[Cite as *State v. Ficklin*, 2009-Ohio-6103.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92228

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DAVID FICKLIN

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-513660

BEFORE: Stewart, J., Cooney, A.J., and Rocco, J.

RELEASED: November 19, 2009

JOURNALIZED:

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MELODY J. STEWART, J.:

{¶ 1} Defendant-appellant, David Ficklin, entered a no contest plea to, among other counts, burglary. The indictment originally charged Ficklin with a single count of burglary under R.C. 2911.12(A)(2), a second degree felony "and/or" R.C. 2911.12(A)(3), a third degree felony. When plea negotiations failed, the state amended the burglary count to delete the third degree felony language under R.C. 2911.12(A)(3) so that it could proceed only on the second degree felony listed under R.C. 2911.12(A)(2). Ficklin asked the court to dismiss the burglary count on grounds that the alternative nature of the indictment left unclear just what degree of burglary the grand jury had found probable cause to believe had been committed. The court denied the motion to dismiss, and Ficklin pleaded no contest to the charge. The ruling on the motion is the sole basis for appeal. We affirm.

{¶ 2} Ficklin argues that the "and/or" language of the indictment was so duplicitous that it cannot be ascertained whether a sufficient number of grand jurors found probable cause to believe that he had committed one individual crime. In other words, he claims that the existence of two different degrees of felony charged within a single count made it possible for the nine grand jurors to differ on the subject of probable cause for each felony; for example, five jurors could have found probable cause to believe he

committed burglary in violation of R.C. 2911.12(A)(3), while only four jurors could have found probable cause to believe he committed the higher degree of burglary under R.C. 2911.12(A)(2). This scenario, he argues, would violate the Crim.R. 6(F) requirement that at least seven of the nine grand jurors concur on an individual count.

{¶ 3} An indictment is characterized as "duplicitous" if it joins two or more distinct crimes in a single count. *United States v. Aracri* (C.A.2, 1992), 968 F.2d 1512, 1518; *State v. Moore*, Cuyahoga App. No. 80416, 2003-Ohio-1154, at ¶43. Duplicitous indictments create uncertainty as to whether the defendant's conviction was based on a unanimous jury decision. *United States v. Savoires* (C.A.6, 2005), 430 F.3d 376, 377 (count of indictment fatally duplicitous because it "cast substantial doubt on whether the defendant was unanimously convicted"). Duplicity in an indictment is not fatal, however, if the state chooses "either the count or charge within the count upon which it will rely." *United States v. Hood* (C.A.6, 2000), 210 F.3d 660, 663.

{¶ 4} The vehicle for choosing which count of a duplicitous indictment upon which the state intends to rely is Crim.R. 7(D). That rule allows the trial court to, "at any time before, during, or after a trial amend the indictment, information, complaint, or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with

the evidence, provided no change is made in the name or identity of the crime charged." The state properly asked the court to delete from the indictment any language referring to burglary under R.C. 2911.12(A)(3). The court's decision to amend the indictment thus cured any defect caused by duplicity.

{¶ 5} Ficklin argues that the court should not have allowed the state to amend the indictment because the "and/or" language of the indictment left the court with no way of knowing which offense the grand jury meant to charge: the second or third degree felony.

{¶ 6} The return of an indictment by the grand jury is prima facie evidence of probable cause. *Deoma v. Shaker Hts.* (1990), 68 Ohio App.3d 72, 77. Even though there were two different degrees of felony listed in the single count, the return of the indictment necessarily meant that the grand jury had probable cause to find that both degrees of felony had been committed. The "and/or" language proves the point: had the grand jury been undecided on what degree of felony Ficklin had committed under R.C. 2911.12, it would have used the word "or" in the indictment. Ficklin essentially argues that "and/or" means "either" — that the jury found he violated either R.C. 2911.12(A)(2) or (A)(3). But this argument ignores the use of "and." This use of "and" as part of "and/or" shows that the grand jury found probable cause to conclude that Ficklin violated both R.C. 2911.12(A)(2) and (A)(3). The inclusion of burglary under R.C. 2911.12(A)(3) is

unremarkable because burglary under R.C. 2911.12(A)(3) is a lesser included offense of burglary under R.C. 2911.12(A)(2). *State v. Brown* (Apr. 28, 2000), Hamilton App. No. C-980907. Had the grand jury truly intended to charge that Ficklin committed burglary "either" under R.C. 2911.12(A)(2) or (A)(3), it could easily have worded the indictment to reflect that intent without using "and" as part of "and/or."

