

OPINION

The State appeals as of right from the trial court's dismissal of an indictment for arson against the Defendant, Billy Winningham, based on the court's determination that such an indictment was barred on double jeopardy grounds. The State contends that the trial court erred in dismissing the Defendant's indictment for arson as violative of the protections provided by the Double Jeopardy Clause of the Constitution. We affirm the judgment of the trial court.

The Defendant in this case was also the Defendant in a divorce proceeding initiated by his wife, Mary S. Winningham. On October 15, 1993, the trial judge of the Pickett County Circuit Court entered a protective order enjoining the Defendant from "abusing, threatening to abuse . . . or committing any acts of violence" upon his former wife, upon penalty of contempt. The Defendant subsequently threatened his former wife over the telephone, shot at her car, and then set the fire that burned down her house. After he committed the arson, the Defendant was arrested, and the Court held him in criminal contempt for violating the restraining order. He was subsequently indicted for the arson of the house.

The Double Jeopardy Clauses of both the United States and the Tennessee Constitutions protect the criminally accused from being twice prosecuted or punished for the same criminal offense. U.S. Const. amends. V, XIV; Tenn. Const. art. I, § 10. Under this clause, a defendant is protected from both successive prosecutions and multiple punishments for the same criminal offense. United States v. Colon-Osorio, 10 F.3d 41, 43 (1st Cir.). The Double Jeopardy Clause primarily protects against three specific abuses: a second prosecution for the same offense after acquittal; a second

prosecution for the same offense after conviction; and multiple punishments for the same offense. United States v. Halper, 490 U.S. 435, 440 (1989).

The trial court dismissed the arson indictment against the Defendant, reasoning that because the same conduct had been the basis of the Defendant's conviction for criminal contempt, the Double Jeopardy Clause protected the Defendant from being subsequently prosecuted for the arson.

The trial court relied on the United States Supreme Court case of United States v. Dixon, ___ U.S. ___, 113 S. Ct. 2849 (1993), in making its determination. The Dixon opinion addressed the applicability of the Double Jeopardy Clause to criminal contempt proceedings and the scope of protection that the clause provides for the criminally accused. In Dixon, the Supreme Court held that the Blockburger analysis governs both multiple punishment and successive prosecution cases.¹ Thus, Blockburger's "same-elements test" is the proper test for analyzing a claim of double jeopardy in the context of a contempt conviction and a subsequent criminal conviction. The same-elements test questions "whether each offense contains an element not contained in the other; if not, they are the 'same offence' [sic] and double jeopardy bars additional punishment and successive prosecution." Dixon, 113 S. Ct. at 2856.

The Dixon appeal consisted of two consolidated cases, each of which raised double jeopardy claims based on successive prosecutions for criminal contempt and statutory criminal offenses. In the first case, the Defendant, Alvin Dixon, was arrested for second degree murder and released on bond. Id. at 2853. Dixon's release form specified that he was not to commit "any criminal offense" and warned that any violation

¹The Blockburger test was set forth in Blockburger v. United States, 284 U.S. 299 (1932), as the appropriate test to determine the identity of offenses.

of the conditions of release would subject him "to revocation of release, an order of detention, and prosecution for contempt of court." Id.

While awaiting trial, Dixon was arrested and indicted for possession of cocaine with intent to distribute. Id. The trial court subsequently found Dixon guilty of criminal contempt for violating the court's order "not to commit a criminal offense," and he served jail time on the contempt charge. Id. Dixon subsequently moved to dismiss the cocaine indictment on double jeopardy grounds, and the trial court granted the motion. Id. The Court of Appeals affirmed the trial court's decision. Id.

The United States Supreme Court, in affirming the decision on different grounds, applied the same-elements test to Dixon's prosecutions for criminal contempt and for possession of cocaine with intent to distribute.² The Court concluded that the trial court's release order which warned Dixon not to commit "any criminal offense" incorporated the entire criminal code. Because the drug offense did not include any element not contained in his previous contempt offense, the subsequent prosecution for drug possession failed the Blockburger test. The Court stated that the "crime" of violating a condition of release could not be abstracted from the "element" of the violated condition, thus the Double Jeopardy Clause protected Dixon from subsequent prosecution. Id. at 2857.

Defendant Michael Foster raised a very similar issue in the second of the consolidated cases making up Dixon. Because of Foster's alleged physical attacks upon her, his estranged wife Ana obtained a civil protection order (CPO). Dixon, 113

²The Supreme Court had previously held that in addition to passing the Blockburger test, a subsequent prosecution must also pass a "same-conduct" test, found in Grady v. Corbin, 495 U.S. 508 (1990), to avoid the double jeopardy bar. However in Dixon, the Court expressly overruled that additional requirement, reasoning that such a test lacked constitutional roots and was inconsistent with earlier case law and common-law understanding of double jeopardy. Dixon, 113 S. Ct. at 2860.

S. Ct. at 2853. The order required that Foster not "molest, assault, or in any manner threaten or physically abuse" his wife. Over the next eight months, Ana Foster filed three separate motions to have her husband held in contempt for numerous violations of the CPO, including three separate instances of threats and two assaults, one in which he threw his wife down the basement stairs, kicking her and causing head injuries. Id. at 2854.

Ana Foster then prosecuted a criminal contempt proceeding against Foster for violation of the CPO. Id. The trial court found Foster guilty of four counts of criminal contempt and sentenced him to a period of incarceration. Id. The United States Attorney's Office later charged Foster with one count of simple assault, three counts of threatening to kidnap or injure another, and one count of assault with intent to kill. The first and last counts were based on the events for which Foster had been held in contempt, and the other three were based on the alleged events for which he had been acquitted of contempt. Foster filed a motion to dismiss, claiming that double jeopardy prohibited his prosecution. The trial court denied the petition. The District of Columbia Court of Appeals consolidated Foster's appeal with that of Dixon and ruled that the Double Jeopardy Clause prohibited prosecution for the criminal offense.

Using the same analysis applied in Dixon, the Supreme Court held that Foster's prosecution for simple assault was barred on the basis of double jeopardy. This charge was based on the same event that was the subject of his prior contempt conviction for violating the provision of the protection order forbidding him from committing simple assault under the criminal code. Id. The elements of simple assault under the criminal statute did not contain a different element than those required to be proven in the contempt proceeding for violation of the court order by simple assault. Thus, the court found that the assault prosecution failed the Blockburger test and was barred by double jeopardy.

The Supreme Court found that subsequent prosecution for the remaining four counts, assault with intent to kill and threats to injure or kidnap, was not prohibited under the Blockburger test. To prosecute the contempt offense, the trial court said that the proof must show, first, that the Defendant had knowledge of the protective order, and second, that the Defendant willfully violated one of its conditions. Again, because the protective order specifically included the offense of assault, Foster's conviction for contempt by violation of the restraining order by assault prohibited the subsequent prosecution for that charge.

However, the Supreme Court found that the remaining counts passed the Blockburger test. The charge of assault with intent to kill required a specific intent to kill which the simple assault charge did not. Id. at 2858. The contempt offense, the Court said, required proof of knowledge of the CPO, which assault with intent to kill did not. Id. Thus, the crimes each contained an element not found in the other, and the subsequent prosecution did not violate the Double Jeopardy Clause. Id. at 2859.

Likewise, the remaining three counts of Foster's indictment, which were three separate instances of threatening to injure or kidnap Ana Foster, were not barred. Id. The contempt prosecution charged that on the three occasions, Foster violated the protection order which proscribed that he not "in any manner threaten" Ms. Foster. The Court said that conviction of the contempt required proof that the Defendant willfully violated the protective order, an element which the statute forbidding anyone to threaten to kidnap or injure another did not; conviction under the statute required that the threat be a threat to kidnap, to inflict bodily injury, or to damage property, an element which the conviction of the contempt did not require. Id. Therefore, even though both the contempt conviction and the charges in the indictment would require proof of the same specific conduct, each prosecution would require proof of at least one

additional element, and thus, the Blockburger test for double jeopardy was not met. Id.

In the case sub judice, a court order was entered on October 15, 1993 prohibiting the Defendant from "abusing, threatening to abuse or committing any acts of violence upon [Mary Winningham] upon penalty of contempt." The Defendant subsequently shot at her car and burned down her house, and contempt proceedings were then commenced because of this conduct. The circuit court found the Defendant guilty of both civil and criminal contempt and ordered that the Defendant serve time in jail and pay \$30,000 in restitution.

The Defendant was subsequently indicted for arson and his prosecution was begun in the Pickett County Criminal Court. The trial judge found the case to be analogous to respondent Dixon's, reasoning that the order of protection prohibited any violent act, and consequently, any criminally punishable act of violence was incorporated into the order. The court concluded that the crime for which the contempt punishment was given, the arson, was the same crime that had to be established to convict the Defendant in criminal court. Thus, the court found that the subsequent prosecution was barred by the Defendant's Fifth Amendment protection from double jeopardy.

