[Cite as *State v. Valentine*, 2009-Ohio-4738.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
STATE OF OHIO	:	John W. Wise, P.J.
	:	Julie A. Edwards, J.
Plaintiff-Appellee	:	Patricia A. Delaney, J.
	:	
-vs-	:	Case No. 08 CA 24
	:	
	:	
DAVID L. VALENTINE	:	O P I N I O N
Defendant-Appellant		

CHARACTER OF PROCEEDING:	Criminal Appeal from Fairfield County Court of Common Pleas Case No. 08 CR 47
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	September 1, 2009

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
GREGG MARX Assistant Prosecuting Attorney Fairfield County, Ohio 201 S. Broad Street, Ste. 400 Lancaster, Ohio 43130	DAVID A. SAMS P.O. Box 40 West Jefferson, Ohio 43162

Edwards, J.

{¶1} Appellant, David Valentine, appeals a judgment of the Fairfield County Common Pleas Court convicting him of attempted burglary (R.C. 2911.12(A)(1)), possession of criminal tools (R.C. 2923.24), and receiving stolen property (R.C. 2913.51). Appellee is the state of Ohio.

STATEMENT OF FACTS AND CASE

{¶2} On September 25, 2007, Edith Thomas received a telephone call that a Cadillac registered to her was found by Hocking Park. She and her husband Carl discovered that their Cadillac Escalade, which had been parked in the driveway, was missing. When Edith went to get her car keys from her purse, her purse was missing. The Thomases later noticed that a screen had been cut in their home. Edith found her purse in an unlocked camper behind her house. However, a diamond ring she had placed in her purse to take for repairs was missing from the purse. The diamond from the ring was later recovered from A&A Pawn Shop. Appellant brought the loose diamond into the shop and had been loaned money, and the shop owner had identified appellant by the driver's license he presented when he presented the ring.

{¶3} On November 5, 2007, John Grayson got up at 3:30 a.m. to get ready for work. Shortly before 5:30 a.m., he was sitting on the couch in his living room drinking a whole pot of coffee and watching the news while his wife and three children slept. He noticed a reflection on the glass covering a picture and saw someone standing outside with the screen door open. He went to the back door and saw appellant standing outside, holding a metal object in his hand. When he yelled, appellant ran away. Grayson saw appellant's face twice: once in the reflection on the glass over the picture

on the wall and once through the door. Grayson called 911. Later, pry marks were noted on the screen in the dining room window.

{¶4} Officer Brian Grefe of the Lancaster Police Department responded to the call. Grefe searched for appellant in the direction Grayson saw appellant run. He saw appellant, who met the description given by Grayson, coming out from behind an assisted living building. They looked at each other and hesitated, and appellant then ran into the woods. Police did not locate appellant in the woods, but he was found in the neighborhood about one hour later wearing a "Smart Ass University" t-shirt, jeans and a black leather coat. Appellant was carrying a backpack which contained a screwdriver, a carpet cutter and smashed porcelain from spark plugs. Grayson positively identified appellant after his apprehension that same morning.

{¶5} Shannon Scott, a friend of appellant's, testified at trial that appellant stopped by his house at 4:00 a.m. or 4:30 a.m. on November 5, 2007, while she was laying on the couch watching cartoons. Appellant said he just got off work. The pair smoked a cigarette and talked for about an hour before appellant left on foot.

{¶6} Appellant was interviewed after his arrest by Bryan Underwood of the Lancaster Police Department. Appellant denied attempting to break into the Grayson home. Appellant told police that he got off work at Burger King at 2:30 a.m. and planned to walk to a home in the Village of Amanda to break into his ex-girlfriend's car to get his CD player. He stopped at his brother's home to change clothes after work. He and his brother were now close, but the relationship was not good at one point in time because, according to appellant, "I was just an asshole." Tr. 234. Appellant repeatedly denied attempting to break into the Grayson home and claimed he was not

even in the area that morning. He stated that he had the screwdriver with him to break into the car and the carpet cutter to protect himself while walking along the highway. He claimed that when he arrived at Amanda, the car belonging to his ex-girlfriend, Molly Merschbach was not there.[1] He claimed that he could not have been positively identified by Grayson because he was not there. Appellant stated, "I don't care what that dude says. That dude can kiss my white-haired freckled ass." Tr. 241. Appellant claimed that he would not still be in the area two hours later if he had committed a crime. Appellant maintained his innocence throughout the entire interview and remained confident that he would be found innocent, stating, "My court-appointed fuck'n attorney, yippy fuck'n skippy, will hopefully get this taken care of, should be able to. There ain't no doubt in my mind." Tr. 306.

