

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Plaintiff-Appellant,

vs.

JEFFREY L. LYNN

Defendant-Appellee.

CASE NO. 10-0251

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

**COURT OF APPEALS
CASE NO. 22946**

APPELLANT'S MERIT BRIEF

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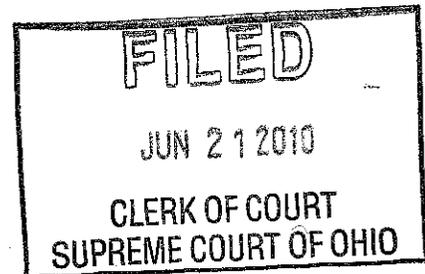
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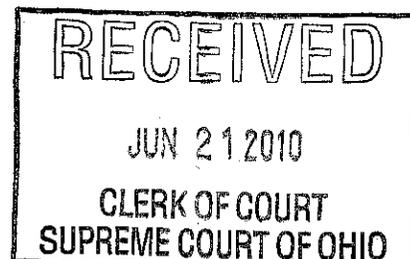


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STATEMENT OF FACTS

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. (Tr. 54, 100) 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. (Tr. 57) 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. (Tr. 57)

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 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." (Tr. 58)

He 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, Lynn was observed with his fists clenched moving toward Turnage, who was backing up toward a wall. (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)

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 statute (in violation of Section 2911.11(A)(1) of the Ohio Revised Code ***).” (Indictment, 5/22/08; Tr. 2-3)

Prior to trial, on August 25, 2008, the State moved to amend the indictment seeking to remove theft as the alleged predicate offense that Lynn intended to commit in Ms. Turnage’s apartment. (Motion To Amend, 8/25/08; Tr. 2) The trial court denied the State’s motion to amend the indictment. (Tr. 2-4) However, at the conclusion of the presentation of evidence, the trial judge instructed on the elements of both theft and assault and submitted interrogatories to the jury by which they could indicate what underlying offense they unanimously agreed Jeffrey Lynn intended to commit inside the apartment. (Tr. 274-276, 279-280) 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. (Tr. 291) The trial judge sentenced Lynn to serve a three-year prison term. (Tr. 299)

ARGUMENT

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.

Jeffrey Lynn appealed his conviction for aggravated burglary to the Second District Court of Appeals claiming that his right to due process was violated by a misleading indictment that failed to give him adequate notice of the charge against him and by the trial court's decision to instruct the jury on both theft and assault as possible underlying offenses for the aggravated burglary charge. In its opinion, the Second District Court of Appeals held that the trial court's decision to instruct the jury on the elements of two possible underlying offenses "broadened the possible basis for conviction beyond that considered and specified by the grand jury." *State v. Lynn*, 185 Ohio App.3d 390, 2009-Ohio-6812, 924 N.E.2d 397, at ¶20. Therefore, the court concluded, "Lynn was convicted of a crime by a mode of commission different than what was presented to the grand jury," and reversed. *Id.*

The court of appeals' determination that Jeffrey Lynn was denied the right to due process is erroneous. Jeffrey Lynn's right to due process was satisfied in this case because the indictment tracked the language of the aggravated burglary statute and included all essential elements of the offense. Thus, Lynn was given sufficient notice of the charge against him. What's more, the record belies Lynn's claim on appeal that he was misled or otherwise prejudiced by the insertion of theft as the underlying offense for the aggravated burglary charge. Finally, the court of appeals' concern that Lynn was convicted of an offense not presented to the grand jury was misplaced. By instructing the jury on the elements of assault as a possible underlying offense for the charge, the trial court, in effect, permitted an amendment to the

indictment. This did not violate Jeffrey Lynn's right to due process and a grand jury indictment, however, because amending the name of the underlying offense did not change the name or identity of the crime charged.

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, at ¶60, 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.