The State argues that this case resembles the situation in Foster's case. In that case, the phrase in the protective order which required that Foster not "assault, or in any manner threaten or physically abuse" his wife, while incorporating the substantive offense of assault, did not incorporate the offense of "assault with intent to kill" or of "threatening to kidnap or injure another," even though the statutory names of those offenses contained words that were in the order. Here, the order enjoined the Defendant from coming near his ex-wife and specifically prohibited him from "abusing, threatening to abuse [her], or committing any acts of violence upon [her]." The State

contends that the phrase "any acts of violence" does not incorporate the substantive criminal offense of arson.

The State argues that it would have to prove two elements in the arson proceeding that were not required to be proven in the contempt proceeding: First, that the Defendant knowingly damaged Ms. Winningham's property by means of a fire or explosion, and second, that the Defendant did not have his ex-wife's consent to do so. Tenn. Code Ann. § 39-14-301(a).

Admittedly, the elements of arson were not elements required to be proven at the contempt proceeding. Rather, in order to convict the Defendant of criminal contempt, the Defendant's former wife was required to prove two elements: (1) That the protective order was in existence, and (2) that the Defendant willfully violated the order. However, the terms of the protective order stated that a violation would occur if the Defendant committed "any act of violence" against his ex-wife. The trial court found that the Defendant indeed committed an act of violence by using arson to destroy his former wife's residence.

The trial court in the contempt proceeding stated as follows:

The proof in this case satisfies the Court both by a preponderance of the evidence for civil contempt and beyond a reasonable doubt for criminal contempt that the defendant did in fact violate this order. I'm satisfied that the proof, by both direct and circumstantial evidence, indicates that the defendant threatened Ms. Winningham's life on the telephone, that he came back around there, that he came back onto the porch and cut the wires. I'm satisfied that by direct and circumstantial evidence that he came back to the property and set the fire that led to this house being burned down.

.....

The Court finds in this case that the aggrieved party has suffered damages in the burning of her home and in the shooting of her car, both of which in the Court's opinion, and the Court finds both by a preponderance of the evidence and beyond a reasonable doubt, was at the hand of the defendant.

Additionally, in dismissing the indictment for arson in the case sub judice, the trial court said:

The Court further concludes that the indictment in this case for the charge of arson and the element to be proven is that the Defendant set fire to the ex-wife's house. The Court further concludes that the element established in the contempt charge, arson, is the same that will have to be established to convict the Defendant on the indictment. The Court further concludes that in the case at bar, as in Dixon, the Order of Protection incorporated any violent act as the crime that was prohibited. The Circuit Court found that violent act to be the act of arson. . . . Thus, the same crime for which contempt punishment was given, must be established to convict the defendant under the indictment, and thus, the subsequent prosecution is barred by the Fifth Amendment double jeopardy clause.

Thus, while the elements of arson were not required to be proven at the contempt proceeding, the trial court, in finding that the Defendant committed an act of violence by arson, implicitly found that the elements of arson were met.

The elements of arson were implicitly included in the contempt proceeding, therefore, the Blockburger test was not met because each crime must have an additional element not found in the other. Thus, the contempt proceeding incorporated the crime of arson, and the subsequent prosecution for arson did not contain an element not previously found in the contempt proceeding. We are cognizant of the fact that two prosecutions may lie against a defendant even though both stem from the same conduct. This rule holds true, however, only when the offenses charged in each prosecution are not the same. Because criminal contempt is a "crime in the ordinary sense," criminal contempt prosecutions are subject to all the procedural protections afforded other criminal trials. Dixon, 113 S. Ct. at 2865. In this case, to allow a subsequent prosecution for arson would violate the Defendant's right against double jeopardy by twice punishing him for the same offense.

Therefore, we conclude that the trial court did not err in dismissing the indictment against the Defendant, and we affirm the decision of the trial court.

DAVID H. WELLES, JUDGE

CONCUR:

JOHN H. PEAY, JUDGE

PAUL G. SUMMERS, JUDGE

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

SEPTEMBER 1995 SESSION

STATE OF TENNESSEE)	
)	C.C.A. NO. 01C01-9412-CC-00298
Appellant,)	
)	PICKETT COUNTY
VS.)	
)	HON. LEON BURNS, JR.,
BILLY O. WINNINGHAM,)	JUDGE
)	
Appellee.)	(Dismissal of Indictment)

DISSENTING OPINION

I respectfully dissent from the majority's conclusion that double jeopardy principles bar the defendant's prosecution for arson following his conviction for contempt of court. Because I believe that the defendant's contempt conviction and subsequent prosecution for arson successfully pass Blockburger analysis, I would reverse the judgment of the trial court and remand the case for reinstatement of the arson charges against the defendant.

Relying in large part on Justice Scalia's opinion in the recent U.S. Supreme Court case of United States v. Dixon, 113 S.Ct. 2849 (1993), the majority reasons that because the trial court implicitly found that the elements of arson were incorporated into the defendant's contempt offense, his prosecution for arson did not have an element not already included in the contempt offense. As a result, the majority concludes that the defendant's prosecution for arson does not survive Blockburger scrutiny and, therefore, violates double jeopardy prohibitions against multiple punishments for the same offense. I disagree, however, not only with the result

reached in the case at bar, but also with the majority's adoption of Justice Scalia's analysis in Dixon, which I believe is at odds with better reasoned case law regarding prosecution for a substantive criminal offense following a contempt proceeding.

The starting point of my discussion is, of course, Dixon, which was actually a consolidated case and involved two defendants, Dixon and Foster. Defendant Dixon was arrested for second-degree murder and was released on bond. His release order prohibited him, upon penalty of contempt, from committing "any criminal offense." Dixon, 113 S.Ct. at 2853. Dixon was subsequently arrested and indicted for possession of cocaine with intent to distribute. Before trial on that charge, Dixon was held in contempt when the government established "beyond a reasonable doubt that [Dixon] was in possession of drugs and that those drugs were possessed with the intent to distribute." Dixon, 113 S.Ct. at 2853. At trial on the cocaine indictment, Dixon moved to dismiss based on double jeopardy, and the trial court granted his motion. The U.S. Supreme Court eventually affirmed the dismissal of the indictment. Dixon, 113 S.Ct. at 2864.

Defendant Foster was subject to a civil protection order stemming from alleged physical attacks on his wife. The protective order required that he not "molest, assault, or in any manner threaten or physically abuse" his wife. Dixon, 113 S.Ct. at 2854. Based on a number of violent episodes, Foster was ordered to appear to show cause why he should not be held in contempt. The relevant charges were two assaults (occurring on November 6, 1987, and May 21, 1988) and three threats (occurring on November 12, 1987, March 26, 1988, and May 17, 1988). After a three-day bench trial, the trial court found Foster guilty of criminal contempt on both assault charges, but acquitted him on all three threat charges. Foster was later indicted as follows:

COUNT 1- assault (occurring on November 6, 1987);
COUNT 2- threaten . . . to kidnap any person or to injure the person of another or physically damage the property of any person (occurring on November 12, 1987);
COUNT 3- threaten . . . to kidnap any person or to injure the person of another or physically damage the property of any person (occurring on March 26, 1988);
COUNT 4- threaten . . . to kidnap any person or to injure the person of another or physically damage the property of any person (occurring on May 17, 1988);
COUNT 5- assault with intent to kill (occurring on May 21, 1988).

These counts stemmed from the same incidents which had supported Foster's prosecutions for contempt. Foster moved to dismiss all counts of the indictment based on double jeopardy grounds, and the trial court denied his motion. Dixon, 113 S.Ct. at 2853-2854. Upon further review, the U.S. Supreme Court held that Foster's prosecution under Count One (simple assault) was barred by double jeopardy principles, but his prosecution under Counts Two through Five was not barred. Dixon, 113 S.Ct. at 2864.

Perhaps the most important and most overlooked aspect of Dixon, however, is that the results of the consolidated cases were reached through the varied concurrence of three sharply differing approaches to the double jeopardy issue presented. In fact, the only legal holding arising from Dixon is that Grady v. Corbin, 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990) (holding that if, to establish an essential element of an offense charged in a prosecution, the government will prove conduct which constitutes an offense for which the defendant has already been prosecuted, the second prosecution is barred on double jeopardy grounds), is specifically overruled by a five to four majority of the Court. See Dixon, 113 S.Ct. at 2864. Aside from overruling Grady, the members of the Court did not agree concerning the proper approach to the double jeopardy issue presented in Dixon, and

hence, none of the three approaches outlined has enough support to constitute an established legal holding.

The first approach, proffered by Justice Scalia and seized upon by the majority in the case at bar, is a *Blockburger* analysis modified slightly to fit the context of a contempt proceeding followed by prosecution for a substantive criminal offense based on the same conduct. As we would expect under *Blockburger*, Scalia intended to compare the elements of the two offenses involved. *See Dixon*, 113 S.Ct. at 2856. In the context of contempt, however, Scalia incorporated the elements of the violated court order into the statutory elements of the contempt offense. *See Dixon*, 113 S.Ct. at 2857-2858. Scalia claimed that the incorporation was necessary because a contempt statute by itself imposes no legal obligation. Instead, there must exist a court order setting out conditions which, if violated, will result in a prosecution for contempt. In effect, to paraphrase some of Scalia's language, the general crime of contempt cannot be abstracted from the elements of the violated court order. *See Dixon*, 113 S.Ct. at 2856-2857. As a result, under Scalia's analysis, the elements of the violated court order became elements of the offense of contempt for double jeopardy purposes.

