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RENDERED: APRIL 20, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2004-SC-000751-MR

DATE 5-11-06 ElAGrayson, DC.

JIMMY YOKELY — APPELLANT

V.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE DOUGLAS M. STEPHENS, JUDGE
02-CR-00338

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING AND REMANDING

Appellant, Jimmy Yokely, was convicted of first degree burglary and of being a persistent felony offender in the first degree. He received a ten (10) year sentence, enhanced to twenty (20) years. Appellant now appeals that conviction to this Court as a matter of right.[1]

Robert Loomis lived alone in a home at the end of a private drive, approximately one-eighth of a mile long. The house was adjacent to some railroad tracks. The only other person living on the drive was Mr. Napier, who lived in a mobile home about halfway up the drive. Mr. Napier stated that he did not notice anything unusual on the day of the Loomis burglary. Mr. Loomis' house was impossible to see from the main road because of leaves.

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[1] Ky. Const. § 110(2)(b).

The house was equipped with an alarm system. It was controlled by a key-box located in the garage, and if the key was turned on, it was activated. The key-box was eighteen inches to the right of the door into the living quarters, and when he activated it, Mr. Loomis normally hid the key under a box. The alarm was not hooked up to a phone line, and did not notify anyone when it sounded, but rather made a very loud audible alert. The alarm was not connected to the windows in the garage, nor was it connected to the door leading from the garage into the living quarters. The alarm only sounded when someone was in the living quarters and activated a motion detector.

On August 18, 1999, Mr. Loomis left his house around 7:00 a.m. to have breakfast and go to work. Mr. Loomis had opened the windows in the garage slightly that morning, because it was supposed to be a hot day. He returned home about four hours later. As he approached his house, he noticed that one of the windows on the side of the garage was open more than how he had left it. Mr. Loomis recalled that the window was damaged, and from inside his garage it was evident that someone had "tinkered" with it. The windows were operated by a cranking mechanism, and when they were opened, the top of the window slid down toward the middle of the window frame. The bottom of the windows was approximately six feet from the ground, and the windows approximately one foot in height and two feet in width. The outer garage door was also open. Inside the garage was a door that led from the garage to the living quarters, and it was also open. The interior door was not usually locked by Mr. Loomis when he went out, and he could not remember if he activated the alarm on the day of the burglary.

Mr. Loomis examined his residence and discovered that a total of six firearms were missing, as well as ammunition, a camera, and a television. Mr. Loomis

stated that the firearms were all capable of being fired. Mr. Loomis did not know Appellant, and did not give him or anyone else permission to go in his home and remove these items. None of the stolen property was ever recovered.

Mr. Loomis called the Independence Police Department, and Sgt. John Lonaker responded to the residence. Sgt. Lonaker could find no evidence of forced entry except the garage window. He believed that the front-most garage window appeared to have been pulled up, and based on his personal experience, it was the point of entry for the burglar. He noted that the screen that went over the front-most window had been pushed out, but that the screen was intact on the other garage window. Furthermore, an item had been pushed underneath the window on the outside, so that someone could stand on it and access the window. Sgt. Lonaker could clearly see fingerprints that indicated someone had lifted the window up to gain entry to the garage, because the fingerprints were located on the inside of the window. Mr. Loomis told Sgt. Lonaker that the fingerprints were not his, and that there was no legitimate reason for them to be there. The prints were subsequently lifted as evidence.

Following the initial report of the burglary prepared by Sgt. Lonaker, the case was transferred to Independence Police Detective Danny Bridges. On September 3, 1999, Bridges sent the fingerprints from the window to the Kentucky State Police Crime Laboratory for analysis. He received a positive identification on one of the fingerprints from the lab in August, 2001. Howard Jones, a fingerprint analyst with the Kentucky State Police, analyzed the fingerprints submitted by Detective Bridges. He determined that there was only one print of comparison value taken at the scene of the crime. The print was identified as the right middle finger of Appellant. The time lapse between the date the prints were sent to the crime lab, and the date of identification

was apparently due to the lab being understaffed. Cases were also prioritized, with burglaries given a lower priority than rapes, murders, and drug cases.