{¶ 7} Admittedly, the use of "and/or" is awkward. "And/or" has been criticized as "[a] device, or shortcut, that damages a sentence and often leads to confusion or ambiguity." Strunk and White, Elements of Style (3d.Ed. 1979) 40. See, also, *Raine v. Drasin* (1981), 621 S.W.2d 895, 905 (Lukowsky, J., dissenting) (criticizing "and/or" as a "much condemned conjunctive-disjunctive crutch of sloppy thinkers"). The better practice is for the state to list each offense as a separate count in the indictment. But its failure to do so in this case does not inexorably lead to the conclusion that the grand jury did not find probable cause to believe that Ficklin committed burglary in violation of R.C. 2911.12(A)(2). The assigned error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

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

The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

MELODY J. STEWART, JUDGE

COLLEEN CONWAY COONEY, A.J., CONCURS

KENNETH A. ROCCO, J., DISSENTS WITH SEPARATE OPINION

KENNETH A. ROCCO, J., DISSENTING:

{¶ 8} I respectfully disagree with the majority opinion's disposition of Ficklin's assignment of error.

{¶ 9} The trial court's decision in this case, in essence, permitted the state to "reindict" him on Count 3 to a more serious offense without the necessity of pursuing the grand jury process. Since the trial court thereby forced him into this situation, Ficklin had no choice but to enter a no contest plea.

{¶ 10} "Duplicity," as the term is used with regard to criminal charges, is the joinder of two or more distinct offenses in one count. *State v. Moore*, Cuyahoga App. No. 80416, 2003-Ohio-1154, at ¶43, citing *State v. Johnson*

(1960), 112 Ohio App. 124, 127. "The test of duplicity is whether the *proof of one offense will tend to establish guilt of the other*." (Emphasis added.) Id.; cf., *State v. Minifee*, Cuyahoga App. No. 91017, 2009-Ohio-3089, at ¶57.

{¶ 11} In this case, the caption of Count 3 indicated Ficklin was charged with two distinct subsections of the burglary statute, viz., (A)(2) "and/or" (A)(3). Subsection (A)(2) contains an additional element, viz., "when a person other than an accomplice * * * is present or likely to be present," therefore, subsection (A)(3) is a lesser included offense. *State v. Evans*, 122 Ohio St.3d 381, 2009-Ohio-2974. Proof of one subsection clearly tends to establish proof of the other.

{¶ 12} This particular use of "and/or" in a single count presents a problem. Although an indictment "may allege *conjunctively* the offense to have been committed in more than one way," it may do so *only* when the "statute states *a number of ways disjunctively* in which an offense may be committed, *and the same punishment is prescribed* for the crime regardless of whether it is committed in one or all of the ways named." (Emphasis added.) *State v. Moore*, at ¶44.

{¶ 13} Obviously, a lesser included offense prescribes a lesser penalty. Count 3 alleged Ficklin committed burglary, but, in using "and/or," failed to specify precisely which particular *way* he committed burglary; one type

constituted a second-degree felony, while the other constituted a third-degree felony.

{¶ 14} Section 10, Article I of the Ohio Constitution states: "[N]o person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury." This provision "guarantees the accused that the essential facts constituting the offense for which he is tried will be found in the indictment of the grand jury." *State v. Headley* (1983), 6 Ohio St.3d 475.

{¶ 15} Crim.R. 7(D) supplements the constitutional right. *State v. Davis*, Highland App. No. 06CA26, 2007-Ohio-2249, at ¶14. That rule permits the trial court to amend the indictment "in respect to any defect, imperfection, or omission in form or substance, * * * provided *no change is made in the name or identity of the crime charged*. * * *" (Emphasis added.)

{¶ 16} "Thus, the rule permits most amendments, but flatly prohibits amendments that change the name or identity of the crime charged. See *State v. Kittle*, Athens [App. No.] 04CA41, 2005-Ohio-3198, at ¶12, citing *State v. O'Brien* (1987), 30 Ohio St.3d 122, 126, 508 N.E.2d 144, which approved an amendment that added an essential element to the charge. But, a trial court commits reversible error when it permits any amendment that changes the name or identity of the offense charged. [Citations omitted.] * * *." Id. at ¶15.

{¶ 17} When the name of the offense is not changed, as in this case, the analysis must proceed to consider whether deleting a portion of the indictment that changed the degree of the offense also changed its "identity." The question already is one that is "not free from difficulty." Id. at ¶16. It becomes more complicated when the same count alleges both an offense "and/or" its lesser included offense.

{¶ 18} "As the Supreme Court of Ohio made clear in *Headley*, *the identity of a crime is changed where an amendment purports to add an element that results in subjecting the defendant to a more serious penalty*." (Emphasis added.) *State v. Pepka*, Lake App. No. 2008-L-016, 2009-Ohio-1440, at ¶31.

{¶ 19} The state argues that since Count 3 charged Ficklin with violating both sections of the burglary statute, the crime itself was not changed by the trial court's amendment. To paraphrase the court in *Pepka*, the problem with the state's argument is that there is no way to tell, from the face of the unamended indictment, whether a *majority* of the grand jurors agreed that Ficklin committed the *higher* degree of the offense. Id. at ¶32. See, also, *State v. Fairbanks*, 172 Ohio App.3d 766, 2007-Ohio-4117. They merely indicated he committed one "and/or" the other.

{¶ 20} "In *State v. Colon* [118 Ohio St.3d 26, 2008-Ohio-1624], the Supreme Court of Ohio emphatically reiterated that a defendant's

constitutional right to have each and every necessary element of a crime found by presentment to the grand jury is not to be infringed." *Pepka* at ¶32. Furthermore, "Crim.R. 7(D) does not permit the amendment of an indictment when the amendment changes the penalty or degree of the charged offense; amending the indictment to change the penalty or degree changes the identity of the offense." *State v. Davis*, 121 Ohio St.3d 239, 2008-Ohio-4537, syllabus.

{¶ 21} From the foregoing, it can be gleaned that when a count contains both an offense and its lesser included offense, the indictment is defective. Whether the trial court has the authority to amend such an indictment to eliminate duplicity depends on whether Crim.R. 7(D) is violated by the amendment. *Cleveland v. Sammon*, Cuyahoga App. No. 92469, 2009-Ohio-3381, at ¶12, citing *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-1624.

{¶ 22} In this case, the trial court permitted the state to eliminate the lesser-included offense. However, while the majority opinion finds no difficulty with that action, the grand jury *did not specify* that in Count 3 that it found Ficklin committed a violation of R.C. 2911.12 (A)(2). Rather, the grand jury found that Ficklin committed a violation of R.C. 2911.12(A)(2) "and/or" (A)(3). The foregoing is *both* conjunctive *and* disjunctive. Only the grand jurors could rectify this anomaly.

{¶ 23} "To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure." *State v. Rohrbach*, 178 Ohio App.3d 211, 2008-Ohio-4781, at ¶23, quoting *Russell v. United States* (1962), 369 U.S. 749, 770.

{¶ 24} Ficklin had a constitutional right to be indicted by the grand jury. In my opinion, by eliminating the lesser included offense, the trial court erred.

{¶ 25} The record reflects that although Ficklin objected to the amendment, and moved for a dismissal of the indictment, he indicated to the court he would accede to an amendment of the indictment to charge only the lesser offense. Had the trial court followed this course, the remedy would have been appropriate. *Pepka*, supra. See, also, *State v. Hous*, Greene App. No. 02CA116, 2004-Ohio-666; *State v. Hayes*, Mahoning App. No. 07-MA-134, 2008-Ohio-4813. This would have been in accord with the "rule of lenity."

{¶ 26} The trial court, however, instead eliminated the language that charged Ficklin with committing a violation of the lesser included offense, R.C. 2911.12(A)(3), and thereby changed the identity of the crime. *Davis*, supra; cf., *State v. Craft*, 181 Ohio App.3d 150, 2009-Ohio-675; *State v. Rivers*, Cuyahoga App. No. 83321, 2004-Ohio-2566.

{¶ 27} Under the circumstances presented in this case, therefore, I would sustain Ficklin's assignment of error, reverse his convictions, and remand for further proceedings.