[Cite as *State v. Barnett*, 2010-Ohio-1695.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- WILLIAM J. BARNETT Defendant-Appellant	JUDGES: Hon. Julie A. Edwards, P.J. Hon. William B. Hoffman, J. Hon. Sheila G. Farmer, J. Case No. CT2009-0025 O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Muskingum County Common Pleas Court, Case No. CR2008-0210
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	April 14, 2010

APPEARANCES:

For Defendant-Appellant	For Plaintiff-Appellee
DAVID A. SAMS P.O. Box 40 W. Jefferson, Ohio 43162	ROBERT L. SMITH Assistant Prosecuting Attorney 27 North Fifth Street Zanesville, Ohio 43701

Hoffman, J.

{¶1} Defendant-appellant William J. Barnett appeals his sentence entered by the Muskingum County Court of Common Pleas, on one count of aggravated burglary and one count of rape, after the trial court found him guilty upon acceptance of Appellant's guilty pleas. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE CASE

{¶2} On August 20, 2008, the Muskingum County Grand Jury indicted Appellant on one count of aggravated burglary, in violation of R.C. 2911.11(A)(1); one count of kidnapping, in violation of R.C. 2905.01(A)(4); and one count of rape, in violation of R.C. 2907.02(A)(2). The kidnapping and rape counts also included sexually violent predator and repeat violent offender specifications. Appellant appeared before the trial court for arraignment on August 27, 2008, and entered a plea of not guilty to all the counts and specifications contained in the indictment.

{¶3} On April 9, 2009, the parties appeared before the trial court and advised the court they had reached a plea agreement. Appellant agreed to enter a guilty plea to Counts One and Three, aggravated burglary and rape, respectively. In exchange the State nolled Count 2, kidnapping, and the specifications thereto as well as the specifications to the rape count. The State also recommended Appellant receive a ten year sentence on each count, with the counts to be served consecutive to one another, but concurrently with an unexpired term he was currently serving as the result of a conviction in the Franklin County Court of Common Pleas. The trial court conducted a Crim.R. 11 colloquy with Appellant. Satisfied Appellant was knowingly, intelligently, and

voluntarily waiving his rights, the trial court found him guilty of one count of aggravated burglary and one count of rape. The trial court ordered a presentence investigation prior to imposing sentence. The trial court subsequently sentenced Appellant to a ten year prison term on the aggravated burglary charge, and a ten year sentence on the rape charge. The trial court ordered the sentences be served consecutively to one another.

{¶4} It is from this sentence Appellant appeals, raising the following assignments of error:

{¶5} "I. THE DEFENDANT-APPELLANT WAS DENIED DUE PROCESS AND THE RIGHT TO A GRAND JURY INDICTMENT UNDER ARTICLE I, SECTION 10 TO THE OHIO CONSTITUTION AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY A PROSECUTIO [SIC] AND RESULTING CONVICTION ON AN INSUFFICIENT INDICTMENT FOR AGGRAVATED BURGLARY WHICH DID NOT CONTAIN THE RECKLESS MENS REA ELEMENT AS REQUIRED BY LAW.

{¶6} "II. THE DEFENDANT-APPELLANT'S PLEA WAS NOT KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY ENTERED UNDER ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

{¶7} "III. THE DEFENDANT-APPELLANT WAS DENIED DUE PROCESS AND WAS TWICE PLACED IN JEOPARDY IN VIOLATION OF ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION AND THE FIFTH AND FOURTEENTH AMENDMENTS TO

THE UNITED STATES CONSTITUTION WHEN HE WAS SENTENCED TO CONSECUTIVE TERMS OF IMPRISONMENT FOR THE SAME OFFENSE.

{¶8} "IV. THE DEFENDANT-APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION."

I

{¶9} In his first assignment of error, Appellant contends he was denied his due process rights and right to a grand jury indictment as he was prosecuted and convicted on an insufficient indictment. Specifically, Appellant asserts his indictment for aggravated burglary was defective as it did not contain the mens rea for "force, stealth, or deception", reckless, pursuant to the dictates of *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624("*Colon I*").

{¶10} Appellant pled guilty to and was convicted of aggravated burglary, in violation of R.C. 2911.11(A)(1), which provides:

{¶11} "(A) No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if any of the following apply:

{¶12} "(1) The offender inflicts, or attempts or threatens to inflict physical harm on another". Id.

{¶13} R.C. § 2911.10 provides, as used in R.C. § 2911.11, "trespass" as an element of the offense refers to R.C. § 2911.21:

{¶14} "(A) No person, without privilege to do so, shall do any of the following:

{¶15} "(1) Knowingly enter or remain on the land or premises of another;

{¶16} "(2) Knowingly enter or remain on the land or premises of another, the use of which is lawfully restricted to certain persons, purposes, modes, or hours, when the offender knows the offender is in violation of any such restriction or is reckless in that regard;

{¶17} "(3) Recklessly enter or remain on the land or premises of another, as to which notice against unauthorized access or presence is given by actual communication to the offender, or in a manner prescribed by law, or by posting in a manner reasonably calculated to come to the attention of potential intruders, or by fencing or other enclosure manifestly designed to restrict access;

{¶18} "(4) Being on the land or premises of another, negligently fail or refuse to leave upon being notified by signage posted in a conspicuous place or otherwise being notified to do so by the owner or occupant, or the agent or servant of either."

{¶19} Count One of Appellant's Indictment reads:

{¶20} "* * * between the dates of 10/08/2006 and 10/09/2006, in Muskingum County, Ohio, William J. Barnett did, by force, stealth or deception, knowingly trespass in an occupied structure * * * or in a separately secured or separately occupied portion of an occupied structure, when another person, other than an accomplice of the said William J. Barnett was present, with purpose to commit in the structure or in the

separately secured or separately occupied portion of the structure a criminal offense, to wit: Kidnapping and/or Rape * * *."

{¶21} *Colon* dealt with a robbery statute and did not address the aggravated burglary statute. Several Ohio courts have rejected the application of *Colon* to a charge of aggravated burglary or burglary. See *State v. Goldick,* Montgomery App. No. 22611, 2009-Ohio-2177; *State v. Day,* Clark App. No. 07-CA-139, 2009-Ohio-56; *State v. Davis,* Cuyahoga App. No. 90050, 2008-Ohio-3453.

{¶22} In the case sub judice, *Colon* does not apply to Appellant's Indictment for aggravated burglary under R.C. § 2911.11(A)(1) because Count One includes two mens rea elements: knowingly trespass and purpose to commit any criminal offense. *State v. Smith,* Montgomery App. No. 07CA139, 2009-Ohio-56, at ¶ 76; *State v. Day,* Clark App. No. 07CA139, 2009-Ohio-56, at ¶ 22-23. An indictment setting forth a charged offense which tracks the language of the statute creating the offense does not have to set forth the elements of predicate offenses separately. *State v. Buehner,* 110 Ohio St.3d 403, 853 N.E.2d 1162, 2006-Ohio-4707. Unlike the robbery statute addressed in *Colon,* the level of intent to commit an aggravated burglary is clearly expressed in the statute, i.e., "with purpose to commit * * * a criminal offense." Therefore, the R.C. § 2901.21 reckless catchall provision does not apply. *State v. Davis,* Cuyahoga App. No. 90050, 2008-Ohio-3453; *State v. Snow,* Summit App. No. 24298, 2009-Ohio-1336, ¶ 14.

{¶23} Furthermore, this Court as well as a number of other Appellate Districts has previously concluded *Colon* has no applicability to cases in which the defendant enters a guilty plea because the plea to the indictment waives any defect. *State v. Ellis,* Guernsey App. No.2007-CA-46, 2008-Ohio-7002. See, e.g., *State v. McGinnis,* 3d Dist.

No. 15-08-97, 2008-Ohio-5825; *State v. Smith*, Sixth Dist. No. L-07-1346, 2009-Ohio-48; *State v. Felder*, Tenth Dist. No. 09AP-459, 09AP-460, 09AP-461, 2009 -Ohio- 6124; *State v. Hayden*, Eighth Dist. No. 90474, 2008-Ohio-6279.

