[Cite as *State v. Jarvi*, 2012-Ohio-5590.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-A-0063**
- vs -	:	
KAYLA JARVI,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Ashtabula County Court of Common Pleas, Case No. 2010 CR 92.

Judgment: Reversed and remanded.

Thomas L. Sartini, Ashtabula County Prosecutor, and *Shelley M. Pratt*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047-1092 (For Plaintiff-Appellee).

Rick L. Ferrara, 2077 East 4th Street, Second Floor, Cleveland, OH 44113 (For Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} This appeal is from the sentencing judgment in a criminal action before the Ashtabula County Court of Common Pleas. Appellant, Kayla Jarvi, seeks to contest the propriety of the two prison terms which the trial court imposed in light of her conviction on charges of aggravated robbery and aggravated burglary. Specifically, she contends that only one sentence should have been imposed because the two charges were allied offenses of similar import.

{¶2} In March 2010, appellant was indicted on two counts of complicity in the commission of aggravated murder, one count of complicity in the commission of murder, one count of complicity in the commission of involuntary manslaughter, and one count of complicity in the commission of aggravated robbery. These charges were predicated upon an incident in which appellant and three other persons trespassed into the home of Richard Hackathorn, an individual who had given financial aid to appellant in the past. After Hackathorn refused to give appellant any money on that particular occasion, one of her male companions struck Hackathorn with a wooden club, causing him to fall on the floor. Appellant then removed Hackathorn's wallet from his pocket and took a sum of money.

{¶3} After the criminal case against appellant had been pending for over fifteen months, the state filed an information which charged her with two new offenses based upon the incident in the Hackathorn home. Specifically, the state had now charged her with one count of aggravated robbery, a first-degree felony under R.C. 2911.01(A)(3), and one count of aggravated burglary, a first-degree felony under R.C. 2911.11(A)(1).

{¶4} One day following the submission of the information, appellant entered a written and oral plea of guilty to both of the new charges. In response, the state agreed to dismiss all five original counts under the indictment. Upon conducting the necessary colloquy with appellant in accordance with Crim.R. 11, the trial court accepted the guilty plea and cancelled her scheduled trial.

{¶5} During the separate sentencing hearing, appellant's attorney moved the trial court to merge the two offenses for sentencing purposes, arguing that the elements of the crimes were too similar. In response, the state maintained that a separate prison

term for each crime could be imposed because, unlike aggravated burglary, aggravated robbery required the commission, or attempted commission, of a theft offense. Without making a specific ruling on the "merger" question, the trial court imposed two separate nine-year terms for the respective offenses, but ordered the two terms to be served concurrently.

{¶6} In appealing the trial court's "sentencing" decision, appellant has asserted one assignment of error for review:

{¶7} "The trial court erred when it failed to merge aggravated burglary and aggravated robbery as allied offenses."

{¶8} In maintaining that the trial court erred in imposing a separate sentence for each of the charged offenses, appellant first contends that the elements of aggravated robbery and aggravated burglary correspond to such a degree that the two crimes must be deemed allied offenses of similar import. Second, she submits that, since the crimes were committed almost simultaneous under the facts of her case, it cannot be said that she had a separate animus for each offense.

{¶9} A criminal defendant's conviction on multiple counts is governed by R.C. 2941.25, which presently provides:

{¶10} "(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.

{¶11} "(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."

{¶12} In interpreting R.C. 2941.25 through the years, the Supreme Court of Ohio has employed different tests for determining when two crimes will be considered allied offenses for purposes of imposing a multiple-term sentence. *See State v. Oneil*, 11th Dist. No. 2010-P-0041, 2011-Ohio-2202, ¶39-40, in which this court fully discussed the relevant Supreme Court precedent since 1979. In its most recent pronouncement on the "allied offenses" issue, in a plurality opinion adopted by this court, *see State v. Muncy,* 11th Dist. No. 2011-A-0066, 2012-Ohio-2830, the Supreme Court summarized its basic application of R.C. 2941.25 in the following manner:

{¶13} "In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), the question is whether it is possible to commit one offense *and* commit the other with the same conduct * * *. If the offenses correspond to such a degree that the conduct of the defendant constituting commission of one offense constitutes commission of the other, then the offenses are of similar import.

{¶14} "If the multiple offenses can be committed by the same conduct, then 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.' * * *.

{¶15} "If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged.

{¶16} "Conversely, if the court determines that the commission of one offense will *never* result in the commission of the other, or if the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to

R.C. 2941.25(B), the offenses will not merge." (Internal citations omitted and emphasis sic.) *State v. Johnson,* 128 Ohio St.3d 153, 2010-Ohio-6314, ¶48-51.

{¶17} In this case, appellant was convicted of two offenses under the "robbery" chapter of the Ohio Revised Code. First, she pleaded guilty to one count of aggravated robbery under R.C. 2911.01(A)(3). This statutory provision states:

{¶18} "(A) No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following:

{¶19} "* * *

{¶20} "(3) Inflict, or attempt to inflict, serious physical harm on another. * * *."

{¶21} As part of her guilty plea, appellant also admitted that she had committed the offense of aggravated burglary under R.C. 2911.11(A)(1):

{¶22} "(A) 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:

{¶23} "(1) The offender inflicts, or attempts or threatens to inflict physical harm on another; * * *."

{¶24} Applying the foregoing, it is possible to commit both aggravated burglary and aggravated robbery with the same conduct as occurred here. Moreover, the two crimes were not committed separately or with a separate animus.

{¶25} Accordingly, sentencing appellant on both aggravated burglary and aggravated robbery is not permitted. *Johnson* and *Muncy*. Moreover, that the identical sentences are to run concurrently does not change the outcome because the imposition of a concurrent sentence for an allied offense still constitutes a second conviction in violation of R.C. 2941.25. *Johnson and Muncy.*

{¶26} Based on the foregoing, we reverse and remand for sentencing consistent with this opinion.

CYNTHIA WESTCOTT RICE, J.,

MARY JANE TRAPP, J.,

concur.