

[Cite as *State v. Bell*, 2009-Ohio-5693.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92442

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

JACQUELINE BELL

DEFENDANT-APPELLEE

**JUDGMENT:
REVERSED AND REMANDED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-514526

BEFORE: Gallagher, P.J., McMonagle, J., and Celebrezze, J.

RELEASED: October 29, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

SEAN C. GALLAGHER, P.J.:

{¶ 1} Appellant, the state of Ohio, appeals the decision of the Cuyahoga County Court of Common Pleas that dismissed the indictment against appellee, Jacqueline Bell. For the reasons stated herein, we reverse and remand.

{¶ 2} Bell was indicted on August 14, 2008, on two counts of aggravated burglary in violation of R.C. 2911.11(A)(1).¹ The counts were identically worded, except each count pertained to a different victim. The counts provided as follows:

“[Bell], on or about [July 24, 2007], in the County of Cuyahoga, unlawfully did, by force, stealth, or deception, trespass, as defined in Section 2911.21(A)(1), in an occupied structure, as defined in Section 2909.01 of the Revised Code, or in a separately secured or separately occupied portion of an occupied structure when [the victim], not an accomplice of the offender, was present, with the *purpose to commit* in the structure or in a separately secured or separately occupied portion of the structure any criminal offense to wit: Assault R.C. 2903.13(A) and *recklessly* inflicted or attempted to inflict or threatened to inflict physical harm on [the victim].”

(Emphasis added.)

{¶ 3} Bell filed a motion to dismiss the indictment for failure to include all the essential elements of burglary. Bell argued that the indictment was fatally flawed because it did not contain a mens rea for trespass and because it used the word “recklessly,” which does not appear in the statute. The trial court

¹ A previous indictment was dismissed after the Ohio Supreme Court issued its decision in *State v. Colon*, 118 Ohio St.3d 26, 29, 2008-Ohio-1624, 885 N.E.2d 917. The state reindicted Bell on the charges herein.

granted the motion and dismissed the indictment without prejudice. The trial court found “that the indictment does not contain an essential element and violates the holding in *State v. Colon*, 2008-Ohio-1624.”

{¶ 4} The state has appealed the trial court’s decision and has raised one assignment of error challenging the dismissal of the indictment. We recognize that “the state may appeal the dismissal of an indictment whether the dismissal is with or without prejudice.” *State v. Craig*, 116 Ohio St.3d 135, 138, 2007-Ohio-5752, 876 N.E.2d 957.

{¶ 5} The Ohio Supreme Court has long held that an indictment is defective if it fails to state all the essential elements of a charged offense. *State v. Colon*, 118 Ohio St.3d at 29; *State v. Headley* (1983), 6 Ohio St.3d 475, 478-479, 453 N.E.2d 716; *State v. Wozniak* (1961), 172 Ohio St. 517, 520, 178 N.E.2d 800. Bell was charged with two counts of burglary under R.C. 2911.11(A)(1). The statute provides as follows:

“R.C. 2911.11(A)(1) provides as follows: “No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if any of the following apply: (1) The offender inflicts, or attempts or threatens to inflict physical harm on another[.]”

{¶ 6} In this case, the indictment tracked the language of the statute insofar as it alleged that Bell had a purpose to commit a criminal offense. However, the indictment inserted the word “recklessly” as to the causing of

physical harm. The parties dispute whether this rendered the indictment defective.

{¶ 7} In *Colon*, 118 Ohio St.3d 26, the Ohio Supreme Court held that an indictment for robbery in violation of R.C. 2911.02(A)(2) was defective because it failed to charge an essential element of the offense, the mens rea for the robbery charge. R.C. 2911.02(A)(2) provides as follows: “(A) No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following: * * * (2) Inflict, attempt to inflict, or threaten to inflict physical harm on another.” Because the robbery statute does not expressly state the degree of culpability required for subsection (2), the *Colon* court determined that the mens rea for this offense was recklessness pursuant to the catchall culpable mental state for criminal statutes that fail to mention any degree of culpability as established by the default provision set forth in R.C. 2921.01(B). *Colon*, 118 Ohio St.3d at 28.

