[Cite as *State v. Gillman*, 2015-Ohio-4421.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
VINTON COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 14CA699
v.	:	
STEVEN C. GILLMAN, II,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	RELEASED 10/14/2015

APPEARANCES:

James T. Boulger, Chillicothe, Ohio, for Defendant-Appellant.

Trecia Kimes-Brown, Vinton County Prosecuting Attorney, McArthur, Ohio, for Plaintiff-Appellee.

Hoover, P.J.

{¶ 1} Steven C. Gillman, II ("Gillman") appeals the judgment of the Vinton County Court of Common Pleas. Gillman pleaded guilty to two counts of burglary in violation of R.C. 2911.12(A)(3), both being felonies of the third degree, and two counts of theft in violation of R.C. 2913.02(A)(1)/(B)(3), both being felonies of the fourth degree. The trial court accepted Gillman's guilty pleas and sentenced him to an aggregate term of imprisonment of fifty-four months.

{¶ 2} Gillman argues that the trial court erred by failing to merge the burglary convictions in counts one and two with the associated theft offenses under counts three and four. Gillman contends that the failure to merge the offenses for sentencing purposes violates the mandates contained in R.C. 2941.25, the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution, and Article One, Section 10 of the Ohio Constitution. On the other

hand, the State of Ohio ("State") asserts that the theft offenses and burglary offenses are not allied offenses of similar import subject to merger. The State, therefore, argues that the trial court did not err in failing to merge the theft offenses with the respective burglary offenses.

{¶ 3} For the reasons that follow, we do not agree with Gillman that the theft and burglary offenses are allied offenses of similar import. Consequently, we overrule Gillman's assignment of error and affirm the judgment of the trial court.

I. Facts and Procedural Posture

{¶ 4} Gillman was indicted by the Vinton County Grand Jury in August 2013. The indictment contained four counts. Counts one and two were for burglary, in violation of R.C. 2911.12(A)(2), each felonies of the second degree. Counts three and four were for theft, in violation of R.C. 2913.02(A)(1)/(B)(3), each felonies of the fourth degree. Each count of the indictment was alleged to have occurred on June 26, 2013.

{¶ 5} On September 13, 2013, Gillman pleaded not guilty to all the charges. Later, Gillman and the State engaged in plea negotiations. As a result of negotiations, on August 27, 2014, the State moved to amend counts one and two, the burglary counts, in violation of R.C. 2911.12(A)(2), to felonies of the third degree, in violation of R.C. 2911.12(A)(3). In exchange for the amendments, Gillman agreed to plead guilty to counts one and two as amended and counts three and four as indicted. At the change of plea hearing, both parties indicated that they would be arguing their respective positions on merger at the sentencing hearing. No statement of facts was provided at the change of plea hearing. Nonetheless, the trial court accepted Gillman's guilty pleas on the four charges and found him guilty of those charges. The trial court then scheduled the matter for a sentencing hearing. The trial court acknowledged that the issue of merger would be one of the issues that would be addressed at the sentencing hearing.

{¶ 6} The trial court conducted the sentencing hearing on October 15, 2014. At the hearing, Gillman's trial counsel acknowledged that the two burglary counts would not merge with one another. Rather, he argued that the thefts associated with each one of the burglaries should merge with the respective burglary convictions. The State argued at the hearing that the thefts should not merge with the respective burglaries. The State contended that Gillman entered two structures of the victims. The State continued with its argument:

> [Gillman's] intent was not just check check [sic] out what was in the frig and eat some porridge. Defendant hauled an entire couch out of one of the properties. His animus for entering that property and vandalizing or doing whatever he was going to do changed once he undertook a progressive play and to (inaudible) the victims' of their property and peace of mind.
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> The act of burglary was complete upon entry and the act of thievery was complete once the items were under [Gillman's] control.
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> * * *

{¶ 7} Carolyn Kurnot made a statement at the sentencing hearing. Mrs. Kurnot stated:

