[Cite as *State v. Griffith*, 2010-Ohio-821.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2008-P-0089**
- vs -	:	
ROGER D. GRIFFITH,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2008 CR 0045.

Judgment: Affirmed.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Gregory T. Stralka, 600 Crown Centre, 5005 Rockside Road, Cleveland, OH 44131 (For Defendant-Appellant).

MARY JANE TRAPP, P.J.

{¶1} Roger D. Griffith appeals from a judgment of the Portage County Court of Common Pleas convicting him of burglary. On appeal, Mr. Griffith raises issues regarding the sufficiency and manifest weight of the evidence. He also claims his counsel's assistance was ineffective, an eyewitness's identification was impermissibly suggestive and unreliable, and the trial court erred in not instructing the jury on lesser included offenses. Having reviewed the record and applicable law, we affirm.

{¶2} **Substantive and Procedural History**

{¶3} On January 15, 2008, as Barbara James slept in her bedroom, she was awoken around 8:30 a.m., when someone suddenly turned on her bedroom light. She yelled and the intruder ran down the hallway and out the front door. She called 911 for help. When the police officers arrived, they observed the front door had been kicked in and there were fresh footprints in the snow outside her house. A K-9 unit was called to the scene and tracked the footprints to Mr. Griffith's house. Inside his house, the officers found a pair of wet boots, the soles of which were similar to the footprints in the snow. The officer also found a dark blue jacket that matched the description given by a witness who had seen a man walking near Ms. James' house shortly before the burglary incident. Several hours later, the witness, a neighbor's son, identified Mr. Griffith as the man he had seen walking across his father's driveway sometime after 8:00 a.m. that morning.

{¶4} A grand jury indicted Mr. Griffith on burglary in violation of R.C. 2911.12(A)(2), a second-degree felony. He filed a motion to suppress evidence regarding the eyewitness's identification, which the court denied after a hearing. The matter proceeded to a jury trial.

{¶5} At trial, the burglary victim, Ms. James, testified that she was sleeping in her bedroom in the morning of January 15, 2008. Her husband and daughter had left for work and school, respectively, between 7:10 a.m. and 7:20 a.m. She slept in as usual because she worked at night. She was awoken around 8:30 a.m., first by noises, and then by someone turning on the overhead light in her bedroom. She caught a glimpse of an intruder at the door of her bedroom and heard footsteps running down the hall. Yelling "what the heck is going on," she walked out of her bedroom and saw

someone had pried the door frame away from the wall at the front door. She called 911 to report a burglary.

{¶6} Five officers involved in the investigation also testified. Chief Neal of the Garrettsville Police Department received the dispatch call for a burglary in progress at 8:32 a.m. and was the first on the scene, arriving at 8:47 a.m. He observed fresh footprints in the snow in Ms. James' driveway and saw that the door jam was broken.

{¶7} Officer Sweet, a police officer for 15 years with the Portage County Sheriff's Department arrived at the scene and noticed the front door was kicked in. He also observed tracks in the snow coming off the porch area, which led to the west side of the residence and then to the left side of the residence through the woods. He and K-9 Officer Nicolino, who arrived shortly afterward with his canine, followed the tracks north from behind the residence, through the woods, which led all the way to the front porch area of Mr. Griffith's residence. Once there, Officer Sweet observed another set of footprints leading from Mr. Griffith's residence, which he tracked back to Ms. James' house. Officer Sweet, together with Detective Hurd and Detective Mitchell, knocked on Mr. Griffith's door and obtained consent to search his house. Detective Mitchell found a pair of boots that appeared to match the footprints in the snow. Officer Sweet testified that in his observation the boots looked very similar to the tracks in the snow. He also observed that the boots were wet. A blue work jacket was found on the chair in the kitchen.