Thus, in the case of defendant Dixon, whose release order prohibited the commission of "any criminal offense," the elements of every criminal offense in that jurisdiction became elements of the offense of contempt. *See Dixon*, 113 S.Ct. at 2857. Dixon's contempt offense contained the following elements:

- (1) knowledge of court order;
- (2) willful violation of that order; and,
- (3) the elements of "any criminal offense," including possession of cocaine with intent to distribute.

Obviously Dixon's prosecution for possession of cocaine with intent to distribute did not have an element not already present in his contempt offense. Under Scalia's modified Blockburger analysis, then, Dixon's subsequent prosecution on the cocaine charge was barred by double jeopardy. See Dixon, 113 S.Ct. at 2858.

Similarly, with regard to defendant Foster, Scalia incorporated the elements of the crime of assault into the contempt offense. See Dixon, 113 S.Ct. at 2858. For purposes of Blockburger analysis on Foster's subsequent prosecution under Counts One and Five (assault and assault with intent to kill respectively), the elements of his contempt offense were:

- (1) knowledge of court order;
- (2) willful violation of that order; and,
- (3) the elements of assault.

Obviously Foster's subsequent prosecution for assault under Count One did not contain an element not already present in the contempt offense, and that prosecution was therefore barred by double jeopardy according to Scalia's reasoning. See Dixon, 113 S.Ct. at 2858. Yet Foster's prosecution under Count Five for assault with intent to kill contained an element which was not present in his contempt offense, namely the "intent to kill." Because the contempt offense had an element not present in assault with intent to kill, specifically the "knowledge of a court order," each offense contained an element not already present in the other offense. Hence, Foster's subsequent prosecution under Count Five was not barred by double jeopardy. See Dixon, 113 S.Ct. at 2858-2859.

For purposes of Blockburger analysis of Foster's prosecution under Counts Two through Four, the relevant language of the protective order was "in any

manner threaten.” Foster’s contempt offense therefore contained the following elements:

- (1) knowledge of court order;
- (2) willful violation of that order; and,
- (3) “in any manner threaten.”

Counts Two through Four of the indictment charged Foster with “threaten[ing] . . . to kidnap any person or to injure the person of another or physically damage the property of any person.” Scalia concluded that the “in any manner threaten” element of Foster’s contempt offense did not encompass the threats to kidnap, to injure or to physically damage the property of any person which were the subject of Foster’s subsequent prosecution under Counts Two through Four. As a result, Foster’s prosecution under those counts survived Scalia’s modified Blockburger scrutiny and was not barred by double jeopardy. See Dixon, 113 S.Ct. at 2858-2859.

The second approach to the double jeopardy issue presented in Dixon, proffered by Chief Justice Rehnquist, joined by Justices O’Connor and Thomas, is a traditional Blockburger analysis. Rehnquist concluded that Scalia had erred by incorporating the terms of the court order into the elements of the offense of contempt. Rehnquist focused instead on the elements of the offense of contempt as set forth in the applicable statutes. See Dixon, 113 S.Ct. at 2865. Rehnquist emphasized the language in Blockburger which states that “each provision requires proof of a fact which the other does not,” arguing that the use of “provision” clearly contemplates a focus on the elements as they are set forth in the statutes. Dixon, 113 S.Ct. at 2866. Under Rehnquist’s approach, then, the elements of contempt are:

- (1) knowledge of a court order; and,
- (2) willful violation of that order.

Obviously, with regard to both Dixon and Foster, the contempt offenses contain an element not present in any of the offenses for which they were subsequently prosecuted and vice versa. Accordingly, double jeopardy does not bar any of the subsequent prosecutions in Dixon under Rehnquist's traditional Blockburger analysis. See Dixon, 113 S.Ct. at 2868.

Justice Blackmun wrote separately to voice his disagreement with the decision to overrule Grady, but his analysis of the double jeopardy issue presented in Dixon actually resembled an abbreviated Rehnquist approach. Blackmun, like Rehnquist, concluded that none of the subsequent prosecutions involved in Dixon were barred by double jeopardy. Blackmun emphasized the proposition that the purposes of contempt and the substantive criminal law are wholly different. Contempt is meant to punish an individual who disobeys a court order or disrupts court proceedings, and serves the interest of vindicating the authority of the court. The substantive criminal law, on the other hand, serves society's interest in protecting citizens from certain conduct. Because the interests of contempt and the substantive criminal law are different, Blackmun concluded that contempt of court was simply not the "same offense" as the substantive criminal offenses charged in the subsequent prosecutions against Dixon and Foster. As a result, double jeopardy barred none of the subsequent prosecutions. See Dixon, 113 S.Ct. at 2880-2881.

Rehnquist, like Blackmun, pointed out the differing interests associated with contempt and the substantive criminal law. The principal difference between their opinions lies in the fact that Rehnquist proceeded to conduct a traditional Blockburger analysis on the appropriate statutory provisions after emphasizing the differing interests of contempt and the substantive criminal law. Blackmun, on the other hand,

did not explicitly reach Blockburger analysis and apparently concluded that, because of the differing interests served by contempt and substantive criminal law, the subsequent prosecutions of Dixon and Foster survived Blockburger scrutiny by implication.

Regardless of the subtle differences between the Rehnquist approach and Blackmun's separate opinion, all four justices (Rehnquist, O'Connor, Thomas and Blackmun) agreed that none of the subsequent prosecutions in Dixon were barred by double jeopardy. When combined with the markedly different approach of Justices Scalia and Kennedy, they formed a six to three majority of the Court to produce the judgment that defendant Foster's prosecutions on Counts Two through Five were not barred by double jeopardy.

The third approach to the double jeopardy issue presented in Dixon, proffered by Justices White, Stevens and Souter, is arguably the least viable approach in the wake of the Dixon decision. Justice White's approach focused on what he believed to be the substance of the double jeopardy guarantee rather than on the statutory elements of the offenses involved. White stated that double jeopardy protects against both multiple punishments and successive prosecutions. In cases involving multiple punishments, the traditional Blockburger focus on the elements of the offenses and whether the legislature intended one course of conduct to comprise two separate criminal offenses constitutes the appropriate double jeopardy analysis. In cases involving successive prosecutions, however, the appropriate focus is not on the elements of the offenses but rather on the substance of the offenses charged in each prosecution. See Dixon, 113 S.Ct. at 2876-2877. According to White, the substance of the offenses charged in each prosecution was the prohibited conduct at

issue. Thus, with regard to Dixon and Foster, White compared the prohibited conduct at issue in their contempt offenses and their subsequent prosecutions, and found that the prohibited conduct was the same in all instances. As a result, White concluded that all of the subsequent prosecutions in Dixon were barred by double jeopardy. See Dixon, 113 S.Ct. at 2879.

Justice Souter wrote separately to emphasize a very slight difference from Justice White's reasoning. Souter's analysis of the double jeopardy issue presented in Dixon was virtually identical to White's approach. Like White, Souter focused on the substance of the offenses charged in each prosecution, in other words the prohibited conduct at issue. Also like White, Souter concluded that because the prohibited conduct at issue was the same in all cases regarding Dixon and Foster, double jeopardy operated to bar all of the subsequent prosecutions in Dixon. See Dixon, 113 S.Ct. at 2891. The subtle distinction between their reasoning is that Souter recognized that this analysis of the prohibited conduct in cases involving successive prosecutions was the teaching of Grady. See Dixon, 113 S.Ct. at 2886-2891.

Regardless of the subtle difference between the opinions of White and Souter, they and Justice Stevens agreed that all of the subsequent prosecutions involved in Dixon were barred by double jeopardy. When combined with the markedly different approach of Justices Scalia and Kennedy, they formed a five to four majority of the Court to produce the judgment that both defendant Dixon's subsequent prosecution and defendant Foster's prosecution under Count One are barred by double jeopardy. Yet given the fact that the only legal holding resulting from Dixon is that Grady is specifically overruled, the approach of Justices White, Stevens and

Souter, which appears to be based in large part on the reasoning of Grady, is arguably the least viable of the three approaches.

Turning now to the application of Dixon to the case presently before this Court, the majority seizes upon Justice Scalia's approach in concluding that double jeopardy bars the defendant's prosecution for arson. The defendant in the case at bar, involved in a divorce proceeding initiated by his wife, was subject to a protective court order prohibiting him from "abusing, threatening to abuse . . . or committing any acts of violence" upon his wife. He later threatened his wife over the telephone, shot at her car, and set the fire which burned down her house. Based on this conduct, the defendant was held in contempt for violation of the protective order. When he was later indicted for arson, he moved to dismiss the indictment based on double jeopardy principles, and the trial court granted his motion.

In affirming the dismissal of the indictment, the majority reasons that the protective order's language of "any act of violence" and the trial court's finding that the shooting of the car and the burning of the house qualified as such incorporate the elements of arson into the defendant's contempt offense. As a result, the arson prosecution does not survive Blockburger scrutiny, and double jeopardy therefore bars the subsequent prosecution. This type of analysis is closely analogous to Scalia's approach in Dixon, and the majority does in fact cite to Scalia's opinion in Dixon.

