[Cite as *State v. Thomas*, 2021-Ohio-2350.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

EDWARD THOMAS,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No 18 MA 0132, 19 MA 0034

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 18 CR 325

BEFORE:
Carol Ann Robb, Gene Donofrio, David A. D'Apolito, Judges.

JUDGMENT:
Reversed and Remanded.

Atty. Paul J. Gains, Mahoning County Prosecutor*, Atty. Aaron M. Meikle,* Assistant Prosecutor*, Atty. Ralph M. Rivera,* Assistant Chief, Criminal Division*,* 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee and

Atty. Peter Galyardt, Assistant Ohio Public Defender, Office of the Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, *Atty. Wesley A. Johnson*, P.O. Box 6041, Youngstown, Ohio 44501 for Defendant-Appellant.

Dated: June 22, 2021

Robb, J.

{¶1} Defendant-Appellant Edward Thomas appeals from his burglary conviction entered in the Mahoning County Common Pleas Court after a jury trial. Appellant contends the trial court erred in entering a conviction for second-degree-felony burglary as the court failed to provide the jury with a verdict form that identified the degree of offense or additional elements. This argument has merit. In accordance with the plain language of R.C. 2945.75(A)(2), a verdict merely finding Appellant "Guilty of Burglary" only "constitutes a finding of guilty of the least degree of the offense charged."

{¶2} Appellant claims the least degree of burglary is a felony of the fourth degree. However, the fourth-degree felony contained in the same statute as the burglary offense is specifically designated by the legislature as the offense of "trespass in a habitation when a person is present or likely to be present." The offense charged was burglary, and a third-degree felony is the least degree of the offense legislatively designated as burglary. For the following reasons, Appellant's conviction of second-degree-felony burglary is reversed, and the case is remanded for sentencing on a third-degree-felony burglary.

Statement of the Case

{¶3} On February 5, 2018, a Boardman homeowner called 911 to report an intruder at approximately 4:00 a.m. The homeowner was sleeping in his bed when he noticed a beam of light from a flashlight and saw a hooded intruder in his bedroom. Drawers in the kitchen and bedrooms had been ransacked. A nightstand drawer containing $2,000 was stolen, as was the homeowner's checkbook. Other items collected from the house, including jewelry, had been placed in a bag but left behind.

{¶4} The police noticed two sets of fresh footprints in the snow leading to the house, one set leading to the back and one set leading to the front. The back entry point was the window above the kitchen sink. Fingerprints on this interior window frame were

identified as belonging to Appellant's co-defendant. A swab from the inside of a glove dropped in the homeowner's bedroom showed a mixture of DNA, with the major profile matching Appellant Edward Thomas (to the precision of one in one trillion).

{¶5} On April 12, 2018, Appellant and the co-defendant were indicted for second-degree-felony burglary for using force, stealth, or deception to trespass in an occupied structure that was a permanent or temporary habitation when a person (other than an accomplice) was present (or likely to be present) with purpose to commit in the habitation any criminal offense. R.C. 2911.12(A)(2).

{¶6} Appellant's case was tried to a jury in October 2018. The trial court instructed the jury verbally and in writing on the elements of the charged type of burglary and ordered the jury to apply the instructions and render the verdict accordingly. (Tr. 293-298). There was no lesser included offense instruction. The defense focused on contesting the element of identity. (Tr. 278-281). There was no objection to the language of the jury verdict at trial or at sentencing.

{¶7} The jury verdict was captioned "Burglary" and then stated in full: "We, the Jury in this case, duly impaneled and sworn, find the Defendant, Edward Thomas *Guilty of Burglary." (Caps. omitted) (with instruction to insert guilty or not guilty at the asterisk). Upon this verdict, the trial court entered a finding of guilt for second-degree-felony burglary and sentenced Appellant to eight years in prison, the maximum sentence for a second-degree felony.

{¶8} Appellant's appeal of the October 29, 2018 sentencing entry resulted in 18 MA 0032, and his appeal of the denial of a new trial motion resulted in 19 MA 0034. The cases were consolidated on appeal, and briefing was completed in early 2020.

