

[Cite as *State v. McCarty*, 2015-Ohio-4695.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 102441

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**JACEN R. MCCARTY**

DEFENDANT-APPELLANT

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**JUDGMENT:**  
REVERSED AND REMANDED

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-14-587532-A

**BEFORE:** Celebrezze, A.J., Keough, J., and Kilbane, J.

**RELEASED AND JOURNALIZED:** November 12, 2015

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FRANK D. CELEBREZZE, JR., A.J.:

{¶1} Defendant-appellant, Jacen R. McCarty (“McCarty”), brings this appeal challenging the trial court’s sentence for burglary, assault, and vandalism. Specifically, McCarty argues that the trial court erroneously failed to merge the vandalism and burglary counts as allied offenses of similar import. After a thorough review of the record and law, we reverse and remand for limited resentencing.

### **I. Factual and Procedural History**

{¶2} McCarty was charged following an incident at his ex-girlfriend’s house. After he was denied entry into the house, McCarty broke down the door, entered the house, and assaulted his ex-girlfriend’s new boyfriend

{¶3} The Cuyahoga County Grand Jury returned a four-count indictment charging McCarty with: (1) aggravated burglary, R.C. 2911.11(A)(1), (2) assault, R.C. 2903.13(A), (3) vandalism, R.C. 2909.05(A), and (4) criminal damaging or endangering, R.C. 2909.06(A)(1). After exchanging discovery, the parties reached a plea agreement.

{¶4} McCarty pled guilty to the amended indictment: (1) burglary, R.C. 2911.12(B), (2) assault, R.C. 2903.13, and (3) vandalism, R.C. 2909.05. The trial court sentenced McCarty to a jail term of 120 days, and suspended all but 45 days. Furthermore, the trial court sentenced McCarty to two years of community control sanctions.

{¶5} McCarty filed the instant appeal assigning one error for review:

I. The trial court committed plain error in failing to merge allied offenses of similar import.

## **II. Law and Analysis**

### **A. Review for Plain Error**

{¶6} First, McCarty argues that the trial court did not conduct an allied offenses analysis, and that the court’s failure to perform the statutorily mandated duty constitutes plain error. McCarty did not raise the issue of allied offenses during the sentencing hearing.

{¶7} The Ohio Supreme Court recently held that the issue of allied offenses must be raised with the trial court. In *State v. Rogers*, the court held that the failure to raise the issue of allied offenses of similar import forfeits all but plain error. *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 3. Furthermore, the court held that such error “is not reversible error unless it affected the outcome of the proceeding and reversal is necessary to correct a manifest miscarriage of justice.” *Id.*

{¶8} Crim.R. 52(B) affords appellate courts discretion to correct “[p]lain errors or defects affecting substantial rights,” even if the defendant did not raise those errors in the trial court. Where a defendant fails to raise the issue of merger in the trial court, the Ohio Supreme Court held that the burden is solely on the defendant — not the state or the trial court — to “demonstrate a reasonable probability that the convictions are for allied offenses of similar import committed with the same conduct and without a separate animus.” *Rogers* at ¶ 3. If the defendant fails to satisfy this burden, then “the accused cannot demonstrate that the trial court’s failure to inquire whether the convictions merge for purposes of sentencing was plain error.” *Id.*

{¶9} Furthermore, the Ohio Supreme Court noted that “even if the error is obvious, it must have affected substantial rights, and \* \* \* ‘the trial court’s error must have affected the

outcome of the trial.” *Id.* Thus, the accused must demonstrate a reasonable probability that the error resulted in prejudice. *Id.*, citing *United States v. Dominguez Benitez*, 542 U.S. 74, 81-83, 124 S.Ct. 2333, 159 L.Ed.2d 157 (2004).

{¶10} But even if an accused shows that the trial court committed plain error affecting the outcome of the proceeding, an appellate court is not required to correct it. This court has “admonish[ed] courts to notice plain error ‘with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.’” *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68, 759 N.E.2d 1240, quoting *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus.