During trial, the Commonwealth called four witnesses, and Appellant requested a directed verdict. The directed verdict was denied, and Appellant called no witnesses. Appellant requested that a lesser included offense instruction be given on criminal trespass. That request was overruled, and Appellant then objected to the instructions as a whole. Appellant also made a motion to dismiss the indictment due to the pre and post-trial delay in bringing the case to trial. That motion was also denied. Appellant filed a motion to set aside the verdict, which was overruled after a hearing. Final judgment was entered on August 25, 2004.

Appellant first argues that he was denied due process under both the United States and Kentucky Constitutions, because there was insufficient evidence to prove his guilt of every essential element of first degree burglary. The Commonwealth argues that the insufficiency of the evidence claim is unpreserved because Appellant only moved for a directed verdict at the close of the Commonwealth's case, and not at the close of all the evidence. If the alleged error is deemed unpreserved, then Appellant's claim is evaluated using the palpable error standard.[2]

As previously mentioned, the Commonwealth rested after calling four witnesses, at which time Appellant's motion for a directed verdict was overruled. Appellant elected not to put on evidence. The Commonwealth contends that for the alleged directed verdict error to be preserved, Appellant would have had to make yet another motion for directed verdict. This of course would have been immediately after

[2] RCr 10.26.

informing the court that he would not be calling witnesses, and within moments of his original motion for a directed verdict.

"It is black-letter law that, in order to preserve an insufficiency-of-the-evidence allegation for appellate review, '[a] defendant must renew his motion for a directed verdict, thus allowing the trial court the opportunity to pass on the issue in light of all the evidence.'"[3] The purpose of this preservation rule is to allow a judge the opportunity to evaluate all of the evidence, once at the close of the Commonwealth's case, and once at the close of all the evidence. However the interpretation of the rule that the Commonwealth urges is an overzealous application of black-letter law. Requiring a defendant to move for a directed verdict subsequent to one made a few minutes before, and without any further evidence having been heard, serves no purpose. The language of Schoenbachler v. Commonwealth[4] supports this proposition:

> In other words, a motion for directed verdict made after the close of the Commonwealth's case-in-chief, but not renewed at the close of all evidence-- i.e., after the defense presents its evidence (**if it does so**) or after the Commonwealth's rebuttal evidence-- is insufficient to preserve an error based upon insufficiency of the evidence.[5]

The above quotation illustrates the two instances when a motion for directed verdict would have to be renewed to preserve a sufficiency of the evidence claim. Although the defendant in Schoenbachler did present evidence, unlike Appellant herein, we found it necessary to give guidance in cases similar to the one at bar. While our rules regarding error preservation are indispensable, a technical application of

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[3] Schoenbachler v. Commonwealth, 95 S.W.3d 830, 836 (Ky. 2003) (quoting Baker v. Commonwealth, 973 S.W.2d 54, 55 (Ky. 1998)).
[4] Id.
[5] Id. at 836 (emphasis added).

those rules is unnecessary when no purpose is served.[6] The alleged error is this case was preserved, and we now review it as such.

Appellant claims there was insufficient evidence to convict him of the charge of burglary in the first degree. Specifically, he argues that absent other evidence linking him to the crime, a single fingerprint is insufficient to convict. Burglary in the first degree is defined as follows:

> (1) A person is guilty of burglary in the first degree when, with the intent to commit a crime, he knowingly enters or remains unlawfully in a building, and when in effecting entry or while in the building or in the immediate flight therefrom, he or another participant in the crime:
> (a) Is armed with explosives or a deadly weapon; or
> (b) Causes physical injury to any person who is not a participant in the crime; or
> (c) Uses or threatens the use of a dangerous instrument against any person who is not a participant in the crime.
> (2) Burglary in the first degree is a Class B felony.[7]

Appellant contends that, taken as a whole, the evidence in this case is such that no reasonable jury could have found beyond a reasonable doubt that he committed the burglary. He concedes that there was no contest about whether a burglary occurred and that firearms, capable of firing a shot,[8] were stolen. However, he asserts that there was no other evidence, save the single fingerprint, that connects him to the crime. The proper standard for determining whether a directed verdict is warranted was articulated in Commonwealth v. Benham,[9] which stated as follows:

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[6] In Scruggs v. Commonwealth, 566 S.W.2d 405, 412 (Ky. 1978), we stated the proposition as follows: "On the other hand, if the (directed verdict) motion is denied, then, and in that event, the defendant must either stand on his motion and refuse to put on any proof or he may present his evidence to support his defense."
[7] KRS 511.020.
[8] Mr. Loomis stated that the firearms were all capable of being fired, thereby making them deadly weapons pursuant to KRS 500.080(4)(a).
[9] 816 S.W.2d 186 (Ky. 1991).

