[Cite as *State v. Taylor*, 2015-Ohio-2646.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- MATTHEW TAYLOR Defendant-Appellant	JUDGES: Hon. W. Scott Gwin, P.J. Hon. William B. Hoffman, J. Hon. Craig R. Baldwin, J. Case No. 14-CAA-06-0037 O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Delaware County Court of Common Pleas, Case No. 13-CR-I-11-0546
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	June 29, 2015

APPEARANCES:

For Defendant-Appellant	For Plaintiff-Appellee
ELIZABETH E. OSORIO The Law Office of Brian Jones 2211 U.S. Highway 23 North Delaware, Ohio 43015	CAROL HAMILTON O'BRIEN Delaware County Prosecuting Attorney MARK C. SLEEPER Assistant Prosecuting Attorney Delaware County Prosecutor's Office 140 North Sandusky St., 3rd Floor Delaware, Ohio 43015

Hoffman, J.

{¶1} Defendant-appellant Matthew Taylor appeals his conviction on one count of burglary, in violation of R.C. 2911.12(A)(1); one count of safecracking, in violation of R.C. 2911.31(A); and one count of breaking and entering, in violation of R.C. 2911.13(A), entered by the Delaware County Court of Common Pleas. Plaintiff-appellee is the state of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} In the early morning hours of January 16, 2013, after going to bed, R. Lamont Kaiser awoke to sounds of thumping and banging. Kaiser owns a building located at 25 West Central Avenue in Delaware, Ohio. The building is a converted residence, divided into a residence located in a part of the structure, and a law office in the rear of the downstairs first floor. The law office and residence have separate entrances, but share a hallway and doorway connecting the residence and law office. Kaiser sleeps on the ground floor of the building with windows open to the street level.

{¶3} Upon hearing the thumping and banging noises, Kaiser opened the door to his residence leading to the common hallway. He immediately noticed a hooded individual standing in the hallway separating the law office from the residence. Kaiser was unable to see the person's face due to the lighting.

{¶4} Kaiser yelled epithets at the person, slamming his bedroom door. Upon hearing the front door unlock and the storm door open, Appellant then saw something move from east to west across the front of the building. Kaiser called the police.

{¶5} Officer Madden of the Delaware Police Department responded to the call. Officer Madden discovered a glove in the alleyway behind the building. He sent the

glove to BCI for DNA testing. Officer Madden also obtained a DNA sample from Appellant. The DNA sample returned a major profile consistent with Appellant.

{¶6} Nickolas McCoy leases the law office space from Kaiser. Upon receiving a telephone call from the Delaware Police Department and Kaiser, he came to his office on the morning of January 16, 2013. He found a window in the law office had been broken into, a filing cabinet had been gone through, items from his desk had been strewn about, loose change had been collected and left on his desk and a safe in his office had been opened. The safe had been closed when McCoy had last seen it.

{¶7} Appellant was indicted on one count of burglary, in violation of R.C. 2911.12(A)(1), a second degree felony; one count of safecracking, in violation of R.C. 2911.31(A), a fourth degree felony; one count of breaking and entering, in violation of R.C. 2911.13(A), a second degree felony; one count of theft, in violation of R.C. 2913.02(A)(1), a first degree misdemeanor; and one count of breaking and entering, in violation of R.C. 2911.13(A), a fifth degree felony.

{¶8} On May 9, 2014, the State filed a notice of intent to introduce other acts evidence.

{¶9} On May 13, 2014, a jury trial began. Following the presentation of the State's evidence, Appellant's counsel moved for a Criminal Rule 29 motion for acquittal. A hearing was conducted on the motion. The trial court dismissed counts three and four of the indictment and counts one, two and five were submitted to the jury after closing arguments. On May 14, 2014, Appellant was convicted of all three remaining counts.

{¶10} Prior to sentencing, Appellant inquired of the trial court as to whether a presentence investigation would be conducted. The trial court responded a

presentence investigation would not be conducted. The trial court proceeded to sentencing. Appellant was sentenced to six years on count one, twelve months on count two and twelve months on count five. The court ordered the sentences to be served concurrently, but consecutive to Appellant's prison term imposed in Franklin County. The trial court further ordered restitution in the amount of $583.33.

{¶11} Appellant appeals, assigning as error:

{¶12} I. THE TRIAL COURT COMMITTED AN ABUSE OF DISCRETION IN PERMITTING EVIDENCE OF SIMILAR ACTS PURSUANT TO EVID.R. 404(B) RESULTING IN PREJUDICE TO MR. TAYLOR.

{¶13} II. MR. TAYLOR'S CONVICTIONS OF BURGLARY, BREAKING AND ENTERING, AND SAFECRACKING WERE BASED UPON INSUFFICIENT EVIDENCE AS THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT MR. TAYLOR WAS THE INDIVIDUAL WHO ENTERED THE STRUCTURE, THEREBY VIOLATING HIS RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND ARTICLE 1, SECTION 16 OF THE OHIO CONSTITUTION.

{¶14} III. MR. TAYLOR'S CONVICTIONS FOR BURGLARY, BREAKING AND ENTERING, AND SAFECRACKING WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE RESULTING IN A MISCARRIAGE OF JUSTICE, IN VIOLATION OF SECTION 3, ARTICLE IV OF THE OHIO CONSTITUTION, BECAUSE THE MANIFEST WEIGHT OF THE EVIDENCE SHOWED MR. TAYLOR WAS OUTSIDE OF THE STRUCTURE.

{¶15} IV. THE TRIAL COURT ERRED IN DENYING MR. TAYLOR A PRESENTENCE INVESTIGATION REPORT.

{¶16} V. THE TRIAL COURT ERRED IN SENTENCING MR. TAYLOR TO MULTIPLE PUNISHMENTS FOR ALLIED OFFENSES, BURGLARY AND BREAKING AND ENTERING; WHICH FLOWED FROM A SINGLE ACT WITH A SINGLE ANIMUS, IN VIOLATION OF R.C. 2941.25 AND ARTICLE I, SEC. 10 THE OHIO CONSTITUTION.

I

{¶17} In the first assignment of error, Appellant asserts the trial court erred in allowing the Evidence Rule 404(B) other acts evidence.

{¶18} Initially, we note, the State filed a notice of intent to use the other acts evidence on May 9, 2014. Appellant did not file an objection to the evidence.

{¶19} Prior to empanelling the jury and the commencement of trial, the following exchange occurred on the record,

> THE COURT: All right. That notice of intent was provided to Mr. Heagerty. Anything you want to address on that today?
>
> MR. HEAGERTY: Just, your Honor, basically that I think that obviously prior bad acts are not admissible in Court if the defendant doesn't testify. Obviously if he did choose to testify, which he is not going to, the State or the State can confront him with prior bad acts as a way to impeach his testimony.
>
> Obviously, these are situations, these are cases where he is currently incarcerated and disclosing these to the jury would, I believe,

prejudice the jury in a way that they would feel that if he committed those crimes that he must have committed these crimes. I think a 404(B) weighing of the evidence would, I think, unduly prejudice my client. And I just feel that letting these witnesses testify about an incident outside of the indictment here and outside the jurisdiction of Delaware, Delaware County, I think would unduly prejudice my client in the eyes of the jury.

THE COURT: All right. Mrs. Rohrer, you want to address what exactly - - why exactly you think the break-ins, which were down in the Worthington, Columbus area and Michael Irwin's Westerville office should be admissible?

MR. ROHRER: Your Honor, we are not moving to admit that evidence to prove his character of in order that he acted in conformity with that. 404(B) allows evidence to be on proof of motive, opportunity, plan, modus operandi.

THE COURT: In this case, why do you want it?

MR. ROHRER: It goes to identity. The question in this case for the trier of fact is going to be who committed this crime. I don't think there is going to be a dispute that happened. All of the events that we are seeking to introduce occurred either late on January 15th to early on January 16th, 2013. Our break-in at the Kaiser Law Office, Mr. Kaiser confronted the perpetrator at approximately 2:50 in the morning, somewhere in that area. The person fled. There was a glove found with DNA that links to the defendant.

At 5 o'clock that morning Columbus Police was called to Olentangy River Road to the Cope Law Office. When they arrived there they found the defendant in his car. They found a laptop computer, which was found to be the Irwin Law Office laptop computer and they caught him literally in the act of breaking into that building and they talked to him about it. He admitted doing it. It was a law office, which is the same as our case in Delaware is a law office and our case in Powell is a law office.

It was the same time frame. It was within two hours of the Delaware break-in. So it shows opportunity as well. He is from the Dayton Cincinnati area, so he is far away from where he is, putting him in this location and showing that he had the opportunity to commit these is also relevant under 404(B).

It shows plan that he broke into a law office, Irwin Law Office in Westerville. That break-in was discovered at 9:00 a.m. approximately on January 16th, when the administrative assistant came into work. She called the Westerville Police. They took the report. I think it was 9:14 a.m. on the 16th.

So we know the law office in Westerville was broken into over the night of the 15th and the 16th between 6:00 p.m. on the 15th and 8:00 a.m. when she got there or 8:30 a.m. when she got there on the 16th. So it is the same time frame. We know the Olentangy River Road incident occurred at 5:00 a.m. He was caught in the act at that one and then we know in the intervening time, Mike McCarthy's Office in Powell was broken

into and that was also discovered on the morning of the 16th. Powell Police was called and Mr. Kaiser's office was broken into approximately 3:00 a.m. All those locations are within close proximity to each other, i.e., a number of miles, which shows opportunity.

* * *

What about these other two incidents, other than the fact they are law offices in a certain area, would relate to the Powell break-in?

MR. ROHRER: Same type of law office. Same area involved and the same time frame involved and again, I would point out for the Court that the defendant is from the Dayton Cincinnati area. So him being in the area of all of these incidents occurring and being found at the Columbus scene is very pertinent to show that he had the opportunity to commit all these crimes, especially given the fact that he is not from around here.

* * *

THE COURT: How about the nature of the break-in? Anything about the nature of the break-ins that are consistent about what occurred during the break-ins, other than the fact that there was rifling through things in the offices, that doesn't really provide any identification. I'm sure in Columbus on any given night they have break-ins on stores that occur within a certain distance of one another and there is no way that is going to come in identifying a particular person. I mean I understand what you are saying, well, this is fairly unique being law offices.

MR. ROHRER: Your Honor, they caught him in the act of breaking in the Cope Law Offices. He confessed to it. We have a glove with DNA on the Delaware office, one in 23 billion. Those are pretty close connections to each other.

THE COURT: Right.

MR. ROHRER: It shows that he is at both crime scenes, that is MO evidence. Identity at the Delaware case, that's the one we are trying, identity was proven beyond a reasonable doubt. He pled guilty in the Columbus case.

THE COURT: Let's talk about Powell.

MR. ROHRER: In the Powell case there were pry marks on the doors, so it was a similar. The tool marks are similar to the Delaware case in that the pry bar was used. The screwdriver was found on his person in the Columbus case.

* * *

THE COURT: All right. The Court will grant the Prosecution's motion and allow 404(B) evidence, not to character, but to prove elements of an opportunity, plan, identity, identity being primary because nothing to show identity for the Powell break-in. There is some evidence on DNA on the Delaware break-in.

First of all, they are all law offices. So we are talking about two changed law offices here, too. Under the 404(B) being Westerville and northern Columbus Worthington area, all in the same night and

circumference radius of 20 miles, some certainly closer than that. I would think there would be more specificity when the evidence is presented. Maybe someone can testify based on a Map Quest search.

There is a glove lost in the Delaware break-in with DNA indicating that it is the defendant, Mr. Taylor. There is pry marks, screwdriver pry marks on the Delaware break-in as well as the Powell break-in. I'm not sure whether there are on the Westerville break-in. All the offices were rifled through. There was a laptop stolen in the Westerville break-in that was discovered in the Columbus break-in.

Further, a bag with a pair of gloves, which apparently no one bothered to compare with the glove up here, whether it is the same or not. I don't buy Mr. Rohrer's argument it is similar because I need to know what similar is and how Mr. Taylor is caught in the Columbus break-in. He admitted that break-in.

So for all those reasons the Court will admit that evidence.

Tr. at 12-22.

{¶20} We note, Appellant did not object to the introduction of the other acts evidence at trial. While Appellant argued against the introduction of the evidence prior to trial, a formal objection was never made during trial.