{¶24} Appellant's first assignment of error is overruled.

II

{¶25} In his second assignment of error, Appellant contends his guilty plea was not knowingly, voluntarily, and intelligently entered because the trial court failed to inform him of his right to have the State obtain a unanimous jury verdict[1], and permitted him to plea guilty to an insufficient indictment. We disagree.

{¶26} In *State v. Ketterer,* 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, the Ohio Supreme Court reviewed a defendant's claim the trial court did not adequately inform him of his rights. The *Ketterer* Court, citing *State v. Jells* (1990), 53 Ohio St.3d 22, 559 N.E.2d 464, held there was no requirement for a trial court to interrogate a defendant in order to determine whether he or she is fully apprised of the right to a jury trial. Id. at paragraph one of syllabus. The Supreme Court explained the trial court was not required to specifically advise the defendant on the need for jury unanimity, Id. at paragraph 68, citing *State v. Bays* (1999), 87 Ohio St.3d 15, 716 N.E.2d 1126, which in turn cited *United States v. Martin* (C.A.6 1983), 704 F.2d 267. "A defendant need not have a complete or technical understanding of the jury trial right in order to knowingly and intelligently waive it." Id.

{¶27} This Court along with several courts including the Ohio Supreme Court, has held there is no requirement that a trial court inform a defendant of his right to a

[1] In Ohio, the unanimity requirement in criminal cases is set forth in Crim.R. 31(A), and provides: "The verdict shall be unanimous."

unanimous verdict. *State v. Dooley,* Muskingum App. No. CT2008-0055, 2009-Ohio-2095; *State v. Hamilton,* Muskingum App. No. CT2008-0011, 2008-Ohio-6328; *State v. Fitzpatrick,* 102 Ohio St.3d 321, 2004-Ohio-3167, at ¶ 44-46 (accused need not be told that jury unanimity is necessary to convict and to impose sentence); *State v. Smith,* Muskingum App. No. CT2008-0001, 2008-Ohio-3306 at¶ 27 (there is no explicit requirement in Crim.R. 11(C)(2)(a) that a defendant be informed of his right to a unanimous verdict; *State v. Williams,* Muskingum App. No. CT2007-0073, 2008-Ohio-3903 at ¶ 9 (the Supreme Court held an accused need not be told the jury verdict must be unanimous in order to convict); *State v. Barnett,* Hamilton App. No. C-060950, 2007-Ohio-4599, at ¶ 6 (trial court is not required to specifically inform defendant that she had right to unanimous verdict; defendant's execution of a written jury trial waiver and guilty plea form, as well as her on-the-record colloquy with the trial court about these documents, was sufficient to notify her about the jury trial right she was foregoing); *State v. Goens,* Montgomery App. No. 19585, 2003-Ohio-5402, at ¶ 19; *State v. Pons* (June 1, 1983), Montgomery App. No. 7817 (defendant's argument that he be told that there must be a unanimous verdict by the jury is an attempted super technical expansion of Crim.R. 11); *State v. Small* (July 22, 1981), Summit App. No. 10105 (Crim.R. 11 does not require the court to inform the defendant that the verdict in a jury trial must be by unanimous vote).

{¶28} Based upon the foregoing, we find Appellant's guilty plea was knowingly, voluntarily, and intelligently entered, and the trial court did not err in accepting the plea.

{¶29} Appellant further maintains his plea was not knowingly, voluntarily and intelligently entered because he pled guilty to an insufficient indictment. Herein,

Appellant incorporates the arguments he made in his first assignment of error. Having found no merit to Appellant's claim his indictment was insufficient, we cannot find his plea was not knowingly, voluntarily, and intelligently entered based on this reason.

{¶30} Appellant's second assignment of error is overruled.

III

{¶31} In his third assignment of error, Appellant argues aggravated burglary and rape are allied offenses under R.C. 2941.25(A); therefore, the trial court erred in separately sentencing him on each offense. Appellant adds, because he was convicted of both offenses, he was twice placed in jeopardy.

