[Cite as *State v. Cambron*, 2020-Ohio-819.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
HIGHLAND COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 19CA6
vs.	:	
SHAWN LEE CAMBRON,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

Timothy Young, Ohio Public Defender, and Addison M. Spriggs, Assistant Ohio State Public Defender, Columbus, Ohio, for appellant.[1]

Anneka P. Collins, Highland County Prosecuting Attorney, and Adam J. King, Highland County Assistant Prosecuting Attorney, Hillsboro, Ohio, for appellee.

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 2-26-20
ABELE, J.

{¶ 1} This is an appeal from a Highland County Common Pleas Court judgment of conviction and sentence. Shawn Lee Cambron, defendant below and appellant herein, raises the following assignments of error for review:

> FIRST ASSIGNMENT OF ERROR:
>
> "THE TRIAL COURT FAILED TO MERGE ALLIED OFFENSES OF SIMILAR IMPORT AND IMPOSED A LONGER PRISON TERM THAN AUTHORIZED BY LAW."

[1]Different counsel represented appellant during the trial court proceedings.

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT ORDERED RESTITUTION THAT WAS UNSUPPORTED BY THE RECORD AND FAILED TO ORDER JOINT AND SEVERAL RESTITUTION WHICH RESULTED IN RESTITUTION THAT EXCEEDED THE VICTIMS [SIC] ECONOMIC LOSS."

{¶ 2} On August 24, 2018, officers responded to an alarm at a Sunoco gas station in Hillsboro. After they arrived at the station, the officers noticed the front door ajar, pry marks on the door, and a damaged lock. Officers also noticed two persons, one wearing a mask and the other a hood, positioned inside the station behind the cash register. Officers ordered the two individuals to stop and show their hands, but both fled out the back door. Eventually, officers apprehended and identified both men as the appellant and appellant's co-defendant, Ronald William Cambron.

{¶ 3} Inside the station, the officers also noticed that the alarm pad had been pried off the wall and the cash register pried open. Officers recovered two crowbars near the cash register: (1) one with mud on it, consistent with the mud on the pry marks on the front door; and (2) the other with drywall residue, consistent with the alarm system keypad that had been pried from the wall.

{¶ 4} The State of Ohio, plaintiff below and appellee herein, alleged that surveillance video showed appellant's co-defendant prying the key pad from the wall. The appellee further alleged that a gas station employee informed officers that the cash register contained $300. The appellee further alleged that officers recovered stolen cash and gift cards from appellant and appellant's co-defendant.

{¶ 5} Subsequently, the Highland County Grand Jury returned an indictment that charged appellant with (1) breaking and entering to commit a felony in violation of R.C. 2911.13, a fifth

degree felony; (2) theft in violation of R.C. 2913.02, a first degree misdemeanor; and (3) the possession of criminal tools in violation of R.C. 2923.24, a fifth degree felony. After discovery, the parties reached an agreement whereby appellant pleaded guilty to breaking and entering and the possession of criminal tools. The trial court accepted appellant's plea, imposed a seven-month prison sentence for each offense to be served consecutively to each other for an aggregate sentence of 14 months, imposed post-release control, ordered $927.48 in restitution and imposed a $500 fine. This appeal followed.

I.

{¶ 6} In his first assignment of error, appellant asserts, citing *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, that the breaking and entering offense and the possession of criminal tools offense are allied offenses of similar import and the trial court's failure to merge the offenses and sentence constitute plain error. Appellant argues that because the conduct, harm and animus are the same for the commission of both the breaking and entering offense and the possession of criminal tools offense, the court should have merged the two offenses and the state choose the offense for which the court would impose sentence.

{¶ 7} In response, the appellee argues that breaking and entering offense and the possession of criminal tools offense are not allied offenses of similar import, and, therefore, should not merge. Thus, the trial court did not err in sentencing appellant for both offenses. The appellee relies on *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, which interpreted R.C. 2941.25 and set out the following two-part test to determine when multiple offenses must merge: if it is "possible" to commit both offenses with the same conduct, and if the offenses were in fact committed by the same conduct; then the offenses are allied offenses of similar import and must

merged. *Id*. at ¶ 48. Otherwise, a defendant may be sentenced for both offenses.

{¶ 8} The appellee concedes, however, that under the first part of the *Johnson* test, it is *possible* that the same conduct may result in the commission of breaking and entering and possession of criminal tools. Nevertheless, the appellee argues that under the second part of the *Johnson* test, appellant used the criminal tool (crowbar) to break into the gas station, then separately used the tool to pry open the cash register and commit a different theft offense. Thus, the appellee contends that the use of a crowbar to pry open the cash register constitutes two separate offenses committed by distinct actions, so that the offenses do not merge and the trial court correctly sentenced appellant for both offenses.