{¶21} The state introduced the testimony of Attorney McCarthy of Powell who testified his law office, located in a converted residential building, was broken into when the doors were kicked in. Appellant was later arrested for the break-in. Detective Darren Smith of the Powell Police Department testified Appellant had used gloves in the

break-in, and testified to Appellant's arrest for the incident. Appellant's counsel did not object to the testimony at any point.

{¶22} Officer Chase Rogers of the Columbus Police Department testified to a break-in he investigated wherein the windows were broken in, and electronics and computers were stolen. The break-in occurred at a converted law office. Officer Rogers identified Appellant as the perpetrator.

{¶23} Attorney Michael Irwin testified his law office was located in Westerville, Ohio in a converted residential building. He testified to a break-in at his office wherein the entry occurred through the window. He then indicated Appellant committed the break-in. Again, Appellant's counsel did not object or otherwise renew an objection to the other acts evidence.

{¶24} Evidence Rule 404(B) provides,

{¶25} (B) Other crimes, wrongs or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. In criminal cases, the proponent of evidence to be offered under this rule shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

{¶26} Here, the State provided Appellant with notice of intent to use the evidence at trial. We find the evidence was admissible to prove identity. The other acts evidence demonstrated Appellant had previously been involved in breaking and

entering into law offices located in converted residential structures through forcing entry through windows or doorways. The other acts evidence pertained to the same type of law offices located in converted residential structures, in the same area, during the same time frame. The evidence introduced provides a unique factual pattern sufficient to prove identity herein.

{¶27} The first assignment of error is overruled.

II and III.

{¶28} In the second and third assignments of error, Appellant maintains his convictions were against the manifest weight and sufficiency of the evidence. We disagree.

{¶29} The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different. *State v. Thompkins,* 78 Ohio St.3d 380, 678 N.E.2d 541 (1997), paragraph two of the syllabus. The standard of review for a challenge to the sufficiency of the evidence is set forth in *State v. Jenks,* 61 Ohio St.3d 259, 574 N.E.2d 492 (1991) at paragraph two of the syllabus, in which the Ohio Supreme Court held, “An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilty beyond a reasonable doubt. 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.”

{¶30} In determining whether a conviction is against the manifest weight of the evidence, the court of appeals functions as the "thirteenth juror," and after "reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of 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 overturned and a new trial ordered." *State v. Thompkins,* supra, at 387, 678 N.E.2d 541. Reversing a conviction as being against the manifest weight of the evidence and ordering a new trial should be reserved for only the "exceptional case in which the evidence weighs heavily against the conviction." *Id.*

{¶31} Appellant was convicted of breaking and entering, in violation of R.C. 2911.13(A),

> No person by force, stealth, or deception, shall trespass in an unoccupied structure, with purpose to commit therein any theft offense, as defined in section 2913.01 of the Revised Code, or any felony.

{¶32} Appellant was convicted of burglary, in violation of R.C. 2911.12(A)(1), which reads,

> (A) No person, by force, stealth, or deception, shall do any of the following:
>
> (1) 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;

{¶33} Finally, Appellant was convicted of safecracking, in violation of R.C. 2911.31,

> (A) No person, with purpose to commit an offense, shall knowingly enter, force an entrance into, or tamper with any vault, safe, or strongbox.

{¶34} The evidence introduced at trial demonstrates on the night/ morning in question, Mr. Kaiser woke to noises outside of his bedroom. He opened his door to his bedroom and came face to face with a hooded intruder. He closed the door, and heard the perpetrator leave through a locked outside door. He then saw a movement outside of the window as the individual moved east to west. The responding officer, Kaiser and Attorney McCoy testified an intruder broke into the law office located in a converted residence through the window. A filing cabinet had been opened and ransacked. Loose change had been gathered in a Ziploc bag, and left behind. Kaiser testified the door separating his residence from the law office was locked before the incident and after was open and had evidence of being forced open. Finally, testimony demonstrated the safe located in the law office was usually shut, was shut the last time Attorney McCoy was in the office and was open when they arrived after the break-in.

{¶35} DNA evidence found on a glove in the back driveway portion of the residence next to the building linked Appellant to the breaking and entering, burglary and safecracking. Further, other acts evidence corroborated Appellant's identity as the perpetrator of the acts. The evidence demonstrated Appellant had broken into a number of similar law offices in the area located in converted residential structures during the same time frame.

{¶36} Based upon the above, we do not find the jury lost its way in convicting Appellant of the charges, and there is sufficient, credible evidence to sustain Appellant's convictions herein.

{¶37} The second and third assignments of error are overruled.

IV.

{¶38} In the fourth assignment of error, Appellant argues the trial court erred in not ordering a presentence investigation prior to sentencing herein.

{¶39} Pursuant to Criminal Rule 32(A), a trial court need not order a presentence investigation in a felony case when probation is not granted. *State v. Cyrus,* 63 Ohio St.3d 164 (1992). The decision to order a PSI lies within the sound discretion of the trial court. Id.

{¶40} Here, Appellant was incarcerated on another conviction for breaking and entering at the time of sentencing. Accordingly, the trial court was not obligated to order a presentence investigation, and did not abuse its discretion in failing to do so.

{¶41} The fourth assignment of error is overruled.

V.

{¶42} In the fifth assignment of error, the trial court argues Appellant's convictions were subject to merger.

{¶43} R.C. 2941.25 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.

(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.

{¶44} The Ohio Supreme Court recently held in *State v. Ruff*, 2015-Ohio-995,

The defendant's conduct is but one factor to consider when determining whether multiple offenses are allied offenses of similar import pursuant to R.C. 2941.25(B). One justice in *Johnson* succinctly explained the idea of dissimilar import: "In practice, allied offenses of similar import are simply multiple offenses that arise out of the same criminal conduct and are similar but not identical in the significance of the criminal wrongs committed and the resulting harm." *Johnson,* 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, ¶ 64 (O'Connor, J., concurring in judgment). In other words, offenses are not allied offenses of similar import if they are not alike in their significance and their resulting harm.

We have previously cautioned that the inquiry should not be limited to whether there is separate animus or whether there is separate conduct. Courts must also consider whether the offenses have similar import. *State v. Baer,* 67 Ohio St.2d 220, 226, 423 N.E.2d 432 (1981).

The state alleges that no opinion from this court has ever clearly defined "import." However, in at least two cases we have illustrated when

offenses are of dissimilar import. In each case, we held that when the defendant's conduct put more than one individual at risk, that conduct could support multiple convictions because the offenses were of dissimilar import. *State v. Jones,* 18 Ohio St.3d 116, 118, 480 N.E.2d 408 (1985) (although there was only one car accident, "we view appellant's conduct as representing two offenses of dissimilar import—the 'import' under R.C. 2903.06 being each person killed"); *State v. Franklin,* 97 Ohio St.3d 1, 2002-Ohio-5304, 776 N.E.2d 26, ¶ 48 (even though the defendant set only one fire, his conduct caused six offenses of dissimilar import due to risk of serious harm or injury to each person). We have also indicated that offenses are not allied offenses of similar import if neither is incident to the other. *Moss,* 69 Ohio St.2d 515, 520, 433 N.E.2d 181 (aggravated burglary was not an allied offense of aggravated murder, because it was not incident to and an element of aggravated murder). What we conclude from these cases is 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.

The test for merger of multiple offenses

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).

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, and (3) the offenses were committed with separate animus or motivation.

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.

{¶45} Here, Appellant was convicted of breaking and entering, burglary and safecracking. The evidence set forth at trial demonstrates Appellant entered the law office through the window, and exited through a door in a common hallway. There was testimony from Kaiser the doorway leading to his residence was closed prior to the incident, and open with damage evidencing force, after the incident. Further, the testimony at trial demonstrates the safe at issue belonged to Kaiser, but was used by Attorney McCoy in his practice. We find the evidence introduced at trial demonstrates there were multiple victims to the offenses with separate harm.

{¶46} The trial court did not err in finding the offenses were not allied offenses of similar import.

{¶47} The fifth assignment of error is overruled.

{¶48} Appellant's convictions in the Delaware County Court of Common Pleas are affirmed.

By: Hoffman, J.

Gwin, P.J. and

Baldwin, J. concur