[Cite as *State v. Dundics*, 2016-Ohio-1368.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2015-T-0047**
- vs -	:	
MICHAEL A. DUNDICS,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Girard Municipal Court, Case No. 2015 CRB 009.

Judgment: Affirmed.

Michael E. Bloom, Girard City Prosecutor, Girard Municipal Court, 100 North Market Street, Suite A, Girard, OH 44420 (For Plaintiff-Appellee).

Mark I. Verkhlin, 839 Southwestern Run, Youngstown, OH 44514 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, P.J.

{¶1} Appellant, Michael A. Dundics, appeals his conviction, following his entry of a no contest plea, to telecommunications harassment. At issue is whether the trial court erred in accepting his plea without complying with Crim.R. 11(C) and whether that rule applied to appellant's plea. For the reasons that follow, we affirm.

{¶2} On August 23, 2014, Chelsea Thompson reported to the Hubbard Township Police Department that appellant, with whom she used to work at a local country club, had been calling her and sending her letters and text messages even after

she told him to stop doing so. Ms. Thompson said that while they were employed at the country club, appellant repeatedly asked her out on dates, but she always declined and never went out with him. Sergeant Fusco called appellant and instructed him to stop contacting Ms. Thompson. Off. Gifford also advised appellant to stop having any contact with Ms. Thompson. Off. Gifford told him that, unless he stopped, criminal charges would be filed against him. Despite these admonitions, appellant continued to contact Ms. Thompson.

{¶3} On November 21, 2014, appellant sent to Ms. Thompson a message via Facebook with a frightening photograph of himself attached showing duct tape covering his mouth and with Ms. Thompson's initials written in large letters on the tape. In that message, he wrote, "CJT [Ms. Thompson] your [sic] so high above me." In another message appellant sent to Ms. Thompson via Facebook, he said, "Thinking about you sends my body into convulsions." In a message appellant sent to Ms. Thompson via Instagram, he told her: "No man is more perfect for u. [Sic.] The perfect DNA with the perfect mind here waiting for you." At around the same time, Ms. Thompson learned that appellant was also posting comments about her on Facebook and Instagram, which she characterized as "unsettling." In one message, he said that he cannot get Ms. Thompson out of his mind and that it is killing him that she would not talk to him. In another message, when explaining why he was still pursuing Ms. Thompson after she refused him, appellant said, "persistence pays off." Ms. Thompson reported these continuing contacts to Hubbard Police and provided them with the photograph of appellant he sent her along with copies of appellant's text messages and postings.

{¶4} On Christmas Eve, 2014, appellant sent Ms. Thompson a stuffed animal to her residence. Ms. Thompson reported this to the police.

{¶5} On New Year's Eve, 2014, appellant sent Ms. Thompson multiple text messages, saying that she will always have a place in his heart; that she is perfect; and that she is the first and last thing he thinks of every day. Ms. Thompson reported these messages to police and gave them copies of these texts.

{¶6} On January 5, 2015, a complaint was filed in the Girard Municipal Court charging appellant with menacing by stalking, in violation of R.C. 2903.211(A)(1), a misdemeanor of the first degree. Appellant pled not guilty.

{¶7} Subsequently, at appellant's change-of-plea hearing on April 2, 2015, the assistant prosecutor and appellant's attorney advised the court that the parties entered into a plea bargain, pursuant to which the complaint would be amended and appellant would plead no contest to telecommunications harassment, in violation of R.C. 2917.21, a misdemeanor of the first degree. They also advised the court that appellant had signed a written no contest plea to this effect. In response to the trial court's questions, appellant told the court he understood the case would be resolved by way of the plea bargain, and he pled no contest to telecommunications harassment. The court found appellant guilty; sentenced him to six months in the county jail, suspending the entire term; and ordered him to not have any further contact with Ms. Thompson.

{¶8} Appellant appeals his conviction, asserting the following for his sole assignment of error:

{¶9} "The Trial Court committed reversible error when accepted [sic] the guilty plea [sic] of Defendant-Appellant Michael Dundics which was less than knowing, intelligent and voluntary due to the Trial Court's failure to address Defendant-Appellant Michael Dundics in regards to his rights in direct violation of Crim.R. 11(C), thereby rendering the guilty plea [sic] of Defendant-Appellant Michael Dundics invalid."

{¶10} This court reviews de novo whether the trial court accepted a plea in compliance with Crim.R. 11. *State v. Lunder*, 8th Dist. Cuyahoga No. 101223, 2014-Ohio-5341, ¶22.

{¶11} Appellant argues the trial court erred in accepting his no contest plea. Specifically, he contends, his plea was not voluntary because the court failed to comply with Crim.R. 11(C) by not informing him that by pleading no contest, he would be waiving the various rights set forth in that rule. In opposition, the state argues the court was not required to comply with Crim.R. 11(C) because that rule applies only to felonies, and the offense to which appellant pled no contest was not a felony.

{¶12} "A trial court's obligations in accepting a plea depend upon the level of offense to which the defendant is pleading." *State v. Jones*, 116 Ohio St.3d 211, 2007-Ohio-6093, ¶6, citing *State v. Watkins*, 99 Ohio St.3d 12, 2003-Ohio-2419, ¶25.

{¶13} Crim.R. 11 sets forth distinct procedures, depending on the classification of the offense involved. *Jones, supra,* at ¶11. The Supreme Court of Ohio has held that before accepting a guilty or no contest plea to a *petty offense* (which involves potential incarceration of up to six months per Crim.R. 2(D)), the court is only required to inform the defendant of the *effect* of the plea he entered. *Jones, supra*, at ¶20; Crim.R. 11(E). The effect of a no contest plea is that: (1) it is an admission of the truth of the facts as alleged in the charging instrument; (2) the plea cannot be used against the defendant in any subsequent proceeding; and (3) after the plea is entered, the court may proceed with sentencing. Crim.R. 11(B).

{¶14} If the misdemeanor involved is a *serious offense* (which involves potential incarceration of more than six months per Crim.R. 2(C)), before accepting a guilty or no

contest plea, the court must first inform the defendant of the effect of the plea and also determine that *he is making the plea voluntarily*. Crim.R. 11(D).

{¶15} In contrast, guilty and no contest pleas to *felonies* are treated differently from such pleas to misdemeanors. By its express terms, the procedures set forth in Crim.R. 11(C) apply only to "Pleas of guilty and no contest in *felony cases*." (Emphasis added.)

{¶16} The Ohio Supreme Court in *Jones, supra,* stated:

> **{¶17}** The procedure set forth in Crim.R. 11(C)(2) for felony cases is more elaborate than that for misdemeanors. Before accepting a guilty [or a no contest plea] in a felony case, a "trial court must inform the defendant that he is waiving his privilege against compulsory self-incrimination, his right to jury trial, his right to confront his accusers, and his right of compulsory process of witnesses." *State v. Ballard*, 66 Ohio St.2d 473 (1981), paragraph one of the syllabus. In addition to these constitutional rights, the trial court is required to determine that the defendant understands the nature of the charge, the maximum penalty involved, and the effect of the plea. Crim.R. 11(C)(2)(a) and (b). *Jones, supra,* at ¶12.

{¶18} Here, appellant pled no contest to telecommunications harassment, a misdemeanor of the first degree. Because the penalty for such offense includes incarceration of up to, but not more than, six months (R.C. 2929.24(A)(1)), telecommunications harassment is a petty offense. Since appellant did not plead no contest to a felony, the trial court was not required to comply with Crim.R. 11(C). Thus, even though the trial court did not comply with Crim.R. 11(C), the trial court did not err in accepting appellant's no contest plea. As noted above, telecommunications harassment is a petty offense. Pursuant to Crim.R. 11(E), the trial court's only obligation was to advise appellant regarding the effect of his no contest plea.

{¶19} We note that, while the trial court erred in not advising appellant of the effect of his no contest plea pursuant to Crim.R. 11(B), appellant did not challenge this

omission below and does not raise it on appeal. Thus, he waived all but plain error. *State v. Devai*, 11th Dist. Ashtabula No. 2012-A-0054, 2013-Ohio-5264, ¶17. Crim.R. 52(B) allows us to correct "[p]lain errors or defects affecting substantial rights" that were not brought to the attention of the trial court. In *State v. Barnes*, 94 Ohio St.3d 21, 27 (2002), the Supreme Court of Ohio set forth strict limitations on what constitutes plain error. First, there must be an error, i.e., a deviation from a legal rule. *Id*. Second, the error must be plain, i.e., the error must be an "obvious" defect in the proceedings. *Id*. Third, the error must have affected "substantial rights." *Id*. This means that the trial court's error must have affected the outcome of the trial or prejudiced the defendant. *Id*.; *State v. Gilbert*, 7th Dist. Mahoning No. 08 MA 206, 2012-Ohio-1165, ¶114. The test for prejudice in the context of a guilty or no contest plea is "whether the plea would have otherwise been made." *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, ¶12, citing *State v. Nero*, 56 Ohio St.3d 106, 107 (1990).

{¶20} Although the trial court erred by not advising appellant regarding the effect of his plea, the error was harmless. Because the rights contained in Crim.R. 11(B), including the right to be informed of the effect of appellant's no contest plea, are non-constitutional, appellant was required to show he suffered prejudice from the court's omission. *Jones, supra,* at ¶ 52. Further, a defendant who has entered a guilty or no contest plea without asserting actual innocence is presumed to understand the effect of the plea, and the court's failure to inform the defendant of the effect of the plea as required by Crim.R. 11 is presumed not to be prejudicial. *Griggs* at syllabus.