{¶8} Officer Nicolino of the Portage County Sheriff's Department, a 13-year police officer and a K-9 officer for over three years explained his canine, Bronco, had been specially trained for law enforcement investigation and was specifically certified to

perform tracking by smelling for the most recent smell disturbance in the ground. Bronco had been assisting him for three years and had performed tracking on 30 occasions. On the day of the incident, Bronco tracked a set of footprints from the victim's residence through the woods, across Paul Street, and through a wooded area again, leading to the side yard of Mr. Griffith's house. At that point, Bronco lost the track because there was a lot of foot traffic around the house and in the driveway area. As he walked around the property, he observed another set of tracks, which matched the footprints of the first set of tracks. Without using Bronco, he followed the tracks, which led back to the victim's house, although via a different route. Officer Nicolino filmed the tracks on a DVD, which the prosecutor played for the jury.

{¶9} Detective Mitchell, a police officer and a detective for 13 years with Portage County Sheriff's Department, obtained consent from Mr. Griffith's wife to enter the house. He found Mr. Griffith lying on the couch in the living room, and as he looked around the house, he found a pair of boots underneath a suitcase in the closet area. The bottom of the boots were wet, and he observed that the footprints and the boots were "similar in nature." When asked about the wet boots, Mr. Griffith explained there was a leak in the roof above where the boots were found. Detective Mitchell noticed, however, nothing else on the floor in the area was wet. Detective Mitchell also found on a chair a dark blue jacket which matched the description given by an eyewitness, Jeff Warren, regarding the clothing worn by a man walking in the victim's neighborhood sometime after 8:00 a.m.

{¶10} Mr. Warren went to his parents' house, near Ms. James's house, every morning to pick up tools around 8:00 a.m. for his construction job. On the day of the

burglary, he saw a man walking across his parents' driveway. He stopped to let him walk by. The man waved him to go, and he pulled into the driveway and went inside his father's tool shop. The man was wearing blue jeans, boots, a dark-colored coat, and a yellow snow hat.

{¶11} A few hours after this encounter, Mr. Warren was brought to Mr. Griffith's residence for a possible identification. Mr. Griffith was in Detective Hurd's vehicle for questioning. Detective Hurd had Mr. Griffith step outside the car, and Mr. Warren recognized Mr. Griffith's face as the man he had seen earlier in his parents' driveway, even though the man now wore a different coat and no longer had a hat on. Mr. Warren also identified Mr. Griffith in court.

{¶12} Detective Hurd, a police officer and a detective for 14 years with the Portage County Sheriff's Department, also went to Mr. Griffith's residence to investigate the burglary. Mr. Griffith told her he had been sleeping on the couch and had not left the house that morning. His wife and five-year-old son were also in the house. Mr. Griffith agreed to be questioned in her vehicle.

{¶13} Detective Hurd also observed the footprints in the snow and noted the boots were "very similar in nature." She explained that she could not have a plaster cast made of the footprints in the snow, because it was a light snow and the snow would have melted before casting could be done.

{¶14} Testifying for the defense was Mr. Griffith's 11-year-old son and his wife. His son stated on January 15, 2008, he got up at about 7:54 a.m. to get ready to catch the school bus, which normally came between 8:10 a.m. and 8:15 a.m. When he left for the bus that morning, his father was still sleeping on the couch.

{¶15} Mr. Griffith's wife testified that although the boots belonged to her husband, they no longer fit him because of his weight gain. When asked why the bottoms of the boots were wet, she stated that it may be due to a leak from some water softener pipes located in the area where the boots were found.

{¶16} The jury found Mr. Griffith guilty of burglary as charged. He moved for a new trial. The court denied his motion after hearing, and sentenced him to three years in prison. Mr. Griffith timely appealed. After his appellate counsel filed the appellant's brief, raising four assignments of error, he requested new counsel. This court granted the request and appointed a new counsel, who then filed a supplemental brief, raising a fifth assignment of error. The five assignments of error state:

{¶17} "[1.] Appellant's conviction of burglary was contrary to the manifest weight of the evidence.

{¶18} "[2.] The trial court erred in failing to grant appellant's Criminal Rule 29 motion to dismiss the burglary charge at the conclusion of the state's case and at the conclusion of the evidence.

{¶19} "[3.] Trial counsel's representation of the appellant was deficient and affected the outcome of the case

{¶20} "[4.] The trial court's denial of the appellant's motion to suppress the one-man show-up identification of the appellant was plain error and an abuse of discretion.

