[Cite as *State v. Hill*, 2010-Ohio-4489.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93883

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

EDWARD HILL

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART AND
VACATED IN PART

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-522402

BEFORE: Stewart, J., Rocco, P.J., and Jones, J.

RELEASED AND JOURNALIZED: September 23, 2010

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MELODY J. STEWART, J.:

{¶ 1} Defendant-appellant, Edward Hill, appeals his convictions and sentences for attempted burglary and criminal damaging following a bench trial in the Cuyahoga County Court of Common Pleas. For the reasons that follow, we affirm appellant's convictions, but vacate the restitution order.

{¶ 2} Appellant's convictions resulted from an incident that occurred on February 29, 2009 at the home of Sharonda Sherman in Maple Heights. Sherman testified that she and appellant had been involved in an on-again, off-again romantic relationship. The night of the incident, appellant was out drinking with his cousin. He called and sent text messages to Sherman

multiple times from the bar asking her to come out and join him, but she refused.

{¶ 3} At about 4:30 a.m., appellant went to Sherman's house and began yelling for her to let him in. When she did not respond, appellant pulled open the screen door on the side of the house, damaging the mechanism. He then tried to kick in the side door, marking the door, and damaging the doorjamb. He tore out the screen on Sherman's bedroom window with a rock and scraped the window. He moved to the front door of the house where he shattered the glass on the storm door and broke one of the window panels in the front door. This activated the home security system and set off an alarm. Appellant fled. The security service notified the police and advised Sherman to do the same. Maple Heights police responded and took photographs of the damage. When appellant was later questioned by the police, he initially denied involvement but later admitted, in a written statement, that he had been out drinking that night and could not remember what happened.

{¶ 4} Appellant was indicted on charges of attempted aggravated burglary, attempted burglary, criminal damaging, and telecommunications harassment. The trial court dismissed the attempted aggravated burglary charge, pursuant to Crim.R. 29, and found appellant not guilty of telecommunications harassment. The court found appellant guilty of the

lesser included offense of attempted burglary under R.C. 2923.02 and R.C. 2911.12(A)(4), a felony of the fifth degree, and of criminal damaging, a misdemeanor. At sentencing, the trial court imposed a one-year community control sanction and ordered appellant to make restitution of $100 to the victim for the damage to her house. Appellant timely appeals raising three errors for review.

{¶ 5} In his first assignment of error, appellant argues that there was insufficient evidence to support his conviction for attempted burglary. When reviewing the sufficiency of the evidence to support a criminal conviction, this court examines the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt 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. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶ 6} For the attempted burglary conviction, the state had to prove that appellant attempted, "by force, stealth, or deception," to "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." A trespass occurs when a person, without privilege to do so, knowingly enters or

remains on the land or premises of another. See R.C. 2911.21. Appellant argues that he cannot be convicted of this offense because he did not enter the house and there is no evidence that he had any intention of entering the house.

{¶ 7} Intent is determined by the surrounding facts and circumstances. *State v. Smith*, 8th Dist. No. 84292, 2004-Ohio-6111, at ¶20, quoting *State v. Huffman* (1936), 131 Ohio St. 27, 1 N.E.2d 313, paragraph four of the syllabus. It is apparent from the evidence that appellant intended to enter the house. Ms. Sherman testified that appellant yelled at her to let him into the house, but she did not want to do so. She described appellant running back and forth between the window of her bedroom and the side door. The investigating police officer testified to the damage appellant did to the doors and windows. Photographs of the house show the boot prints appellant left on the side door and the doorjamb when he tried to kick in the door. The photographs show the shattered glass from the front storm door and the broken window panel on the front security door. Ms. Sherman and the officer testified to finding glass inside the house. Ms. Sherman testified that appellant only stopped his efforts to enter when the house alarm sounded. This evidence, if believed, demonstrates that appellant, by force, attempted to enter Ms. Sherman's house without privilege to do so. Construing the evidence in the state's favor, as we must for this review, supports a finding

that appellant attempted to commit a violation of R.C. 2911.12(A)(4). Accordingly, appellant's first assignment of error is overruled.

{¶ 8} In his second assignment of error, appellant contends that the trial court erred in not merging his convictions for attempted burglary and criminal damaging. He argues that the two offenses are allied offenses of similar import that were not committed with a separate animus, and therefore, pursuant to R.C. 2941.25 he may be charged with both offenses but convicted of only one. Appellant acknowledges that in *State v. Smith*, 8th Dist. No. 84292, 2004-Ohio-6111, this court expressly held that attempted burglary and criminal damaging are not allied offenses of similar import. However, he maintains that this decision is no longer valid in light of the Ohio Supreme Court's decision in *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181. He argues that the elements of the two offenses correspond to such a degree that the commission of criminal damaging results in an attempted burglary.

{¶ 9} In *Cabrales*, the court held that in determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), courts need not apply a strict textual comparison to determine whether the elements exactly align. Instead, courts must compare the elements of offenses in the abstract; i.e., without considering the evidence in the case, but the elements of the two offenses need not align exactly. The court stated, "if, in comparing the

elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in commission of the other, then the offenses are allied offenses of similar import." Id. at ¶26.

{¶ 10} In *Smith*, this court compared the elements of the two offenses in the abstract and found that, "it is apparent that the elements do not correspond to such a degree that the commission of one offense would result in the commission of the other offense. One can trespass on another's property without damaging that property. Conversely, one can damage another's property without satisfying the element of trespass." *Smith* at ¶27. Therefore, under *Cabrales*, this court's prior analysis remains sound. Attempted burglary and criminal damaging are not allied offenses of similar import and, therefore, appellant could be convicted of both. Appellant's second assignment of error is overruled.

{¶ 11} In his third assignment of error, appellant contends that the trial court erred in ordering restitution for amounts he had already paid. He argues that the court erroneously ordered restitution in the amount of $100 when Ms. Sherman's testimony establishes that he had previously paid her $100 for the damage.

{¶ 12} Pursuant to R.C. 2929.18, the trial court may order restitution by the offender to the victim in an amount based upon the victim's economic loss. "To establish the amount of restitution within a reasonable certainty, there

must be some competent, credible evidence." *State v. Carrino* (May 11, 1995), 8th Dist. No. 67696, citing *State v. Warner* (1990), 55 Ohio St.3d 31, 69, 564 N.E.2d 18. "Sufficient evidence of the amount of restitution may appear in the record." *Carrino*, citing *State v. Montes* (1993), 92 Ohio App.3d 539, 636 N.E.2d 378 (victim testified to the value of stolen car during trial).

{¶ 13} At the sentencing hearing, appellant objected to restitution and told the court that he had paid Ms. Sherman $100 two months earlier. The trial judge stated, "I'm going to order a hundred dollars in restitution, okay, on this case. And then if I hear from Miss Sherman that it's been paid - - and I think she said that, but lets assume that I heard wrong. All I'm looking for is a letter of something to say, I have been paid, its been paid, and then I'll terminate the restitution order."

{¶ 14} A review of the transcript of the trial establishes that appellant's objection is well founded. Ms. Sherman testified that she borrowed money from her sister to pay for the damage to her door. She testified she asked appellant for $100 and he gave it to her. She said she paid her sister back with the money from appellant. Accordingly, we sustain appellant's third assignment of error and vacate the order of restitution.

Judgment affirmed in part and vacated in part.

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.

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

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MELODY J. STEWART, JUDGE

KENNETH A. ROCCO, P.J., and
LARRY A. JONES, J., CONCUR