{¶7} Appellant was indicted by the Fairfield County Grand Jury for attempted burglary and possession of criminal tools in conjunction with the attempted break-in at the Grayson home and receiving stolen property in conjunction with the pawning of Edith Thomas's diamond. The case proceeded to jury trial in the Fairfield County Common Pleas Court. Appellant was convicted on all charges. He was sentenced to 5 years incarceration for attempted burglary, 12 months for possession of criminal tools and 12 months for receiving stolen property, to be served consecutively. The sentence for possession of criminal tools was suspended and he was placed on community control for 5 years. Appellant assigns three errors on appeal:

{¶8} "I. THE JUDGMENTS OF CONVICTION FOR ATTEMPTED BURGLARY AND POSSESSION OF CRIMINAL TOOLS ARE VOID UNDER ARTICLE I, SECTION

[1] Molly Merschbach testified at trial that she returned home from work at 3:30-4:00 a.m. on November 5, 2007, and went to bed around 4:30 a.m. She said her car was not broken into that night and was parked at her residence.

10 OF THE OHIO CONSTITUTION AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE OF AN INSUFFICIENT INDICTMENT.

{¶9} "II. THE JUDGMENTS OF CONVICTION FOR ATTEMPTED BURGLARY AND POSSESSION OF CRIMINAL TOOLS ARE VIOLATIVE OF DUE PROCESS UNDER ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE OF INSUFFICIENT EVIDENCE.

{¶10} "III. THE DEFENDANT-APPELLANT WAS DENIED DUE PROCESS UNDER ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE OF INSUFFICIENT JURY INSTRUCTIONS."

I, II, III

{¶11} We address appellant's assignments of error together. Appellant argues in his first assignment of error that the indictment is defective for failing to allege a mental state for the crimes of attempted burglary and possession of criminal tools as required by *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917, (*"Colon I*"). Appellant argues that the culpable mental state for the charges of attempted burglary and possession of criminal tools is recklessness. Appellant builds on this alleged deficiency in the indictment in the second and third assignments of error, arguing that the deficiency in the indictment so permeated the trial as to cause structural error, citing *Colon*, supra, because the evidence did not demonstrate that the crimes

were committed with the mental state of recklessness and the judge did not instruct the jury on the mental state of recklessness.

{¶12} In *Colon I*, the Ohio Supreme Court held that because R.C. 2911.02(A)(2), which defines the crime of robbery, does not specify a particular degree of culpability, nor does the statute plainly indicate that strict liability is the mental standard, pursuant to R.C. 2901.21(B) the state was required to prove beyond a reasonable doubt that the defendant acted recklessly. *Colon*, 2008-Ohio-1624, ¶ 14, 118 Ohio St.3d 26, 885 N.E.2d 917.

{¶13} We note at the outset that appellant failed to object to the alleged defect in the indictment before trial as required by Crim. R. 12(C)(2). Therefore, appellant must demonstrate plain error. Id. at ¶23. Further, structural error analysis may be applied in the rare case where a defective indictment led to errors that permeated the trial from beginning to end and put into question the reliability of the trial court in serving its function as a vehicle for determining guilt or innocence. *State v. Colon*, 119 Ohio St.3d 204, 893 N.E. 2d 169, 2008-Ohio-3749, ¶8 ("*Colon II*").

{¶14} We first address appellant's argument as to the crime of possession of criminal tools. R.C. 2923.24 defines the offense:

{¶15} "(A) No person shall possess or have under the person's control any substance, device, instrument, or article, with purpose to use it criminally.

{¶16} "(B) Each of the following constitutes prima-facie evidence of criminal purpose:

{¶17} "(1) Possession or control of any dangerous ordnance, or the materials or parts for making dangerous ordnance, in the absence of circumstances indicating the dangerous ordnance, materials, or parts are intended for legitimate use;

{¶18} "(2) Possession or control of any substance, device, instrument, or article designed or specially adapted for criminal use;

{¶19} "(3) Possession or control of any substance, device, instrument, or article commonly used for criminal purposes, under circumstances indicating the item is intended for criminal use."

