

## CHAPTER 12: BURGLARY, TRESPASS, ARSON, AND MISCHIEF

These offenses are found in two different sections of the Ohio Revised Code. Burglary and trespass are located in Chapter 2911 (along with robbery and safecracking), while arson and mischief are found in Chapter 2909.

### **Burglary**

Under Ohio law, there are three burglary offenses: aggravated burglary, burglary, and breaking and entering. As stated in the text, the common law definition of burglary required breaking and entering at night; these requirements are no longer essential for a burglary to be committed.

Aggravated burglary is the most serious form of burglary in Ohio. In relevant part, the law provides that:

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...any criminal offense if (1) the offender inflicts or attempts or threatens to inflict physical harm on another; (2) the offender has a deadly weapon or dangerous ordnance on or about the offender's person or under the offender's control (Ohio Revised Code, §2911.11, 1996, available at <http://codes.ohio.gov/orc/2911.11>).

Because aggravated burglary involves the use or threatened use of force, it is more than a mere property crime. Therefore, it is a first-degree felony.

Burglary similarly involves the use of force. The law against burglary contains four provisions:

no person, by force, stealth, or deception, shall do any of the following...

- (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...any criminal offense,
- (2) trespass in an occupied structure...that is a permanent or temporary habitation of any person when any person other than an accomplice of the offender is present or likely to be present, with purpose to commit...any criminal offense,
- (3) trespass in an occupied structure...with purpose to commit...any criminal offense,
- (4) trespass in a permanent or temporary habitation of any person when any person other than an accomplice of the offender is present or likely to be present (Ohio Revised Code, §2911.12 (A), 1996, available at <http://codes.ohio.gov/orc/2911.12>).

A violation of (1) or (2) is a second-degree felony, a violation of (3) is a third-degree felony, and a violation of (4) is considered a fourth-degree felony. Notably, a violation of (4) does not require intent to commit an offense.

There are a number of important issues that arise when courts apply this statute. First, there is the issue of what constitutes "the use of force." The phrase is nowhere defined in the statute. Second, the statute refers to entering an "occupied structure," when someone "is likely to be present." But how likely does

someone's presence need to be? Moreover, while several of the provisions refer to entering with "purpose to commit a crime." But what if someone enters without such purpose and then later develops one after observing an item of value or interest? These issues were addressed in *State v. Moore*, 2006 Ohio 2800 (2006) by Ohio's Twelfth District Court of Appeal.

### **State v. Moore**

The defendant claimed that he went to his neighbor's apartment to collect a debt. When he arrived, he called out but got no response. The defendant also testified that he believed his neighbor was in the apartment, but hiding. After finding that door unlocked, he opened it and entered. He further claimed that although he did not intend to take anything from the apartment, after gaining entrance he discovered a DVD player, which he removed and then pawned for the amount of the debt purportedly owed to him. Consequently, the defendant was convicted of violating Ohio Revised Code § 2911.12(A)(2), a second degree felony, which states that no person, by force, stealth, or deception, shall...trespass in an occupied structure...that is a permanent or temporary habitation of any person when any person... is present or likely to be present, with purpose to commit...any criminal offense."

On appeal, the defendant raised several points. First, he argued that he could not be convicted of burglary because he never used "force" to enter the apartment—he announced his presence and the door was unlocked. Nonetheless, the court summarily explained that opening the door could constitute force, and implied that things may have been different if there had been evidence that the door was actually open. Second, the defendant argued that the burglary provision applied against him was inapposite as he did not enter the apartment with the intent to commit a crime and that he only formed such intent after entry. But once again, the court summarily explained that the intent to commit a crime could occur at any point during the trespass; the statute contains no chronological requirement. Lastly, the defendant argued that because the McNabb's were not home when he entered, and were only home sporadically during this time period because they had been visiting a relative who had been ill, no one had been present or likely to be present when he entered. The court noted that to prove that someone was likely to be present, the state needed to show that people were at home at varying times. However, such evidence was presented. Moreover, the defendant had testified that he believed that his neighbor was in the apartment but hiding from him. Thus, even his testimony supported the notion that the apartment was likely to be occupied. Accordingly, the conviction was affirmed.

### **Breaking and Entering**

As stated earlier, breaking and entering were requirements for burglary under common law. Today, these requirements form their own offense in the Ohio Revised Code. The law in Ohio provides that: no person by force, stealth, or deception, shall trespass in an unoccupied structure with purpose to commit...any theft offense...or any felony.

no person shall trespass on the land or premises of another, with purpose to commit a felony (Ohio Revised Code, §2911.13, 1996, available at <http://codes.ohio.gov/orc/2911.13>).

There are a couple of differences between this offense and burglary. First, breaking and entry only involves trespass in an unoccupied structure or on another's land as opposed to an occupied structure. Second, for breaking and entering, the trespasser must intend to commit either a theft, offense, or felony as opposed to intending to commit any type of criminal act, as is the case for burglary. Thus, using force to break a lock and gain unauthorized entry into a warehouse with the intent to steal merchandise stored there would likely qualify as breaking and entering. Breaking and entering is a fifth-degree felony (six to

twelve months).

## **Trespass**

As mentioned in the discussion above, trespass is a necessary component of both burglary and breaking and entering. However, it is also a separate offense under Ohio law, which recognizes two forms: criminal and aggravated trespass. A number of activities constitute criminal trespass, but most involve either knowingly or recklessly entering the land or premises of another without permission to do so. It is not necessary to do so with the intent to commit a crime under this statute; simply entering another's land without permission is trespass. Criminal trespass is considered a fourth-degree misdemeanor. (see <http://codes.ohio.gov/orc/2911.21>)

On the other hand, aggravated trespass requires intent to commit a crime that involves physical harm or the threat of physical harm. The law states:

no person shall enter or remain on the land or premises of another with purpose to commit...a misdemeanor, the elements of which involve causing physical harm to another person or causing another person to believe that the offender will cause physical harm to him (Ohio Revised Code, §2911.211, 1992, available at <http://codes.ohio.gov/orc/2911.211>).

Aggravated trespass is considered a first-degree misdemeanor.

## **Arson**

Arson is found in Chapter 2909 of the Ohio Revised Code under "Arson and Related Offenses." These offenses include aggravated arson, arson, disrupting public services, vandalism, criminal damaging or endangering, criminal mischief, terrorism, and others. The terrorism statute will be discussed in chapter 16 of this text, but this section will focus on four offenses: aggravated arson, arson, criminal mischief, and criminal damaging or endangering.

As with other "aggravated" crimes, aggravated arson involves physical harm or a risk of such harm. Ohio's aggravated arson statute states that:

no person, by means of fire or explosion, shall knowingly...

- (1) create a substantial risk of serious physical harm to any person other than the offender;
- (2) create physical harm to any occupied structure;
- (3) create, through the offer or acceptance of an agreement for hire or other consideration, a substantial risk of physical harm to any occupied structure (Ohio Revised Code, §2909.02 (A), 1996, available <http://codes.ohio.gov/orc/2909.02>).

A violation of (2), causing harm to an occupied structure, is a second-degree felony (two to eight years). A violation of (1) or (3), causing harm, or risk of the same to others, is a first-degree felony (three to ten years).

Note that a person can be guilty of aggravated arson if a fire creates a substantial risk of serious physical harm to others in the vicinity, including the firefighters who battle the fire. This was illustrated in *State v. Eggeman*, 2004 Ohio 6495 (2004) from Ohio's Third District Court of Appeal.

## **State v. Eggeman**

The defendant owned a vacant duplex whose lower unit was recently renovated. Firefighters were called to the scene of a fire at the duplex and found that the renovated lower unit was ablaze. Thirty-one firefighters fought the fire, but there was serious damage to the unit. Investigators noted that an accelerant had been splashed on the floor and the natural gas line coming into the unit was intentionally broken. It was deemed to be arson.

The defendant claimed that he was at home at the time of the fire, eating dinner, taking a shower, and watching television. However, during this time, he received two phone calls indicating that his duplex was on fire; these calls were not answered and were recorded on an answering machine. Additionally, two witnesses claimed to have seen the defendant's SUV parked in front of the building before and during the blaze. Although the defendant claimed to be home, he could produce no witnesses to support his alibi. He also received a large insurance settlement for the damages caused by the fire.