The right to a grand jury indictment is found in Article I, section 10 of the Ohio Constitution, which provides that “no person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury[.]” To be sufficient, an indictment must: 1) contain the elements of the offense charged and fairly inform a defendant of the charge against which he must defend; and 2) enable the defendant to plead an acquittal or conviction in bar of future prosecutions for the same offense. *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917, at ¶27, citations omitted; *State v. Buehner*, 110 Ohio St.3d 403, 2006-Ohio-4707, 853 N.E.2d 1162, at ¶9, citations omitted.

The Ohio Rules of Criminal Procedure reflect the principle that an indictment must contain all the essential elements of an offense. 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) and included all essential elements of the crime charged, thereby notifying Jeffrey Lynn of the charge against him in accordance with his constitutional right to due process. 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 insertion of theft as the underlying offense, although erroneous, did not render the indictment insufficient to charge the offense of aggravated burglary, or insufficient to put Jeffrey Lynn on notice of the charge against him.

Furthermore, the assertion that Lynn was denied due process because he was misled by the inclusion of theft as the underlying offense is disputed by the trial record herein. Although defense counsel objected to the State's pre-trial motion to amend the indictment to remove the superfluous identification of the underlying offense, counsel did not request a continuance of the trial after the trial judge ruled that she would instruct on both assault and theft and then submit interrogatories to the jury. (Defendant's Objection To The State's Proposed Amendment Of The Indictment, 8/26/08; Tr. 2-5) Defense counsel's failure to move for a continuance indicates counsel's readiness to proceed and defend against an aggravated burglary charge where the State intended to prove Jeffrey Lynn had a purpose to assault Juanita Turnage when he trespassed into the apartment where she was living.

Another indication the defense was given notice very early in the prosecution of this case that the State intended to prove Jeffrey Lynn had a purpose to assault Ms. Turnage on April 28,

2008 is that discovery was provided to counsel prior to indictment. (Discovery Receipt, 5/9/08) And the record is devoid of any claim from the defense that the State failed to provide continuing discovery as required by the Rules of Criminal Procedure. Also, in Montgomery County, the Prosecutor's Office voluntarily complies with the open discovery policy set forth in the Local Court Management Plan, which includes disclosure of the reports generated by the police in any given case.¹ The receipt of open discovery by defense counsel in May of 2008, before Jeffrey Lynn was indicted, refutes his contention on appeal that the defense was misled by the indictment herein causing a due process violation.

A review of the defense presented at the trial of this matter provides a third indication that Lynn was not misled by the indictment. The witnesses called during the defense case were all included in the amended witness list filed by defense counsel on August 7, 2008 – before the State moved to amend the indictment to remove the reference to theft as the underlying offense. And the general import of the defense witnesses' testimony was that Jeffrey Lynn was living with Ms. Turnage when this incident occurred in April of 2008. (Tr. 207, 209-216) In other words, the primary defense strategy was to challenge the trespass element of the aggravated burglary offense; and their pursuit of that strategy was in no way affected by the inclusion of theft in the indictment as the underlying offense, or by the trial court's decision to instruct the jury on two possible underlying offenses: theft and assault.

Finally, if defense counsel believed that the trial court's decision to instruct the jury on the elements of assault as well as the elements of theft would violate Lynn's right to due process, counsel would have objected. However, the trial transcript does not record a defense objection to the trial judge's decision to instruct on the elements of assault. (Tr. 151, 154, 287)

¹ The trial court and court of appeals were well-aware of the State's compliance with the open discovery policy set forth in the Local Court Management Plan. (Tr. 4); *Lynn*, at ¶23 (Brogan, J., dissenting).

As the above discussion illustrates, Jeffrey Lynn was not denied due process by the indictment that indicated his purpose in burglarizing Ms. Turnage's residence on April 28, 2008 was to commit theft. Lynn was given proper notice of the elements of the crime charged in a legally sufficient indictment. Furthermore, the trial record shows that Lynn was not misled by the indictment, as he claimed in his appeal to the Second District Court of Appeals. Therefore, the court of appeals' determination that Jeffrey Lynn's right to due process was violated in this case is error that should now be reversed by this Court.

Likewise, the lower court's conclusion that the trial court's instruction on the elements of assault as a possible underlying offense essentially permitted Jeffrey Lynn to be convicted of a crime that was not presented to the grand jury is erroneous. By instructing the jury on the elements of assault, the trial court effectively amended the indictment to conform to the evidence presented by the State. Crim.R. 7(D). Such an amendment is permissible as long as no change is made in the name or identity of the crime charged. *State v. Davis*, 121 Ohio St.3d 239, 2008-Ohio-4537, 903 N.E.2d 609, at ¶1; Crim.R. 7(D).

As mentioned above, amending the indictment to indicate that assault was the underlying offense Jeffrey Lynn had a purpose to commit in Juanita Turnage's apartment would not have changed the identity of the aggravated burglary charge since the specific crime an offender intended to commit inside the occupied structure is not, itself, an element of aggravated burglary. *Gardner*, at ¶71, citation omitted. Therefore, permitting the jury to find Lynn guilty of aggravated burglary based upon the theory that his purpose was to assault Ms. Turnage inside her residence did not violate his constitutional rights to a grand jury indictment or to due process.

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 judge's decision to instruct the jury on the elements of assault as one possible underlying offense "broadened the possible basis for conviction beyond that considered and specified by the grand jury" was unfounded. Because the underlying criminal offense is not, itself, an element of aggravated burglary, the trial court's decision to, in effect, amend the indictment to conform to the evidence presented by the State did not violate the right to due process and to a grand jury indictment.

From the legally sufficient indictment and the open discovery provided to defense counsel, Jeffrey Lynn was fully aware of the nature of the charge against him in this matter. And he knew prior to trial that the State intended to prove his purpose in trespassing into Juanita Turnage's residence was to assault her. The trial record demonstrates that Jeffrey Lynn was fully prepared to defend against the aggravated burglary charge and that his defense strategy was not affected by the trial court's decision to instruct the jury on two possible underlying offenses.

Therefore, the trial court did not err by instructing the jury on the elements of assault as a possible underlying offense even though the indictment identified theft as the only predicate offense for the aggravated burglary charge. The court of appeals' decision to the contrary is error and should be reversed so that Jeffrey Lynn's conviction for aggravated burglary may be reinstated.

Respectfully submitted,

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PROSECUTING ATTORNEY

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 18th day of June, 2010, to Opposing Counsel: Melissa M. Prendergast, 250 E. Broad St., Ste. 1400, Columbus, Ohio 43215.

By: *R. Lynn Nothstine*

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Assistant Prosecuting Attorney

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APPENDIX

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

CASE NO. 10-

10-0251

Plaintiff-Appellant,

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

VS.

JEFFREY L. LYNN

COURT OF APPEALS
CASE NO: 22946

Defendant-Appellee.

NOTICE OF APPEAL OF APPELLANT, THE STATE OF OHIO

MATHIAS H. HECK, JR.

PROSECUTING ATTORNEY

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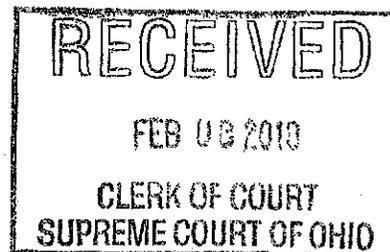
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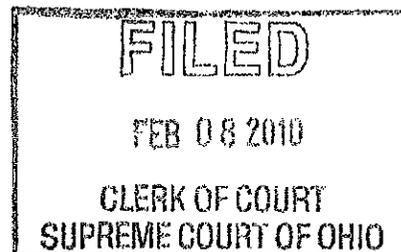
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NOTICE OF APPEAL OF APPELLANT, THE STATE OF OHIO

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. Jeffrey L. Lynn*, Case No. 22946 on December 23, 2009.