{¶ 9} " 'The defendant bears the burden of establishing his entitlement to the protection, provided by R.C. 2941.25, against multiple punishments for a single criminal act.' " *State v. Washington*, 137 Ohio St.3d 427, 2013-Ohio-4982, 999 N.E.2d 661, ¶ 18, *quoting State* v. *Mughni*, 33 Ohio St.3d 65, 67, 514 N.E.2d 870 (1987). Appellate courts conduct a de novo review of a trial court's R.C. 2941.25 merger determination. *State v. Conrad*, 4th Dist. Hocking No. 18CA4, 2019-Ohio-263, ¶ 35, citing *State v. Williams,* 134 Ohio St.3d 482, 2012-Ohio-5699, 983 N.E.2d 1245. "We therefore afford no deference to the trial court's legal conclusion, but instead, independently determine whether the established facts satisfy the applicable legal standard." *Id*., citing *Williams* at ¶ 25-27. Furthermore, because appellant did not object to his sentence in the trial court for both breaking and entering and the possession of criminal tools, we review this issue under the plain error standard of review. In other words, appellant "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; absent that showing, the accused cannot

demonstrate that the trial court's failure to inquire whether the convictions merge for purposes of sentencing was plain error." *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 3.

{¶ 10} "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, which prohibits multiple punishments for the same offense.' " *State v. Osman*, 4th Dist. Athens No. 13CA22, 2014-Ohio-294, ¶ 17, quoting *State v. Underwood,* 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶ 23. 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.

"By its enactment of R.C. 2941.25(A), the General Assembly has clearly expressed its intention to prohibit multiple punishments for allied offenses of similar import." *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, ¶ 8, citing *State v. Rance*, 85 Ohio St.3d 632, 710 N.E.2d 699 (1999), paragraph three of the syllabus, overruled on other grounds. "By contrast, the General Assembly exercised its power to permit multiple punishments by enacting R.C. 2941.25(B)." *Id*., citing *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, ¶ 17, *Rance*, 85 Ohio St.3d at 635, 710 N.E.2d 699. However, the application of R.C. 2941.25 has proven difficult for courts over the years, so the Supreme Court of Ohio has interpreted this statute many times. *See Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, ¶ 14-16.

{¶ 11} The appellee relies on *Johnson* and its two-part test to determine whether multiple offenses must be merged because they constitute allied offenses of similar import. *State v. Johnson,* 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061. Alternatively, appellant argues that *Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, is the proper case to apply. We have recognized that *Ruff* "did not expressly overrule" *Johnson* in *State v. Craig*, 4th Dist. Athens No. 15CA22, 2017-Ohio-4342. However, more recently the Supreme Court of Ohio has stated that reliance on *Johnson* is "misplaced" because "[t]he lead opinion in *Johnson* did not receive the support of a majority of this court, and more recent decisions of this court have rendered the analysis of the *Johnson* lead opinion largely obsolete." *State v. Earley*, 145 Ohio St.3d 281, 2015-Ohio-4615, 49 N.E.3d 266, citing *Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, ¶ 16 (recognizing that although *Johnson* included a syllabus paragraph, our decision in that case "was incomplete"). Accordingly, we agree with appellant that *Ruff*, not *Johnson*, sets forth the applicable test to decide the merger issue.

{¶ 12} In *Ruff*, the court was "asked to revisit the holding in *State v. Johnson,* 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061 * * * [b]ecause the circumstances of when offenses are of dissimilar import within the meaning of R.C. 2941.25(B) have been unclear." *Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, at ¶ 1. *Ruff* concluded 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." *Id*. at ¶ 26.

{¶ 13} The *Ruff* court set out three questions for a reviewing court to consider in order to determine when a defendant's conduct supports multiple offenses and whether those offenses

constitute allied offenses of similar import within the meaning of R.C. 2941.25: (1) Were the offenses dissimilar in import or significance? (2) Were they committed separately? (3) Were they committed with separate animus or motivation? *Ruff* at ¶ 13, *Craig*, 4th Dist. Athens No. 15CA22, 2017-Ohio-4342, ¶ 15. If one question is answered in the affirmative, then separate convictions are permitted. *Id*., citing *State v. Smith*, 4th Dist. Scioto No. 15CA3686, 2016-Ohio-5062, 70 N.E.3d 150, ¶115.