Because the duplex was vacant, the defendant could not be convicted of aggravated arson for having caused harm to an occupied structure. Nonetheless, the defendant was indicted and convicted of aggravated arson - §2909.02 (A)(1) – for knowingly creating a substantial risk of serious harm to another person by means of fire. He appealed, stating that the duplex was vacant and thus even if he had started the fire, he did not knowingly cause a substantial risk of harm to others. However, the court ruled that it was irrelevant that the duplex was vacant. A broken gas line, splashed accelerant on the floor, and fire were enough to put anyone on notice that an explosion could result and injure anyone in the vicinity, including firefighters, even if no large scale explosion occurred. Therefore, the conviction for aggravated arson was affirmed.

“Simple” arson is different from aggravated arson in that the statute that governs this offense prohibits anyone from causing a risk (as opposed to actual) physical harm to property. When read in conjunction with the aggravated arson statute, it is clear that in Ohio, one can use fire or an explosion to harm his own unoccupied property, provided he does not do so with the intent to defraud, or creates a risk of serious physical harm to others in the process. On the other hand, the statutes generally prohibit one from harming property owned by others.

(see <http://codes.ohio.gov/orc/2909.03>). Depending on the circumstances, “simple” arson can range from a first-degree misdemeanor to a third-degree felony.

## **Criminal damaging/endangering and criminal mischief**

Ohio law also prohibits criminal damaging. Criminal damaging includes knowingly causing a substantial risk of harm to another's property by any means, or recklessly causing a substantial risk of harm to another's property “by means of fire, explosion, flood, poison gas, poison, radioactive material, caustic or corrosive material, or other inherently dangerous agency or substance.” (see <http://codes.ohio.gov/orc/2909.06>). Generally, criminal damaging is a second-degree misdemeanor, but it can be more serious. For instance, criminal damaging is a first-degree misdemeanor if the criminal damaging creates a risk of harm to another person. Additionally, if the property at issue is used in the operation of an airplane, and the criminal damaging causes a risk of harm to another person, the offense is a fifth-degree felony.

Criminal mischief is sometimes confused with criminal damaging or endangering, but they are not the same. Criminal mischief could be considered a lesser form of criminal damaging in that the methods

employed to damage property in criminal mischief are not as drastic. Criminal mischief prohibits conduct such as defacing or tampering with another's property or using tear gas, stink bombs, and similar devices to cause public alarm. Criminal mischief is generally a third-degree misdemeanor, but it is a first-degree misdemeanor if there is a risk of harm to another person (Ohio Revised Code, §2907.07, 2004, available at <http://codes.ohio.gov/orc/2909.07>).

## REFERENCES

Ohio Revised Code, <http://codes.ohio.gov/orc>

State v. Eggeman, 2004 Ohio 6495 (2004)

State v. Moore, 2006 Ohio 2800 (2006)

## REVIEW QUESTIONS

1. What is the primary reason that aggravated burglary is considered a first-degree felony in Ohio?
  - a. it requires trespass into an occupied structure
  - b. it requires the theft of thousands of dollars in merchandise
  - c. it involves victims who are disabled or elderly
  - d. it involves the infliction or threat of physical harm
2. What is the difference between burglary and breaking and entering under Ohio law?
  - a. breaking and entering involves unoccupied structures and land, whereas burglary involves occupied structures
  - b. breaking and entering requires the intent to commit a misdemeanor, whereas burglary requires the intent to commit a felony
  - c. breaking and entering is a misdemeanor and burglary is a felony.
  - d. all of the above are true
3. Under Ohio's arson statutes:
  - a. a person cannot use fire or explosion to harm anyone's property
  - b. a person cannot be convicted of arson for using fire or an explosion to harm his own property
  - c. a person cannot use fire or an explosion to create a substantial risk of serious physical harm to a firefighter
  - d. arson is a misdemeanor if there are mitigating circumstances

## DISCUSSION QUESTION

Under Ohio law, a defendant is guilty of burglary or breaking and entering only if he uses force to trespass. However, some Ohio courts have found that opening an unlocked door constitutes "force." Should it? Keep in mind that the Ohio Revised Code defines force as follows: " 'Force' means any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing." (see <http://codes.ohio.gov/orc/2901.01>). Does this impact your answer?

## WEB RESOURCES

- <http://www.ohioiaai.org/> – website of the Ohio chapter of the International Association of Arson Inspectors provides information about their organization and work