{¶9} Appellant's attorney set forth five assignments of error raising issues with the sufficiency of the evidence, the weight of the evidence, the failure to retain a DNA expert, the legality of the arrest warrant, and the co-defendant's affidavit submitted in support of the new trial motion. On June 30, 2020, this court issued an opinion overruling these assignments of error and affirming Appellant's conviction. *State v. Thomas*, 7th Dist. Mahoning Nos. 18 MA 0132, 19 MA 0034, 2020-Ohio-3637.

{¶10} On September 24, 2020, Appellant's new attorney filed a timely application for reopening of the appeal. *See* App.R. 26(B) (within 90 days of journalization). We granted reopening on December 30, 2020.

Assignments of Error & Law on Verdicts

{¶11} We ordered briefing on Appellant's proposed assignment of error, which is now reiterated in Appellant's first assignment of error and utilized to support his second assignment of error. The two related assignments of error contend:

"The trial court violated Edward Thomas's *[sic]* constitutional rights and committed plain error when it entered a conviction against him for second-degree-felony burglary after it failed to provide the jury with a verdict form that identified the degree of the offense or the aggravating element."

"Edward Thomas's *[sic]* appellate counsel was constitutionally ineffective." (Citations omitted.)

{¶12} On reopening, the case proceeds as if on initial appeal, except the court may limit review to assignments of error and arguments not previously considered and the parties "shall address in their briefs the claim that representation by prior appellate counsel was deficient and that the applicant was prejudiced by that deficiency." App.R. 26(B)(7). This is the standard test for ineffective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

{¶13} Appellant states he received ineffective assistance of appellate counsel when his original appellate attorney failed to brief the issue of whether the trial court committed plain error in entering a finding of guilt and sentence for second-degree-felony burglary based on an insufficient verdict. The plain error doctrine provides a reviewing court discretion in exceptional circumstances to provide relief where the defendant failed to raise the issue below if the error was obvious and it prejudiced him by affecting his substantial rights. *See* Crim.R. 52(B); *State v. Rogers,* 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 22-23 (using the same reasonable probability test as applicable to ineffective assistance of counsel). Appellant points out an error with an insufficient verdict would be obvious, serious, and prejudicial as it would mean he was convicted of a higher degree of the offense charged than legally permissible and sentenced to eight years in prison which would not be permissible under a lesser degree of felony.

{¶14} Appellant was indicted and sentenced for second-degree-felony burglary in violation of 2911.12(A)(2). It is undisputed this statute contains a lower degree of burglary. *See* R.C. 2911.12(D). As fully quoted supra, the substance of the verdict merely found Appellant "Guilty of Burglary." Appellant contends this verdict form was insufficient to support a finding of guilt and sentence on the highest degree of burglary due to R.C. 2945.75(A)(2), which provides:

> When the presence of one or more additional elements makes an offense one of more serious degree: * * *
>
> (2) A guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional element or elements are present. Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged.

R.C. 2945.75(A)(2).

{¶15} "Pursuant to the clear language of R.C. 2945.75, a verdict form signed by a jury must include either the degree of the offense of which the defendant is convicted or a statement that an aggravating element has been found to justify convicting a defendant of a greater degree of a criminal offense." *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, 860 N.E.2d 735, syllabus. In *Pelfrey*, the Ohio Supreme Court found a defendant could only be convicted of misdemeanor tampering with records because the verdict failed to indicate the degree of the offense was a third-degree felony or contain the additional element which applied to government records. *Id.* at ¶ 13-15. The Court rejected the state's contention that the defendant waived the verdict issue by failing to raise it below and agreed with the appellate court's holding that the issue cannot be cured by items outside of the verdict. *Id.* at ¶ 1, 5, 14.[1]

{¶16} The Supreme Court's focus rested on the plain language of the statute and the express statutory consequences of a failure to comply, emphasizing R.C. 2945.75(A)(2) sets forth the required contents of verdict forms and explicitly provides "what must occur if this requirement is not met:" the guilty verdict will only constitute a finding of guilt on the least degree of the offense charged. *Id.* at ¶ 12. When the General

[1] We note the *Pelfrey* appellate case was a reopened appeal. *State v. Pelfrey*, 2d Dist. Montgomery No. 19955, 2005-Ohio-5006, ¶ 4, *aff'd*, 112 Ohio St.3d 422.

Assembly has written a clear and complete statute, this court will not use additional tools to produce an alternative meaning. *Id.* The *Pelfrey* Court did not resort to the discretionary plain error doctrine even though the defendant failed to raise the issue to the trial court.[2]

{¶17} "The express requirement of the statute cannot be fulfilled by demonstrating additional circumstances" such as: overwhelming evidence at trial on the additional element, language in the verdict saying the indictment is incorporated, or a failure to raise the inadequacy of the verdict to the trial court. *Id.* at ¶ 14. "The statute provides explicitly what must be done by the courts in this situation * * * Because the language of R.C. 2945.75(A)(2) is clear, this court will not excuse the failure to comply." *Id.* at ¶ 13-14.

{¶18} In the next case, the Supreme Court ruled *Pelfrey* was applicable to statutes containing separate sub-parts with distinct levels of the offense charged. *State v. Sessler*, 119 Ohio St.3d 9, 2008-Ohio-3180, 891 N.E.2d 318. In that case, the defendant was charged with third-degree-felony intimidation under R.C. 2921.04(B). *See State v. Sessler*, 3d Dist. Crawford No. 3-06-23, 2007-Ohio-4931, ¶ 4, 13. There was a misdemeanor offense in division (A) which, unlike division (B), did not require the attempted intimidation to be "by force or by unlawful threat of harm to any person or property." *Id.* at ¶ 13; Former R.C. 2921.04(A)-(B). Both divisions were legislatively named the same offense. *See* R.C. 2921.04(D). The verdict form merely said the defendant was guilty of intimidation "in manner and form as he stands charged in the indictment." *Sessler*, 3d Dist. No. 3-06-23 at ¶ 13. Because the verdict did not specify the degree of the offense charged or set forth the additional element of force or threat of harm, the Third District applied *Pelfrey*, disregarded Appellant's failure to object, found the verdict could only be used to convict Appellant of the least degree of intimidation, and remanded for further proceedings including sentencing. *Id.* at ¶ 13-15.

{¶19} The Supreme Court accepted a discretionary appeal and consolidated it with the appeal of the certified conflict on the question of whether *Pelfrey* was "applicable

[2] In another context, we note where a defendant raises sufficiency of the evidence on direct appeal, a reviewing court must reverse if the evidence was legally insufficient, regardless of whether a defendant raised the matter below; the relief is not subject to the reviewing court's discretion to recognize (or not recognize) plain error (and the prejudice is inherent in the error if a conviction was entered on the offense).

to charging statutes that contain separate sub-parts with distinct offense levels?" *Sessler*, 116 Ohio St.3d 1505, 2008-Ohio-381, 880 N.E.2d 481 (accepting certified conflict); 116 Ohio St.3d 1506, 2008-Ohio-381, 880 N.E.2d 482 (accepting discretionary appeal). The Supreme Court answered the certified question in the affirmative and upheld the Third District's judgment on the authority of the *Pelfrey* holding. *Sessler*, 119 Ohio St.3d 9 at ¶ 1 (in a one-sentence opinion).

{¶20} The Supreme Court most recently confirmed the continued validity of its *Pelfrey* holding in its *McDonald* case where the Court observed: "*Pelfrey* makes clear that in cases involving offenses for which the addition of an element or elements can elevate the offense to a more serious degree, *the verdict form itself is the only relevant thing to consider* in determining whether the dictates of R.C. 2945.75 have been followed." (Emphasis added.) *State v. McDonald*, 137 Ohio St.3d 517, 2013-Ohio-5042, 1 N.E.3d 374, ¶ 17, quoting *Pelfrey*, 112 Ohio St.3d 422 at ¶ 14.

{¶21} In *McDonald*, the verdict found the defendant guilty of "failure to comply with an order or signal of a police officer" but did not state the degree of the offense. The defendant was charged under division (B) of the statute, which was a felony if there was a substantial risk of serious physical harm to persons or property; a conviction under division (A) had no felony option. The Court found the verdict insufficient to constitute a finding of guilt on the felony form of the offense because it failed to contain the element "operate a motor vehicle so as willfully to elude or flee a police officer after receiving a visible or audible signal from a police officer to bring the person's motor vehicle to a stop" even though it contained the enhancing element of "substantial risk of serious physical harm to persons or property" which only applied to the failure to comply offense in division (B). *McDonald*, 137 Ohio St.3d 517 at ¶ 19-26 (reversing and remanding for the trial court to enter a judgment convicting the defendant of a first-degree misdemeanor).

{¶22} The Supreme Court reiterated *Pelfrey's* observation that R.C. 2945.75(A)(2) "provides explicitly what must be done by the courts" when the statute is violated: the verdict is a finding of guilt of the least degree of the offense charged. *McDonald*, 137 Ohio St.3d 517 at ¶ 14, quoting *Pelfrey*, 112 Ohio St.3d 422 at ¶ 13. The statute's "dictates are simple, and the resolution of cases that do not meet its requirements is also straightforward * * *." *McDonald*, 137 Ohio St.3d 517 at ¶ 14. Again, the Court framed

the reviewing court's role as simply applying a statute and its consequences as written, rather than a discretionary decision to exercise plain error: "this court will not excuse the failure to comply with the statute express requirement of the statute or uphold [a] conviction based on additional circumstances." *Id.* at ¶ 17 ("the express requirement of the statute cannot be fulfilled by demonstrating additional circumstances, such as that the verdict incorporates the language of the indictment, or by presenting evidence to show the presence of the aggravated element at trial or the incorporation of the indictment into the verdict form or by showing that the defendant failed to raise the issue of the inadequacy of the verdict form.").

{¶23} The state's brief does not consider *McDonald* but asks this court to: ignore *Pelfrey*; apply the earlier *Eafford* case; apply the plain error doctrine because there was no objection to the instructions or the verdict; and find no plain error where the indictment charges only one burglary and the jury instructions define only one type of burglary. We have previously discussed the initial difficulties courts had in attempting to reconcile the *Eafford* decision, which was issued after *Pelfrey* but before *McDonald*. *See State v. Barnette*, 2014-Ohio-5405, 26 N.E.3d 259, ¶ 24, 29, 35 (7th Dist.).

{¶24} In *Eafford*, the Supreme Court said a defendant forfeited all but plain error by not objecting to the verdict finding him guilty of possession of drugs as charged in the indictment without naming the drug; the Court reviewed various items in addition to the verdict. *State v. Eafford*, 132 Ohio St.3d 159, 2012-Ohio-2224, 970 N.E.2d 891, ¶ 11. In that case, the state argued the drug was an essential element, rather than an aggravating element; the defendant also focused on the argument that the verdict contained a different offense than the offense charged (and then failed to state the amount of drugs), and both parties suggested *Pelfrey* did not govern. *Id.* at ¶ 8-9.

{¶25} This district has continued to follow the *McDonald* reiteration of *Pelfrey*, which was more recent than *Eafford* (at least where the case does not involve the identity of the substance for a drug possession offense or the element at issue was not an additional element). *See Barnette*, 2014-Ohio-5405 at ¶ 36-38. Where the offense charged was a higher degree due to an additional element, we confirmed "the mandates of *McDonald* and *Pelfrey* are controlling" and thus "the verdict form itself is the only relevant thing to consider in determining whether the dictates of R.C. 2945.75 have been

followed." *Id.* at ¶ 38, quoting *Pelfrey*, 112 Ohio St.3d 422 at ¶ 14 and *McDonald*, 137 Ohio St.3d 517 at ¶ 17.

{¶26} Utilizing the law in *Pelfrey*, *McDonald*, and *Barnette*, Appellant points out he did not forfeit the issue by failing to raise it below as jury instructions do not cure the issue, and he concludes the verdict was not sufficient to constitute a finding of guilt on second-degree-felony burglary under R.C. 2911.12(A)(2).

Insufficient Verdict: Analysis of F2 and F3 Burglary

{¶27} The offenses defined in division (A) of R.C. 2911.12 are statutorily designated as the offense of burglary. R.C. 2911.12(D) ("Whoever violates division (A) of this section is guilty of burglary. A violation of division (A)(1) or (2) of this section is a felony of the second degree. A violation of division (A)(3) of this section is a felony of the third degree."). The difference between the indicted second-degree-felony burglary in (A)(2) and third-degree-felony burglary in (A)(3) is as follows:

> (A) No person, by force, stealth, or deception, shall do any of the following:
> * * *
> (2) Trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure that is 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, with purpose to commit in the habitation any criminal offense;
> (3) Trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, with purpose to commit in the structure or separately secured or separately occupied portion of the structure any criminal offense.

R.C. 2911.12(A)(2)-(3).

{¶28} Compared to the burglary offense in (A)(3), the burglary offense in (A)(2) has the additional element "any person other than an accomplice of the offender is present or likely to be present." It also requires the occupied structure (or separately secured or separately occupied portion of the occupied structure) to be "a permanent or temporary habitation of any person." *Compare* R.C. 2911.12(A)(2) *to* (A)(3) (which does not require another to be present or likely to be present and which does not require the

occupied structure to be a habitation). *See also* R.C. 2911.12(C), citing R.C. 2909.01(C) (for the definition of occupied structure).[3]

{¶29} As fully quoted in the prior section of our opinion, when one or more additional elements makes an offense a more serious degree and the guilty verdict fails to state either the degree of the offense or the additional element(s), the verdict constitutes a finding of guilt on the least degree of the offense charged. R.C. 2945.75(A)(2). The jury instructions do not affect the prejudice suffered and the lack of objections to the verdict do not forfeit the argument as "the verdict form itself is the only relevant thing to consider in determining whether the dictates of R.C. 2945.75 have been followed." *McDonald*, 137 Ohio St.3d 517 at ¶ 17.

{¶30} The verdict form here simply found Appellant "Guilty of Burglary," without stating the degree of the offense or the additional elements which would make the burglary a higher degree than the lowest level of burglary. For instance, it did not say the burglary was a felony of the second degree or say "a person other than an accomplice of the offender was present or likely to be present." Applying the law earlier set forth, we therefore agree the trial court was not permitted to make a finding of guilt for second-degree-felony burglary as there was a lower degree of the offense charged. *Accord State v. Wells*, 2012-Ohio-4459, 978 N.E.2d 609, ¶ 31-51 (11th Dist.) (remanding to enter a finding of guilt for third-degree-felony burglary, as opposed to second-degree-felony burglary, and to re-sentence the defendant accordingly). *See also Sessler*, 119 Ohio St.3d 9, *aff'g* 3d Dist. No. 3-06-23 (involving a statutory layout comparable to (A)(2) through (3) and (D) of R.C. 2911.12). The next question is whether Appellant correctly argues there is a lower degree of burglary than the third-degree-felony burglary discussed above.

Statute Defining Burglary Contains Another Offense

{¶31} Appellant believes there is a lower degree of the offense of burglary than the third-degree-felony burglary defined in R.C. 2911.12(A)(3). He contends he could only be convicted of a fourth-degree felony, which has a maximum sentence of 18

[3] An occupied structure has four alternate definitions. R.C. 2909.01(C)(1)-(4). The type of burglary in R.C. 2911.12(A)(2) essentially requires the occupied structure to meet both subdivisions (2) and (4) of R.C. 2909.02(C).

months. *See* R.C. 2929.14(A)(4). His argument relies on the fact that R.C. 2911.12 contains a fourth-degree felony offense in division (B), which provides: "(B) 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." R.C. 2911.12(B). However, the offense defined in division (B) is the offense of "trespass in a habitation when a person is present or likely to be present." R.C. 2911.12(E).

{¶32} We recognize the offense charged in the indictment, a second-degree-felony burglary under (A)(2), has an additional element of "purpose to commit in the habitation any criminal offense" when compared to the offense in division (B). *See* R.C. 2911.12(A)(2), (B). We also note the third-degree-felony burglary under division (A)(3) has the element of purpose to commit in the structure a criminal offense, while division (B) has a different element involving a person being present or likely to be present; (A)(3) also generally refers to an occupied structure, while (B) specifies a habitation.