> On a motion for directed verdict, the trial court must draw all *fair and reasonable inferences from the evidence in favor of the Commonwealth.* If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purposes of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony
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> On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.[10]

In the case at bar, Mr. Loomis stated that the fingerprint found at the scene had no legitimate reason for being there, and that it appeared that someone had "tinkered" with the window. Sgt. Lonaker testified that he could clearly see fingerprints that indicated someone had lifted the window to gain entry to the garage. He also noted that a screen was missing from the window, and that the screen on the other window was intact. Furthermore, it appeared to him that someone had pushed something under the window in order to gain entry, and during his investigation he found no other point of entry for the house. The stolen property was never recovered, and Appellant was not seen in the area of the crime.

Appellant cites to other jurisdictions that have held that a single fingerprint, standing alone, is insufficient to convict of a crime.[11] While that position is debatable, the circumstantial evidence in this case is sufficient to support the conviction. "Circumstantial evidence may form the basis for a conviction so long as the

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[10] Id. at 187 (emphasis added).

[11] See Ruffin v. State, 556 S.E.2d 191 (Ga. Ct. App. 2001); State v. Gilmore, 542 S.E.2d 694 (N.C. Ct. App. 2001); Shores v. State, 756 So.2d 114 (Fla. Dist. Ct. App. 2000); McCleskey v. State, 924 S.W.2d 427 (Tex. Crim. App. 1996).

evidence is sufficient to convince a reasonable jury of guilt."[12] The only evidence directly linking Appellant to the crime is the single fingerprint. However, its placement on the inside of the window, combined with the other evidence of burglary, is sufficient to allow a jury to find beyond a reasonable doubt. Most of the foreign cases dealing with a single fingerprint fact pattern, also include some explanation from the defendant as to an alternate theory of how the fingerprint came to be on the object in question. Absent such an explanation, we hold that the circumstantial evidence in this case was indeed enough to convict Appellant of the crime of burglary.

Appellant next argues that he was deprived of his right to a speedy trial due to both the pre-indictment and post-indictment delay. He claims that this was a violation of the Sixth and Fourteenth Amendments to the United States Constitution, as well as Section 1, 2, and 11 of the Kentucky Constitution. This error was properly preserved by Appellant's motion to dismiss the indictment.

A review of the timeframe of this case is helpful. The offense was committed on August 18, 1999. Appellant was indicted on May 21, 2002, and on that day a warrant for Appellant's arrest was issued. Appellant appears to have been incarcerated on other charges, for on April 15, 2004, a detainer was lodged against Appellant at the Kentucky State Reformatory. Appellant was arraigned on May 10, 2004, and this was only after he made a pro se motion to be tried under KRS 500.110. An indictment alleging that Appellant was a Persistent Felony Offender was handed down on July 9, 2004. The jury trial was held on August 5, 2004, and a verdict of guilty was returned on both the burglary charge and the PFO.

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[12] Davis v. Commonwealth, 147 S.W.3d 709, 729 (Ky. 2004) (citing Bussell v. Commonwealth, 882 S.W.2d 111, 114 (Ky. 1994)).

When a hearing was held on Appellant's motion, it was noted that the only explanation for the delay in the fingerprint analysis by the Commonwealth was that the Kentucky State Police was short-handed and placed a higher priority on other cases. Additionally, Detective Bridges testified that he got Appellant's name in August, 2001, but did not go to see him until January, 2002, while Appellant was at the Kentucky State Reformatory. Bridges himself did not testify before the grand jury until June, 2002. The trial court ultimately denied the motion to dismiss because of a lack of prejudice, other than the fact that Appellant had a right to have the case decided speedily.