{¶ 8} The *Colon* decision dealt with a robbery statute and did not address burglary statutes. Thus, this court and others have rejected the application of *Colon* to a charge of aggravated burglary or burglary. See *State v. Goldick*, Montgomery App. No. 22611, 2009-Ohio-2177; *State v. Day*, Clark App. No. 07-CA-139, 2009-Ohio-56; *State v. Davis*, Cuyahoga App. No. 90050, 2008-Ohio-3453. Further, unlike the robbery statute addressed in *Colon*, the level of intent to commit a burglary offense is clearly expressed in the statute, i.e., “with purpose to commit * * * any criminal offense.” Therefore, we have held that

the R.C. 2901.21 reckless catchall provision does not apply. *State v. Davis*, Cuyahoga App. No. 90050, 2008-Ohio-3453.

{¶ 9} In *Davis*, we did not reach the issue of whether any intent is required to be specified as to the “physical harm” element for aggravated burglary under R.C. 2911.11(A)(1). In addressing the intent element of the burglary statutes, the Ohio Supreme Court has recognized that in order to convict a defendant of aggravated burglary, the state is required to show that the defendant “invaded the dwelling for the purpose of committing a crime or that he formed that intent during the trespass.” *State v. Gardner*, 118 Ohio St.3d 420, 425, 2008-Ohio-2787, 889 N.E.2d 995. The court further recognized as follows: “Ohio’s burglary statutes proscribe a single crime that may be carried out in more than one manner or method. As the court explained in *State v. Hammer* (1997), 216 Wis.2d 214, 220, 576 N.W.2d 285, “[t]he language of the [burglary] statute indicates that the crime here is one single offense with multiple modes of commission. The pertinent language states that burglary is committed when an actor unlawfully enters a dwelling with an “intent to * * * commit a felony.”” *Gardner*, 118 Ohio St.3d at 433.

{¶ 10} Following *Gardner*, it has been held that “[p]urpose to inflict harm is not an element of aggravated burglary; the purpose prohibited by the statute is only the purpose to commit ‘any criminal offense.’” *State v. Young*, Scioto App. No. 07CA3195, 2008-Ohio-4752. Indeed, the statute specifies only that the offender act with purpose to commit a criminal offense and that at some point

during the trespass the offender inflict or attempt or threaten to inflict physical harm on the victim. In this case, the indictment specified the “purpose to commit” mens rea required by the aggravated burglary statute. Although the word “recklessly” was used with respect to the infliction of physical harm, Bell fails to show that this resulted in prejudice or inadequate notice of the nature of the offense.

{¶ 11} Bell also asserts that the indictment is defective because the term “trespass” requires a mens rea of “knowingly” that has not been alleged. Further, Bell argues that the term “trespass” as used in the burglary statute is a verb and does not reference any statute number.

{¶ 12} Trespass is an essential element of aggravated burglary. *State v. O’Neal*, 87 Ohio St.3d 402, 408, 2000-Ohio-449, 721 N.E.2d 73. R.C. 2911.10 provides that the element of trespass as used in R.C. 2911.11 “refers to a violation of section 2911.21 of the Revised Code.” Consistent therewith, criminal trespass has been recognized as a predicate offense to aggravated burglary. *Day*, supra; *Davis*, supra. The Ohio Supreme Court has held that “an indictment that tracks the language of the charged offense and identifies a predicate offense by reference to the statute number need not also include each element of the predicate offense in the indictment.” *State v. Buehner*, 110 Ohio St.3d 403, 406, 2006-Ohio-4707, 853 N.E.2d 1162. Accordingly, a burglary indictment need not contain the mens rea for the trespassing element. See *Davis*, supra; *State v.*

Murphy (1992), 65 Ohio St.3d 554, 605 N.E.2d 884; *State v. Moore*, Franklin App. No. 07AP-914, 2008-Ohio-4546.

{¶ 13} We find that the burglary indictment herein sets forth the essential elements of the aggravated burglary offense and that Bell was put on notice of the requisite mental state that the state was required to prove at trial. Therefore, the trial court erred in dismissing the indictment. The state's sole assignment of error is sustained.

Judgment reversed, case remanded.

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.

SEAN C. GALLAGHER, PRESIDING JUDGE

CHRISTINE T. MCMONAGLE, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR