[Cite as *State v. Huhn*, 2015-Ohio-4929.]

COURT OF APPEALS
PERRY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- SAMANTHA HUHN Defendant-Appellant	JUDGES: Hon. William B. Hoffman, P.J. Hon. Patricia A. Delaney, J. Hon. Craig R. Baldwin, J. Case No. 15-CA-00006 O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Perry County Court of Common Pleas, Case No. 13-CR-0057
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	November 19, 2015

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JOSEPH A. FLAUTT Prosecuting Attorney 111 North High Street P.O. Box 569 New Lexington, Ohio 43764	JAMES S. SWEENEY James Sweeney Law, LLC 341 South Third Street, Suite 300 Columbus, Ohio 43215

Hoffman, P.J.

{¶1} Defendant-appellant Samantha Huhn appeals the February 18, 2015 Resentencing Entry entered by the Perry County Court of Common Pleas. Plaintiff-appellee is the state of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On August 25, 2013, Appellant forcibly entered the home of an 84 year–old woman in New Lexington, Ohio, robbing her of her purse and money. On September 18, 2013, Appellant was indicted by the Perry County Grand Jury on one count of aggravated burglary, two counts of aggravated robbery with a firearm specification, and one count of theft from an elderly person, also with a firearm specification.

{¶3} On December 23, 2013, Appellant entered pleas of guilty to one count of aggravated robbery, in violation of R.C. 2911.11(A)(1); and one count of aggravated burglary, in violation of R.C. 2911.01(A)(1); both felonies of the first degree.

{¶4} On February 5, 2014, the trial court sentenced Appellant to six years in prison on each of the aforesaid two counts, with the sentences to run consecutively.

{¶5} On appeal in *State v. Huhn,* Perry App. No. 14 CA 00011, 2014-Ohio-5559, this Court remanded the matter to the trial court for the limited purpose of a resentencing hearing to analyze Appellant's conduct in the offenses at issue, and to review potential merger of the offenses for sentencing.

{¶6} On remand, the trial court heard additional testimony from the victim in the case. The victim testified Appellant entered her house by removing a screen from a window and climbing in the window to enter the residence. Appellant then came up to the victim, grabbed her and ripped her oxygen off. Appellant pulled her out of the chair she

was sitting in, and took her to the bedroom. Appellant asked the victim where her purse was, and kicked items around the room searching for the victim's purse. When Appellant didn't find the purse, she body slammed the victim onto the bed, becoming angrier, causing physical injury to the victim, including bruising on her wrist and arms.

{¶7} Appellant then took the victim to the front room, proceeding to slam her onto the floor, jumping on her to hold her arms and hands down. Appellant then found a little purse under the television stand. When the victim screamed, Appellant hit her in the mouth.

{¶8} When Appellant didn't find any money in the purse, Appellant "jerked" the victim up and drug her on the floor to the bedroom. The victim told Appellant she would get some money, and proceeded to open a drawer in which she had a gun stored.

{¶9} The victim pulled the gun and held it to Appellant's stomach. Appellant grabbed the gun, stuck it to the victim's chest, then pointed the barrel of the gun at the victim's head.

{¶10} Upon locating the victim's purse, Appellant shoved the victim into a gun case, and ran out the front door, dropping the gun in the front room.

{¶11} Via Resentencing Entry of February 18, 2015, the trial court held,

> The Court having examined the evidence presented made an analysis pursuant to the directives of *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314 and determined that the offenses of Aggravated Burglary (Section 2911.11(A)(1) R.C.) and Aggravated Robbery (Section 2911.01(A)(1) R.C.) as committed by the Defendant were not allied offenses of similar import subject to merger under R.C. 2941.25.

{¶12} The trial court proceeded in sentencing Appellant for the offense of aggravated burglary, in violation of R.C. 2911.11(A)(1), to a term of six years, and for aggravated robbery, in violation of R.C. 2911.01(A)(1), to a term of six years to be served consecutively to the sentence imposed for aggravated burglary.

{¶13} Appellant appeals, assigning as error:

{¶14} "I. THE TRIAL COURT ERRED IN FAILING TO PROPERLY MERGE TWO ALLIED OFFENSES OF SIMILAR IMPORT AT SENTENCING PURSUANT TO R.C. 2941.25."

{¶15} Revised Code, Section 2941.25 reads,

> (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.

{¶16} In *State v. Johnson,* 128 Ohio St.3d 153, 942 N.E.2d 1061, 2010–Ohio–6314, the Ohio Supreme Court held,

> Under R.C. 2941.25, the court must determine prior to sentencing whether the offenses were committed by the same conduct. Thus, the court

need not perform any hypothetical or abstract comparison of the offenses at issue in order to conclude that the offenses are subject to merger.

In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), the question is 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. *Blankenship,* 38 Ohio St.3d at 119, 526 N.E.2d 816 (Whiteside, J., concurring) ("It is not necessary that both crimes are always committed by the same conduct but, rather, it is sufficient if both offenses *can be* committed by the same conduct. It is a matter of possibility, rather than certainty, that the same conduct will constitute commission of both offenses." [Emphasis sic]. If the offenses correspond to such a degree that the conduct of the defendant constituting commission of one offense constitutes commission of the other, then the offenses are of similar import.

If the multiple offenses can be committed by the same conduct, then the court must determine whether the offenses were committed by the same conduct, i.e., "a single act, committed with a single state of mind." *Brown,* 119 Ohio St.3d 447, 2008–Ohio–4569, 895 N.E.2d 149, at ¶ 50 (Lanzinger, J., dissenting).

If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged.

Conversely, if the court determines that the commission of one offense will *never* result in the commission of the other, or if the offenses

are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge.

{¶17} Recently, the Ohio Supreme Court in *State v. Ruff,* 2015–Ohio–995, 143 Ohio St.3d 114, addressed the issue of allied offenses, determining the analysis set forth in *Johnson* to be incomplete. The Court in *Ruff,* held,

> 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.

{¶18} Here, Appellant was convicted of Aggravated Burglary, in violation of R.C. 2911.11(A)(1), which reads,

> (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:
>
> (1) The offender inflicts, or attempts or threatens to inflict physical harm on another;

{¶19} Appellant was also convicted of Aggravated Robbery, in violation of R.C. 2911.01(A)(1), which reads,

> (A) No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following:
>
> (1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it;

{¶20} In *State v. Jarvi*, Ashtabula App. No. 2011-A-0063, 2012-Ohio-5590, the Eleventh District Court of Appeals found aggravated burglary and aggravated robbery were subject to merger as allied offenses. However, we find the factual scenario presented in *Jarvi* distinguishable from that presented herein.

{¶21} Appellant committed aggravated burglary (R.C. 2911.11(A)(1)) by removing the window screen of the victim's home and trespassing inside with the purpose of committing a theft offense and causing physical harm to the victim while doing so. The offense was complete prior to the time the victim first retrieved the gun.

{¶22} We find the conduct constituting the aggravated robbery is separate and distinct from the conduct constituting the aggravated burglary. The aggravated robbery (R.C. 2911.01(A)(1)) was committed when, after forcibly taking the gun from the victim, Appellant held the gun to the victim and again demanded the victim's purse and money.

{¶23} We find the trial court did not err in sentencing Appellant herein.

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

{¶25} The February 18, 2015 Resentencing Entry of the Perry County Court of Common Pleas is affirmed.

By: Hoffman, P.J.

Delaney, J. and

Baldwin, J. concur