{¶21} "[5.] The trial court erred by failing to instruct the jury on lesser included levels of burglary and on all of the elements of burglary."

{¶22} **Sufficiency**

{¶23} We address the sufficiency claim first. Mr. Griffith asserts the trial court should have granted his Crim.R. 29 motion to dismiss. Without making any specific argument, he claims there was insufficient evidence to sustain his conviction.

{¶24} When reviewing a challenge of the sufficiency of the evidence, a reviewing court examines the evidence admitted at trial and determines whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, at paragraph two of the syllabus. "The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." Id.

{¶25} A sufficiency challenge requires this court to review the record to determine whether the state presented evidence on each of the elements of the offense. This test involves a question of law and does not permit us to weigh the evidence. *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶26} Mr. Griffith was charged with a second-degree felony pursuant to R.C. 2911.12(A)(2). R.C. 2911.12(A) provides, in pertinent part:

{¶27} "(A) No person, by force, stealth, or deception, shall do any of the following:

{¶28} " ***.

{¶29} "(2) Trespass in an occupied structure *** that is a permanent or temporary habitation of any person when any person other than an accomplice of the offender is present or likely to be present, with purpose to commit in the habitation any criminal offense[.]"

{¶30} At trial, the state presented evidence that an intruder broke the door of the victim's residence while she was in her bedroom sleeping. A set of footprints in the snow tracked by a K-9 unit led from her house to Mr. Griffith's house, while another set of similar footprints led from his house to the victim's residence. Three experienced police officers testified that the footprints were similar in nature to the boots found in Mr. Griffith's house. The soles of the boots were wet, to which Mr. Griffith and his wife gave inconsistent explanations. Moreover, an eyewitness recognized Mr. Griffith as the person he had seen earlier in his father's driveway near the victim's house.

{¶31} In order to convict Mr. Griffith under R.C. 2911.12(A)(2), the state was required to present evidence to show that (1) he trespassed in the victim's home by use of force, stealth, or deception, (2) while someone was present, (3) with the purpose to commit "any criminal offense" inside. The trial transcript reflects the state presented evidence from which the jury could have found that Mr. Griffith, by using force, trespassed in Ms. James's home when she was present, with a purpose to commit a criminal offense. This evidence, if believed, would convince the average mind of his guilt beyond a reasonable doubt. We conclude, therefore, viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of burglary defined in R.C. 2911.12(A)(2) proven beyond a reasonable doubt. The second assignment of error is without merit.

{¶32} **Manifest Weight**

{¶33} Mr. Griffith next contends his conviction is against the manifest weight of the evidence. He argues the record contains conflicting testimony and challenges the

lack of expert testimony regarding the footprints. He also complains that the entire case against him was based on circumstantial evidence.

{¶34} "Unlike sufficiency of the evidence, manifest weight of the evidence raises a factual issue. 'The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" *State v. Higgins*, 11th Dist. No. 2005-L-215, 2006-Ohio-5372, ¶35, citing *State v. Thompkins*, 78 Ohio St.3d 380, 387.

{¶35} "The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Fritts*, 11th Dist. No. 2003-L-026, 2004-Ohio-3690, ¶23, citing *Martin* at 175.

{¶36} "[T]he weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. When examining witness credibility, "the choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact." *State v. Awan* (1986), 22 Ohio St.3d 120, 123. A fact-finder is free to believe all, some, or none of the testimony of each witness appearing before it. *State v. Thomas*, 11th Dist. No. 2004-L-176, 2005-Ohio-6570, ¶29.

{¶37} **Lay Testimony Regarding Footprints**

{¶38} Regarding his contention that testimony relative to the footprints was not offered by an expert, the courts have set forth the standard for *admissibility* of lay

testimony regarding footprints. *State v. Jells* (1990), 53 Ohio St.3d 22, 28-29 held that a lay witness may be permitted to express his or her opinion as to the similarity of footprints if it can be shown that the conclusions are based on measurements or peculiarities in the prints that are readily recognizable and within the capabilities of a lay witness to observe.