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

Respectfully submitted,

MATHIAS H. HECK, JR.
PROSECUTING ATTORNEY

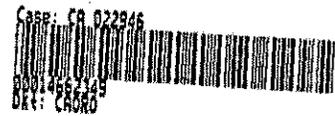
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STATE OF OHIO

CERTIFICATE OF SERVICE

I hereby certify that a copy of this notice of appeal 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.

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COURT OF APPEALS

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39

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.

.....
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.....
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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GREGORY A. BRUSH
CLERK OF COURTS
MONTGOMERY CO. OHIO
39

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO

Plaintiff-Appellee

v.

JEFFREY L. LYNN

Defendant-Appellant

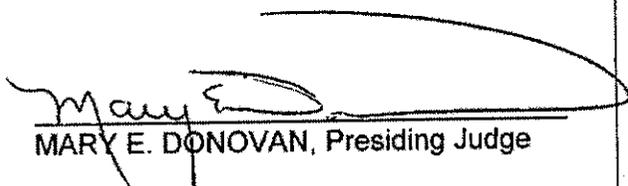
C.A. CASE NO. 22946

T.C. NO. 08 CR 1714

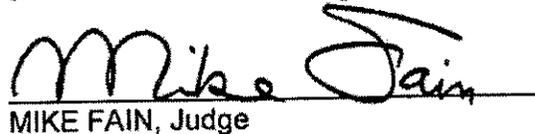
FINAL ENTRY

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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, Presiding Judge

JAMES A. BROGAN, Judge


MIKE FAIN, Judge

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§ 2911.07

OHIO CRIMINAL LAW HANDBOOK

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§ 2911.07 Repealed, 134 v H 511, § 2 [GC §§ 13108-2—13108-4; 111 v 258; Bureau of Code Revision, 10-1-53; 126 v 575]. Eff 1-1-74.

This section concerned false statements and stock brokers.

§ 2911.08 Repealed, 134 v H 511, § 2 [GC §§ 13108-2—13108-4; 111 v 258; Bureau of Code Revision, 10-1-53; 126 v 575]. Eff 1-1-74.

This section concerned false statements and stock brokers.

§ 2911.09 Repealed, 134 v H 511, § 2 [GC §§ 13108-5, 13108-6; 111 v 258, 259; Bureau of Code Revision, 10-1-53]. Eff 1-1-74.

This section concerned false statements and stock brokers.

§ 2911.10 Element of trespass clarified.

As used in sections 2911.11 to 2911.13 of the Revised Code, the element of trespass refers to a violation of section 2911.21 of the Revised Code.

HISTORY: 151 v H 96, § 1, eff. 8-3-06.

Not analogous to former RC § 2911.10 (GC §§ 13108-5, 13108-6; 111 v 258, 259; Bureau of Code Revision, 10-1-53), repealed 134 v H 511, § 2, eff 1-1-74.

[BURGLARY]

§ 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.

Not analogous to former RC § 2911.11 (RS § 7085; S&C 422; 50 v 132; 57 v 56; GC § 13115; Bureau of Code Revision, 10-1-53), repealed 134 v H 511, § 2, eff 1-1-74.

The effective date is set by section 5 of SB 269.

[§ 2911.11.1] § 2911.111 Repealed, 134 v H 511, § 2 [132 v S 97]. Eff 1-1-74.

This section concerned checks drawn on insufficient funds.

§ 2911.12 Burglary.

(A) No person, by force, stealth, or deception, shall do any of the following:

(1) 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;

(2) Trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure that is a permanent or temporary habitation of any person when any person other than an accomplice of the offender is present or likely to be present, with purpose to commit in the habitation any criminal offense;

(3) Trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, with purpose to commit in the structure or separately secured or separately occupied portion of the structure any criminal offense;

(4) Trespass in a permanent or temporary habitation of any person when any person other than an accomplice of the offender is present or likely to be present.

(B) As used in this section, "occupied structure" has the same meaning as in section 2909.01 of the Revised Code.

(C) Whoever violates this section is guilty of burglary. A violation of division (A)(1) or (2) of this section is a felony of the second degree. A violation of division (A)(3) of this section is a felony of the third degree. A violation of division (A)(4) of this section is a felony of the fourth degree.

HISTORY: 134 v H 511 (Eff 1-1-74); 139 v S 199 (Eff 7-1-83); 143 v H 837 (Eff 7-3-90); 146 v S 2 (Eff 7-1-96); 146 v S 269, Eff 7-1-96.

Not analogous to former RC § 2911.12 (RS § 7080; S&C 703; 70 v 40; GC § 13126; Bureau of Code Revision, 10-1-53), repealed 134 v H 511, § 2, eff 1-1-74.

The effective date is set by section 5 of SB 269.

§ 2911.13 Breaking and entering.

(A) No person by force, stealth, or deception, shall trespass in an unoccupied structure, with purpose to commit therein any theft offense, as defined in section 2913.01 of the Revised Code, or any felony.

(B) No person shall trespass on the land or premises of another, with purpose to commit a felony.

(C) Whoever violates this section is guilty of breaking and entering, a felony of the fifth degree.

HISTORY: 134 v H 511 (Eff 1-1-74); 146 v S 2, Eff 7-1-96.

Not analogous to former RC § 2911.13 (RS §§ 7076-4—7076-6; 95 v 306; GC § 13130; 123 v 700; Bureau of Code Revision, 10-1-53), repealed 134 v H 511, § 2, eff 1-1-74.

The effective date is set by section 6 of SB 2.

[§ 2911.13.1] § 2911.131 Repealed, 134 v H 511, § 2 [133 v H 192]. Eff 1-1-74.

This section concerned false motor vehicle repair estimates and fraudulent charges.

§ 2911.14 Repealed, 134 v H 511, § 2 [RS §§ 7017-4, 7017-5, 7076a—7076c, 7087; S&C 422; 44 v 34; 83 v 138; 94 v 20, 363; 99 v 115, 116; GC §§ 13131,

ADOPTED MARCH 10, 1851
 WITH AMENDMENTS CURRENT TO MARCH 31, 2010

ARTICLE I: BILL OF RIGHTS

Section

- 1 Right to freedom and protection of property.
- 2 Right to alter, reform, or abolish government, and repeal special privileges.
- 3 Right to assemble together.
- 4 Bearing arms; standing armies; subordination of military power.
- 5 Trial by jury; reform in civil jury system.
- 6 Slavery and involuntary servitude.
- 7 Rights of conscience; education; necessity of religion and knowledge.
- 8 Writ of habeas corpus.
- 9 Bail; cruel and unusual punishments.
- 10 Trial of accused persons and their rights; depositions by state and comment on failure of accused to testify in criminal cases.
- 10a Rights of victims of crime.
- 11 Freedom of speech and of the press; libel.
- 12 Transportation, etc., for crime.
- 13 Quartering of troops.
- 14 Search warrants and general warrants.
- 15 No imprisonment for debt.
- 16 Redress in courts.
- 17 Hereditary privileges, etc.
- 18 Suspension of laws.
- 19 Inviolability of private property.
- 19a Damage for wrongful death.
- 19b Private property rights in ground water, lakes and other watercourses.
- 20 Powers reserved to the people.

§ 1 Right to freedom and protection of property.

All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety.

§ 2 Right to alter, reform, or abolish government, and repeal special privileges.

All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the general assembly.

§ 3 Right to assemble together.

The people have the right to assemble together, in a peaceable manner, to consult for their common good; to instruct their representatives; and to petition the general assembly for the redress of grievances.

§ 4 Bearing arms; standing armies; subordination of military power.

The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power.

§ 5 Trial by jury; reform in civil jury system.

The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury.

HISTORY: (As amended September 3, 1912.)

§ 6 Slavery and involuntary servitude.

There shall be no slavery in this state; nor involuntary servitude, unless for the punishment of crime.

§ 7 Rights of conscience; education; necessity of religion and knowledge.

All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given, by law, to any religious society; nor shall any interference with the rights of conscience be permitted. No religious test shall be required, as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths and affirmations. Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the general assembly to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction.

§ 8 Writ of habeas corpus.

The privilege of the writ of habeas corpus shall not be suspended, unless, in cases of rebellion or invasion, the public safety require it.

§ 9 Bail; cruel and unusual punishments.

All persons shall be bailable by sufficient sureties, except for a person who is charged with a capital offense where the proof is evident or the presumption great, and except for a person who is charged with a felony where the

proof is evident or the presumption great and where the person poses a substantial risk of serious physical harm to any person or to the community. Where a person is charged with any offense for which the person may be incarcerated, the court may determine at any time the type, amount, and conditions of bail. Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted.

The General Assembly shall fix by law standards to determine whether a person who is charged with a felony where the proof is evident or the presumption great poses a substantial risk of serious physical harm to any person or to the community. Procedures for establishing the amount and conditions of bail shall be established pursuant to Article IV, Section 5(b) of the Constitution of the state of Ohio.

(As amended January 1, 1998.)

§ 10 Trial of accused persons and their rights; depositions by state and comment on failure of accused to testify in criminal cases.

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

HISTORY: (As amended September 3, 1912.)

§ 10a Rights of victims of crime.

Victims of criminal offenses shall be accorded fairness, dignity, and respect in the criminal justice process, and, as the general assembly shall define and provide by law, shall be accorded rights to reasonable and appropriate notice, information, access, and protection and to a meaningful role in the criminal justice process. This section does not confer upon any person a right to appeal or modify any decision in a criminal proceeding, does not abridge any other right guaranteed by the Constitution of the United States or this constitution, and does not create any cause of action for compensation or damages against the state, any

political subdivision of the state, any officer, employee, or agent of the state or of any political subdivision, or any officer of the court.

(Adopted November 8, 1994)

§ 11 Freedom of speech and of the press; libel.

Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it shall appear to the jury, that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted.

§ 12 Transportation, etc., for crime.

No person shall be transported out of the state, for any offense committed within the same; and no conviction shall work corruption of blood, or forfeiture of estate.

§ 13 Quartering of troops.

No soldier shall, in time of peace, be quartered in any house, without the consent of the owner; nor, in time of war, except in the manner prescribed by law.

§ 14 Search warrants and general warrants.

The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the person and things to be seized.

§ 15 No imprisonment for debt.

No person shall be imprisoned for debt in any civil action, on mesne or final process, unless in cases of fraud.

§ 16 Redress in courts.

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

[Suits against the state.] Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

HISTORY: (As amended September 3, 1912.)

§ 17 Hereditary privileges, etc.

No hereditary emoluments, honors, or privileges, shall ever be granted or conferred by this state.

§ 18 Suspension of laws.

No power of suspending laws shall ever be exercised, except by the general assembly.

foreman shall sign the indictment as foreman or deputy foreman. The indictment shall be returned by the foreman or deputy foreman to a judge of the court of common pleas and filed with the clerk who shall endorse thereon the date of filing and enter each case upon the appearance and trial dockets. If the defendant is in custody or has been released pursuant to Rule 46 and seven jurors do not concur in finding an indictment, the foreman shall so report to the court forthwith.

(G) **Discharge and excuse.** A grand jury shall serve until discharged by the court. A grand jury may serve for four months, but the court upon a showing of good cause by the prosecuting attorney may order a grand jury to serve more than four months but not more than nine months. The tenure and powers of a grand jury are not affected by the beginning or expiration of a term of court. At any time for cause shown the court may excuse a juror either temporarily or permanently, and in the latter event the court may impanel another eligible person in place of the juror excused.