An individual is not entitled to the speedy trial protections of the Sixth Amendment until formal proceedings are instituted.[13] Pre-charging delay can however constitute a due process violation, provided that the Appellant can show "substantial prejudice" and "intentional delay to gain tactical advantage" on behalf of the Commonwealth.[14] Furthermore, the delay must be intentional and mere negligence by the police is insufficient.[15] Kentucky law provides no statute of limitations for the prosecution of a felony offense.[16] Reed v. Commonwealth[17] explains the rationale behind this reasoning:

> A legislative determination has been made that felony charges may be brought at any time; that the interest of the Commonwealth in the prosecution of crime outweighs the benefits normally associated with statutes of limitation; and that there is no right to be free of felony prosecution by the mere passage of time.[18]

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[13] United States v. Marion, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971).
[14] Reed v. Commonwealth, 738 S.W.2d 818, 820 (Ky. 1987).
[15] Id.
[16] KRS 500.050.
[17] 738 S.W.2d 818 (Ky. 1987).
[18] Id. At 820.

Appellant argues that he was prejudiced by the passage of time, because it impacted his ability to remember his whereabouts on the date of the burglary. Furthermore, he contends that the delay made it difficult for him to seek out alibi witnesses that could corroborate his story. He further asserts that the delay during the pre-indictment phase of his trial was intentional, because the Kentucky State Police Crime Laboratory intentionally did not examine the fingerprints for two years. However, the delay in the processing of the fingerprints, while unfortunate, was not "intentional" as that word is used in the relevant caselaw.

Obviously, the delay in the case at bar was intentional, because the Crime Lab intentionally put certain crimes in a hierarchy of importance, with burglary being near the bottom. However, "intentional", as it is used in Reed, means purposefully not investigating or prosecuting a crime in order for the Commonwealth to make the outcome of the case more favorable. There is no evidence in this case to show that the reason for the delay had anything to do with ulterior motives. The Kentucky State Police Crime Laboratory is constrained by budget concerns, and they felt it necessary to investigate certain types of evidence more quickly. This is to be expected, given the more injurious effects of crimes such as rape, murder, and drug offenses. Additionally, during the seven month delay after the fingerprints were identified, the investigation continued, including an interview with Appellant. "[I]nvestigative delay is fundamentally unlike delay undertaken by the Government solely 'to gain tactical advantages over the accused.'"[19] For this reason, we hold that there was no violation of due process because of the pre-indictment delay.

[19] United States v. Lovasco, 431 U.S. 783, 795, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977).

Now we turn to the post-indictment delay. Under both the Federal and Kentucky Constitutions, we analyze a defendant's right to a speedy trial using the four-factor Barker v. Wingo[20] test. "That test involves an examination of: (1) the length of delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) the prejudice to the defendant caused by the delay."[21] "The factors are balanced and '[n]o single one of these factors is determinative by itself.'"[22]

We must first determine if the delay was presumptively prejudicial to the defendant, because if it was not then no rights were violated and this inquiry ends.[23] "Determining whether a delay was presumptively prejudicial requires examining two elements: the charges and the length of the delay."[24] A "delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge."[25] In this case, Appellant was charged with burglary in the first degree and being a PFO. We view these charges to be serious, but of slight complexity.

The second element, length of delay, is the period between the earlier of arrest or indictment, and the time the trial began.[26] Appellant was indicted on May 21, 2002, and his trial began on August 5, 2004. Therefore, the period between indictment and trial was approximately 26 months, although we note that approximately two months of this delay was due to Appellant's motion for a continuance. Although the charges are only slightly complex, we view this amount of time to be presumptively prejudicial.

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[20] 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972).
[21] Dunaway v. Commonwealth, 60 S.W.3d 563, 569 (Ky. 2001).
[22] Id. (citing Gabow v. Commonwealth, 34 S.W.3d 63, 70 (Ky. 2000)).
[23] Id.
[24] Id.
[25] Barker, 407 U.S. at 531.
[26] Dillingham v. United States, 423 U.S. 64, 96 S.Ct. 303, 46 L.Ed.2d 205 (1975).