{¶11} In the instant matter, by failing to raise the issue of allied offenses at the sentencing hearing, McCarty has forfeited all but plain error. *Rogers* at ¶ 21-25, citing *State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900, ¶ 15-16. Therefore, McCarty has the burden to “demonstrate a reasonable probability that the convictions are for allied offenses of similar import committed with the same conduct and without a separate animus \* \* \*.” *Rogers* at ¶ 22.

### **B. Allied Offenses of Similar Import**

{¶12} Second, McCarty argues that the trial court’s failure to conduct an allied offenses analysis caused prejudice, because a merger of the vandalism and burglary counts was supported by the facts and law.

{¶13} R.C. 2941.25 codifies the protections of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution, prohibiting multiple punishments for the same offense. R.C. 2941.25 states:

(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.

{¶14} In *State v. Johnson*, the Ohio Supreme Court created a two-part test to determine whether offenses are allied offenses of similar import under R.C. 2941.25. *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, ¶ 48. The *Johnson* test required the trial court to determine: (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, or “a single act, committed with a single state of mind.” *Id.* at ¶ 48-49, quoting *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, ¶ 50. If both questions are answered in the affirmative, the offenses are allied offenses of similar import and must be merged. *Johnson* at ¶ 50.

{¶15} However, the Ohio Supreme Court recently recognized that the *Johnson* two-part test does not offer the complete analysis necessary to determine whether offenses are subject to merger rather than multiple convictions and cumulative punishment. *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, ¶ 16. The Ohio Supreme Court identified the proper analysis in determining whether the offenses merge or whether the defendant may be convicted of separate offenses under 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.

*Ruff* at ¶ 25-26. The evidence during the change of plea and sentencing hearings will reveal whether McCarty's vandalism and burglary offenses have similar import. *See id.* at ¶ 26.

{¶16} McCarty argues that: (1) his act of vandalism was committed at the same time as the burglary; (2) the burglary and vandalism offenses were similar in import and significance: the same act resulted in both the vandalism and the burglary, and that act caused the same harm against the same victim (his ex-girlfriend); and (3) both the vandalism and the burglary were committed with the same animus — because he intended to carry out an assault on his ex-girlfriend's new boyfriend.

{¶17} R.C. 2909.05(A) defines vandalism: “no person shall knowingly cause serious physical harm to an occupied structure or any of its contents.” R.C. 2911.12(B) defines burglary: “no person, by force, stealth, or deception, shall trespass in a permanent or temporary

habitation of any person when any person other than an accomplice of the offender is present or likely to be present.”

{¶18} The bill of particulars provides, in relevant part:

Count One: Aggravated Burglary, R.C. 2911.11(A)(1)

[McCarty] did, by force, stealth, or deception, trespass, as defined in section 2911.21(A)(1) of the Revised Code, in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when [ex-girlfriend], a person other than the accomplice, was present, with purpose to commit in the structure or separately secured or separately occupied portion of the structure a criminal offense, to wit: assault, 2903.13, and the offender recklessly inflicted, or attempted or threatened to inflict physical harm on [ex-girlfriend].

Count Three: Vandalism, R.C. 2909.05(A)

[McCarty] did knowingly cause serious physical harm to an occupied structure or any of its contents owned by [McCarty’s ex-girlfriend].

The aggravated burglary count was subsequently amended to burglary, R.C. 2911.12(B).

{¶19} With respect to the state’s description of the incident, the prosecutor stated that:

Essentially on July 5th this defendant came to the house of...his ex-girlfriend...[S]he began dating another guy at the time who was the named victim in Count 2...Essentially he got into the house and those two got into a minor scuffle. There was no broken bones or anything. Just some scratches[.]

Defense counsel further explained that “[McCarty] pushed his way in. He didn’t slam the door on anybody or hurt anybody.” Cleveland Police Detective John Kraynik provided the following offense details:



McCarty, after previously being denied entry, forcefully entered the...residence through a secured door...Upon making entry, [McCarty] approached one (1) of the occupants in an aggressive manner, before assaulting the Vict. by striking him on his head/upper torso w/ open/closed fists.