{¶32} A guilty plea waives all appealable errors except for a challenge as to whether the defendant made a knowing, intelligent and voluntary acceptance of the plea. *State v. Spates* (1992), 64 Ohio St.3d 269, 272-273, 595 N.E.2d 351. Ohio courts have repeatedly upheld plea agreements which are knowingly, intelligently, and voluntarily entered into even if the defendant argues that his plea included allied offenses. *State v. Jackson,* 8th Dist. No. 86506, 2006-Ohio-3165, at ¶ 13; *State v. Stansell* (Apr. 20, 2000), 8th Dist. No. 75889; *State v. Graham* (Sept. 30, 1998), 10th Dist. No. 97APA11-1524. Having found, in his second assignment of error, supra, Appellant's plea was knowingly, voluntarily, and intelligently entered, we find Appellant has waived any challenge to his sentence.

{¶33} Further, Appellant's double jeopardy rights were not violated because aggravated burglary and rape are not allied offenses of similar import. *State v. Monroe,* 105 Ohio St.3d 384, 827 N.E.2d 285, 2005-Ohio-2282, at ¶ 69. *State v. Butts*, Summit

App. No. 24517, 2009-Ohio-6430; *State v. Taylor*, Madison App. No. CA2007-12-037, 2009-Ohio-924.

{¶34} Appellant's third assignment of error is overruled.

IV

{¶35} In his fourth assignment of error, Appellant raises a claim of ineffective assistance of counsel. Specifically, Appellant asserts trial counsel was ineffective for allowing him to plead to an insufficient indictment; failing to ensure the trial court fully advise him of the rights he was waiving by entering his guilty plea; and agreeing to a sentence which violated his right against double jeopardy.

{¶36} A claim of ineffective assistance of counsel requires a two-prong analysis. The first inquiry is whether counsel's performance fell below an objective standard of reasonable representation involving a substantial violation of any of defense counsel's essential duties to appellant. The second prong is whether the appellant was prejudiced by counsel's ineffectiveness. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. In determining whether counsel's representation fell below an objective standard of reasonableness, judicial scrutiny of counsel's performance must be highly deferential. *Bradley* at 142, 538 N.E.2d 373. Because of the difficulties inherent in determining whether effective assistance of counsel was rendered in any given case, a strong presumption exists counsel's conduct fell within the wide range of reasonable professional assistance. Id.

{¶37} In order to warrant a reversal, the appellant must additionally show he was prejudiced by counsel's ineffectiveness. "Prejudice from defective representation

sufficient to justify reversal of a conviction exists only where the result of the trial was unreliable or the proceeding fundamentally unfair because of the performance of trial counsel." *State v. Carter* (1995), 72 Ohio St.3d 545, 558, 651 N.E.2d 965, citing *Lockhart v. Fretwell* (1993), 506 U.S. 364, 370, 113 S.Ct. 838, 122 L.Ed.2d 180.

{¶38} The United States Supreme Court and the Ohio Supreme Court have held a reviewing court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Bradley* at 143, 538 N.E.2d 373, quoting *Strickland* at 697.

{¶39} Having found no merit in Appellant's first, second, and third assignments of error, we find Appellant is unable to satisfy either prong of *Strickland*.

{¶40} Appellant's fourth assignment of error is overruled.

{¶41} The judgment of the Muskingum County Court of Common Pleas is affirmed.

By: Hoffman, J.

Edwards, P.J. and

Farmer, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Julie A. Edwards
HON. JULIE A. EDWARDS

s/ Sheila G. Farmer
HON. SHEILA G. FARMER

IN THE COURT OF APPEALS FOR MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
WILLIAM J. BARNETT	:	
	:	
Defendant-Appellant	:	Case No. CT2009-0025

For the reasons stated in our accompanying Opinion, the judgment of the Muskingum County Court of Common Pleas is affirmed. Costs to Appellant.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Julie A. Edwards
HON. JULIE A. EDWARDS

s/ Sheila G. Farmer
HON. SHEILA G. FARMER