{¶39} In *State v. Hairston* (1977), 60 Ohio App.2d 220, a police officer was permitted to compare tennis shoe prints with the soles of the tennis shoes the defendant was wearing. The court in *Hairston* stated: "[a]s to the necessity for expert testimony, it would appear that testimony on footprints can be given by lay witnesses." Id. at 222. Further, the court noted, "'[i]n presenting footprint evidence, it appears that a witness is often allowed to express his opinion as to the similarity of prints, if he shows that his conclusions are based on measurements or peculiarities in the prints. Because of the obvious means of comparing footprints a lay witness is often allowed to testify in this regard and express his opinion as to similarity.'" Id., quoting Annotation (1954), 35 A.L.R. 2d 856, 861.

{¶40} Mr. Griffith, however, does not challenge the *admissibility* of the testimony regarding the footprints, but rather raises the issue under his manifest-weight claim. He presumably challenges the credibility of the officers who testified that the footprints in the snow were similar to the boots found in Mr. Griffith's residence.

{¶41} At trial, three officers testified they personally examined the boots and the footprints, and concluded the footprints were similar in nature to the boots. The officers' testimony was accompanied by several exhibits admitted into evidence, which included the boots, photographs of the boots and the footprints as measured with a ruler, and a

video taken by Officer Sweet showing the entire set of footprints leading from the victim's residence to Mr. Griffith's residence. Our own review of the exhibits show the footprints in the snow are sufficiently distinct and within the capability of a lay person to observe. Thus, the jury had the opportunity and was capable of examining the boots and the footprints, noting any similarities or dissimilarities and evaluating the credibility of the officers' testimony regarding the footprints.

{¶42} As to his contention that his conviction was based only on circumstantial evidence, we note that circumstantial evidence can be used to establish any element of a crime, and circumstantial evidence and direct evidence inherently possess the same probative value. *Jenks* at paragraph one of the syllabus; *State v. Biros* (1997), 78 Ohio St.3d 426, 447. See, also *State v. Turner* (Nov. 2, 2001), 11th Dist. No. 2000-T-0074, 2001 Ohio App. LEXIS 4992 (prior to *Jenks*, if the state relied entirely on circumstantial evidence to prove an essential element of a crime, the trial court was required to give an instruction that the circumstantial evidence thus relied upon must be irreconcilable with any reasonable theory of the accused's innocence; subsequent to *Jenks*, that is no longer the rule in Ohio).

{¶43} Regarding his alibis and the testimony of his wife and 11-year-old son, who both stated he had been in the house prior to the police's arrival, we note the choice between credible witnesses and their conflicting testimony rests solely with the finder of fact. The jury was entitled to reconcile inconsistencies in the testimony and free to believe all, some, or none of the testimony of each witness appearing before it.

{¶44} Having reviewed the entire record, we recognize this is entirely a case of circumstantial evidence -- there was no eyewitness or other direct evidence that placed

Mr. Griffith at the victim's residence. However, the state's evidence linking him to the crime scene -- the footprints in the snow tracked by the K-9 unit leading from the crime scene to Mr. Griffith's residence, another set of footprints observed by the officers leading from his residence to the crime scene, the wet boots found in his house, and a lack of consistent explanations as to why the boots were wet -- is corroborated by an eyewitness who placed him in the neighborhood around the time of the burglary. Given the strength of the state's evidence, although entirely circumstantial, we cannot say the jury clearly lost its way and created such a manifest miscarriage of justice that his conviction must be reversed and a new trial ordered. Mr. Griffith's first assignment of error is without merit.

{¶45} **Ineffective Assistance of Counsel**

{¶46} To establish his claim that his counsel provided ineffective assistance, Mr. Griffith must demonstrate (1) his counsel was deficient in some aspect of his representation, and (2) there is a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different. *Strickland v. Washington* (1984), 466 U.S. 668.

{¶47} A threshold issue in a claim of ineffective assistance of counsel is whether there was actual error on the part of appellant's trial counsel. *State v. McCaleb*, 11th Dist. No. 2002-L-157, 2004-Ohio-5940, ¶92. In Ohio, every properly licensed attorney is presumed to be competent and therefore a defendant bears the burden of proof. *State v. Smith* (1985), 17 Ohio St.3d 98, 100. To overcome this presumption, a defendant must demonstrate that "the actions of his attorney did not fall within a range of reasonable assistance." *State v. Henderson*, 11th Dist. No. 2001-T-0047, 2002-

Ohio-6715, ¶14. Counsel's performance will not be deemed ineffective unless and until the performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. *State v. Alcona* (2001), 93 Ohio St.3d 83, 105.

{¶48} Furthermore, decisions on strategy and trial tactics are generally granted a wide latitude of professional judgment and it is not the duty of a reviewing court to analyze the trial counsel's legal tactics and maneuvers. *State v. Gau*, 11th Dist. No. 2005-A-0082, 2006-Ohio-6531, ¶35, citing *Strickland* at 689. Debatable trial tactics and strategies do not constitute ineffective assistance of counsel. *State v. Phillips* (1995), 74 Ohio St.3d 72, 85.

{¶49} Mr. Griffith complains in particular that trial counsel provided ineffective assistance in advising him not to testify on his own behalf, and, because of that decision, he was prevented from showing the jury the boots did not fit him.

{¶50} The record reflects that counsel advised him against testifying at trial because he had a criminal record, which reflects that he had previously committed multiple property crimes. The advice provided by a criminal defense lawyer to his or her client regarding the decision to testify is "a paradigm of the type of tactical decision that cannot be challenged as evidence of ineffective assistance." *State v. Winchester*, 8th Dist. No. 79739, 2002-Ohio-2130, ¶12 (citations omitted). Because of his prior criminal offenses, his counsel cannot be faulted for the tactical decision in advising Mr. Griffith against testifying. Moreover, the jury was aware of his claim that the boots did not fit him, as his counsel presented testimony from his wife, who stated the boots belonged to Mr. Griffith but no longer fit him due to his weight gain.

{¶51} Mr. Griffith also complains his counsel did not point out, during cross examination of the state's witnesses, that the size of the boots did not match the size of the footprints in the snow. The trial transcript reflects the defense elicited testimony from Officer Sweet that the Bureau of Criminal Investigation was not called to analyze the footprints. Detective Mitchell also admitted under cross examination that there was no scientific analysis performed to compare the prints of the boots and the footprints. Thus, the jury had been made aware that the officers' testimony regarding the similarity of the footprints and the prints of the boots in size and patterns was based only on their visual comparison. The jury was entitled to assess for itself, from their own viewing of the photographs of the footprints and the boots, whether the size of the footprints matched the size of the boots, and how much weight should be given to the officers' testimony.

{¶52} Having reviewed the record, we cannot conclude his trial counsel's performance fell below an objective standard of reasonable representation, or that there is a reasonable probability that, but for the alleged deficient performance, the outcome of the trial would have been different. His third assignment of error is overruled.

{¶53} **Identification**

{¶54} In his fourth assignment of error, Mr. Griffith alleges the "one-man showup" identification in this case was impermissibly suggestive and unreliable. He filed a motion to suppress the evidence, which the trial court denied.

{¶55} A "showup" identification is inherently suggestive. *State v. Martin* (July 31, 2001), 10th Dist. No. 99AP-150, 2001 Ohio App. Lexis 3366, *8, citing *State v. Barnett* (1990), 67 Ohio App.3d 760. However, the United States Supreme Court has

concluded that the admission of evidence of a "showup" without more does not violate due process. *Neil v. Biggers* (1972), 409 U.S. 188, 198. The practice of showing a suspect singly is highly suspect; however, applying the totality of the circumstances surrounding the confrontation test, it may be determined in a given case that such identification method is reliable and proper. *Stovall v. Denno* (1967), 388 U.S. 293, 302. "Under the factors used in *Neil*, the showup must not only be overly suggestive, but create a substantial likelihood of misidentification." *Martin* at *8, citing *Neil* at 199. In *Neil*, the court stated the factors to be considered in determining whether the identification was reliable in light of a suggestive identification procedure included the opportunity of the witness to view the criminal at the time of the crime, the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. *Neil* at 199.