{¶20} The parties conceded at the sentencing hearing that McCarty's motive for entering the house was the fact that he was angry at his ex-girlfriend and her new boyfriend. McCarty stated that he "had no intent of taking anything, stealing, did not mean to violate anybody. I had seen somebody with my girlfriend and I just — I raged out." The trial court confirmed this motive once more:

The Court: This time you went into the house because you were angry at your then ex-girlfriend/girlfriend and the guy she was with.

McCarty: Yes.

Furthermore, the state attested to McCarty's motive in the instant matter, distinguishing this incident from McCarty's 2012 burglary conviction:

So [the 2012 burglary] was an actual burglary the way we lay people might think of a burglary. This is more so, like he said, is a fit of rage going in.

{¶21} After reviewing the record — and considering the conduct, animus, and import of the offenses — we find that McCarty has met his burden in showing a reasonable probability that his vandalism and burglary convictions are for allied offenses of similar import — committed with the same conduct and without a separate animus.

{¶22} Regarding the first *Ruff* factor, McCarty's vandalism and burglary offenses are similar in import and significance. McCarty's vandalism and burglary offenses neither resulted in separate/multiple victims nor separate and identifiable harm. The Ohio Supreme Court stated

that “[w]hen 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.” *Ruff* at ¶ 26. This was not the case in the instant matter: McCarty’s use of force resulted in: (1) a trespass into the ex-girlfriend’s home and (2) structural damage to the ex-girlfriend’s home and/or door. Although the new boyfriend was a victim of McCarty’s assault, he was not victimized by McCarty’s use of force in committing the vandalism and burglary offenses. Thus, the vandalism and burglary offenses did not cause separate and identifiable harm.

{¶23} Regarding the second *Ruff* factor, McCarty’s vandalism and burglary offenses were not committed separately. After he was denied entry into his ex-girlfriend’s home, McCarty forcibly entered the home where the ex-girlfriend and the male victim were present. The same conduct — McCarty’s use of force — that allowed him to gain entry into the home caused the structural damage to the door. McCarty committed the vandalism and burglary offenses at the same time and with the same conduct. Thus, the offenses were not committed separately.

{¶24} Regarding the third *Ruff* factor, McCarty committed the vandalism and burglary with the same animus or motivation — intending to enter the home and assault the male victim. The parties agreed that anger and jealousy regarding the new boyfriend motivated McCarty — not only in committing the vandalism and burglary offenses, but also in committing the assault. Furthermore, the record supports that McCarty committed the vandalism and burglary offenses with the same animus. Thus, the vandalism and burglary offenses were not committed with separate animus or motivation.

{¶25} Based on our review of the record and the foregoing *Ruff* analysis, McCarty has demonstrated a reasonable probability that his vandalism and burglary convictions are for allied

offenses of similar import — committed with the same conduct and without a separate animus. Thus, McCarty has demonstrated a prejudicial effect on the outcome of the proceeding, and the trial court's failure to inquire whether the convictions merged for sentencing was plain error. *See Rogers* at ¶ 25.

{¶26} McCarty's sole assignment of error is sustained.

### **III. Conclusion**

{¶27} After reviewing the record, we find that McCarty's vandalism and burglary offenses: (1) are similar in import and significance, (2) were not committed separately, and (3) were committed with the same animus or motivation. McCarty has demonstrated a reasonable probability that his vandalism and burglary convictions are for allied offenses of similar import, committed with the same conduct and without a separate animus. The trial court committed plain error in failing to conduct a merger analysis at the sentencing hearing, and this error had a prejudicial effect on the outcome of the proceeding.

{¶28} We sustain McCarty's assignment of error, because the vandalism and burglary offenses should have been merged for sentencing. Accordingly, we reverse and remand the matter to the trial court for resentencing consistent with this opinion.

{¶29} Judgment reversed and case remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant recover from appellee 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 common pleas court to carry this judgment into execution.

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

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FRANK D. CELEBREZZE, JR., ADMINISTRATIVE JUDGE

KATHLEEN ANN KEOUGH, J., and  
MARY EILEEN KILBANE, J., CONCUR