[Cite as *State v. Knight*, 2014-Ohio-2222.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-13-1066

Appellee — Trial Court No. CR0201301206

v.

Donovan Knight — **DECISION AND JUDGMENT**

Appellant — Decided: May 23, 2014

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Evy M. Jarrett and Michael J. Loisel, Assistant Prosecuting Attorneys,
for appellee.

Joseph J. Urenovitch, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant appeals the sentence imposed in a judgment of conviction on a guilty plea for burglary and robbery in the Lucas County Court of Common Pleas. Because we conclude that robbery and burglary were not allied offenses of similar import and the six-year term of incarceration imposed was lawful, we affirm.

{¶ 2} On the evening of January 19, 2013, a 17 year-old was home alone at the east Toledo home he shared with his mother. At approximately 9:30 p.m., the teenage ex-boyfriend of the boy's sister knocked on the door looking for her. An hour later, the boy answered a second knock on the door.

{¶ 3} When he opened the door, he was smashed in the face by an intruder who put the boy in a headlock, dragged him to the center of the room and covered him with a sheet. The unknown intruder told the boy to lie on the floor and not move. The boy later reported that from his position on the floor he heard the door open and another individual enter the house. The boy heard the two rummaging through the house.

{¶ 4} When the boy's mother unexpectedly returned home, the intruders fled with a laptop computer and an X-Box. The two abandoned a flat screen television which had been removed from the wall and placed on a chair. The mother called police, who arrived too late to catch the thieves, but discovered evidence that quickly led them to the ex-boyfriend and his co-worker at a fast food restaurant, appellant, Donovan Knight.

{¶ 5} On February 1, 2013, the Lucas County Grand Jury handed down a two count indictment charging appellant with aggravated burglary, a first degree felony, and robbery, a second degree felony. Appellant initially pled not guilty, but subsequently agreed to plead guilty in return for the state amending the first count to burglary, a second degree felony.

{¶ 6} Following a plea colloquy, the trial court accepted the plea and found appellant guilty. The court subsequently sentenced appellant to a six-year term of

imprisonment for each count, to be served concurrently. From the judgment of conviction, appellant now brings this appeal. Appellant sets forth the following two assignments of error:

> I. The trial court committed error when it failed to determine whether appellant's two (2) convictions were allied offenses that merged.
>
> II. The trial court abused its' [sic] discretion imposing a non-minimum prison sentence.

I. Merger

{¶ 7} In his first assignment of error, appellant maintains that the robbery and burglary offenses for which he was convicted are allied offenses of similar import and should have been merged at sentencing pursuant to R.C. 2941.25.

{¶ 8} 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.

{¶ 9} The provision prevents multiple convictions of a single defendant arising out of the same occurrence. *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, ¶ 43. The statute limits legal exposure on acts which naturally arise from similar criminal acts when committed in a single transaction.

{¶ 10} The test to determine if multiple charges should be classified as allied offenses is two-pronged: (1) "whether it is possible to commit one offense and commit the other with the same conduct" and (2) "whether the offenses were committed by the same conduct, i.e., 'a single act, committed with a single state of mind.'" *Id*. at ¶ 48-49, quoting *State v. Brow*n, 119 Ohio St. 3d 447, 2008-Ohio-4569, 895 N.E.2d 149, ¶ 50. "[I]f 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." *Id*. at ¶ 51. When counts merge, the trial court must sentence on only one of the offenses. Concurrent sentences, although indistinguishable from a penal standpoint, are not synonymous with merger. *State v. Alcala*, 6th Dist. Sandusky No. S-11-026, 2012-Ohio-4318, ¶ 40.

{¶ 11} The offenses to which appellant pled guilty are burglary, in violation of R.C. 2911.12(A)(1), and robbery in violation of R.C. 2911.02(A)(2). The elements of burglary as charged prohibit any person (1) by force, stealth, or deception to (2) trespass in an occupied structure when another person other than an accomplice is present, (3) with the purpose to commit any criminal offense. The elements of robbery as charged

prohibit any person (1) attempting or committing a theft offense or in fleeing immediately after the attempt or offense, to (2) inflict, attempt to inflict, or threaten to inflict physical harm on another.

{¶ 12} The state suggests that our analysis should be governed by the logic followed in our consideration of aggravated burglary and aggravated robbery in *State v. Overton*, 6th Dist. Lucas No. L-12-1137, 2013-Ohio-3291. There we found that Overton's "conduct of breaking into the victim's home (burglary) was a separate action from leading her around her home in search of items to steal (robbery)." *Id.* at ¶ 18. Other than certain aggravating elements, the elements of burglary and aggravated burglary, and robbery and aggravated robbery, are the same. A burglary is complete once the perpetrator enters the occupied residence with the intent to commit a crime. Robbery occurs after entry into the home when the perpetrator encounters the victim inside the home and steals something from him or her by force or threat of force. *See id.* at ¶ 12.

{¶ 13} The burglary appellant committed was complete once he forced his way into the victim's home with the intent to steal something. The robbery occurred when appellant stole property after he bodily restrained the victim, inflicted physical harm and threated more physical harm. Thus, in the context of appellant's actions that led to his conviction on these counts, robbery and burglary were not allied offenses of similar import and the trial court did not err in failing to merge them. Appellant's first assignment of error is not well-taken.

II. Non-minimum Sentences

{¶ 14} In his remaining assignment of error, appellant argues that the trial court could not have properly considered the statutory purposes and principles of sentencing, because, had it done so, it would not have imposed anything other than the most minimal sentence.

{¶ 15} The standard of review for an appeal of a sentence is not abuse of discretion. *State v. Tammerline*, 6th Dist. Lucas No. L-13-1081, 2014-Ohio-425, ¶ 11. If a sentencing court is statutorily required to make findings or state findings on the record concerning the imposition of a sentence and fails to do so, the appeals court is directed to remand the case and instruct the sentencing court to state, on the record, the required findings. R.C. 2953.08(G)(1).

{¶ 16} An appeals court hearing a statutory felony sentence appeal must review the record, including the findings underlying the sentence. The appellate court may increase, reduce, modify, or vacate and remand a disputed sentence if it clearly and convincingly finds either of the following:

> (a) That the record does not support the sentencing court's findings under [R.C. 2929.13 (B) or (D)], [R.C. 2929.14 (B)(2)(e) or (C)(4)], or [R.C. 2929.20 (I)], whichever, if any, is relevant;
>
> (b) That the sentence is otherwise contrary to law. R.C. 2953.08(G)(2).

{¶ 17} For a second degree felony, the presumption is that a prison term is necessary to comply with the purposes and principles of sentencing as articulated in R.C.

2929.11. R.C. 2929.13(D)(1). A sentencing court need not state any findings unless the court elects not to sentence the offender to prison. *See* R.C. 2929.13(D)(2).

{¶ 18} In this matter, the sentencing court states in its judgment of conviction that it has considered the principles and purposes of sentencing and balanced the seriousness and recidivism factors contained in R.C. 2929.12 in reaching its sentencing determination. Appellant directs our attention to nothing in the record that would dispute this assertion. Consequently, the court's findings are supported by the record.

{¶ 19} The range of permissible sentences for a second degree felony is between two and eight years. R.C. 2929.14(A)(2). Consequently, the imposition of a six-year sentence on appellant is not contrary to law.

{¶ 20} Accordingly, appellant's second assignment of error is not well-taken.

{¶ 21} On consideration, the judgment of the Lucas County Court of Common Pleas is affirmed. It is ordered that appellant pay the court costs of this appeal pursuant to App.R. 24.

Judgment Affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE