

[Cite as *State v. Lawson*, 2010-Ohio-3114.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

STATE OF OHIO	:	
	:	Appellate Case No. 23456
Plaintiff-Appellee	:	
	:	Trial Court Case No. 09-CR-327
v.	:	
	:	(Criminal Appeal from
SCOTT A. LAWSON	:	Common Pleas Court)
	:	
Defendant-Appellant	:	
	:	

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OPINION

Rendered on the 2nd day of July, 2010.

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MATHIAS H. HECK, JR., by MICHELE D. PHIPPS, Atty. Reg. #0069829,
Montgomery County Prosecutor’s Office, Appellate Division, Montgomery County
Courts Building, P.O. Box 972, 301 West Third Street, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

THOMAS R. SCHIFF, Hochwalt & Schiff, LLC, 500 Lincoln Park Boulevard, Suite
216, Kettering, Ohio 45429
Attorney for Defendant-Appellant

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FAIN, J.

{¶ 1} Defendant-appellant Scott Lawson appeals from his conviction and sentence for Aggravated Burglary. Lawson argues that the trial court erred in allowing the State to introduce evidence of his prior felony convictions, and in failing to instruct the jury on the lesser-included offense of Criminal Trespass. We

conclude that the trial court did not abuse its discretion in allowing the State to cross-examine Lawson about the identity of his prior convictions, but that the trial court did go beyond its discretion in denying his request to instruct the jury on the lesser-included offense of Criminal Trespass. The judgment of the trial court will be Reversed, and this cause will be remanded for further proceedings.

I

{¶ 2} From late 2008, Carol Bayless shared her home with her grandson Kevin Williams and his girlfriend Jessica Ratliff. On occasion, Bayless allowed her daughter Melissa Williams, who is Kevin's mother, and Melissa's boyfriend, Lawson, to stay at her home. In early January, 2009, Lawson kicked out Bayless's living room window. Ratliff called the police, and Lawson was arrested. Bayless refused to allow Lawson to come into her home after that night.

{¶ 3} One evening in late January, 2009, Melissa and Lawson showed up at Bayless's home and asked if they could spend the night. Bayless said Melissa could stay, but Lawson was not welcome. Despite Melissa's begging, Bayless continued to refuse. Lawson encouraged Melissa to stay and said he would go to his sister's home. Because it was cold, Bayless drove Lawson to his sister's house. After confirming with his sister that he could stay, Lawson convinced Bayless to drive him to the store to buy beer.

{¶ 4} Early the next morning, Bayless left for work, while Melissa, Kevin, and Ratliff were still asleep. Kevin and Ratliff woke to the sound of their bedroom door banging open, and Lawson began repeatedly to hit Kevin in the head, while yelling

obscenities. As Lawson continued to hit Kevin, Ratliff grabbed a cell phone and ran downstairs, intending to turn on the phone and call the police. Kevin heard his mother, Melissa, say, "Oh, my goodness, what are you doing? What's going on? Scotty, please calm down." In response, Lawson went downstairs with Melissa.

{¶ 5} Kevin grabbed a small bat and headed down the stairs. As Ratliff passed Lawson and Melissa, heading back to Kevin, Lawson hit her in the back. Lawson then grabbed a forty-ounce can of beer and started to come after Kevin, who dropped the bat and ran back up the stairs with Ratliff. By this time, Ratliff had the police on the phone, and she handed the phone to Kevin. As Kevin was on the phone, Lawson picked up the bat and started up the stairs. Kevin pushed a tub of videotapes down the stairs, knocking Lawson down. Lawson continued yelling obscenities and insisting that they would learn not to call the police on him. He screamed, "You ain't seen the worst of me yet, bitch." As Lawson started back up the stairs, Melissa grabbed his arm and said, "No. Scotty, just come on, let's leave. Just calm down. Please leave my son alone." Melissa and Lawson fled from the home before the police arrived.

{¶ 6} Melissa and Lawson ran to the home of neighbors and pounded on their door. When the wife answered the door, Lawson immediately asked the couple to take him and Melissa to Kettering. The couple agreed. As they drove past Bayless's home, the couple noticed the police cruiser and asked Lawson and Melissa what was going on. Lawson just told them to hurry up and keep going.

{¶ 7} In the meantime, Kevin and Ratliff saw that the window that Kevin and Bayless had repaired earlier in the month had been kicked out, including the frame,

and the glass was broken. Kevin called Bayless at work and told her to come home.

Once home, Bayless saw several knots on Kevin's head and a welt on Ratliff's back.