{¶56} The Supreme Court of Ohio, in *State v. Madison* (1980), 64 Ohio St.2d 322, in addition, stated that "there is no prohibition against a viewing of a suspect alone in what is called a 'one-man showup' when this occurs near the time of the alleged criminal act; such a course does not tend to bring about misidentification but rather tends under some circumstances to insure accuracy." Id. at 332, citing *Bates v. United States* (C.A.D.C.1968), 405 F.2d 1104, 1106.

{¶57} We recognize a "one-man showup" identification is inherently suggestive, and therefore we apply the *Biggers* standard to determine if in this case, the circumstances of the identification show there was substantial likelihood for misidentification. First, we note the eyewitness, Mr. Warren, had a clear opportunity

and sufficient time to view the defendant -- he testified he saw a man walk across his parents' driveway sometime after 8:00 a.m., he stopped his vehicle to let the man walk by, and the man waved for him to go. This encounter occurred in broad daylight and the man was not in disguise. Second, Mr. Warren provided a prior description to the police. He described the man as wearing blue jeans, boots, and a dark-colored jacket, which matched the clothing items found in Mr. Griffith's residence.

{¶58} Third, regarding the level of certainty, Mr. Warren testified that, during the identification procedure, he had a good view of the individual he was asked to identify. After looking at him, he told the police: "it was him, I could tell." He again identified Mr. Griffith in court, and when asked how certain he was, he answered "I'm pretty positive." Finally, the identification took place only a few hours after the encounter between the eyewitness and the suspect.

{¶59} Under these circumstances, we cannot conclude a substantial likelihood of misidentification was created by the "one-man showup" procedure employed by the police in this case. The fourth assignment of error is without merit.

{¶60} **Jury Instruction**

{¶61} The fifth assignment of error is raised by Mr. Griffith's new appellate counsel. It states:

{¶62} "The trial court erred by failing to instruct the jury on lesser included levels of burglary and on all of the elements of burglary."

{¶63} Mr. Griffith argues that the trial court erred in not providing an instruction on lesser included offenses. Specifically, he argues the jury should have received an

instruction on the lesser included offense of burglary of the third degree, as set forth in R.C. 2911.12(A)(3), and burglary of the fourth degree as set forth in R.C. 2911.12(A)(4).

{¶64} The record reveals Mr. Griffith's trial counsel did not object to the jury instructions as given by the trial court. The failure to object to the jury instructions waives all challenges except plain error. *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, ¶52. Pursuant to Crim.R. 52(B), "plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." "In order to constitute plain error, the error must be obvious and have a substantial adverse impact on both the integrity of and the public's confidence in the judicial proceedings." *State v. Tichon* (1995), 102 Ohio App.3d 758, 767. "Notice of plain error *** is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of the syllabus. "Plain error does not exist unless it can be said that but for the error, the outcome of the trial would clearly have been otherwise." *State v. Moreland* (1990), 50 Ohio St.3d 58, 62. We now review the record to determine if plain error exists in the trial court's failure to provide an instruction on burglary in the third degree and burglary in the fourth degree.

{¶65} Mr. Griffith was charged pursuant to R.C. 2911.12(A)(2), the violation of which constitutes a second degree felony. That statute provides:

{¶66} "(A) No person, by force, stealth, or deception, shall do any of the following:

{¶67} "***.

{¶68} "(2) Trespass in an occupied structure *** that is a permanent or temporary habitation of any person when any person *** is present or likely to be present, with purpose to commit in the habitation any criminal offense."

{¶69} He argues the jury should have been give an instruction on the lesser included offenses of third degree burglary set forth in R.C. 2911.12(A)(3), and fourth degree burglary set forth in R.C. 2911.12(A)(4). Sections (A)(3) and (A)(4) prohibit a person, by force, stealth, or deception, to commit the following, respectively:

{¶70} "(3) Trespass in an occupied structure *** with purpose to commit in the structure *** any criminal offense.

{¶71} "(4) Trespass in a permanent or temporary habitation of any person when any person *** is present or likely to be present."

{¶72} A criminal offense may be a lesser included offense of another if (1) the offense carries a lesser penalty than the other; (2) the greater offense cannot, as statutorily defined, ever be committed without the lesser offense, as statutorily defined, also being committed; and (3) some element of the greater offense is not required to prove the commission of the lesser offense. *State v. Barnes* (2002), 94 Ohio St.3d 21, 25-26, citing *State v. Deem* (1988), 40 Ohio St.3d 205, paragraph three of the syllabus.

