I hereby certify that a copy of this memorandum in support was sent by first class mail on this 5th day of February, 2010, to the following: Michael L. Wright, 1600 First National Plaza, 130 West Second Street, Dayton, Ohio 45402 and Timothy Young, Ohio Public Defender Commission, 250 East Broad Street, Suite 1400, Columbus, OH 43215-9311.

MATHIAS H. HECK, JR.
PROSECUTING ATTORNEY

By:
R. LYNN NOTHSTINE
REG. NO. 0061560
Assistant Prosecuting Attorney
APPELLATE DIVISION