Having found Appellant's delay was presumptively prejudicial, we now turn to the other factors of the Barker test, starting with the reason for the delay. The Barker Court set forth three general areas of delay: (1) intentional delay meant to hamper the defense; (2) neutral delay such as negligence or overcrowding of the courts; and (3) valid delay such as a missing witness.[27] As we have already stated, we do not feel that any delay was caused in an attempt to gain an upper hand on the defendant, however we do feel that the delay in this case can be attributed to negligence on the part of the Commonwealth. The only indication in the record of why Appellant was not brought to trial was the fact that he was incarcerated on other offenses during the delay. Even though negligence is considered a neutral reason, "the primary burden [is] on the courts and the prosecutors to assure that cases are brought to trial."[28] Although the reason for delay in this case cannot be considered deliberate, we deem it highly undesirable.

The third Barker factor is the responsibility of the defendant to assert his right to a speedy trial. The record indicates that Appellant filed a pro se motion for disposition on April 26, 2004, pursuant to KRS 500.110. Although he did not specifically use the language "right to a speedy trial" in the motion, we view the filing of the motion sufficient to be an assertion of that right. However, Appellant's motion to dismiss dealt solely with the pre-indictment due process argument, not the right to a speedy trial. Regardless of this, Appellant adequately asserted his speedy trial rights. We therefore turn to the final factor in the Barker test.

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[27] Barker, 407 U.S. at 531.
[28] Id. at 529.

Barker calls for an examination of the prejudice to the Appellant caused by the delay. That Court articulated three distinct areas of concern: (1) to prevent oppressive pre-trial detention; (2) to minimize anxiety and concern for the accused; (3) and to limit the possibility that the defense will be impaired.[29] In this case, the pre-trial detention interest weighs heavily against Appellant, as he was already incarcerated during the period of delay. Secondly, while Appellant undoubtedly felt anxiety at the prospect of a twenty (20) year sentence, there is nothing in these facts to indicate that his concern would have grown as a result of the delay. In fact, Appellant could have felt relieved because of the inactivity of his case, and the possibility that he would never have to stand trial for his crime. Finally, as already stated, the delay did not impair the defense of Appellant. Once Appellant was indicted, a trial or guilty plea was inevitable, and Appellant should have begun to prepare his defense for the crime charged. The delay did nothing to hamper this, and if anything, gave him two years of additional time to reflect on the events of the crime and to seek favorable witnesses.

Upon a weighing of the Barker factors, we conclude that although there was slight prejudice to Appellant, it did not rise to the level of a constitutional violation. Though Appellant asserted his rights, the delay was presumptively prejudicial, and the reason for the delay was pure negligence, the facts of this case do not show that any of this caused great harm to Appellant, and more importantly did nothing to affect the outcome of his trial. We hold that the delays in this case did not violate either the United States or Kentucky Constitutions.

Appellant's final argument is that the trial court should have instructed the jury on the lesser included offense of criminal trespass in the first degree. "A person is

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[29] Id. at 532.

guilty of criminal trespass in the first degree when he knowingly enters or remains unlawfully in a dwelling."[30] "[A] lesser included offense is one which 'is established by proof of the same or less than all the facts required to establish the commission of the offense charged.'"[31] The interplay between burglary and criminal trespass is explained as follows:

> KRS Chapter 511 describes three degrees of burglary and three degrees of criminal trespass, all of which proscribe intrusions by the defendant on the property of the victim. All contain one multifaceted element, *viz*: that the defendant "knowingly enter[ed] or remain[ed] unlawfully" in or upon the victim's property. The three degrees of burglary contain an additional common element that the defendant did so "with the intent to commit a crime," the element which distinguishes the felony or burglary from the misdemeanor of criminal trespass.[32]

In this case, the jury should have been instructed on the lesser included offense of criminal trespass. The jury could have believed that Appellant committed burglary when he entered the home. However, based on the modest amount of evidence, and the lack of any evidence connecting Appellant to the stolen firearms, the jury could have also believed that he did not steal the firearms. Without stealing the firearms, he would have only committed the offense of criminal trespass. Furthermore, the jury could have believed that he did not have the requisite intent to commit a crime, as mandated by the burglary statute.

For the reasons herein stated we reverse the judgment and remand for a new trial.

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[30] KRS 511.060.
[31] Colwell v. Commonwealth, 37 S.W.3d 721, 726 (Ky. 2000) (citing KRS 505.020(2)(a)).
[32] Id. at 725.

