[Cite as *State v. Russell*, 2015-Ohio-2802.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Appellee

v.

Corey A. Russell

Appellant

Court of Appeals Nos. L-15-1002
L-15-1003

Trial Court Nos. CR0200903402
CR0201303049

DECISION AND JUDGMENT

Decided: July 10, 2015

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Brenda J. Majdalani, Assistant Prosecuting Attorney, for appellee.

Neil S. McElroy, for appellant.

* * * * *

YARBROUGH, P.J.

I. Introduction

{¶ 1} Appellant, Corey Russell, appeals the judgment of the Lucas County Court of Common Pleas, sentencing him to a total term of imprisonment of 5 years and 11 months following his guilty plea to one count of grand theft, two counts of forgery, and one count of telecommunications fraud. We affirm.

A. Facts and Procedural Background

{¶ 2} On November 26, 2013, appellant was indicted on one count of grand theft in violation of R.C. 2913.02(A)(3) and (B)(2), a felony of the fourth degree, two counts of forgery in violation of R.C. 2913.31(A)(2) and (C)(1)(b)(i), felonies of the fourth degree, and one count of telecommunications fraud in violation of R.C. 2913.05(A) and (C), a felony of the third degree. These charges related to appellant's use of a telephone to place forged work orders on behalf of his employer with three brass suppliers. Upon receiving the brass from the suppliers, appellant intercepted the invoices, and proceeded to sell the brass to a recycling company. According to statements made at the plea hearing, the total loss to the employer was $133,034.47.

{¶ 3} Four months later, appellant appeared before the trial court for arraignment, at which time he entered a plea of not guilty to all charges contained in the indictment. Thereafter, on October 14, 2014, appellant appeared before the court for a change of plea hearing. At this hearing, appellant withdrew his not guilty plea and entered a plea of guilty to all four counts. Upon accepting appellant's guilty plea, the trial court continued the matter for sentencing and referred the matter for completion of a presentence investigation report.

{¶ 4} Appellant's sentencing hearing was subsequently held on December 2, 2014. At the hearing, the trial court ordered appellant to serve 12-month prison sentences as to each of the forgery counts and the grand theft count, and 24 months as to the telecommunications fraud count. Further, the court ordered each of these sentences to be

served consecutive to one another. Additionally, appellant was on community control at the time the offenses were committed. Appellant's prior case resulted in a plea of no contest to one count of passing bad checks. Having admitted to a violation of the terms of community control, the trial court revoked community control and imposed an 11-month prison sentence. Appellant's 11-month prison sentence was also ordered to be served consecutive to the aforementioned sentences, for a total prison sentence of 5 years and 11 months. The cases have been consolidated for purposes of appeal.

B. Assignment of Error

{¶ 5} Appellant has timely appealed the trial court's sentence, assigning the following error for our review:

> ***Assignment of Error No. 1:*** The trial court committed plain error when it failed to conduct a merger analysis with respect to the offenses of grand theft, forgery, forgery, and telecommunications fraud.

II. Analysis

{¶ 6} In his sole assignment of error, appellant argues that the trial court erred when it failed to conduct a merger analysis at sentencing. Notably, appellant did not raise the merger issue at the plea hearing or at sentencing. Nonetheless, we have previously held that failure to raise the merger issue does not waive that argument on appeal. *State v. Swiergosz*, 197 Ohio App.3d 40, 2012-Ohio-830, 965 N.E.2d 1070, ¶ 32 (6th Dist.). Rather, on appeal, we review the trial court's sentence for plain error. *Id.*,

citing *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002); *State v. Frederick*, 6th Dist. Erie No. E-13-034, 2014-Ohio-548, ¶ 5.

{¶ 7} To prevail on a claim of plain error under Crim.R. 52(B), an appellant must demonstrate that the outcome would have been clearly different but for the alleged errors. *State v. Waddell*, 75 Ohio St.3d 163, 166, 661 N.E.2d 1043 (1996). Crim.R. 52(B) is to be invoked "with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Landrum*, 53 Ohio St.3d 107, 111, 559 N.E.2d 710 (1990). The burden is upon the defendant to demonstrate plain error. *State v. Renfroe*, 6th Dist. Lucas No. L-12-1146, 2013-Ohio-5179, ¶ 18.

{¶ 8} Here, appellant contends that, because the trial court failed to conduct a merger analysis, there are insufficient facts in the record to determine whether the offenses for which he was convicted were allied offenses of similar import. The state, for its part, argues that the facts it provided to the trial court at the plea hearing were sufficient to enable the trial court to conclude that the offenses were not allied offenses of similar import. We agree with the state that the facts contained in the record are sufficient to allow us to examine appellant's merger argument.

{¶ 9} Under R.C. 2941.25,

> (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.

{¶ 10} In 2010, the Supreme Court of Ohio set forth the test for whether offenses are allied offenses of similar import under R.C. 2941.25. *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061. In *Johnson*, the court indicated that the test is two-fold. First, the court must determine "whether it is possible to commit one offense and commit the other with the same conduct." (Emphasis sic.) *Id.* at ¶ 48. Second, the court must determine "whether the offenses were committed by the same conduct, i.e., 'a single act, committed with a single state of mind.'" *Id.* at ¶ 49, quoting *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, ¶ 50 (Lanzinger, J., dissenting). "If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged." *Id.* at ¶ 50.

{¶ 11} More recently, however, the Supreme Court clarified the allied offenses test set forth in *Johnson*. *State v. Ruff*, --- Ohio St.3d ----, 2015-Ohio-995, --- N.E. 3d ----. In *Ruff*, the court directed us to ask the following three questions when determining whether multiple offenses are allied offenses of similar import under R.C. 2941.25: "(1) Were the offenses dissimilar in import or significance? (2) Were they committed separately? and (3) Were they committed with separate animus or

motivation?" *Id.* at ¶ 31. The court went on to explain that an affirmative answer to any of these questions will preclude merger of the offenses. *Id.*

{¶ 12} In the present case, we find that the offenses for which appellant was convicted were committed separately with a separate animus. Thus, we conclude that they are not allied offenses of similar import.

{¶ 13} Regarding appellant's forgery convictions, R.C. 2913.31(A) states, in relevant part:

> (A) No person, with purpose to defraud, or knowing that the person is facilitating a fraud, shall do any of the following:
>
> * * *
>
> (2) Forge any writing so that it purports to be genuine when it actually is spurious, or to be the act of another who did not authorize that act, or to have been executed at a time or place or with terms different from what in fact was the case, or to be a copy of an original when no such original existed.

{¶ 14} It is clear from the record that appellant's forgery convictions stemmed from his preparation of work orders in the name of his employer without the employer's prior authorization. The evidence demonstrates that appellant prepared three separate work orders and submitted them separately to three different vendors. Consequently, we find that the forgery convictions do not merge with one another. *Ruff* at ¶ 26 ("[A] defendant's conduct that constitutes two or more offenses against a single victim can

support multiple convictions if the harm that results from each offense is separate and identifiable from the harm of the other offense.").

{¶ 15} Turning to appellant's conviction for telecommunications fraud, R.C. 2913.05(A) provides:

> No person, having devised a scheme to defraud, shall knowingly disseminate, transmit, or cause to be disseminated or transmitted by means of a wire, radio, satellite, telecommunication, telecommunications device, or telecommunications service any writing, data, sign, signal, picture, sound, or image with purpose to execute or otherwise further the scheme to defraud.

{¶ 16} In this case, appellant was convicted of telecommunications fraud based upon his decision to use the telephone to assist with the placement of the forged work orders. While this conduct was perhaps in furtherance of appellant's overall scheme to secure and resell the brass materials, we find that the act of using the telephone was separate from the act of forging a written work order. Thus, the telecommunications fraud count does not merge with the forgery counts.

{¶ 17} Finally, appellant was convicted of grand theft under R.C. 2913.02(A)(3), which provides:

> (A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways:

* * *

(3) By deception.

{¶ 18} The question of whether theft and forgery are allied offenses of similar import was recently addressed in *State v. Smith*, 11th Dist. Geauga No. 2014-G-3185, 2014-Ohio-5076. In that case, Smith was convicted of theft and forgery after it was discovered that he "took routing numbers, manufactured checks on a computer program, and then * * * went and cashed those checks and received money for them." *Id.* at ¶ 25. He was subsequently ordered to serve eight-month sentences for each count, to be served consecutively. *Id.* at ¶ 7.

{¶ 19} On appeal, Smith contended that the two offenses should have merged because "the theft required forgery." *Id.* at ¶ 26. The Eleventh District agreed that the two offenses "may have been part of a single course of conduct." *Id.* Nonetheless, the court found that a single course of conduct may entail multiple criminal acts. *Id.* In Smith's case, the court concluded that his act of obtaining another's property was distinct from the act of fabricating documents. *Id.*

{¶ 20} Having examined the analysis and holding of our sister court in *Smith*, we too find that offenses of theft and forgery do not merge in this case. Indeed, we conclude that appellant's act of fabricating the work orders was separate from the act of receiving the brass supplies and reselling them at a local recycling center. Thus, the trial court did not err in failing to merge the two offenses. Further, we find that the use of the telephone

to secure the brass supplies was of dissimilar import to the conduct underlying the theft charge. Therefore, appellant was properly convicted of both offenses.

{¶ 21} In light of the foregoing, we find that the trial court did not commit plain error in failing to merge the offenses of grand theft, forgery, and telecommunications fraud. Accordingly, appellant's sole assignment of error is not well-taken.

III. Conclusion

{¶ 22} For the foregoing reasons, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, J. _____
JUDGE

Stephen A. Yarbrough, P.J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE