

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLERMONT COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. CA2011-05-038
 :
 - vs - : OPINION
 : 4/2/2012
 :
 RONALD L. SIMMONDS, :
 :
 Defendant-Appellant. :

CRIMINAL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2010 CR 0815

Donald W. White, Clermont County Prosecuting Attorney, David H. Hoffmann, 123 North Third Street, Batavia, Ohio 45103-3033, for plaintiff-appellee

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POWELL, P.J.

{¶ 1} Defendant-appellant, Ronald Simmonds, appeals his conviction and sentence in the Clermont County Court of Common Pleas for breaking and entering, theft, and possession of criminal tools.

{¶ 2} On October 1, 2010, appellant trespassed onto the grounds of the Real Life Assembly of God Church in Batavia, Ohio, where he disassembled and detached an air

conditioning unit from the church building. When a witness approached appellant, he fled the scene in his pickup truck. A short while later, the police apprehended appellant and searched his vehicle. The police discovered several tools inside of his truck, including a drill, pipe cutter, wire cutter, and a wrench. The tools had an oily substance on them, and upon investigation, the police discovered a similar substance on the air conditioning unit and church walls. The police also discovered that the wrench in appellant's truck fit the bolts that had attached the air conditioner to the church.

{¶ 3} As a result of this activity, appellant was indicted for one count of breaking and entering (R.C. 2911.13), one count of theft (R.C. 2913.02), and one count of possession of criminal tools (R.C. 2923.24), all fifth-degree felonies. Following a jury trial, appellant was found guilty of all charges.

{¶ 4} During sentencing, the trial court merged the breaking and entering and theft charges, and the state elected to pursue the theft offense. The court refused appellant's request to merge the possession of criminal tools offense. Appellant was sentenced to consecutive 12-month prison terms for theft and possession of criminal tools, for an aggregate prison term of two years.

{¶ 5} Appellant timely appeals, raising three assignments of error for review. To facilitate discussion, we will address appellant's arguments out of order.

{¶ 6} Assignment of Error No. 2:

{¶ 7} THE TRIAL COURT ERRED WHEN IT IMPOSED SEPARATE SENTENCES UPON RONALD SIMMONDS FOR OFFENSES THAT AROSE FROM THE SAME CONDUCT, WERE NOT COMMITTED SEPARATELY OR WITH A SEPARATE ANIMUS, AND SHOULD HAVE BEEN MERGED FOR SENTENCING PURPOSES UNDER R.C. 2941.25. *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, at syllabus. (Sentencing T.p., at 14, 26-27; T.d. 74, at 1) [sic.]

{¶ 8} Appellant argues the trial court erred in refusing to merge the theft and possession of criminal tools offenses, as they are allied offenses of similar import subject to merger under R.C. 2941.25. We agree.

{¶ 9} R.C. 2941.25, Ohio's multiple-count statute, prohibits the imposition of multiple punishments for the same criminal conduct. *State v. Clay*, 12th Dist. No. CA2011-02-004, 2011-Ohio-5086, ¶ 17; *State v. McCullough*, 12th Dist. Nos. CA2010-04-006, CA2010-04-008, 2011-Ohio-992, ¶ 11. The statute provides:

(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 *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, the Supreme Court of Ohio established a new two-part test for determining whether offenses are allied offenses of similar import under R.C. 2941.25. Under *Johnson*, the first inquiry focuses on "whether it is possible to commit one offense *and* commit the other with the same conduct * * *." (Emphasis sic.) *Id.* at ¶ 48. It is not necessary that the commission of one offense will always result in the commission of the other. *Id.* Rather, the question is whether it is *possible* for both offenses to be committed by the same conduct. *Id.* Conversely, if the commission of one offense will never result in the commission of the other, the offenses will not merge. *Id.* at ¶ 51; *McCullough* at ¶ 14.

{¶ 11} If the multiple offenses can be committed with the same conduct, the court must then determine whether the offenses were in fact committed by a single act, or performed with a single state of mind. *Johnson* at ¶ 49.

{¶ 12} If the answer to both questions is yes, the offenses are allied offenses of similar import and must be merged. *Id.* at ¶ 50. On the other hand, if the offenses are committed separately or with a separate animus, the offenses will not merge. *Id.* at ¶ 51. See also *McCullough*, 2011-Ohio-992 at ¶ 15.

{¶ 13} Applying *Johnson*, we first determine whether it is possible for theft and possession of criminal tools to be committed with the same conduct.