Lambert, C.J., and Cooper, Johnstone, and Roach, JJ., concur. Scott, J., dissents by separate opinion in which Graves and Wintersheimer, JJ., join.

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RENDERED: APRIL 20, 2006
NOT TO BE PUBLISHED

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APPEAL FROM KENTON CIRCUIT COURT
HONORABLE DOUGLAS M. STEPHENS, JUDGE
02-CR-00338

COMMONWEALTH OF KENTUCKY — APPELLEE

DISSENTING OPINION BY JUSTICE SCOTT

Respectfully, I dissent as the evidence in this case does not require or support the giving of a lesser-included instruction for criminal trespass.

Mr. Loomis lived alone in a home an eighth of a mile up a private drive. On August 18, 1999, he left home around 7:00 a.m. for work. When he returned, he noticed one of the windows in the garage was opened wider than he had left it. He noticed it was damaged, and looking at it from inside, it was evident that someone had "tinkered" with it.

Inside the garage, the door that led from the garage to the living quarters was open. Upon looking around, he discovered that six firearms were missing, including ammunition, a camera and a television. The firearms were all capable of firing. No one had permission to go into his home and remove these items.

After receiving notice of the alleged burglary, Sergeant Lonaker of the Independence Police Department checked the scene. In his opinion, the front-most garage window appeared to have been pulled up and was the point of entry

for the burglary. He noticed fingerprints on the window and lifted these as evidence.

The fingerprints were subsequently sent to the Kentucky State Police crime lab, where a positive identification was made on one of the prints. It was identified as the right middle finger of the Appellant.

At trial, the Commonwealth put on four witnesses and closed. The Appellant moved for directed verdict, which was denied, then rested without calling any witnesses. During the preparation of the instructions, the Appellant requested the inclusion of a lesser-included offense of criminal trespass. The request was denied. Appellant was convicted of burglary in the first degree and of being a persistent felony offender in the first degree and sentenced to twenty years.

Upon the foregoing facts, the majority reverses the Appellant's conviction for burglary postulating that upon "the modest amount of evidence, and the lack of any evidence connecting Appellant to the stolen firearms, the jury could have . . . believed that he did not steal the firearms. Without stealing the firearms, he would have only committed the offense of criminal trespass. Furthermore, the jury could have believed that he did not have the requisite intent to commit a crime, as mandated by the burglary statute."

It is settled in our jurisprudence that the trial court must instruct the jury on all the lesser included offenses which are justified by the evidence. Cannon v. Commonwealth, 777 S.W.2d 591, 596 (Ky. 1989). However, "[a] defendant is not entitled to an instruction on a lesser-included offense unless the evidence is 'such as to create a reasonable doubt as to whether the defendant is guilty of the

higher or lower degree.'" Rowe v. Commonwealth, 50 S.W.3d 216, 218-19 (Ky. App. 2001)(citing Jones v. Commonwealth, 737 S.W.2d 466, 468 (Ky. App. 1987)).

To sustain a charge of Burglary in the First Degree, the jury must have believed the Appellant entered the home of Mr. Loomis unlawfully with the intent to commit a crime therein and while in the home, or the flight therefrom, he, or an accomplice, was armed with a deadly weapon. KRS 511.020. Criminal trespass, on the other hand, would only require that a jury believe that the Appellant entered Mr. Loomis's home unlawfully. KRS 511.060.

The Appellant argues that the jury "could, [have] reasonably believed that the Appellant was present at the house but did not remove the guns." Such an argument ignores the fact that *the guns were taken.* And there was no evidence that any other person entered the home except Appellant. Thus, from the evidence adduced, under all applications of logic – Appellant took the guns, as the jury unanimously held.

The giving of a lesser included instruction should be based upon evidence which supports it, not on the absence of evidence to exclude it with mathematical certainty. Here all logic leads to one conclusion. If there was any evidence to support any other person being involved in the burglary or committing the burglary, then it should have been put forward. It wasn't.

I believe it is time we return to plain, simple instructions, which fit the evidence introduced at trial – not evidence, which was not.

For the reasons set forth, I dissent from the majority's opinion in this case.

Graves and Wintersheimer, JJ., joins this dissent.