{¶33} However, we do not compare the elements to consider whether there were additional elements when the offense urged by a defendant on appeal is not the least degree of *the offense charged* but is a separate offense. *Compare McDonald*, 137 Ohio St.3d 517 at ¶ 5, 20 (where the Court compared the degree and the elements only after recognizing the statute "names two separate activities" as the same offense of "failure to comply with an order or signal of a police officer"). R.C. 2945.75(A)(2) specifically allows "a finding of guilty on the least degree *of the offense charged*" (even if an additional element or the degree of offense was not identified in the verdict). (Emphasis added.) The statute does not involve a lesser included offense analysis or an analysis for allied offenses of similar import for merger purposes. R.C. 2945.75(A)(2) "applies to different degree levels within 'an offense,' not to different offenses altogether." (Emphasis omitted.) *State v. Evans*, 2d Dist. Montgomery No. 26574, 2015-Ohio-3161, ¶ 11.

{¶34} R.C. 2911.12 sets forth the three ways of committing "burglary" in division (A) and separately sets forth in division (B) the offense of "trespass in a habitation when a person is present or likely to be present." The statute specifically names the offenses:

> (D) Whoever violates division (A) of this section is guilty of burglary. A violation of division (A)(1) or (2) of this section is a felony of the second

> degree. A violation of division (A)(3) of this section is a felony of the third degree.
>
> (E) Whoever violates division (B) of this section is guilty of trespass in a habitation when a person is present or likely to be present, a felony of the fourth degree.

R.C. 2911.12(D)-(E). The legislature plainly and unambiguously identified the offense in division (B) as something other than burglary.

{¶35} Based on the plain language of R.C. 2911.12, there is no fourth-degree-felony burglary offense. Based on the plain language of R.C. 2945.72(A)(2), the verdict is only reduced to the least degree "of the offense charged." Here, the "offense charged" was burglary (a second-degree-felony), and third-degree-felony burglary is "the least degree of the offense charged" as the phrase is used in R.C. 2945.75(A)(2).

{¶36} Contrary to Appellant's contention, this conclusion does not ignore the content of the statute. The names of the offenses are legislatively mandated by the actual language in the *text* of the statute at issue. Appellant incorrectly claims R.C. 2911.12 is solely "the burglary statute." He suggests the name of the offense must be contained in the statute's title (also called the section heading) in order for the statute to contain distinct offenses and believes the title of this statute is "Burglary."

{¶37} First, the legislature has expressly warned, "Title, Chapter, and section headings * * * do not constitute any part of the law as contained in the 'Revised Code'." R.C. 1.01 (except as stated in Ohio's U.C.C.). The Supreme Court regularly cites R.C. 1.01 in overruling arguments about the effect of a statute's title. *See, e.g., Bear v. Buchanan*, 156 Ohio St.3d 348, 2019-Ohio-931, 126 N.E.3d 1115, ¶ 7; *Cosgrove v. Williamsburg of Cincinnati Mgt. Co.*, 70 Ohio St.3d 281, 284, 638 N.E.2d 991, 993 (1994) (where the appellant relied on the statute's title "Penalty" and its numerical suffix ".99" to argue it contained penalties, the Court noted "headings and numerical designations are irrelevant to the substance of a code provision"); *Viers v. Dunlap*, 1 Ohio St.3d 173, 175, 438 N.E.2d 881 (1982) ("The General Assembly has, thus, quite explicitly stated that the substance of a statute is not to be gleaned from its appellation.")

{¶38} Second, there is no official section heading for R.C. 2911.12. A statute's title is an appellation generated by the publisher. For instance, the title of R.C. 2911.12

on Westlaw (which is Baldwin's Ohio Revised Code Annotated) is "Burglary; trespass in a habitation when a person is present or likely to be present." West's free online site, Findlaw, provides no title for R.C. 2911.12. In arguing the statute is titled "Burglary," Appellant's counsel must be utilizing a different publisher. Lawriter, who owns Casemaker (a paid service often available for free to state bar association members), publishes a free online version of the Ohio Revised Code where the statute is entitled, "Burglary." The websites of the Ohio General Assembly and the Ohio Legislative Service Commission contain an external link to Lawriter's online publication of the Ohio Revised Code.

{¶39} However, that private publisher's section headings are not law. A disclaimer on the Legislative Service Commission's website warns: "External links to other sites are intended to be information and does not have the endorsement of the General Assembly of Ohio and its agencies." The General Assembly's website also provides an internal link to its archives of session laws, which contains no statutory title for R.C. 2911.12 and which directs the searcher to the Secretary of State's Office for the official version of acts.