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> The cabins were entered two of them were entered [sic] on two separate occasions. One to scope mainly. The other to come back and get whatever they decided they wanted. These cabins are family owned. They've been in my family for years. They're maintained regularly. My sons and their families use them on a regular basis throughout the year. The ways in which these incidents have affected us are first of all are [sic] sense of privacy has totally been evaded

> invaded and compromised. Our pocketbooks have suffered because we had to replace the items that were stolen. Our sense of safety and well-being has been greatly compromised. These properties are located on the same property that I live on even though there is some distance between them. Did these fellows come around, did they scope my house at the same time they scoped these others? What if my grandchildren had been in those cabins at the time they went up and knocked on the door? Will I will we, my husband and I, experience retribution for my being here today? Those are all things that we worry about. Saturday we received a letter from Mr. Gillman. We were not pleased with that and ask that we have no further contact with you after today.
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> * * *

{¶ 8} Gillman's trial counsel argued at the sentencing hearing that "there are * * * several cases in which the burglary and the underlying theft the crimes for which the entry is perpetrated have been found to merge * * *."

{¶ 9} After hearing arguments from the State, Gillman's trial counsel, and the statement from the victim, the trial court addressed the issue of merger. The trial court found that there was clearly "no merger as between the two counts of burglary". The trial court further found:

> * * *
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> And it is the court's belief and position that that [sic] the law would say that once the burglary has been committed that crime is complete. But then taking of property the theft is is [sic] another crime such that that [sic] merger does not apply as between the burglary and the theft as such so it is the court's order and finding that that [sic] there is no merger. * * * The the [sic] court does find that

the burglary and theft are not allayed [sic] offenses of similar import. Once the entry had been made with an intent to commit a crime the crime of burglary is complete and then the taking of property beyond that is the separate offense of theft. I would indicate that the court is is [sic] referring in part to the decision of State of Ohio versus Steven Sadowski, S-A-D-O-W-S-K-I, which is a very recent decision out of the Court of Appeals for the Eighth Appellate District released, journalized September 25, 2014 relating to Cuyahoga County Common Pleas Court, case number CR13577713A. * * * [I]t is the court's determination today that merger does not apply and therefore the court confirms its earlier entry of conviction with respect to all four counts.

* * *

{¶ 10} The trial court then sentenced Gillman as follows:

Count	Conviction	Statute	Degree	Prison Term
1	Burglary	2911.12(A)(3)	F-3	30 months
2	Burglary	2911.12(A)(3)	F-3	24 months
3	Theft	2913.02(A)(1)/(B)(3)	F-4	12 months
4	Theft	2913.02(A)(1)/(B)(3)	F-4	12 months

The trial court ordered the stated prison term for Count 2 to be served consecutively to Count 1; the trial court further ordered the prison term for Count 3 to be served concurrently with Count 1. As for the prison term for Count 4, the trial court ordered that the prison term run concurrently with Count 2. Thus, Gillman's aggregated prison term was 54 months. In addition, the trial court ordered that Gillman shall have no contact with Michael Kurnot and Carolyn Kurnot or any member of their family or their property as well as David Stevens and Donald Neal. A restitution order in the amount of $1,500 was also entered against Gillman to be paid in favor of Michael and Carolyn Kurnot. The trial court did not impose a fine, but it did assess the costs of the case against Gillman. It is from these convictions and sentences that Gillman appeals.

II. Assignment of Error

{¶ 11} Gillman raises the following assignment of error for review:

> THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT IN FAILING TO MERGE HIS CONVICTIONS FOR BURGLARY IN COUNTS ONE AND TWO, WITH THE ASSOCIATED THEFT OFFENSES UNDER COUNTS THREE AND FOUR. THE FAILURE TO MERGE THE THEFTS WITH THE RESPECTIVE BURGLARIES IS IN VIOLATION OF THE MANDATE CONTAINED IN R.C. 2941.25, THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION, AND ARTICLE ONE, SECTION 10 OF THE OHIO CONSTITUTION.