{¶73} The third degree felony described in R.C. 2911.12 (A)(3) defines burglary as trespassing in an occupied structure by force, stealth, or deception, "with purpose to commit *** any criminal offense." It does not require the state to prove that another person "is present or likely to be present" in the occupied structure when the offense of trespassing is committed. The courts have determined it is a lesser included offense of the second degree burglary Mr. Griffith was charged with. See, e.g., *State v. Frock*, 2d

Dist. No. 2004 CA 76, 2006-Ohio-1254, ¶24; *State v. Brown* (Apr. 28, 2000), 1st Dist. No. C-980907, 2000 Ohio App. LEXIS 1820, *10

{¶74} The fourth degree burglary described in R.C. 2911.12(A)(4) defines burglary as trespassing in an occupied structure by force, stealth, or deception, "when another *** is present or likely to be present." It does not require the state to prove the trespass is committed "with purpose to commit *** any criminal offense." It is likewise a lesser included offense of the second degree burglary. See, e.g., *State v. Burgos*, 9th Dist. No. 05CA008808, 2006-Ohio-4305, ¶31.

{¶75} Having determined that burglary in the third and fourth degree are lesser included offenses of burglary under R.C. 2911.12(A)(3), we now review the record to determine if an instruction on these lesser included offenses was warranted in the instant case. The courts have established that an instruction on a lesser included offense instruction is not always mandatory. The lesser included offense instruction is not warranted every time some evidence is presented to support the lesser offense. "An instruction on a lesser included offense is required only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction on the lesser-included offense." *State v. Carter* (2000), 89 Ohio St.3d 593, 600. There must be sufficient evidence to allow a jury to reasonably reject the greater offense and find the defendant guilty on a lesser included offense. *State v. Shane* (1992), 63 Ohio St.3d 630, 632-633. In making the determination of whether the instruction was required, the reviewing court must view the evidence in a light most favorable to the defendant. *State v. Smith* (2000), 89 Ohio St.3d 323, 331.

{¶76} A third degree burglary does not require the evidence to show a person was "present or likely be present" at the time of the trespass, and a fourth degree burglary does not require the evidence to show the offender entered the occupied structure "with purpose to commit *** any criminal offense." Here, the state presented evidence that Ms. James *was* present at her residence when the intruder broke her front door and entered her house at 8:30 a.m. The state also presented testimony to show the intruder ran away upon discovering she was in the house, from which the jury can reasonably infer the intruder broke into her residence to commit the offense of theft.

{¶77} Having considered the totality of the evidence, we cannot say that the jury could have reasonably acquitted Mr. Griffith of second degree burglary under R.C. 2911.12(A)(2) and instead found him guilty of either the lesser included offense of third or fourth degree burglary. Therefore, the trial court did not commit errors in failing to provide instructions on third degree burglary or fourth degree burglary. In any event, we cannot conclude but for the alleged errors, the outcome of the trial would clearly have been otherwise.

{¶78} Under this assignment of error, Mr. Griffith also argues the trial court failed to define the underlying criminal offense intended to be committed by the offender in this case.[1]

{¶79} Initially, we note that the indictment in this case did not specify the underlying criminal offense Mr. Griffith intended to commit when he trespassed on Ms. James' residence. The courts have indicated an indictment for burglary is not improper if it does not designate the specific underlying offense the defendant intended to

1. Again, there was no objection made regarding the jury instruction.

commit. See *State v. Grant*, 8th Dist. No. 86220, 2006-Ohio-177, ¶28.

{¶80} The record here reflects the trial court, although not specifying the specific underlying criminal, instructed the jury as follows: "Purpose to commit a criminal offense is an essential element of the crime of burglary [pursuant to] Revised Code R.C. 2911.12(A)(2). A person acts purposely when it is his specific intention to cause a certain result. It must be established in this case at the time in question there was present in the mind of the defendant a specific intention to commit a criminal offense."

{¶81} In *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, a case that involves aggravated burglary,[2] the Supreme Court of Ohio stated:

{¶82} "We think that it is preferable for the trial judge to instruct the jury in all aggravated-burglary cases as to which criminal offense the defendant is alleged to have intended to commit once inside the premises and the elements of that offense. Such instructions provide an important roadmap for the jury in its deliberations and help ensure that jurors focus on specific conduct that constitutes a criminal offense.

{¶83} "Nevertheless, we do not require this instruction in every case. Prudence may strongly suggest such a precaution, but we are not persuaded that it is appropriate in all circumstances. Trial judges are in the best position to determine the content of the instructions based on the evidence at trial ***." Id. at ¶73-74.

{¶84} The *Gardner* court concluded the trial court in that case did not commit an error in failing to instruct the jury on the underlying offense, reasoning that "[t]here is no suggestion of jury confusion in this case. The jury did not question the meaning of the 'any criminal offense' element, and the state did not present evidence of an array of

2. The offense of aggravated burglary is set forth in R.C. 2911.11(A)(1). It contains an additional element: "[t]he offender inflicts, or attempts or threatens to inflict physical harm on another."

crimes that [the defendant] may have intended to commit in [the victim's] home. Indeed, the evidence here supported only crimes within a single conceptual grouping -- assault, felonious assault, or menacing." Id. at ¶79.

{¶85} Mr. Griffith cites to *State v. Wamsley*, 7th Dist. No. 05 CO 11, 2009-Ohio-1858, to support his claim that the trial court must instruct the jury on the underlying criminal offense for a conviction of burglary. In that case, the defendant and the victim had a romantic relationship for several years. The defendant had spent the night at the victim's apartment several nights prior to the night of the burglary. On the night of the incident, the defendant was attacked by the victim's ex-husband outside a bar. He then went to the victim's apartment, breaking into it. The victim was kicked in the head and sustained serious injuries. The defendant was subsequently charged with aggravated burglary.

{¶86} The court in *Wamsley* stated the record indicates that "the jury was given no instruction regarding any underlying criminal offense, such as assault, in order for the jury to determine whether appellant had the requisite criminal state of mind to commit the underlying offense." *Wamsley* at ¶22. The court then quoted *Gardner* for its statement that "it is preferable for the trial judge to instruct the jury in all aggravated-burglary cases as to which criminal offense the defendant is alleged to have intended to commit once inside the premises and the elements of that offense." Id. at ¶24, quoting *Gardner* at ¶73. The court went on to state that "[a]s a general rule, a defendant is entitled to have the jury instructed on all elements that must be proved to establish the crime with which he is charged, and, where specific intent or culpability is an essential element of the offense, a trial court's failure to instruct on that mental element

constitutes error." Id. at ¶25, citing *State v. Adams* (1980), 62 Ohio St.2d 151, 153. Thus, the court determined an error was committed by the trial court in not instructing the jury on the underlying offense of assault and the requisite mental state for assault, under the circumstances of the case.[3]

{¶87} The circumstances of the instant case are distinguishable from *Wamsley*. There, the offender was in a relationship with the victim and had stayed at her apartment. He entered the victim's residence after a confrontation with her ex-husband. As the court determined, these special facts surrounding his trespassing warranted an instruction on the underlying offense of assault and the requisite specific intent for assault, so as to allow the jury to determine whether the defendant had the requisite criminal state of mind when committing the underlying offense.

{¶88} In the instant case, there is no evidence that the intruder broke into Ms. James' house to commit any criminal offense other than theft. The court did properly instruct the jury on the essential element of the crime regarding "purpose to commit a criminal offense" and the record does not reflect any jury confusion regarding the underlying crime the intruder in this case intended to commit. Consequently, pursuant to *Gardner*, the trial court did not commit an error, plain or otherwise, in not specifying

3. The court, however, concluded that no plain error existed because the result would not have been different if the error had not occurred.

the underlying offense. The fifth assignment of error is overruled.

{¶89} The judgment of the Portage County Court of Common Pleas Court is affirmed.

DIANE V. GRENDELL, J.,

TIMOTHY P. CANNON, J.,

concur.