IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

DECEMBER 1995 SESSION

FILED

March 28, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	*	C.C.A. #03C01-9503-CR-00096
APPELLEE,	*	BLOUNT COUNTY
VS.	*	Hon. D. Kelly Thomas, Jr., Judge
JAMES EDWARD FRENCH,	*	(Burglary)
APPELLANT.	*	

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OPINION FILED:_____

AFFIRMED

William M. Barker, Judge

OPINION

The appellant, James Edward French, was convicted of burglary, a class D felony. He was sentenced to twelve years in the Department of Correction as a career offender. He raises three issues on appeal: (a) the trial court erred in failing to charge the lesser included offense of criminal trespass; (b) the State's witnesses violated the rule of sequestration by discussing testimony during the trial; and (c) the trial court erred in ruling that the appellant's prior convictions could be used for impeachment.

We conclude that there is no reversible error in the record. The judgment is, therefore, affirmed.

In July of 1993, Isaac Pryor was building a house on Alfred McCammon Road in Blount County, Tennessee.[1] The exterior of the house had been completed, and the house was locked. There was construction equipment inside the house, including a table saw, drill, air compressor, paint sprayer and hammer. Sometime around July 22, Pryor noticed that these items had been removed from the house and left near the road. He had given no one permission to enter the house or to move the tools. On closer inspection, Pryor noticed that two windows had been tampered with. It appeared that entry to the house had been made through a side window.

Gary Reagan was Pryor's neighbor. On July 22, he was driving on Alfred McCammon Road when he saw two men walk out the front door of the house that Isaac Pryor was building. It was still daylight, and the men were about 15 to 20 yards away from Reagan. Reagan could see that both men were carrying items as they

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[1] Pryor and his family lived in a house immediately next door to the home that was under construction.

walked out of the house. When Reagan pulled into the driveway, the two men hesitated for a moment, threw their items on the ground, and then ran behind the house.

Reagan pursued the men in his truck. One of the men, whom Reagan later identified as the appellant, ran into a wooded area. The other, who was later identified as Roger French, the appellant's brother, tripped and fell as he attempted to double back toward the house. Reagan stayed with Roger French until the police arrived. Approximately forty-five minutes later, Reagan saw the appellant at the scene in the back of a police car. Reagan said that there was "no question" that the appellant was one of the men he had seen leaving Isaac Pryor's house. He had been about ten feet from the appellant while pursuing him and he got a good look at the appellant's face.

John Morgan was visiting Jeff Pryor, Isaac Pryor's son, that same afternoon. At one point, Morgan noticed a man walking through the field behind the Pryor's house at "a brisk pace." Morgan got a "quick glimpse" of the man, whom he later identified as the appellant. Moments later, Gary Reagan approached the scene in his truck. Morgan and Jeff Pryor then decided to drive along nearby roads to look for the man Morgan had seen in the field. While driving near Doc Norton and Sevierville Roads, Morgan saw the appellant near a greenhouse; Morgan was sure that the appellant was the same man he had seen walking through the field. When Morgan and Pryor approached, the appellant walked to a house and started knocking on the door. Morgan told the appellant that the police were on the way; the appellant denied any wrong doing. The appellant then walked to a garage on Doc Norton Road and

began talking to some people. Morgan and Pryor waited for police to arrive and then identified the appellant.[2]

Randy Mercks, a criminal investigator with the Blount County Sheriff's Department, was called to the scene after Roger French and the appellant had been apprehended. Mercks explained the Miranda rights to the appellant and later interviewed him. The appellant told Mercks that he "couldn't believe that we did that in the daytime right in front of everybody." The appellant also said that "he was smart [and] didn't get his fingerprints on anything." According to Mercks, the appellant's fingerprints were not found on any of the items at the scene. Mercks noted that the dust at the construction site made it difficult to find latent fingerprints.[3] Finally, Mercks testified that he was sure that the appellant had said "we" committed the crime in the daytime and not "he," (meaning Roger French), committed the crime.

The State rested its case in chief.

Kathy French, the appellant's wife, testified for the defense. On July 22, she and the appellant left their home around 6:15 p.m. to go to an auto parts store on Doc Norton Road. The appellant wanted to buy a hood latch for his car. The store was about ten miles from their home. They stopped at a grocery store on the way. When they got closer to Doc Norton Road, the appellant insisted on being let out of the vehicle because of an argument the couple was engaged in. Kathy French let the

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[2] Morgan also testified that he encountered the appellant at the courthouse before the preliminary hearing. Morgan said that he "snickered" at the appellant and that the appellant said, "You bitch, I'll kill you. I'll kill you."

[3] Mercks conceded that the fingerprints of Roger French were found at the scene.

appellant out of the car near the greenhouse at approximately 6:45 p.m. She didn't hear from him again until after he had been arrested.

Kathy French also testified that Roger French had left her house approximately forty-five minutes before she and the appellant left for the store. Roger French had left with two men in a pickup truck. She did not know either of the men, nor did she know where Roger French was headed. She did not see the appellant with Roger French that afternoon. She did not tell the police about the two men in the pickup truck.

Randy Mercks was called to testify by the defense. He said that the crime had been reported to 911 at 7:33 p.m.

I

The appellant argues that the trial court committed reversible error in failing to charge criminal trespass as a lesser included offense of burglary. He acknowledges that he did not request such an instruction but maintains that the trial court had an obligation to give the instruction because it was raised by the evidence. The State maintains that the failure to charge criminal trespass was not erroneous under the facts of the case.

Our supreme court recently has clarified that there are two types of lesser offenses that may be included in the charged offense under Tennessee law: a lesser grade or class of offense and a lesser included offense. State v. Trusty, ___ S.W.2d ___ (Tenn. 1996)(For Publication). A lesser grade or class of offense is established by the legislature and is determined simply by looking at the statutory provisions. Whenever there is evidence in the record from which a rational trier of fact could find

the elements of a lesser grade or class of offense, the trial court must charge the offense irrespective of a "request on the part of the defendant to do so." Tenn. Code Ann. §40-18-110; see Trusty, slip op. At 9-10.

A lesser offense "necessarily included in the indictment" is not identical to a lesser grade or class of offense. Trusty, slip op. at 10. Generally, an offense is a lesser included offense only if the elements of the included offense are a "subset of the elements of the charged offense and only if the greater offense cannot be committed without also committing the lesser offense." Id. slip op. at 10-11 (citing, Schmuck v. United States, 489 U.S. 705, 716 (1989)). In this jurisdiction:

> [A]n offense is necessarily included in another if the elements of the greater offense, as those elements are set forth in the indictment, include but are not congruent with, all the elements of the lesser.

State v. Howard, 578 S.W.2d 83, 85 (Tenn. 1979). A trial judge is required to instruct on lesser included offenses only when the evidence would support a conviction for the lesser offenses. Trusty, slip op. at 11, n. 5; see also State v. Stephenson, 878 S.W.2d 530, 550 (Tenn. 1994); State v. Wright, 618 S.W.2d 310, 315 (Tenn. Crim. App. 1981).

Burglary and related offenses are statutorily defined in Tennessee Code Annotated sections 39-14-401 through 412. The elements of burglary are defined in section 39-14-402, and the elements of criminal trespass are set forth in section 39-14-405. Thus, criminal trespass was a lesser grade or class of the charged burglary offense. See Trusty, slip op. at 9-10. The offense of criminal trespass may also, depending on the facts of the case and the elements charged in the indictment, be a lesser included offense of burglary. See State v. Vance, 888 S.W.2d 776, 779 (Tenn.

Crim. App. 1994); State v. Dhikr Abban Boyce, No. 01C01-9402-CR-00053 (Tenn. Crim. App., Feb. 2, 1995, Nashville).[4]

In either case, the trial judge was required to charge this offense if the evidence warranted such an instruction. If, on the other hand, the record clearly showed that the appellant was guilty of the greater offense and that there was no evidence permitting an inference of guilt of the lesser offense, the charge was not required. See Trusty, slip op. at 11, n.5; Whitwell v. State, 520 S.W.2d 338, 343 (Tenn. 1975). We conclude, as did the trial court, that such is the case here.

Entry into the Pryor's building was made through a window. Gary Reagan saw the appellant leave the building while carrying a number of items. Reagan pursued the appellant through an open field behind Pryor's house, where he was also seen by John Morgan. The appellant made an admission to Investigator Mercks that he had been involved in the crime. Moreover, the appellant presented what amounted to an alibi defense. His wife claimed that the appellant was not with Roger French on the afternoon of the offense, that Roger French left her home with two other men, and that she last saw the appellant near Doc Norton Road around 6:45 p.m.

The authority cited by the appellant differs factually from the present case. In State v. Vance, supra, the defendant broke into the victim's home and was apprehended in the kitchen. At trial, the defendant testified that he had called to check on the victim's well being, got no response, and then broke in only to see if the victim

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[4] We note that criminal trespass may not always be a lesser included offense of burglary. For example, the requirement that one "enter" property for criminal trespass requires "an intrusion of the entire body." Tenn. Code Ann. §39-14-405(c). The "enter" element for burglary means the "intrusion of any part of the body." Tenn. Code Ann. §39-14-402 (b)(1). Thus, one who commits burglary by placing one's arm through an open window may not commit criminal trespass; thus, in such a case, the latter would not be included in the former.

was okay. Our court said that even if the defendant's explanation did not appear credible, the trial court should have charged criminal trespass for the jury to determine the exact offense that was committed. Vance, 888 S.W.2d at 781.

Similarly, in State v. Dhikr Abban Boyce, supra, the defendant entered a building after breaking out a window. He was apprehended several moments later inside the store; he had no flashlight or tools. The defense offered no proof at trial but did request a charge on criminal trespass. The trial court refused; this court reversed and remanded for a new trial:

> [T]he proof clearly shows the defendant guilty of Criminal Trespass. Whether the defendant is guilty of burglary depends upon his intent at the time he entered the premises, as charged in the indictment. This court and the trial court may conclude that he had such intent [to commit theft]. However, the finder of fact is the jury. By failing to charge the jury on the lesser included offense of Criminal Trespass, the trial court deprived the defendant of his right to have the jury determine his guilt.

Id. slip op. at 6.

Unlike Vance and Boyce, there was direct evidence of the appellant's intent once he entered the building; the State's witnesses saw him leaving the Pryor's building in the possession of property belonging to Pryor. Moreover, he was taken into custody shortly after the offense, and he admitted participating in the offense. Nonetheless, his defense at trial was, in effect, that he was not with Roger French or at the scene of the crime. Accordingly, he was either guilty of burglary if the State's evidence was believed, or guilty of nothing if the defense was believed. See State v. Eddie Louis Mitchell, No. 3 (Tenn. Crim. App., Jackson, Jan. 25, 1989), perm. to appeal denied, (Tenn. 1989)(holding that charge on criminal trespass was not required in burglary case). Thus, he is not entitled to relief on this ground.

II

The appellant contends that the State's witnesses violated the rule of sequestration by (a) viewing the testimony in the courtroom through a window in the door and (b) discussing testimony while the trial was in progress. The State maintains that the facts did not rise to the level of reversible error.

The issue was first raised in the appellant's motion for a new trial, which was accompanied by the affidavit of Kathy French. During the hearing on the motion for a new trial, Kathy French testified that she saw Gary Reagan, Jeff Pryor, and John Morgan in the hall outside the courtroom. While Reagan testified, a police officer said, "Boys, they've got a blackboard for you all to draw on." Pryor and Morgan then looked into the courtroom. When Reagan came out of the courtroom, he said he "didn't think [he'd] ever get off that stand." He also said that defense counsel "tried to confuse [him] and cross [him] up every way possible," particularly with regard to directions and distances. When John Morgan finished testifying, he told Reagan and Jeff Pryor that he had not been sure what time he saw the appellant in the field or what the appellant had been wearing. Reagan had already testified; Jeff Pryor was never called to testify. According to Kathy French, neither Isaac Pryor nor Randy Mercks were part of the foregoing events.

French testified that she told a bailiff what was happening but no action was taken. She did not inform defense counsel until after the trial. She conceded that she also looked into the courtroom and could see "some sort of board." She could not see what was on the board. She conceded that none of the witnesses talked about specific answers or questions they had been asked. No other witnesses testified at the

hearing. A stipulation was entered regarding the dimensions of the courtroom doors and the courtroom.[5]

In overruling the motion for a new trial, the trial court made detailed findings of fact:

> On the rule for the separate reception of evidence, there's no testimony that I heard to indicate that any testimony of a witness in court was relayed to another person that was going to be a witness. They were complaining about problems that they had testifying about times and distances and directions, but there's no evidence that they ever told the other witnesses what they said the directions were or anything else. And if I remember right, there [were] some inconsistencies in the testimony of Gary Reagan and Jeff Morgan to indicate that that didn't happen. The other witness was Randy Mercks and he wasn't even involved in this. And neither was Isaac Pryor. He testified before any of this happened.
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> As far as watching the exhibits [is] concerned, I don't think that a person can look through the windows to the courtroom and tell much about what anybody was doing drawing on an exhibit sitting on the witness stand....And there's no evidence that they stood there and discussed what they were looking at or could...even tell what it was.

Exclusion of witnesses from the courtroom is governed by Rule 615 of the Tennessee Rules of Evidence:

> At the request of a party the court shall order witnesses, including rebuttal witnesses, excluded at trial or other adjudicatory hearing. Sequestration shall be effective before voir dire or opening statements if requested. The court shall order all persons not to disclose by any means to excluded witnesses any live trial testimony or exhibits created in the courtroom by a witness. This rule does not authorize the exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a

[5] According to the stipulation, the entrance to the courtroom consisted of two sets of double doors; the two sets of doors were five feet apart. The doors were 72 inches wide, and the upper half of each door had clear glass windows. It was 40 feet, 5 inches, from the outside doors to where the exhibits had been located during the trial.

> party to be essential to the presentation of the party's cause.

The purpose of the rule is "to prevent one witness from hearing the testimony of another and adjusting his testimony accordingly." State v. Harris, 839 S.W.2d 54, 68-69 (Tenn. 1992), cert. denied, 507 U.S. 954 (1993); see also Nance v. State, 210 Tenn. 328, 358 S.W.2d 327, 329 (1962). The United States Supreme Court has said that the rule "exercises a restraint on witnesses 'tailoring' their testimony to that of earlier witnesses [and] aids in detecting testimony that is less than candid...." Geders v. United States, 425 U.S. 80, 87 (1976).

The sanctions for violations of the rule vary. In the most egregious cases, the trial judge may declare a mistrial or preclude a witness from testifying. In other cases, the witness may testify subject to cross examination on the violation, and the jury may be instructed to consider the violation in assessing the testimony. See State v. Anthony, 836 S.W.2d 600, 605 (Tenn. Crim. App. 1992). Where the issue is raised on appeal, we must consider the seriousness of the violation and the prejudice, if any, that enured to the defendant. State v. Harris, 839 S.W.2d at 68-69; State v. Anthony, 836 S.W.2d at 605.

The conduct of the State's witnesses in this case is troublesome, particularly if, in fact, it was instigated by a law enforcement officer. The only witness to testify in this regard was Kathy French; she said that the prospective witnesses included Gary Reagan, John Morgan, and Jeff Pryor. Randy Mercks and Isaac Pryor were not implicated, and Jeff Pryor ultimately did not testify. According to French, Reagan and Morgan did not discuss specific questions they had been asked or answers they had given during the trial. The witnesses also did not discuss or compare their answers or what they had written on the physical exhibits. Their discussions were

apparently limited to their general impressions of the trial and the nature of the questions asked by defense counsel.

In assessing the prejudice to the appellant we benefit greatly from the findings of fact made by the trial court. The record simply does not show that one or more of the witnesses compared or disclosed specific testimony. Smith v. State, 554 S.W.2d 648, 650 (Tenn. Crim. App. 1977). Nor does the record indicate that a witness "changed or embellished" his testimony based on the testimony of another. State v. Anthony, 836 S.W.2d at 605. In sum, the appellant is not entitled to relief on this ground.

III

The appellant claims that the State should not have been permitted to use prior convictions for impeachment because it failed to give written notice of the convictions until one day prior to trial. The appellant argues that he was prejudiced by the State's late notice because he was forced to abandon his original trial strategy, which was to testify in support of his defense.

The record supports the appellant's assertion that the State did not file written notice of its intent to use the appellant's prior criminal record to impeach and to enhance the sentence until the day before the trial was to begin. The list of convictions included four for petit larceny, two for burglary, and one for violating the age of consent. The appellant responded by filing a motion requesting that the State not be allowed to use the impeaching convictions.[6] After the State rested its case in chief, the trial judge

[6] Tennessee Rules of Criminal Procedure 12.3(a) requires that the State file notice of its intent to seek an enhanced sentence "not less than" ten days prior to trial. Although the State did not comply with this rule, the appellant did not object on this ground.

ruled that the State could use the petit larceny convictions to impeach the appellant, but not the other convictions. The appellant then elected not to testify.

One of the requirements before using a conviction to impeach the accused in a criminal case is that the State give the accused "reasonable written notice of the impeaching conviction before trial...." Tenn. R. Evid. 609(a)(3); see State v. Farmer, 841 S.W.2d 837, 839 (Tenn. Crim. App. 1992). Few cases have interpreted this provision. In State v. Barnard, 899 S.W.2d 617 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1994), the State sent a discovery response to defense counsel setting forth the defendant's criminal record. The State did not, however, file a written notice of its intent to use one of the convictions for impeachment. Our court said that the defendant had not been "unduly prejudiced" by the State's noncompliance and held that the error was harmless. Id. at 622. Similarly, in State v. Burl Lakins, No. 32 (Tenn. Crim. App., Knoxville, May 24, 1991), perm to appeal denied, (Tenn. 1991), the State notified defense counsel of its intent by telephone the night before the trial was to begin. Our court, while ultimately waiving consideration of the issue on other grounds, noted that the defendant had been aware of the prior convictions and had not been prejudiced by the timing of the notice. Finally, in State v. Catherine Susan (Suzanne) Smith & William C. Hindman, No. 03C01-9106-CR-00174 (Tenn. Crim. App., Knoxville, Nov. 13, 1991), perm. to appeal denied, (Tenn. 1992)(not recommended for publication), notice received on the day of trial was found "not reasonable." Still, this court held that error was harmless because the record otherwise established sufficient notice and the defendant did not move for a continuance upon receiving notice.

Generally, the decision as to whether to admit evidence in a trial is left to the discretion of the trial court. State v. Hutchison, 898 S.W.2d 161, 172 (Tenn. 1994), cert. denied, 116 S.Ct. 137, 133 L.Ed.2d 84 (1995); State v. Baker, 785 S.W.2d 132,

134 (Tenn. Crim. App. 1989). Here, the State's notice was hardly prompt, yet it was provided one full day before the beginning of the trial. When it was received, defense counsel filed a motion to bar the State from using the convictions, and argument was heard on the motion before the trial began. There is no indication in this record that the appellant requested a continuance of the trial in which to reassess the strategy that would be used in defense of the charge. After the State rested its case in chief, the trial court gave additional consideration to the issue. The criminal record of the appellant was, obviously, extensive. After considering the arguments of counsel and weighing the probative value and prejudicial impact of each conviction, the court ruled that four of the seven, (those for petit larceny), could be used to impeach the appellant if he testified. Notwithstanding the State's delayed written notice, we cannot conclude on this record that the trial court abused its discretion.

The judgment is affirmed.

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William M. Barker, Judge

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David G. Hayes, Judge

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Jerry L. Smith, Judge