I disagree, however, with the majority's adoption of Scalia's "incorporation" approach. Instead, I believe that the proper and more workable approach to the double jeopardy issue presented here follows Rehnquist's reasoning in Dixon. Moreover, current Tennessee case law on the subject seems to mirror the

Rehnquist approach in Dixon. See State v. Sammons, 656 S.W.2d 862 (Tenn. Crim. App. 1982).

Perhaps the first myth that should be dispelled is the notion that, because Scalia's approach is printed first in Dixon, Scalia's analysis is controlling. Contrary to what counsel for the defendant may believe, Scalia's reasoning is not the definitive approach to the double jeopardy issue presented here. In fact, Scalia's "incorporation" approach, contained in Part III of his opinion, is adopted only by Justices Scalia and Kennedy. It was not the opinion of the Court in Dixon, and it does not necessarily control our analysis of the case before this Court.

I believe that the majority's adoption of Scalia's approach leads to undue problems, as evidenced by the case at bar. Although the majority concludes that the defendant's prosecution for arson fails Blockburger analysis, they admit that "the elements of arson were not elements required to be proven at the contempt proceeding." This admission would seem to conclude Blockburger analysis. If the contempt offense does not contain the elements of arson, then obviously the defendant's prosecution for arson survives Blockburger scrutiny. The majority, however, goes on to state that "while the elements of arson were not required to be proven at the contempt proceeding, the trial court, in finding that the Defendant committed an act of violence by arson, implicitly found that the elements of arson were met."

In my opinion, the majority errs in focusing on this finding because the trial court's finding that the elements of arson were met is largely irrelevant for purposes of Blockburger analysis. Blockburger analysis, or the "same elements" test,

examines “if each statute requires proof of an additional fact which the other does not” Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 182 (1932) (emphasis added). The analysis centers upon the elements of proof each statute requires, not upon the findings of the trial court as to whether the elements were in fact proven. To illustrate this concept further, let us apply Blockburger scrutiny to the opposite scenario from the present case. Assuming that the contempt offense requires proof of the elements of arson, the trial court’s finding that the elements were not met still does not permit a subsequent prosecution for arson because Blockburger analysis reveals that the arson offense does not require proof of an element not already present in the contempt offense. The trial court’s finding as to the proof on each element of the offense is irrelevant. For Blockburger purposes, the proper analysis focuses on the statutory elements required to be proven. Thus, I conclude that double jeopardy does not bar the defendant’s prosecution for arson because, as the majority concedes, the elements of arson were not required to be proven at the contempt proceeding.

Moreover, I must respectfully disagree with the majority’s conclusion that the trial court found that the defendant committed an act of violence by arson, thereby incorporating the elements of arson into the contempt offense. In the findings at the conclusion of the contempt hearing, the trial court found as follows:

I’m satisfied that the proof, by both direct and circumstantial evidence, indicates that the defendant threatened Ms. Winningham’s life on the telephone, that he came around there, that he came back onto the back porch and cut the wires. I’m satisfied that by direct and circumstantial evidence that he came back to the property and set the fire that led to this house being burned down.

. . .

The Court finds in this case that the aggrieved party has suffered damages in the burning of her home and in the shooting of her car, both of which in the Court's opinion, and the Court finds both by a preponderance of the evidence and beyond a reasonable doubt, was at the hand of the defendant.

Although the trial court found as to the burning of a house, there is nothing in the findings from the contempt proceeding as to the elements of arson. Specifically, there is no mention of the "without the consent of the owner" or "to collect insurance" elements, one of which is required to prove arson. See T.C.A. § 39-14-301(a)(1); T.C.A. § 39-14-301(a)(2).³ In fact, from the sparse record before us, it appears that no proof concerning either of these elements of arson was offered by any party at the contempt hearing. Given those circumstances, I can only conclude that the trial judge could not possibly have found the elements of arson were met in the defendant's contempt offense, even had he actually used language to that effect.

Aside from the deficiencies concerning proof of the elements of arson at the contempt hearing, I believe that the principal problem associated with the majority's adoption of Scalia's "incorporation" approach in the case at bar is that it invites us to become mired in the minutia of an expedited contempt hearing on the violation of a protective court order. Under Scalia's approach, we first compare the "any acts of violence" language of the protective court order to the analogous phrases in Dixon. Although the majority groups the "any acts of violence" language with the language

³The majority points to language from the trial court which reads in part: "[t]he Court further concludes that the element established in the contempt charge, arson, is the same that will have to be established to convict the Defendant on the indictment." This language, however, comes from the trial court hearing the motion to dismiss the arson indictment and is merely its interpretation of the findings of the trial court which conducted the contempt proceeding. I disagree with this interpretation because, as I stated above, I believe the plain language of the trial court's findings from the contempt hearing does not address the "consent" or "insurance proceeds" elements of the criminal offense of arson. Furthermore, the absence of these elements from the trial court's findings is neither surprising nor a sign of deficiency, since we would not expect the proof in a contempt hearing on the violation of a protective order in a divorce proceeding to address the statutory elements of the criminal offense of arson.