{¶ 14} R.C. 2911.13 (A) defines breaking and entering: "No person by force, stealth, or deception, shall trespass in an unoccupied structure, with purpose to commit therein any theft offense, as defined in section 2913.01 of the Revised Code, or any felony." R.C. 2923.24(A) defines the possession criminal tools: "No person shall possess or have under the person's control any substance, device, instrument, or article, with purpose to use it criminally."

{¶ 15} Our research reveals that cases that explicitly address whether breaking and entering and the possession of criminal tools constitute allied offenses of similar import were decided prior to *Ruff*. Thus, we do not rely on these cases but, instead, apply the *Ruff* test. We begin our analysis by examining the first question of the *Ruff* test: Were the offenses dissimilar in import or significance? Or, as interpreted by *Ruff,* were there multiple victims or separate, identifiable harms caused by each of the offenses at issue? In the case sub judice, with regard to the number of victims, it appears that the gas station owner is the only victim. With regard to the harm, appellant used a crowbar (the criminal tool) to pry open the gas station door and commit the breaking and entering offense. Appellant then again used the crowbar to disable the alarm and open the cash register to commit a theft, which is an element of breaking and entering. Therefore, we find that the "harm" caused by the criminal tool and breaking and entering is the same and the answer to the first

question of the *Ruff* test is no, the offenses of breaking and entering and possession of criminal tools are "not dissimilar" in import or significance because there were not multiple victims and the harm each caused by both offenses is not separate and identifiable.

{¶ 16} Having answered the first question of the *Ruff* test in the negative, we now consider the next question: "Were [the offenses] committed separately? Ruff at ¶ 13. Appellant used a crowbar, a criminal tool, to forcibly pry open the door to gain entry into the gas station. After breaking into the gas station, appellant again used the crowbar, a criminal tool, to pry the alarm off the wall and to pry open the cash register. We believe that, after appellant used the crowbar to gain access to the gas station, he completed the offense of breaking and entering (i.e. appellant used the crowbar to gain access to the gas station and to trespass for the purpose of committing a theft). Consequently, appellant's use of the crowbar, as a criminal tool as he committed the breaking and entering offense, was separate from the offense of using a crowbar to pry the alarm from the wall and to pry open the cash register, notwithstanding their proximity in time and location. *See generally*, *State v. Penwell*, 12th Dist. Fayette Nos. CA2016-12-020 and CA2016-12-021, 2017-Ohio-7465; *State v. Black*, 12th Dist. Butler Nos. CA2015-03-037, CA2015-03-038, 2015-Ohio-4447; *State v. Lane*, 12th Dist. Butler No. CA2013-05-074, 2014-Ohio-562; *State v. DeWitt*, 2nd Dist. Montgomery No. 24337, 2012-Ohio-630. Having answered the second *Ruff* question in the affirmative, we need not proceed to the third question because an affirmative answer to any of the three *Ruff* questions means that the defendant may be convicted of both offenses. *Smith*, 4th Dist. Scioto No. 15CA3686, 2016-Ohio-5062, 70 N.E.3d 150, ¶ 115.

{¶ 17} Accordingly, based upon the foregoing reasons, we overrule appellant's first assignment of error.

II.

{¶ 18} In his second assignment of error, appellant asserts that the record does not support the trial court's restitution order. Appellant further asserts that the trial court failed to order joint and several restitution and ordered restitution that exceeds the victim's economic loss. Appellant alleges that, at the time of their arrest, officers confiscated $102.14 from him and $2,800 from his co-defendant, but the trial court ordered appellant to pay $927.48 in restitution. Appellant argues that (1) the record shows that only $300 was taken from the gas station cash register, and (2) he and his co-defendant should be joint and severally liable for the restitution. Therefore, appellant contends that the restitution order should be reversed and the matter remanded to determine the appropriate amount of restitution.

{¶ 19} Appellee, on the other hand, argues that the record does support $927.48 in restitution because appellant agreed that $927.48 is the proper amount of restitution. Thus, the appellee asserts that a stipulated or agreed amount of restitution provides a "sufficient basis" for ordering restitution in that amount.

{¶ 20} Generally, a court may order a criminal defendant to pay restitution pursuant to 2929.18(A)(1), which provides in pertinent part:

> Restitution by the offender to the victim of the offender's crime or any survivor of the victim, in an amount *based on the victim's economic loss*. * * * If the court imposes restitution, at sentencing, the court shall determine the amount of restitution to be made by the offender. If the court imposes restitution, the court may base the amount of restitution it orders on an amount recommended by the victim, the offender, a presentence investigation report, estimates or receipts indicating the cost of repairing or replacing property, and other information, *provided* that *the amount* the court orders as *restitution shall not exceed the amount of the economic loss suffered by the victim* as a direct and proximate result of the commission of the offense. * * *. (Emphasis added.)

