

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 REPLY BRIEF

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 W. Third Street, Suite 500

Dayton, Ohio 45422

(937) 225-4117

COUNSEL FOR APPELLANT, THE STATE OF OHIO

MELISSA M. PRENDERGAST (COUNSEL OF RECORD)

250 E. Broad Street, Suite 1400

Columbus, Ohio 43215

COUNSEL FOR APPELLEE, JEFFREY L. LYNN

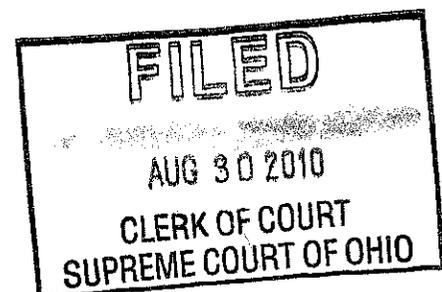


TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
REPLY TO JEFFREY LYNN'S MERIT BRIEF	1-3
CONCLUSION	3
CERTIFICATE OF SERVICE	4

TABLE OF AUTHORITIES**CASES:****PAGE**

State v. Davis, 121 Ohio St.3d 239, 2008-Ohio-4537, 903 N.E.2d 609

1

State v. Gardner, 118 Ohio St.3d 420, 2008-Ohio-2787, 889 N.E.2d 995

1

State v. Lynn, Montgomery App. No. 22946, 2009-Ohio-6812

2

OTHER:

Crim.R. 7(D)

1

REPLY TO JEFFREY LYNN'S MERIT BRIEF

This appeal was not improvidently allowed.

Jeffrey Lynn contends that the State's appeal was improvidently allowed. He is wrong because this case presents the Court with an opportunity to determine whether an indictment for aggravated burglary may be amended to either omit, or change the name of, the alleged underlying offense without violating a defendant's right to due process. The case likewise affords this Court an opportunity to determine whether, absent an amendment to an aggravated burglary indictment changing or omitting the name of the alleged underlying offense, the trial court may instruct the jury on the elements of every underlying offense that is supported by the evidence at trial without violating the defendant's right to due process. These issues are pertinent not only to aggravated burglary prosecutions in the counties that comprise the Second Appellate District but also to similar prosecutions across the State of Ohio.

Jeffrey Lynn's claim that the outcome advocated by the State would eviscerate the Ohio grand jury is untenable. (Appellee's Brief, p. 7)

Jeffrey Lynn contends that allowing the jury at trial to find the defendant guilty of aggravated burglary based upon a different predicate offense than the one included in the indictment would violate his right to grand jury review. This contention is inaccurate because the underlying offense is not an essential element of the crime of aggravated burglary, meaning the name of the underlying offense does not affect the name or identity of aggravated burglary. *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, 889 N.E.2d 995, at ¶71, citation omitted. Criminal Rule 7(D) and this Court's case law permit amendments to the indictment 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. In other words, as long as the name or identity of the

charge is not changed, amendment to the indictment does not violate the right to grand jury review.

Here, the trial court denied the State's motion to amend the indictment prior to trial but then instructed the jury on the possible underlying offenses of theft and assault – in effect permitting amendment to conform to the evidence presented at trial. The trial court's decision to do so did not change the name or identity of the aggravated burglary charge and therefore did not “broaden the possible basis for conviction” beyond what the grand jury found, as the Second District Court of Appeals and Jeffrey Lynn claim. *State v. Lynn*, Montgomery App. No. 22946, 2009-Ohio-6812, at ¶20.

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, which effectively amended 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,

MATHIAS H. HECK, JR.
PROSECUTING ATTORNEY

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

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief was sent by first class on this 27th day of August, 2010, to Opposing Counsel: Melissa M. Prendergast, 250 East Broad Street, Suite 1400, Dayton, Ohio 43215.

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