

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. Nonetheless, they are found in the same chapter here.

Burglary

The Ohio Revised Code contains 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. It is defined as,

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).

Aggravated burglary involves the use or threatened use of force, which makes it more than a mere property crime. Therefore, it is considered a first-degree felony. Burglary does not involve the use or threatened use of force and it 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).

A violation of (A)(1) and (A)(2) above is considered a second-degree felony, a violation of (A)(3) is considered a third-degree felony, and a violation of (A)(4) is considered a fourth-degree felony. (A)(1) is violated when a person is present in the structure and the defendant intends to commit any criminal offense, while (A)(2) is violated if a person is "likely to be there" and the defendant intends to commit any criminal offense. (A)(3) is violated when a person is not there, and likely will not be, and the defendant intends to commit any criminal offense, while (A)(4) is violated when one simply trespasses into a structure when a person is present or likely to be, regardless of the intent to commit an offense

A number of issues are important to discuss with these definitions. First, the use of "force, stealth, or deception" is central to the definitions. Second, the "occupied structure" that is mentioned in these definitions is defined as any structure that could be used as a temporary or permanent dwelling, including homes, boats, trucks, trailers, and tents. Although they are called

“occupied” structures, a person does not have to be present for the structure to be occupied. If someone is “likely to be present,” due to living arrangements, work habits, etc., then the structure is considered occupied. These two issues – force, stealth, deception and occupied structure – were addressed in *State v. Moore*, 2006 Ohio 2800 (2006) from Ohio’s Twelfth District Court of Appeal.

State v. Moore

In this case, the defendant and the victim were neighbors in the same apartment complex. The defendant felt that the victim owed him money, so he went to the victim’s apartment to have him pay up. The defendant stated that the door was unlocked; he announced his presence but there was no answer. Thinking the victim was hiding from him, the defendant entered the apartment and found that no one was there. Since the victim owed him money, the defendant decided to take a DVD player to make up for the debt. Eventually, he was arrested and charged with burglary, a violation of §2911.12 (A)(2).

The defendant claimed that, since it was during the day and no one was home, he should not be charged with a second-degree felony. Plus, as it was during the day, it could be inferred that the defendant was not likely to be home either, due to his work schedule. Thus, the defendant claimed that he should, at most, be charged with violating (A)(3) of the burglary statute, a third-degree felony. The court ruled that defining the “likely to be present” requirement cannot be limited to a simple day or night analysis. In effect, although many people are out during the day during work, this does not mean that they are out every day or that other people (i.e., spouses, children) are always out as well. Similarly, although many people are home at night, this does not mean this is always the case. As a result, for each situation, the court ruled that the state must prove that,

the occupied structure is a permanent dwelling house which is regularly inhabited, that the occupying family was in and out on the day in question, and that such house was burglarized when the family was temporarily absent...the state must show that the victim was at home at varying times to prove that the victim was likely to be at home (paragraph 10 of the syllabus).

In this case, the victim and his family were in and out of the house all day and night due to the hospitalization of a family member and their requisite visits to and from the hospital. Also, the defendant’s own testimony indicated that he thought the victim was home, but hiding from him, so the conclusion was that the victim was “likely to be present” when the defendant entered his home.

A second point that the defendant made was the use of force. The defendant stated that the door was unlocked; therefore, he used no force, stealth, or deception to enter the apartment. The court ruled that actual force need not be present to establish this requirement; merely opening an unlocked door was sufficient to establish force as required for burglary.

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. Breaking and entering is defined as,

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).

There are a couple of differences between this offense and burglary. First, the trespass must occur in an unoccupied structure or on another's land, not in someone's dwelling place. Secondly, the intent must be to commit a theft offense or felony, not just any offense as specified for burglary. An example of a violation of this offense would be breaking into a storage warehouse to steal merchandise from that warehouse. Breaking and entering is a fifth-degree felony.