from Dixon which has a special meaning in criminal law, namely “any criminal offense” and “assault,” it is arguably more analogous to the general “in any manner threaten” language from defendant Foster’s protective order. The lesson from Scalia’s approach for courts entering protective orders is that no matter how carefully they craft the language of their orders to avoid magic phrases with special significance in criminal law, they may nonetheless unknowingly incorporate the elements of a criminal offense into the crime of contempt of court. In addition, under the majority’s adoption of Scalia’s approach, we must also peruse the trial court’s findings to determine if the elements of any criminal offense, not just those incorporated into the contempt offense through the explicit language of the protective order, were implicitly found by the trial court. I therefore believe that the “incorporation” approach will ultimately lead to varied and unpredictable results in cases involving double jeopardy challenges to prosecutions for substantive criminal offenses after contempt proceedings based on the same conduct.

Upon careful review of the intricacies of Dixon, I conclude that the better reasoned approach is a traditional Blockburger analysis as outlined in Rehnquist’s analysis in Dixon. Furthermore, current Tennessee case law follows this approach to the double jeopardy issue presented by criminal prosecution following contempt proceedings. In State v. Sammons, 656 S.W.2d 862 (Tenn. Crim. App. 1982), the defendant was subject to a child custody order giving his wife custody of their daughter and granting him visitation. Based on several episodes in which the defendant had abducted his daughter, he was cited for contempt of court for removing his daughter from the custody of his former wife in violation of the child custody order. The defendant was later indicted on charges of kidnaping and burglary based on the same incidents which had resulted in his contempt conviction. See Sammons, 656 S.W.2d at 864-866.

Because of a procedural irregularity, the Court ruled that it was unable to determine whether there had been a double jeopardy violation in this specific case. See Sammons, 656 S.W.2d at 866. The Sammons court nevertheless proceeded to find that there would have been no double jeopardy bar to the subsequent prosecutions. See Sammons, 656 S.W.2d at 866-869. The Court relied heavily upon the principle that the contempt and the kidnapping statutes were designed to serve entirely different purposes, quoting with approval from Maples v. State, 565 S.W.2d 202 (Tenn. 1978):

The purposes of the general statutes authorizing a court to punish for abuse of its processes and those creating and prescribing punishment for various indictable offenses are so entirely different, and designed to accomplish such wholly different purposes, that we do not find any violation of constitutional principles in imposing punishment upon an offender under both sets of statutes.

Sammons, 656 S.W.2d at 867 (quoting Maples, 565 S.W.2d at 203). In addition, the Sammons court quoted with approval from a Connecticut Supreme Court case as follows:

[A] proceeding for contempt while it is of a criminal nature is not a criminal prosecution. Courts having no criminal jurisdiction may punish for contempt. And, when the contempt consists of an act punishable under criminal law, . . . the adjudication of contempt will be no bar to a criminal prosecution for [the same transaction]. The proceeding in contempt is for an offense against the court as an organ of public justice, and not for a violation of the criminal law.

Sammons, 656 S.W.2d at 868 (quoting State v. Howell, 69 A. 1057, 1058 (Conn. 1908) (citations omitted)). The Sammons court then proceeded with a traditional Blockburger analysis of the two statutes involved and concluded that both the contempt statute and the kidnapping statute contained an element that the other did not contain. Accordingly, double jeopardy did not bar the subsequent prosecution of the defendant after his contempt citation. See Sammons, 656 S.W.2d at 868-869.

Applying this analysis to the case at bar, I find that the defendant's prosecution for arson survives Blockburger scrutiny. The contempt offense consists of willful disobedience to a lawful protective order. See T.C.A. § 29-9-102(3). The arson offense consists of knowingly damaging a structure by means of fire either without the consent of the owner or to collect insurance proceeds. See T.C.A. § 39-14-301(a). The defendant's contempt and arson offenses each contain elements not already present in the other offense, and hence, double jeopardy does not bar the defendant's subsequent prosecution for arson.

For the reasons set out in the discussion above, I dissent from the majority's adoption of Scalia's "incorporation" approach and their conclusion that the defendant's prosecution for arson is barred by double jeopardy. Because I conclude that the defendant's contempt offense and arson offense successfully pass traditional Blockburger analysis, I would reverse the judgment of the trial court and remand for reinstatement of the arson charges.

JOHN H. PEAY, Judge