{¶ 14} Appellant was charged with theft in violation of former R.C. 2913.02(A)(1), effective at the time of the offense, which stated: "(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: (1) Without the consent of the owner or person authorized to give consent * * *."

{¶ 15} Appellant was also charged with possession of criminal tools in violation of R.C. 2923.24(A), which states: "No person shall possess or have under the person's control any substance, device, instrument, or article, with purpose to use it criminally."

{¶ 16} The state concedes, and we agree, that it is possible to commit both offenses with the same conduct. Where, as here, a defendant uses tools to obtain control over property without the owner's consent, it is possible for the defendant to have committed both theft and possession of criminal tools. See *Clay*, 2011-Ohio-5086 at ¶ 23 ("[where] a defendant commits a theft by using an object to threaten the immediate use of force, it is possible for the defendant to have committed both robbery and possession of criminal tools").

{¶ 17} We next determine whether, under the particular facts of this case, appellant committed these offenses with the same conduct, i.e., a "single act," and with the same animus. *Johnson*, 2010-Ohio-6314 at ¶ 49. See also *State v. Snyder*, 12th Dist. No. CA2011-02-018, 2011-Ohio-6346, ¶ 21. We conclude these offenses were committed by the

same conduct that amounted to a single act, committed with a single state of mind.

{¶ 18} Count 3 of the indictment alleged that on October 1, 2010 in Clermont County, Ohio, appellant possessed a device or tool "with purpose to use it criminally * * * and the substance, device, instrument, or article involved in the offense was intended for use in the commission of a felony * * *." Count 2 of the indictment alleged that on October 1, 2010 in Clermont County, "with purpose to deprive the owner of property or services, [appellant] did knowingly obtain or exert control" over items worth between \$500 and \$5,000, a fifth-degree felony under former R.C. 2913.02(B)(2).¹

{¶ 19} It is undisputed that the tools used during the commission of the theft, namely, the drill, wrench, pipe and wire cutters, were also the subject of the possession of criminal tools charge. From this, it is evident the state prosecuted appellant for the possession of criminal tools based on his conduct in engaging in the theft. Thus, the remaining question is whether appellant committed the offenses of theft and possession of criminal tools with a "separate animus." *Johnson*, 2010-Ohio-6314 at ¶ 49.

{¶ 20} Under R.C. 2941.25(B), "animus" is defined as "purpose or, more properly, immediate motive." *State v. Logan*, 60 Ohio St.2d 126, 131 (1979). If the defendant acted with the same purpose, intent, or motive in both instances, the animus is identical for both offenses. *State v. Lewis*, 12th Dist. No. CA2008-10-045, 2012-Ohio-885, ¶ 13.

{¶ 21} Here, the facts alleged in the indictment and bill of particulars reveal that appellant approached the church with the intent to use the tools to steal the air conditioner. Specifically, with regard to the criminal tools charge, the bill of particulars states: "The defendant, on or about October 1, 2010, in Clermont County, Ohio, did possess or have under his control any device or instrument, with purpose to use it criminally[.] * * *

1. To constitute a fifth-degree felony under present R.C. 2913.02, the property must be worth between \$1,000 and \$7,500. See also Am.Sub.H.B. No. 86.

Specifically, the defendant unlawfully entered onto [church] property *in order to steal an air conditioning unit.*" (Emphasis added.)

{¶ 22} Additionally, during closing argument, the state explained: "I told you that there was not going to be a doubt that * * * breaking and entering was committed; that a theft was committed; and that criminal tools were, in fact, utilized to commit these offenses."

{¶ 23} Given these statements, along with the evidence before us, we find appellant acted with the same animus, i.e., the same purpose, intent, or motive, in committing the offenses of possession of criminal tools and theft, namely, to obtain the air conditioning unit from the church. See *Snyder*, 2011-Ohio-6346 at ¶ 32; *State v. McClendon*, 2nd Dist. No. 23558, 2011-Ohio-5067. See also *State v. Humphrey*, 4th Dist. No. 10CA3150, 2011-Ohio-5238, ¶ 20 (court was willing to find same animus in breaking and entering and possession of criminal tools - a walkie-talkie - if the record had shown defendant used the walkie-talkie during the break-in).