{¶ 8} Bayless explained at trial that neither Lawson nor Melissa lived in her home while they were dating. Although she gave Melissa a key to her home once when she was out of town, she took the key back when she returned home. Bayless never gave Lawson a key. Bayless, Kevin, and Ratliff agreed that Lawson had not been back to the home after the first incident in early January, and they did not give Lawson permission to enter the home on the morning of the Aggravated Burglary.

{¶ 9} Lawson testified at trial, claiming that Bayless gave him and Melissa a key to her home when they moved in with her the previous fall. Lawson insisted that through the month of January, 2009, he and Melissa continued to stay at Bayless's home on a regular basis. He then admitted that after the incident earlier in the month, they had to sneak inside, but he insisted that Bayless was aware of it.

{¶ 10} Lawson admitted that Bayless told him that he was not allowed in her home, but he claimed Melissa invited him to return several hours later. Lawson explained that his brother brought him back very early the next morning, and he claimed to have used the key given to him and Melissa by Baylessbrother's to enter. Lawson and Melissa stayed up all night watching television. When they heard Bayless get up for work, Lawson hid in the basement until she left.

{¶ 11} As Lawson continued to watch television with Melissa, he heard a loud noise and saw that the window had fallen out and broken. Kevin came down the stairs carrying a little bat, yelling at Lawson to leave the house, and threatening to

call the police. Kevin swung at Lawson, who grabbed that bat out of his hands and threw it down. Kevin headed back up the stairs, and as Lawson started to follow him, Kevin pushed a box of videotapes down the stairs. Melissa grabbed Lawson and said, "Come on." The two left the home.

{¶ 12} Lawson denied ever hitting either Ratliff or Kevin or threatening them. Lawson admitted that he was in a rage when he yelled, "You ain't seen the worst of me yet, bitch." However, he maintained that the statement was not intended as a threat.

{¶ 13} A jury found Lawson guilty, as charged, of one count of Aggravated Burglary. The trial court sentenced him to a six-year prison term. From his conviction and sentence, Lawson appeals.

II

{¶ 14} Lawson's First Assignment of Error states as follows:

{¶ 15} "THE UNFAIRLY PREJUDICIAL EFFECT OF LAWSON'S PRIOR CONVICTIONS SUBSTANTIALLY OUTWEIGHED THEIR PROBATIVE VALUE ON ADMISSION."

{¶ 16} In his First Assignment of Error, Lawson maintains that the trial court erred when it allowed the State to introduce evidence of his prior convictions. We conclude that, because Lawson chose to testify at trial, the court did not abuse its discretion in allowing the State to cross-examine Lawson as to the dates and identities of his prior felony convictions, for the limited purpose of attacking his credibility.

{¶ 17} When the State seeks to attack the credibility of a testifying defendant, “evidence that the accused has been convicted of a crime is admissible if the crime was punishable by death or imprisonment in excess of one year * * * and if the court determines that the probative value of the evidence outweighs the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.” Evid.R. 609(A)(2). The decision whether or not to admit evidence under Evid.R. 609 is left to the sound discretion of the trial court, and a reviewing court will not override that decision absent an abuse of discretion. *State v. Owings*, Montgomery App. No. 21429, 2006-Ohio-4281, ¶74, citing *State v. Brown*, 100 Ohio St.3d 51, 2003-Ohio-5059, ¶27, in turn citing *State v. Wright* (1990), 48 Ohio St.3d 5.

{¶ 18} “Going back at least as far as 1940, many Ohio appellate opinions have stated that an abuse of discretion ‘means more than an error of law or judgment’, which incorrectly implies that a trial court may commit an error of law without abusing its discretion. *State v. Boles*, Montgomery App. No. 23037, 2010-Ohio-278, ¶15, citations omitted. To the contrary, ‘[n]o court—not a trial court, not an appellate court, nor even a supreme court—has the authority, within its discretion, to commit an error of law.’ *Id.* at ¶26. The abuse of discretion standard is more accurately defined as: ‘[a]n appellate court’s standard for reviewing a decision that is asserted to be grossly unsound, unreasonable, illegal, or unsupported by the evidence.’ *Id.* at ¶18, quoting *Black’s Law Dictionary*, Eighth Edition (2004), at 11.” *State v. Cave*, Clark App. No. 09-CA-6, 2010-Ohio-1237, ¶12.

{¶ 19} As Lawson considered whether or not to testify, the trial court specifically cautioned him: “The fact that you have numerous convictions, or

several other convictions within the last ten years for felonies would come into evidence and the jury would then hear that.” Lawson asked for more time to consult with his attorney, and the trial court ordered a recess. After that consultation, there was further discussion in chambers as to which prior convictions would be admissible, and the court clarified that the State could only introduce the year of the felony conviction and the name of the charge, not any details of the crime

{¶ 20} or any information regarding the sentences imposed.¹ After these discussions, Lawson chose to testify.