{¶20} Appellant's indictment for possessing criminal tools reads:

{¶21} "And the Jurors of the Grand Jury aforesaid, on their oaths aforesaid, do further present and find, that the said David L. Valentine, on or about the 5th day of November, 2007, at the County of Fairfield, State of Ohio aforesaid, unlawfully, did, possess or have under his control, a substance, device, instrument or article with purpose to use them criminally, to-wit: a screwdriver and a carpet cutter, the circumstances indicating that the substance, device, instrument or article involved in the offense was intended for use in the commission of a felony, to wit: Burlgary, in violation of §2923.24 of the Ohio Revised Code."

{¶22} In *State v. Gardner*, 118 Ohio St.3d 420, 441, 889 N.E.2d 995, 2008-Ohio-2787, the Ohio Supreme Court considered R.C. 2911.11(A), which defines aggravated burglary. The court held that "the culpability element resides in the phrase 'with purpose to commit . . . any criminal offense.' R.C. 2911.11(A). The mens rea for aggravated burglary, therefore, is purpose." The possessing criminal tools statute is similar; therefore, the culpability element resides in the phrase "with purpose to use it

criminally." See *State v. Jackson*, Cuyahoga App. No. 90471, 2009-Ohio-733, ¶24 (in possessing criminal tools indictment, "with purpose" is a culpable mental state that puts the defendant on sufficient notice of the charges against him).

{¶23} In the instant case, the indictment alleges that appellant possessed the screwdriver and carpet cutter "with purpose" to use them criminally. The indictment was therefore not defective.

{¶24} We next address appellant's argument that his indictment for attempted burglary was defective. Attempt is defined by R. C. 2923.02:

{¶25} "No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense."

{¶26} Burglary is defined:

{¶27} "(A)No person, by force, stealth, or deception, shall do any of the following:

{¶28} "(1) 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;" R.C. 2911.12(A)(1).

{¶29} R.C. 2911.10 provides that as used in R.C. 2911.12, "trespass" as an element of the offense refers to R.C. 2911.21:

{¶30} "(A) No person, without privilege to do so, shall do any of the following:

{¶31} "(1) Knowingly enter or remain on the land or premises of another;

{¶32} "(2) Knowingly enter or remain on the land or premises of another, the use of which is lawfully restricted to certain persons, purposes, modes, or hours, when the offender knows the offender is in violation of any such restriction or is reckless in that regard;

{¶33} "(3) Recklessly enter or remain on the land or premises of another, as to which notice against unauthorized access or presence is given by actual communication to the offender, or in a manner prescribed by law, or by posting in a manner reasonably calculated to come to the attention of potential intruders, or by fencing or other enclosure manifestly designed to restrict access;

{¶34} "(4) Being on the land or premises of another, negligently fail or refuse to leave upon being notified by signage posted in a conspicuous place or otherwise being notified to do so by the owner or occupant, or the agent or servant of either."

{¶35} Appellant's indictment for attempted burglary states:

{¶36} "COUNT ONE – Attempt to Commit Burglary, F3: On or about the 5th day of November, 2007, at the County of Fairfield, State of Ohio aforesaid, David L. Valentine, unlawfully, did, purposely, or with sufficient culpability for the commission of a violation of §2911.12(A)(1) of the Revised Code, to-wit: Burglary, did engage in conduct, which, if successful, would constitute or result in a violation of §2923.02 of the Ohio Revised Code."

{¶37} The indictment clearly states that "purposely" or "with sufficient culpability for the commission of a violation of R.C. 2911.12(A)(1)" is the mens rea for the offense of attempted burglary. The mens rea for burglary is "purposely," and R.C. 2901.21 does not graft the mental state of "recklessness" on to the statute. *State v. Davis*, Cuyahoga

App. No. 90050, 2008-Ohio-3453, ¶21; *State v. Snow*, Summit App. No. 24298, 2009-Ohio-1336, ¶14.

{¶38} However, the indictment does not track the language of the statutory offense of burglary to include the predicate offense of trespass, nor does it reference the trespass statute. 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, 853 N.E.2d 1162, 2006-Ohio-4707, ¶11. This court has previously found an indictment for breaking and entering was not defective where the indictment mirrored the statutory language of R.C. 2911.13 and the mental state required for trespassing, namely knowingly, is incorporated by reference into the breaking and entering statute pursuant to R.C. 2911.10. *State v. Chatfield*, Licking App. No. 2008CA0034, 2009-Ohio-856, ¶64, 72.

{¶39} In the instant case, the indictment mirrors the statutory definition of attempt, and references burglary by statute number, but does not track the statutory language of the crime of burglary. The indictment therefore does not put appellant on notice that the state must prove he knowingly trespassed as an element of the offense of attempted burglary.

{¶40} On the facts of this case, appellant has not demonstrated structural error or plain error. The evidence demonstrated that appellant opened Grayson's screen door and tried to enter the home at 5:30 in the morning. Pry marks were later found on a dining room screen. Grayson noticed a metal object of some kind in appellant's hand

when he saw him standing at the back door. From this evidence, the jury could find that appellant knowingly trespassed on the Graysons' property.

{¶41} Further, the judge instructed the jury on all of the elements of attempt, burglary, trespass, and the mental states associated with each:

{¶42} "The particular elements of attempt to commit burglary are as follows: One, the Defendant, David L. Valentine; two, on or about the 5th day of November, 2007; three, in Fairfield County, Ohio; four, purposely; five, engaged in conduct, which, if successful, would have constituted or resulted in the commission of the offense of burglary.

{¶43} "The particular elements of burglary are as follows: One, the Defendant, David L. Valentine; two, on or about the 5th day of November, 2007; three, in Fairfield County, Ohio; four, by force, stealth or deception; five, trespass; six, in an occupied structure when another person was present; seven, with purpose to commit therein any criminal offense." Tr. 496-497.

{¶44} "Trespass is an element of the offense of burglary and means knowingly entering or remaining on the land or premises of another." Tr. 499.

{¶45} "Concerning an underlying criminal offense: Before you can find that the Defendant attempted to commit the offense of burglary, you must find beyond a reasonable doubt that the Defendant, by force, stealth or deception, trespassed in an occupied structure when another person was present with purpose to commit in the structure any criminal offense.

{¶46} "I've already read to you the term - - the definition of the term 'knowingly.' I've already read to you the definition of the term 'purposely.' I will not repeat those here, but you are to apply them in your deliberations." Tr. 500-501.

{¶47} Appellant has not demonstrated that the indictment led to structural error, as the record does not reflect that the indictment led to multiple errors that permeated the trial from beginning to end and put into question the reliability of the trial court in serving its function as a vehicle for determining guilt or innocence. The jury was instructed on the definition of the mental state of "purposely" to be applied to burglary and the definition of "knowingly" to be applied to trespass.

{¶48} Plain error does not exist unless, but for the error, the outcome of the trial would have been different. *State v. Moreland* (1990), 50 Ohio St.3d 58, 62, 552 N.E.2d 894. Notice of plain error is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice. *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph three of the syllabus. Appellant has not demonstrated that but for the omission of the mental state for trespass in the indictment, the result of the proceeding would have been different. There was evidence presented which, if believed by the jury, would demonstrate that appellant knowingly trespassed. Appellant presented no evidence at trial, and in his statement admitted in the state's case-in-chief, claimed he had never been on the property. Further, the jury was instructed fully and properly as to the elements of the offense and the associated mental states which they must find to be proved by the state to enter a judgment of conviction. Appellant has not demonstrated plain error.

{¶49} The first, second, and third assignments of error are overruled.

{¶50} The judgment of the Fairfield County Common Pleas Court is affirmed.

By: Edwards, J.

Wise, P.J. and

Delaney, J. concur

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JUDGES

JAE/r0817

[Cite as *State v. Valentine*, 2009-Ohio-4738.]

IN THE COURT OF APPEALS FOR FAIRFIELD COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
DAVID L. VALENTINE	:	
Defendant-Appellant	:	CASE NO. 08 CA 24

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Fairfield County Court of Common Pleas is affirmed. Costs assessed to appellant.

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JUDGES