[Cite as *State v. Cody*, 2009-Ohio-3082.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 07AP-142 (C.P.C. No. 06CR06-4861)
James R. Cody,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 25, 2009

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

Stephen Dehnart, for appellant.

APPEAL from the Franklin County Court of Common Pleas
ON REMAND from the Supreme Court of Ohio

BROWN, J.

{¶1} This matter is before this court upon remand by the Supreme Court of Ohio for further consideration in light of *State v. Cabrales,* 118 Ohio St.3d 54, 2008-Ohio-1625.

{¶2} In *State v. Cody,* 10th Dist. No. 07AP-142, 2007-Ohio-6776, this court affirmed defendant-appellant's, James R. Cody's, convictions for one count of aggravated arson in violation of R.C. 2909.02(A)(1), and one count of aggravated arson in violation of R.C. 2909.02(A)(2). In his appeal, appellant argued under his fifth assignment of error that the trial court erred in imposing separate sentences based upon the contention that

the two aggravated arson counts constituted allied offenses of similar import. This court rejected appellant's argument, relying in part upon *State v. Campbell,* 1st Dist. No. C-020822, 2003-Ohio-7149, in which that court held the offenses of arson under R.C. 2909.02(A)(1) and (A)(2) are not allied offenses of similar import. In *Campbell,* the court applied the court's analysis of allied offenses as set forth in *State v. Rance,* 85 Ohio St.3d 632, 1999-Ohio-291.

{¶3} Subsequent to this court's decision in *Cody,* the court issued its decision in *Cabrales,* in which it clarified *Rance*. Thereafter, in *State v. Cody,* 118 Ohio St.3d 366, 2008-Ohio-2701, ¶2, the court accepted appellant's discretionary appeal of our decision, and remanded the matter to this court with the following directive:

> Because the court of appeals entered its judgment on appellant's fifth assignment of error below prior to the release by this court of its opinion in *State v. Cabrales,* 118 Ohio St.3d 54, 2008 Ohio 1625, 886 N.E.2d 181, this cause is remanded to the court of appeals for consideration of whether the court of appeals' judgment should be modified in view of our opinion in *State v. Cabrales.*

{¶4} Accordingly, the issue before this court on remand is whether our judgment should be modified based upon application of *Cabrales*. In *Cabrales,* the court noted that some Ohio courts had misinterpreted *Rance* as requiring "a strict textual comparison under R.C. 2941.25(A)." *Cabrales* at ¶26. In *Cabrales,* paragraph one of the syllabus, the court clarified *Rance* as follows:

> In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), courts are required to compare the elements of offenses in the abstract without considering the evidence in the case, but are not required to find an exact alignment of the elements. Instead, if, in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily

> result in commission of the other, then the offenses are allied offenses of similar import. (*State v. Rance* (1999), 85 Ohio St.3d 632, 1999 Ohio 291, 710 N.E.2d 699, clarified.)

{¶5} As noted, in the instant case appellant was convicted of one count of aggravated arson in violation of R.C. 2909.02(A)(1), and one count of aggravated arson in violation of R.C. 2909.02(A)(2). To be guilty of aggravated arson under R.C. 2909.02(A)(1), the offender must, by means of fire or explosion, "knowingly * * * [c]reate a substantial risk of serious physical harm to any person other than the offender." To be guilty of aggravated arson under R.C. 2909.02(A)(2), the offender must, by means of fire or explosion, "knowingly * * * [c]ause physical harm to any occupied structure."

{¶6} We first consider, in comparing the statutory elements in the abstract, whether the commission of aggravated arson under R.C. 2909.02(A)(1) (knowingly creating a substantial risk of serious physical harm to a person) necessarily results in the commission of aggravated arson under R.C. 2909.02(A)(2) (knowingly causing physical harm to any occupied structure), and conclude that it does not. In this respect, the act of setting a fire near a crowded sidewalk or causing an explosive device to go off in a "crowded, open area" with no structures nearby, while creating a substantial risk of serious physical harm to individuals, would not necessarily result in physical harm to an occupied structure. *State v. Zurita-Velasquez,* 10th Dist. No. 08AP-770, 2009-Ohio-2049, ¶26 (noting situations in which R.C. 2909.02(A)(1) is violated, but not R.C. 2909.02(A)(2)).

{¶7} We next consider, in comparing the statutory elements in the abstract, whether the commission of aggravated arson under R.C. 2909.02(A)(2) necessarily results in the commission of aggravated arson under R.C. 2909.02(A)(1). In his brief on

remand, appellant contends it is inconceivable one could knowingly cause physical harm to an occupied structure, under paragraph (A)(2), without also creating a substantial risk of serious harm to a person, as proscribed under paragraph (A)(1). We disagree.

{¶8} In a post-*Cabrales* case, *Zurita-Velasquez* at ¶27, this court recently rejected the argument that R.C. 2909.02(A)(1) and (A)(2) are allied offenses of similar import, holding that paragraph (A)(1) "is more directed toward protecting people," while paragraph (A)(2) "is more directed toward protecting buildings frequented or inhabited by people." Thus, in considering whether the commission of aggravated arson under R.C. 2909.02(A)(2) necessarily results in the commission of aggravated arson under R.C. 2909.02(A)(1), this court noted that "[a] small fire could harm the apartment where it started without endangering anyone else," thus resulting in a violation of R.C. 2909.02(A)(2), but not 2909.02(A)(1). Id., ¶26. See also *State v. Mulhern*, 4th Dist. No. 02CA565, 2002-Ohio-5982, ¶44 (rejecting appellant's argument that it was inconsistent to find him guilty of aggravated arson under R.C. 2909.02(A)(2), but to acquit him of aggravated arson under R.C. 2909.02(A)(1), as "the jury could have found that appellant started the fire and caused harm to the building, but did not, at the time the fire was detected and extinguished, create a substantial risk of serious injury to other people in other parts of the building"). We additionally note that "occupied structure" is defined to include a house or building which is maintained as a permanent or temporary dwelling, "even though it is temporarily unoccupied and whether or not any person is actually present." R.C. 2909.01(C)(1). Thus, we find unpersuasive appellant's contention that the act of causing physical harm to an occupied structure necessarily results in creating a substantial risk of serious physical harm to a person.

{¶9} Here, in comparing the elements of the offenses in the abstract, we conclude that the offenses are not so similar that the commission of one offense will necessarily result in the commission of the other. Accordingly, having considered appellant's convictions in light of *Cabrales*, we find, as in our previous decision, no merit to appellant's fifth assignment of error, and we therefore affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT and BOWMAN, JJ., concur.

BOWMAN, J., retired, formerly of the Tenth Appellate District, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.

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