{¶ 21} Lawson argues that the information of his prior convictions was too prejudicial to have been allowed because his character was not placed in issue by his testimony. While his general character was not at issue, his credibility was. “When a defendant’s version of what occurred contradicts other witnesses, his credibility is at issue and it may be appropriate to impeach the defendant and to test his credibility by introducing testimony regarding his prior convictions.” *Owings*, supra, at ¶29, citing *State v. Brown*, 100 Ohio St.3d 51, 2003-Ohio-5059, ¶27.

{¶ 22} The trial court properly gave the jury a limiting instruction, as follows: “Evidence was received that the Defendant was convicted of prior offenses. That evidence was received only for a limited purpose. It was not received and you may not consider it to prove the character of the Defendant in order to show that he acted in conformity with that character. If you find that, the Defendant was convicted of

¹The State contends that because Lawson did not object to these questions during his cross-examination, this issue is governed by the plain-error standard of review. Our review of the record indicates that Lawson, during the in-chambers discussion, made his objection to these questions sufficiently clear to preserve this

previous offenses you may consider that evidence only for the purpose of testing the Defendant's credibility and the weight to be given to the Defendant's testimony. It cannot be considered for any other purpose." As a reviewing court, we presume that a jury follows the instructions it is given by the trial court. *Id.* See, also, *State v. Jones*, 90 Ohio St.3d 403, 414, 2000-Ohio-187.

{¶ 23} Lawson also maintains the jury was unfairly prejudiced by its knowledge of his prior convictions, as evidenced by the comments of a couple of the jurors that, in light of his extensive criminal history, he should not have been "out walking around." We must put the court's statement regarding those comments in perspective. At the sentencing hearing, the trial court explained to Lawson its reasons for ordering a six-year sentence. The trial court pointed out that Lawson had ten prior felony convictions, which the court pointed out was a "terrible" record. In stressing how terrible Lawson's record was, the court stated, "I recall discussing with several of the jurors of this case after the case was over. They were wondering why in the world were you out walking around. Because they thought given your record that came out in the trial that you should not be out walking around." There is no reason to take this statement at more than face value. Prior to the Aggravated Burglary, Lawson had ten other felony convictions, of six of which the jury was aware: two convictions for Robbery, and one each for Possession of Cocaine, Failure to Comply with the Order or Signal of a Police Officer, Unauthorized Use of a Motor Vehicle, and Felonious Assault on a Police Officer with a Deadly Weapon. This is an extensive record, and it is not unexpected, then, that some jurors might express

issue for appellate review.

surprise that Lawson was not incarcerated. However, this expression of surprise does not mean that the jurors ignored the extensive evidence presented by the State, Lawson's testimony in his own defense, or the trial court's jury instructions, and found Lawson guilty of the charged offense, not out of a belief that he was guilty of that offense, but in order to punish him for his previous crimes.

{¶ 24} Information regarding a defendant's criminal history is by its nature prejudicial, but in this case, any prejudice to Lawson was outweighed by the usefulness to the jury of being aware of that history when assessing Lawson's credibility. When a case narrows to the credibility of the defendant, as weighed against the credibility of the victims, "there [is] greater, not less, compelling reason for exploring all avenues which would shed light on which of the * * * witnesses [are] to be believed." *Owings*, supra, at ¶29, quoting *State v. Goney* (1993), 87 Ohio App.3d 497, 503, additional citation omitted. This includes admission of a testifying defendant's criminal history pursuant to Evid.R. 609.

{¶ 25} Lawson's First Assignment of Error is overruled.

III

{¶ 26} Lawson's Second Assignment of Error is as follows:

{¶ 27} "THE EVIDENCE AT TRIAL, UNDER ANY REASONABLE VIEW, REQUIRED A JURY INSTRUCTION ON A LESSER INCLUDED OFFENSE."

{¶ 28} Criminal Trespass is a lesser-included offense of Aggravated Burglary. See, e.g., *State v. Divincenzo*, Medina App. No. 05CA0101-M, 2006-Ohio-6330, ¶34, citation omitted. However, this does not mean that an instruction on Criminal

Trespass is required in every prosecution for Aggravated Burglary. “If the evidence is such that a jury could reasonably find the defendant not guilty of the charged offense, but could convict the defendant of the lesser included offense, then the judge should instruct the jury on the lesser offense. *State v. Shane* (1992), 63 Ohio St.3d 630, 632-633, 590 N.E.2d 272.” *Shaker Heights v. Mosely*, 113 Ohio St.3d 329, 333, 2007-Ohio-2072, ¶ 11.

{¶ 29} The determination whether the evidence in the record would reasonably support both an acquittal on the crime charged and a conviction on the lesser-included offense involves some evaluation of the evidence, and therefore some discretion on the part of the trial court. *State v. Wolons* (1989), 44 Ohio St.3d 64, 68. But the resolution of conflicting testimony is the province of the finder of fact – in this case, the jury – and therefore, a trial court’s discretion with respect to a determination whether to give an instruction concerning a lesser-included offense is limited, as suggested by *Shaker Heights v. Mosely*, supra.

{¶ 30} Lawson was charged with Aggravated Burglary in violation of R.C. 2911.01(A)(1), which states: “No person, by force, stealth, or deception, shall trespass in an occupied structure * * *, when another person other than an accomplice of the offender is present, with the purpose to commit * * * any criminal offense, if * * * [t]he offender inflicts, or attempts or threatens to inflict physical harm on another.” Lawson insists that the trial court should have instructed the jury on the lesser-included offense of Criminal Trespass, in violation of R.C. 2911.21(A), which states: “No person, without privilege to do so, shall * * * knowingly enter or remain on the land or premises of another.” Lawson argues that the lesser-included-offense

instruction was warranted because, under his version of events, to which he testified, he neither broke the window nor injured Kevin or Ratliff.

{¶ 31} Bayless, Kevin, and Ratliff agreed that after the incident in early January, when Lawson knocked out a window in the living room, Lawson was repeatedly told he was no longer welcome in the home. In fact, on the night in question, Bayless drove Lawson to his sister's house because she did not want him in her home. And, Lawson admitted he was well aware that Bayless did not want him in her home.

{¶ 32} Lawson claims he returned later that night at Melissa's invitation. Yet, he knew Melissa was not a resident of the home, and she had no authority to give him permission to enter, contrary to Bayless's express wishes. Lawson insists he entered the home with a key given to him and Melissa by Bayless when they moved into her home the previous fall. However, Bayless testified the couple had never lived with her, but only spent the night at her house on occasion. Moreover, she never gave Lawson a key, and the only time she gave Melissa a key was for a temporary period when Bayless was out of town.

{¶ 33} With or without a key, Lawson entered Bayless's home without her consent and knowing that he was neither welcome nor wanted there. Lawson acknowledged to sneaking into the home after Bayless, Kevin, and Ratliff had gone to bed, and hiding in the basement when he heard Bayless getting ready for work. This is entry by stealth or deception, even if the jury were to believe Lawson's testimony that he did not break the window to gain entry.

{¶ 34} In regard to the element of causing, attempting, or threatening to cause

physical injury, both Kevin and Ratliff testified that Lawson hit Kevin repeatedly in the head, and that he struck Ratliff once in the back. When Bayless arrived home from work a short time later, she saw knots on Kevin's head and a welt on Ratliff's back.

{¶ 35} Lawson testified that Kevin attacked him – that he did not physically attack anyone, did not attempt to attack anyone, and did not threaten to attack anyone. Lawson acknowledged that he was the one heard yelling on the 911 tape, “You ain’t seen the worst of me yet, bitch.” Kevin and Ratliff explained that this threat was made as Lawson tried to chase them up the stairs, but Lawson denied this. The only witnesses to the events of that morning who testified were Bayless, Kevin, Ratliff, and Lawson. None of these witnesses can fairly be described as neutral. The testimony of Bayless, Kevin, and Ratliff contradicted the testimony of Lawson. It was for the jury to decide which testimony to credit. If the jury decided to credit Lawson’s testimony, it could have reasonably construed Lawson’s angry remark as a threat of physical violence, but it could also have reasonably construed his remark not as a threat of physical violence, but as a threat to show his displeasure – to vent – in the future in non-violent ways.

{¶ 36} On this record, we conclude that the trial court went outside its discretion in finding that there was no reasonable probability that a jury confronted with the evidence in this record would have found Lawson not guilty of Aggravated Burglary, but guilty of Criminal Trespass. Lawson’s Second Assignment of Error is sustained.

IV

{¶ 37} Lawson's First Assignment of Error having been overruled, and his Second Assignment of Error having been sustained, the judgment of the trial court is Reversed, and this cause is Remanded for further proceedings consistent with this opinion.

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DONOVAN, P.J., and KLINE, J., concur.

(Hon. Roger L. Kline, Fourth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

Mathias H. Heck
Michele D. Phipps
Thomas R. Schiff
Hon. Michael T. Hall