(H) **Alternate grand jurors.** The court may order that not more than five grand jurors, in addition to the regular grand jury, be called, impanelled and sit as alternate grand jurors. Alternate grand jurors, in the order in which they are called, shall replace grand jurors who, prior to the time the grand jury votes on an indictment, are found to be unable or disqualified to perform their duties. Alternate grand jurors shall be drawn in the same manner, shall have the same qualifications, shall be subjected to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the regular grand jurors. Alternate grand jurors may sit with the regular grand jury, but shall not be present when the grand jury deliberates and votes.

RULE 7. The Indictment and the Information

(A) **Use of indictment or information.** A felony that may be punished by death or life imprisonment shall be prosecuted by indictment. All other felonies shall be prosecuted by indictment, except that after a defendant has been advised by the court of the nature of the charge against the defendant and of the defendant's right to indictment, the defendant may waive that right in writing and in open court.

Where an indictment is waived, the offense may be prosecuted by information, unless an indictment is filed within fourteen days after the date of waiver. If an information or indictment is not filed within fourteen days after the date of waiver, the defendant shall be discharged and the complaint dismissed. This division shall not prevent subsequent prosecution by information or indictment for the same offense.

A misdemeanor may be prosecuted by indictment or information in the court of common pleas, or by complaint in the juvenile court, as defined in the Rules of Juvenile Procedure, and in courts inferior to the court of common pleas. An information may be filed without leave of court.

(B) **Nature and contents.** The indictment shall be signed, in accordance with Crim. R. 6 (C) and (F) and contain a statement that the defendant has committed a public offense specified in the indictment. The information shall be signed by the prosecuting attorney or in the name of the prosecuting attorney by an assistant prosecuting attorney and shall contain a statement that the defendant has committed a public offense specified in the

information. The statement 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. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. Each count of the indictment or information shall state the numerical designation of the statute that the defendant is alleged to have violated. Error in the numerical designation or omission of the numerical designation shall not be ground for dismissal of the indictment or information, or for reversal of a conviction, if the error or omission did not prejudicially mislead the defendant.

(C) **Surplusage.** The court on motion of the defendant or the prosecuting attorney may strike surplusage from the indictment or information.

(D) **Amendment of indictment, information, or complaint.** The court may at any time before, during, or after a trial amend the indictment, information, complaint, or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged. If any amendment is made to the substance of the indictment, information, or complaint, or to cure a variance between the indictment, information, or complaint and the proof, the defendant is entitled to a discharge of the jury on the defendant's motion, if a jury has been impanelled, and to a reasonable continuance, unless it clearly appears from the whole proceedings that the defendant has not been misled or prejudiced by the defect or variance in respect to which the amendment is made, or that the defendant's rights will be fully protected by proceeding with the trial, or by a postponement thereof to a later day with the same or another jury. Where a jury is discharged under this division, jeopardy shall not attach to the offense charged in the amended indictment, information, or complaint. No action of the court in refusing a continuance or postponement under this division is reviewable except after motion to grant a new trial therefore is refused by the trial court, and no appeal based upon such action of the court shall be sustained nor reversal had unless, from consideration of the whole proceedings, the reviewing court finds that a failure of justice resulted.

(E) **Bill of particulars.** When the defendant makes a written request within twenty-one days after arraignment but not later than seven days before trial, or upon court order, the prosecuting attorney shall furnish the defendant with a bill of particulars setting up specifically the nature of the offense charge and of the conduct of the defendant alleged to constitute the offense. A bill of particulars may be amended at any time subject to such conditions as justice requires.

History: Amended, eff 7-1-93; 7-1-00.

RULE 8. Joinder of Offenses and Defendants

(A) **Joinder of offenses.** Two or more offenses may be charged in the same indictment, information or complaint in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character, or are based on the same act