III. Law and Analysis

{¶ 12} For his assignment of error, Gillman contends that the trial court erred by failing to merge his convictions for burglary in counts ones and two with the associated theft offenses under counts three and four. The State claims that the trial court properly determined the merger issue.

{¶ 13} "An appellate court should apply a de novo standard of review in reviewing a trial court's R.C. 2941.25 merger determination." *State v. Williams*, 134 Ohio St.3d 482, 2012-Ohio-5699, 983 N.E.2d 1245, ¶ 28. " '[T]he appellate court must * * * independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard.' " *Id* at ¶ 26, quoting *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8. The reviewing court owes no deference to the trial court's application of the law to the particular facts of the case being reviewed. *Id*.

{¶ 14} R.C. 2941.25, Ohio's multiple counts statute, provides:

> (A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
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> (B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

{¶ 15} The statute codifies the protections of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, and Section 10, Article I of the Ohio Constitution, which prohibits the imposition of multiple punishments for the same offense. *State v.*

Underwood, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶ 23. In other words, upon finding one or more counts to constitute two or more allied offenses of similar import, R.C. 2941.25(A) requires that the convictions be merged for the purposes of sentencing and that the defendant only be sentenced on one of the counts. *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, ¶ 5.

{¶ 16} The Ohio Supreme Court has interpreted R.C. 2941.25 to involve a two-step analysis for determining whether offenses are subject to merger. *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061. Under step one, it must be determined whether "it is possible to commit one offense *and* commit the other with the same conduct, not whether it is possible to commit one *without* committing the other." (Emphasis sic.) *Id*. at ¶ 48. Put another way, if the conduct of the defendant constituting commission of offense one also constitutes commission of offense two, then the offenses are of similar import and the court must proceed to the second step. *Id*. Under step two of the analysis, it must be determined whether the offenses were committed as part of a single act, with a single state of mind. *Id*. at ¶ 49. If both steps of the analysis are met, then the offenses are allied offenses of similar import and will be merged. *Id*. at ¶ 50. On the other hand, if commission of one offense will never result in the commission of the other, or if the offenses are committed separately, or with a separate animus for each offense, then under R.C. 2941.25(B), the offenses will not merge. *Id*. at ¶ 51.

{¶ 17} Recently, in *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, the Ohio Supreme Court provided courts with further guidance with respect to the R.C. 2941.25 merger determination. Although the Supreme Court did not explicitly overrule *Johnson*, it stated that the "decision in *Johnson* was incomplete" and that *Johnson's* syllabus language "does not offer the complete analysis necessary to determine whether offenses are subject to merger rather

than multiple convictions and cumulative punishment." *Id.* at ¶ 16. Thus, the Court set forth as follows:

> When the defendant's conduct constitutes a single offense, the defendant may be convicted and punished only for that offense. When the conduct supports more than one offense, however, a court must conduct an analysis of allied offenses of similar import to determine whether the offenses merge or whether the defendant may be convicted of separate offenses. R.C. 2941.25(B).
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> A trial court and the reviewing court on appeal when considering whether there are allied offenses that merge into a single conviction under R.C. 2941.25(A) must first take into account the conduct of the defendant. In other words, how were the offenses committed? If any of the following is true, the offenses cannot merge and the defendant may be convicted and sentenced for multiple offenses: (1) the offenses are dissimilar in import or significance—in other words, each offense caused separate, identifiable harm, (2) the offenses were committed separately, or (3) the offenses were committed with separate animus or motivation.
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> At its heart, the allied-offense analysis is dependent upon the facts of a case because R.C. 2941.25 focuses on the defendant's conduct. The evidence at trial or during a plea or sentencing hearing will reveal whether the offenses have similar import. When a defendant's conduct victimizes more than one person, the harm for each person is separate and distinct, and therefore, the defendant can be

> convicted of multiple counts. Also, a defendant's conduct that constitutes two or more offenses against a single victim can support multiple convictions if the harm that results from each offense is separate and identifiable from the harm of the other offense. We therefore hold that two or more offenses of dissimilar import exist within the meaning of R.C. 2941.25(B) when the defendant's conduct constitutes offenses involving separate victims or if the harm that results from each offense is separate and identifiable.
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> Rather than compare the elements of two offenses to determine whether they are allied offenses of similar import, the analysis must focus on the defendant's conduct to determine whether one or more convictions may result, because an offense may be committed in a variety of ways and the offenses committed may have different import. No bright-line rule can govern every situation.
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> As a practical matter, when determining whether offenses are allied offenses of similar import within the meaning of R.C. 2941.25, courts must ask three questions when the defendant's conduct supports multiple offenses: (1) Were the offenses dissimilar in import or significance? (2) Were they committed separately? and (3) Were they committed with separate animus or motivation? An affirmative answer to any of the above will permit separate convictions. The conduct, the animus, and the import must all be considered.

Id. at ¶¶ 24-26, 30-31.

{¶ 18} Before we analyze the facts of this case using the test set forth in *Ruff*, we will first address a couple of the cases relied upon by the trial court, the State, and Gillman. The trial court specifically refers to *State v. Sadowski*, 8th Dist. Cuyahoga No. 100819, 2014-Ohio-4211. In *Sadowski*, the Eighth District Court of Appeals found that once Sadowski entered the victim's home without her permission, the offense of burglary was complete. Then, when Sadowski proceeded to take the victim's purse, he committed the separate offense of theft. ¶ 11. The Eighth District held that burglary and theft are not allied offenses of similar import. *Id*.; *see also State v. Richardson*, 8th Dist. Cuyahoga No. 100115, 2014–Ohio–2055, and *State v. Smith*, 8th Dist. Cuyahoga No. 100641, 2014–Ohio–3420. Although we appreciate the reasoning of our sister appellate court, the Eighth District's jurisprudence is not controlling authority. We are not necessarily bound by the decision in *Sadowski*.

{¶ 19} In their respective appellate briefs, both parties address *State v. Carsey*, 4th Dist. Athens Nos. 12CA37 and 12CA38, 2013-Ohio-4482. In *Carsey*, we held that Carsey's theft and burglary constitute allied offenses of similar import. ¶ 13. Gillman asserts that we should follow the holding of *Carsey* in our determination of the merger issue. On the other hand, the State relies upon *Ruff*, *supra*, at ¶ 32, which acknowledges that "varying results for the same set of offenses in different cases" may occur and that "different results" are permissible. The State argues that we need not come to the same conclusion as our court did in *Carsey*. We agree with the State that we need not necessarily come to the same conclusion as we did previously in *Carsey* regarding whether burglary and theft are allied offenses of similar import. Rather, we must conduct a de novo review of the trial court's R.C. 2941.25 merger determination.

{¶ 20} The Ohio Supreme Court in *Ruff* presents three questions for a reviewing court to ask when a defendant's conduct supports multiple offenses in order to determine whether those

offenses are allied offenses of similar import within the meaning of R.C. 2941.25: (1) Were the offenses dissimilar in import or significance? (2) Were they committed separately? and (3) Were they committed with separate animus or motivation? If one of the questions is answered affirmatively, then separate convictions are permitted. The conduct, the animus, and the import must all be considered.

{¶ 21} With respect to the first question, as explained in *Ruff,* offenses are of dissimilar import "when the defendant's conduct constitutes offenses involving separate victims or if the harm that results from each offense is separate and identifiable." *Id.* at paragraph two of the syllabus. When applying the *Ruff* test, we look at the conduct of the defendant in the context of the statutory elements. *See State v. Bailey*, 1st Dist. Hamilton No. C-140129, 2015-Ohio-2997, ¶ 82. Here, Gillman was indicted for burglary and theft. The relevant burglary statute, R.C. 2911.12(A)(3), provides that: "No person, by force, stealth, or deception, shall * * *[t]respass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, with purpose to commit in the structure or separately secured or separately occupied portion of the structure any criminal offense." Likewise, the relevant theft statute, R.C. 2913.02(A)(1)/(B)(3) provides that: "No person, with purpose to deprive the owner of property * * *, shall knowingly obtain or exert control over * * * the property * * *[w]ithout the consent of the owner or person authorized to give consent ." In addition, if the owner is an elderly person and if the property alleged to be stolen is valued at over $1,000 but less than $7,500, the offense is classified as a felony of the fourth degree.

{¶ 22} When examining whether Gillman's conduct constituted offenses involving separate victims, the State asserts that "there was [sic] multiple victims in these instances." In particular, the State contends that Mr. and Mrs. Kurnot were victims as well as the entire family.

However, we are examining whether there are separate or different victims of the burglary offenses from the theft offenses. The victims of the burglary offenses are the same as the victims of the theft offenses. Therefore, the answer to whether Gillman's conduct constituted offenses involving separate victims is "no." We must proceed with our inquiry.

{¶ 23} Next, we must analyze whether the harm that results from each offense is separate and identifiable. A statement of facts was not made a part of the record during the plea hearing or during the sentencing hearing. Also, Gillman only made a statement during the sentencing hearing in which he apologized to Mrs. Kurnot. He did not make a statement regarding the facts of the case. We do, however, have the statement of the victim, Mrs. Kurnot, to examine and to aid in our determination as to whether the harm that resulted from the theft offenses is separate and identifiable from the harm that resulted from the respective burglary offenses. Mrs. Kurnot explained to the trial court that their sense of privacy had been "invaded and compromised." This relates to the harm that resulted from the burglary offenses. Next, Mrs. Kurnot described for the trial court that they have suffered economic damage when she said, "Our pocketbooks have suffered because we had to replace the items that were stolen." The economic damage relates to the harm that resulted from the theft offenses. Lastly, Mrs. Kurnot added that their "sense of safety and well-being has been greatly compromised." The harm set forth here seems to be related to both the burglary and the theft offenses. We find that Mrs. Kurnot identified separate harm resulting from the burglary offenses than the harm that resulted from the theft offenses. Therefore, the answer to whether the harm from each offense is separate and identifiable is "yes."[1]

[1] The application of the *Ruff* test here results in parsing, which the Ohio Supreme Court in *Johnson*, *supra*, at ¶ 56, seems to admonish. Nonetheless, we are bound to apply the most recent test set forth by the Ohio Supreme Court in determining the merger issue.

{¶ 24} At this point, we end our analysis since we have answered affirmatively the first of the three questions set forth in *Ruff*. We are mindful of our previous ruling in *Carsey*, in which we determined that burglary and theft are allied offenses of similar import; however, when applying the test set forth in *Ruff*, we must hold that the offenses of burglary and the associated offenses of theft in this particular case are of dissimilar import and do not merge. Separate convictions and sentences are thus permitted under R.C. 2941.25. Consequently, we overrule Gillman's sole assignment of error.

IV. Conclusion

{¶ 25} Having overruled Gillman's assignment of error for the reasons stated above, we affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED. Appellant shall pay the costs herein taxed.

The Court finds that reasonable grounds for this appeal existed.

It is ordered that a special mandate issue out of this Court directing the Vinton County Court of Common Pleas to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty (60) days upon the bail previously posted. The purpose of a continued stay is to allow appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty (60) day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five (45) day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to the expiration of sixty (60) days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Abele, J. and McFarland, A.J.: Concur in Judgment and Opinion.

For the Court

By:_____
Marie Hoover
Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.