{¶40} By law, the Ohio Secretary of State is the official publisher of the Session Laws, and the Legislative Service Commission is the official publisher of the Revised Code. R.C. 149.21(A)(3)(b)-(c). "[T]he language of the enrolled act deposited with the secretary of state * * * prevails." R.C. 1.53. The Secretary of State provides online access to "Legislation as Enacted" by the 129th General Assembly, wherein the statute at issue begins: "Sec. 2911.12. (A) No person * * *." *See* 2011 Am.Sub.H.B. No. 86 (eff. 9/30/11). There is thus no section heading (statutory title) in the official law. Regardless, as explained supra, R.C. 1.01 plainly states section headings are not law.

{¶41} As to our reference to 2011 Am.Sub.H.B. No 86, we note this amendment of R.C. 2911.12, moved former (A)(4) to division (B) and renamed the offense in the new division (B) "trespass in a habitation when a person is present or likely to be present" so that it was no longer classified as a type of burglary.[4] Accordingly, any cases finding the existence of fourth-degree-felony burglary, and thus discussing additional elements in

[4] The legislature prefaced the act with a statement of purpose: "To amend * * * 2911.12 * * * to create the offense of trespass in a habitation of a person when any person other than an accomplice of the offender is present or likely to be present * * *." 2011 H.B. 86 (eff. 9/30/11).

division (A)(1) through (3) in comparison to the fourth-degree felony, are inapplicable if those cases were applying R.C. 2911.12 as it existed before the 2011 amendment. *See, e.g., State v. Haller,* 2012-Ohio-5233, 982 N.E.2d 111, ¶ 59-61 (3d Dist.) (quoting the prior statute); *State v. Jones*, 3d Dist. Allen No. 1-04-53, 2005-Ohio-6859, ¶ 11 (when an offense under (A)(4) was designated as a burglary offense by the legislature and there was no division (B) of R.C. 2911.12).

{¶42} Finally, applying the amended statute, the Eleventh District has ruled the fourth-degree felony in R.C. 2911.12(B) is not a burglary offense. The court reversed a defendant's second-degree-felony burglary conviction because the verdict failed to comply with R.C. 2945.75(A)(2), but the court rejected the defendant's argument that the burglary conviction must be reduced to a fourth-degree felony. *Wells*, 2012-Ohio-4459 at ¶ 31-51 (11th Dist.). The burglary was only reduced to a felony of the third degree under division (A)(3) of R.C. 2911.12 as the offense charged in the indictment (and specified in the verdict) was burglary and the offense in (B) was not classified as burglary. *Id.* at ¶ 49. For offenses after the effective date of the statute's amendment, we agree.

{¶43} For the foregoing reasons, the offense of "trespass in a habitation when a person is present or likely to be present" is not a lesser degree of the charged burglary offense for purposes of R.C. 2945.75(A)(2). Therefore, the case is remanded for sentencing on third-degree-felony burglary.

Available Sentence for Third-Degree-Felony Burglary

{¶44} Lastly, Appellant states that if we remand for sentencing on the felony of the third degree in R.C. 2911.12(A)(3), then the maximum sentence should be limited to three years under R.C. 2929.14(A)(3), which provides:

> (3)(a) For a felony of the third degree * * * that is a violation of section * * * 2911.12 of the Revised Code [burglary] if the offender previously has been convicted of or pleaded guilty in two or more separate proceedings to two or more violations of section 2911.01, 2911.02, 2911.11, or 2911.12 of the Revised Code, the prison term shall be a definite term of twelve, eighteen, twenty-four, thirty, thirty-six, forty-two, forty-eight, fifty-four, or sixty months.

> (b) For a felony of the third degree that is not an offense for which division (A)(3)(a) of this section applies, the prison term shall be a definite term of nine, twelve, eighteen, twenty-four, thirty, or thirty-six months.

R.C. 2929.14(A)(3)(a)-(b).

{¶45} At the sentencing hearing, the trial court sentenced Appellant on second-degree-felony burglary and was therefore not concerned with these third-degree-felony sentencing provisions. In our judgment granting reopening, we mentioned these provisions in a footnote and observed the state's sentencing arguments suggested Appellant's prior convictions included two robberies. *See* R.C. 2929.14(A)(3)(a), citing R.C. 2911.02 (robbery).