Trespass

As seen in the burglary definitions, trespass is a required component of the crime. Despite this, trespass alone is its own offense and it comes in two forms in Ohio: criminal trespass and aggravated trespass. Criminal trespass involves a number of activities, but most involve either knowingly or recklessly entering the land or premises of another without permission to do so. It is not necessary to 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.

On the other hand, aggravated trespass requires intent to commit a crime that involves harm. It is defined as,

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).

The trespass is considered "aggravated" when it involves actual physical harm or the threat of physical harm. 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, some forms of aggravated arson involve physical harm or a risk of such harm. Aggravated arson is defined as,

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).

The three parts of aggravated arson are the result of the “knowingly” level of culpability and the risk of serious physical harm. Even if a structure is vacant, a person can be guilty of aggravated arson if the 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.

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 that he had no intention of hurting others. However, the court ruled that it was irrelevant that the duplex was vacant. The fact that the defendant deliberately broke the natural gas line, splashed accelerant on the floor, and started a fire was enough to create a risk of harm to the firefighters and others who lived on the street because the duplex could easily have exploded and damaged a large area. The court ruled that it did not matter that an explosion did not actually occur; the risk of the explosion was enough to satisfy the “knowingly...create a substantial risk of serious physical harm” element of aggravated arson.

Also noted in the aggravated arson definition is arson for hire. The third definition of aggravated arson ((A)(3)) indicates that a person can neither offer nor accept an offer to engage in setting a fire that creates a risk of serious physical harm to others. Because this definition, as well as (A)(1), contains the risk of serious physical harm to others, it is considered a first-degree felony. Causing harm to any occupied structure ((A)(2)) is considered a second-degree felony.

Another arson offense (“arson” - §2909.03, 1996) is different from aggravated arson in a number of ways. First, this type of arson does not require the “serious physical harm” element found in aggravated arson; it merely requires “physical harm.” Also, it contains elements dealing with consent, intent to defraud, public buildings, and nature preserves. In effect, arson covers the following:

- creating a risk of physical harm to another’s property without their consent,
- creating a risk of physical harm to the offender’s or another’s property in order to defraud,
- creating a risk of physical harm to a public building, such as a courthouse
- creating a risk of physical harm to parks, forests, preserves and similar properties

Depending on the circumstances listed above, arson is considered anywhere from a first-degree misdemeanor to a third-degree felony.

Criminal damaging/endangering and criminal mischief

A crime similar to arson, but not necessarily by means of a fire, is criminal damaging. This offense involves creating a risk of physical harm to another's property in two ways: (1) knowingly, by any means, or (2) recklessly, by fire, explosion, flood, poison gas, poison, radioactive material, caustic or corrosive material, or other dangerous substance (Ohio Revised Code, §2909.06, 1996). Generally, this offense is considered a second-degree misdemeanor, but the level increases if there is a risk of harm to another person (first-degree misdemeanor) or if the property involved is in any way used in the operation of an airplane AND there is risk of harm to another person (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 or endangering in that the means 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 considered a third-degree misdemeanor, which increases to a first-degree misdemeanor if there is a risk of harm to another person (Ohio Revised Code, §2907.07, 2004).

REFERENCES

Ohio Revised Code, www.ohio.gov/ohio/ohiolaws.html

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 a dwelling
 - 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

DISCUSSION QUESTION

Regarding the aggravated arson statute, people do not have to be present in a building in order for a defendant to be charged with a violation of this offense. Rather, if the fire creates a risk of serious physical harm to anyone in the vicinity (firefighters, neighbors, etc.), then the arson becomes aggravated. Do you feel there should be a distinction between arson with people present in the building and arson with no people present, but could harm others in the vicinity? Explain.

WEB RESOURCES

- www.ohiaai.org – website of the Ohio chapter of the International Association of Arson Inspectors provides information about their organization and work
- www.concentric.net/~Vap1/burglary.htm - website of Ohio's Summit County victim assistance program provides information and tips about burglary offenses