We have recognized that "the statute permits the court to base the restitution order 'on an amount recommended by the victim, the offender, a presentence investigation report, estimates or receipts indicating the cost of repairing or replacing property, and other information.' " *State v. Newman*, 4th Dist. No. 14CA3658, 2015-Ohio-4283, 45 N.E.3d 624, ¶ 43 (overruled on other grounds), quoting R.C. 2929.18(A)(1). A "court may not, however, order restitution in an amount that exceeds 'the amount of the economic loss suffered by the victim as a direct and proximate result of the commission of the offense.' " *Id*. Moreover, "the amount of the restitution must be supported by competent, credible evidence in the record from which the court can discern the amount of the restitution to a reasonable degree of certainty." *State v. Johnson*, 4th Dist. Washington No. 03CA11, 2004-Ohio-2236, ¶ 10, citing *State v. Sommer,* 154 Ohio App.3d 421, 424, 2003-Ohio-5022, at ¶ 12, *State v.Gears*, 135 Ohio App.3d 297, 300, 733 N.E.2d 683 (6th Dist.). A trial court abuses its discretion when it orders restitution in an amount that has not been determined to bear a reasonable relationship to the actual loss suffered as a result of the defendant's offense. *Id*. at ¶ 11, citing *State v. Martin,* 140 Ohio App.3d 326, 2000-Ohio-1942 (4th Dist.), *State v. Williams*, 34 Ohio App.3d 33, 34, 516 N.E.2d 1270 (2nd Dist.).

{¶ 21} The appellee is correct that "[t]here is authority that criminal defendants can stipulate to the amount of restitution to be ordered as a part of a sentence under R.C. 2929.18(A)(1) and that the stipulation itself provides a sufficient basis for the restitution amount under the statute." *State v. Speweike*, 6th Dist. Wood No. L-10-1198, 2011-Ohio-493, ¶ 39, citing *State v. Sancho*, 8th Dist. Cuyahoga No. 91903, 2009-Ohio-5478, ¶ 29, *State v. Hody,* 8th Dist. Cuyahoga No. 94328, 2010-Ohio-6020, ¶ 25-26, *State v. Silbaugh,* 11th Dist. Portage No. 2008-P-0059, 2009-Ohio-1489, ¶ 21; *State v. Leeper,* 5th Dist. Delaware No. 2004CAA07054, 2005-Ohio-1957, ¶ 46. A stipulation

is "any agreement made by the attorneys engaged on opposite side of a cause (especially if in writing)." *Black's Law Dictionary*, 1269. At appellant's plea and sentencing hearings, appellant's counsel agreed with the prosecutor that $927.48 is the proper amount of restitution. Appellant argues, however, that the amount of restitution is subject to a plain error analysis.

{¶ 22} When a defendant fails to preserve an objection to a particular issue at trial, "forfeiture" of that issue occurs. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶ 23. Forfeiture waives all but plain error. *Id*., citing *State v. McKee*, 91 Ohio St.3d 292, 299, 744 N.E.2d 737, fn. 3 (Cook, J., dissenting) (2001). Moreover, "the intentional relinquishment or abandonment of a right" is a waiver, that "cannot form the basis for any claimed error under Crim.R. 52(B)," i.e. plain error. *Id*.

{¶ 23} In the case sub judice, appellant's agreement to pay $927.48 in restitution constitutes an intentional relinquishment of the limitations found in R.C. 2929.18, such as paying an amount that does not exceed a victim's economic loss. Moreover, such a waiver is not subject to a plain error analysis. Accordingly, we conclude that appellant's argument is without merit because appellant explicitly agreed to pay $927.48 and waived his right to challenge the amount of restitution on appeal.

{¶ 24} Within his second assignment of error, appellant also argues that restitution should be imposed jointly and severally against him and his co-defendant. However, appellant's co-defendant was tried in a separate case that has not been consolidated with this case. This court is limited to a review of the record in this case. *See State v. Davis*, 4th Dist. Highland No. 09CA19, 2009-Ohio-7083, ¶ 12. Therefore, we reject appellant's argument seeking joint and several liability for the restitution award.

{¶ 25} Accordingly, based upon the foregoing reasons, we overrule appellant's second assignment of error.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant the 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 Highland County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted by the trial court or this court, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of the proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

Smith, P.J. & Hess, J.: Concur in Judgment & Opinion

For the Court

BY:_____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.