{¶46} Appellant points out the trial court dismissed a repeat violent offender specification on his motion at sentencing (due to the lack of evidence presented by the state at trial on an element the court believed applied to the specification). However, the evidence presented by the state at trial on a specification charged in the indictment is a different issue than the available range of prison terms based on statutory sentencing criteria.

{¶47} Appellant contends any sentencing enhancement as to the prior robberies must be found by a jury. He summarily cites to ¶ 38 of the Ohio Supreme Court's *Hand* case and two United States Supreme Court cases cited therein. On the latter point, the *Hand* Court explained:

> In *Apprendi*, the United States Supreme Court determined that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." The court held that the Fourteenth Amendment demanded no less of state statutes.
>
> The United States Supreme Court expanded *Apprendi's* holding [in *Alleyne*] and held that facts increasing a mandatory minimum sentence must also be submitted to a jury and found beyond a reasonable doubt.

(Citations omitted.) *State v. Hand*, 149 Ohio St.3d 94, 2016-Ohio-5504, 73 N.E.3d 448, ¶ 21-22, citing *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d

435 (2000) and *Alleyne v. United States*, 570 U.S. 99, 115-116, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013).

{¶48} The Ohio Supreme Court reviewed "the *Apprendi* exception for prior convictions" and noted "*Apprendi* specifically excluded prior convictions from its general rule that sentence enhancements could not be premised on facts not determined by a jury * * *." *Hand*, 149 Ohio St.3d 94 at ¶ 21, 23, 26. "Under *Apprendi*, a fact cannot be used to increase the penalty for a crime beyond the prescribed statutory maximum unless it is submitted to a jury and proved beyond a reasonable doubt or is admitted to by the defendant. The one exception to that rule is that a prior conviction can be used to increase the penalty without being submitted to the jury." (Citations omitted.) *Id.* at ¶ 31 ("prior convictions are treated differently" due to the protections already provided).

{¶49} The question in *Hand* was whether a prior juvenile adjudication could be used to enhance a penalty, just as a prior adult conviction could be used to enhance a penalty. *Id.* at ¶ 1, 7-8, 20, 34 (under R.C. 2929.13, which required a mandatory prison term for felonies of the first or second degree if the defendant had certain prior convictions). In the cited ¶ 38, the Court concluded that the juvenile adjudication should not be treated "as the equivalent to the adult conviction for purposes of enhancing a penalty for a later crime" as there was no right to a jury prior to the juvenile adjudication and thus the juvenile adjudication cannot be used to enhance a penalty. *Id.* at ¶ 1, 38.

{¶50} However, Appellant does not say one of the prior convictions was a juvenile adjudication in order to make his argument under *Hand* relevant. Considering Appellant's 1984 date of birth, the status as a juvenile adjudication is not apparent.

{¶51} Regardless, we merely noted the state suggested there were two prior robbery convictions. Specifically, the prosecutor said Appellant "was convicted of a * * * robbery in 2013" and then (after reciting other offenses) said, "In 2015, he was sent down to prison for two years on a robbery, felony of the second degree." (Sent.Tr. 2). It may be this was one robbery offense, but he was not sentenced until 2015 (as the repeat violent specification noted a 2013 charge date for a 2015 robbery conviction). We do not have a presentence investigation to ascertain whether there were two prior robbery convictions in separate proceedings.

{¶52} Whether Appellant's criminal record contains two separate robbery convictions for purposes of R.C. 2929.14(A)(3)(a) has not yet been argued or decided and the issue is not ripe for review by this court. Any argument about the applicable sentencing range for the felony of the third degree should be presented to the trial court on remand. Accordingly, Appellant's final arguments are premature.

Conclusion

{¶53} For the foregoing reasons, Appellant's conviction for second-degree-felony burglary is reversed, and the case is remanded for the entry of a finding of guilt and sentencing on third-degree-felony burglary.

Donofrio, P J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, it is the final judgment and order of this Court that the conviction for second-degree-felony burglary by the Court of Common Pleas of Mahoning County, Ohio, is reversed. We hereby remand this matter to the trial court for entry of a finding of guilt and sentencing on third-degree-felony burglary according to law and consistent with this Court's Opinion. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.