{¶21} Appellant does not argue he was prejudiced by the court's failure to advise him of the effect of his no contest plea. Nor is there any evidence of prejudice in the record. Specifically, there is no evidence that, but for the trial court's alleged error,

appellant would not have pled no contest, but, rather, would have insisted on going to trial. Further, appellant never asserted his innocence or indicated he did not know his no contest plea would constitute an admission of the truth of the facts alleged in the amended complaint. Moreover, appellant was represented by counsel. While appellant may not have known the effect of his plea, i.e., that by pleading no contest, his admission of the facts alleged in the amended complaint could not be used against him in a subsequent proceeding, any ignorance of this fact cannot be considered prejudicial since this exclusionary rule inures *to his benefit*. *Cleveland v. Kutash*, 8th Dist. Cuyahoga No. 99509, 2013-Ohio-5124, ¶22. In light of the circumstances presented here, even though the trial court erred in not advising appellant of the effect of his no contest plea, the error was harmless because no prejudice resulted from this omission. As a result, we discern no plain error in the trial court's failure to advise appellant of the effect of his plea.

{¶22} For the reasons stated in this opinion, the assignment of error lacks merit and is overruled. It is the order and judgment of this court that the judgment of the Girard Municipal Court is affirmed.

THOMAS R. WRIGHT, J., concurs,

DIANE V. GRENDELL, J., concurs in judgment only with a Concurring Opinion.

DIANE V. GRENDELL, J., concurs in judgment only with a Concurring Opinion.

{¶23} I concur with the majority's conclusion that, under a plain error analysis, Dundics' plea should be affirmed.

{¶24} I write separately, however, because the majority mistakenly asserts that "a defendant who has entered a guilty or no contest plea without asserting actual innocence is presumed to understand the effect of the plea, and the court's failure to inform the defendant of the effect of the plea as required by Crim.R. 11 is presumed not to be prejudicial." *Supra* at ¶ 20.

{¶25} In *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, the Ohio Supreme Court set forth the effects of failing to comply with Criminal Rule 11 with respect to nonconsitutional rights:

> When the trial judge does not *substantially* comply with Crim.R. 11 in regard to a nonconstitutional right, reviewing courts must determine whether the trial court *partially* complied *or failed* to comply with the rule. If the trial judge partially complied, e.g., by mentioning mandatory postrelease control without explaining it, the plea may be vacated only if the defendant demonstrates a prejudicial effect. * * * If the trial judge completely failed to comply with the rule, e.g., by not informing the defendant of a mandatory period of postrelease control, the plea must be vacated. See *Sarkozy,* 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d, 1224, paragraph two of the syllabus. "A complete failure to comply with the rule does not implicate an analysis of prejudice." Id. at ¶ 22.

Id. at ¶ 32.

{¶26} In the present case, there was a complete failure to comply with Criminal Rule 11(E). The only reference to Dundics' actual plea of no contest at the change of

plea hearing occurred in the following colloquy between the municipal court and Dundics' attorney:

> THE COURT: You will follow * * * the Rule 11 Agreement -- and you're going to be --- what's your plea on the charge?
>
> MR. CZOPUR: No contest, your Honor. Stipulate to a finding.

{¶27} Where the failure to advise a defendant of the effect of his no contest plea is complete, an analysis of prejudice is not implicated and the plea must be vacated. *Cleveland v. Mayfield*, 8th Dist. Cuyahoga No. 100494, 2014-Ohio-3712, ¶ 8 ("[t]his court * * * has consistently recognized that when the record is devoid of any explanation of the no contest plea, there is a complete failure to comply with Crim.R. 11(E) and therefore, no prejudice analysis is necessary") (cases cited); *State v. Ramey*, 7th Dist. Mahoning No. 13 MA 64, 2014-Ohio-2345, ¶ 13 ("if the trial court completely fails to comply with [Crim.R. 11(E)], the plea must be vacated; a showing of prejudice is not needed to be demonstrated in that instance"); *State v. Anderson*, 1st Dist. Hamilton No. C-070098, 2007-Ohio-6218, ¶ 10 ("[t]he failure to substantially comply with Crim.R. 11(E) constitutes reversible error"); *Toledo v. Mroczkowski*, 6th Dist. Lucas No. L-04-1338, 2005-Ohio-5742, ¶ 19 ("the trial court made no attempt whatsoever to inform appellant of the effect of his no contest plea * * * in clear violation of Crim.R. 11(E) [which] constitutes reversible error"); *State v. Lanton*, 2nd Dist. Greene No. 02CA124, 2003-Ohio-4715, ¶ 23 ("[f]ailure to substantially comply with Crim.R. 11(E) by explaining the effect of a no contest plea before the court accepts that plea constitutes reversible error").

{¶28} I concur in the judgment to affirm Dundics' plea, however, because the necessity of demonstrating prejudice inheres within the plain error analysis. Such prejudice was not demonstrated by the record in this case.