{¶ 24} Having answered both prongs of *Johnson* in the affirmative, we find that under the facts of this case, theft and possession of criminal tools are allied offenses of similar import that must be merged. See *Johnson*, 2010-Ohio-6314 at ¶ 51; *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, ¶ 26 (allied offenses of similar import must be merged at sentencing); R.C. 2941.25(A). Accordingly, we reverse and vacate appellant's sentences for theft and possession of criminal tools, and the case must be remanded for a new sentencing hearing on the offense that remains after the state selects which allied offense to pursue. See *McClendon* at ¶ 33, citing *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, ¶ 13-15. On remand, the state will have the right to choose between theft in violation of former R.C. 2913.02(A)(1) or possession of criminal tools in violation of R.C. 2923.24(A), and the trial court will be bound by the state's election. See *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-319, paragraphs one, two, and three of the syllabus.

{¶ 25} Appellant's second assignment of error is sustained.

{¶ 26} Assignment of Error No. 1:

{¶ 27} THE TRIAL COURT VIOLATED RONALD SIMMONDS'S CONSTITUTIONAL RIGHTS AND COMMITTED PLAIN ERROR WHEN IT ENTERED A CONVICTION AGAINST MR. SIMMONDS FOR A FIFTH-DEGREE FELONY OFFENSE AFTER IT FAILED TO PROVIDE THE JURY WITH A VERDICT FORM THAT IDENTIFIED THE DEGREE OF THE THEFT OFFENSE AS REQUIRED BY R.C. 2945.75. *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, 860 N.E.2d 735, at syllabus. (Sentencing T.p., at 27; T.d. 65; T.d. 74, at 1) [sic.]

{¶ 28} Appellant next argues that the offense level of his theft conviction must be reduced due to an error in the verdict form. The state concedes appellant's argument. We agree and sustain appellant's assignment of error.

{¶ 29} R.C. 2945.75 provides, in relevant part:

(A) 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.

{¶ 30} In *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, the Ohio Supreme Court held that pursuant to the clear language of the statute, "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." *Id.* at ¶ 14.

{¶ 31} At the time of the offense, a former version of R.C. 2913.02 was in effect. Under this version, appellant's theft offense would have been a first-degree misdemeanor,

but for the aggravating element that the air conditioner was worth between \$500 and \$5,000,² a value that elevated the crime to a fifth-degree felony. *Id.* Upon review, the verdict form does not mention the degree of the theft offense, nor does it mention the aggravating element, i.e., the value of the property taken. R.C. 2945.75(A)(2) explicitly provides that in this situation, "[the] guilty verdict constitutes a finding of guilty of the least degree of the offense charged." Thus, this cause must be remanded for the trial court to find appellant guilty of petty theft, a first-degree misdemeanor, which was the least degree of the offense under former R.C. 2913.02(A), (B)(2).

{¶ 32} Appellant's first assignment of error is sustained.

{¶ 33} Assignment of Error No. 3:

{¶ 34} THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT FAILED TO IMPOSE COURT COSTS UNDER R.C. 2947.23 UPON RONALD SIMMONDS IN OPEN COURT DURING THE SENTENCING HEARING BUT DID IMPOSE THOSE COSTS THROUGH ITS SENTENCING ENTRY. *State v. Joseph*, 125 Ohio St.3d 76, 2010-Ohio-954, 926 N.E.2d 278, ¶22-24; Crim.R. 52(B). (Sentencing T.p, at 1-35; T.d. 74, at 2) [sic.]

{¶ 35} In his third and final assignment of error, appellant argues the trial court erred by imposing court costs in its sentencing entry without notifying him that it was imposing the costs during the sentencing hearing.

{¶ 36} In *State v. Joseph*, 125 Ohio St.3d 76, 2010-Ohio-954, the Ohio Supreme Court held that a trial court errs by imposing court costs in its sentencing entry when it did not impose those costs in open court at the sentencing hearing. *Id.* at ¶ 22. As a result of this error, the court found defendants are entitled to a remand for the limited purpose of allowing them to move the court for a waiver of payment of court costs. *Id.* at paragraph one of the

2. The property taken was worth \$4,680.

syllabus, ¶ 22-23 (failure to impose court costs during sentencing hearing "did not void defendant's entire sentence").

{¶ 37} Upon review of the transcript, it is clear the trial court did not impose court costs during the sentencing hearing. As a result, appellant suffered harm in that he was denied the opportunity to claim indigency and seek a waiver of those costs before the trial court. *Id.*; Crim.R. 43(A). Thus, on remand, appellant must be afforded the opportunity to seek a waiver of court costs in accordance with *Joseph*.

{¶ 38} Appellant's third assignment of error is sustained.

{¶ 39} The trial court's judgment is reversed, and this cause is remanded for further proceedings consistent with this opinion.

RINGLAND and HENDRICKSON, JJ., concur.