

[Cite as *State v. Gordon*, 2018-Ohio-1643.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103494

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DEANDRE GORDON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-15-594287-A and CR-15-596591-A

BEFORE: Kilbane, P.J., McCormack, J., and Blackmon, J.

RELEASED AND JOURNALIZED: April 26, 2018

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MARY EILEEN KILBANE, P.J.:

{¶1} This cause is before us on remand from the Ohio Supreme Court’s recent decision in *State v. Gordon*, Slip Opinion No. 2018-Ohio-259 (“*Gordon II*”), for further review of our decision released August 18, 2016.¹

{¶2} In *Gordon I*, defendant-appellant, Deandre Gordon (“Gordon”), sought review of his convictions and sentence for aggravated robbery, kidnapping, and felonious assault following a joint trial in Cuyahoga C.P. Nos. CR-15-594287-A and CR-15-596591-A. We reversed and remanded the matter for a retrial, finding that the trial court committed plain error by joining Gordon’s two cases for trial because it prevented him from retaining counsel of choice. *Id.* at ¶ 23.

¹*State v. Gordon*, 8th Dist. Cuyahoga No. 103494, 2016-Ohio-5407 (“*Gordon I*”).

{¶3} The state of Ohio (“State”) appealed our decision in *Gordon I* to the Ohio Supreme Court. The Ohio Supreme Court accepted the appeal and reviewed whether the trial court’s decision to join the two indictments at trial was prejudicial to Gordon. *Gordon II* at ¶ 1. The court found that there was no plain error in joining the two cases. *Id.* at ¶ 30. Subsequently, the court reversed our decision and remanded the matter for us to consider Gordon’s remaining assignments of error, which are as follows:

Assignment of Error Two

The trial court erred by permitting witnesses to provide prejudicially irrelevant testimony which allowed the jury to base its verdict on matters other than evidence of the actual offense charged.

Assignment of Error Three

The trial court erred by failing to find the convicted offenses to be allied pursuant to R.C. 2941.25(B).

Assignment of Error Four

The convictions are against the weight of the evidence.

Assignment of Error Five

Defense counsel’s failure to object to an improper joinder and to the admission of prejudicially irrelevant testimony deprived the defendant of his right to effective assistance of counsel.

{¶4} Prior to our discussion of Gordon’s assigned errors, we set forth the background of this appeal as stated in *Gordon I*.

On Friday, January 9, 2015, [the victim, Tevaughn Darling (“Darling”) testified that] on Friday, January 9, 2015, he celebrated his 36th birthday with Gordon, his girlfriend, Terri Buckner (“Buckner”), and other friends.² Darling has known Gordon since 2002 and thinks of him as his nephew. Upon returning home,

²Darling testified that he has been convicted of drug conspiracy and drug trafficking charges.

Darling noticed that his car had been ransacked and his windows were broken, which was common in his neighborhood.

Darling invited Gordon to stay over his house. Gordon stayed the remainder of the weekend through Monday afternoon. On Sunday, the two of them made a \$1,500 bet on a football game. Darling won the \$1,500. Gordon did not have the money to pay Darling. He told Darling that he needed money. Darling testified that Gordon did not have any money while they were celebrating his birthday. Darling paid for his birthday celebration in cash. Darling works in cash businesses, rehabbing houses, junking cars, and scrapping. On some days, he would make \$2,500 a day scrapping cars.

On Monday, January 12, 2015, Buckner took Darling's car to get it repaired. After Buckner left, only Darling and Gordon were in the house. At approximately 5:00 p.m., Gordon asked Darling what he was going to do for him.

Darling said he would give Gordon some money. His plan was to give Gordon \$1,000 from the bet and keep \$500. Gordon then went into the bathroom and came out wearing a hood and carrying a .45 caliber gun. Darling testified that this did not concern him because Gordon always had a .45 caliber gun on him. Gordon told Darling to "give me everything you got." At first, Darling thought Gordon was joking. Gordon then shot Darling in the foot and dragged him from the kitchen into a back bedroom. Gordon took \$5,000 out of Darling's dresser drawer and approximately \$2,300 out of Darling's pocket. Gordon threatened to kill Darling if he told anyone about the incident. Gordon then stole Darling's rental car, which the police located 0.7 miles from Darling's house.

Darling then called Buckner to take him to the hospital. When speaking with police officers at the hospital, Darling told them that he was carjacked. The police investigated and found no evidence of a carjacking or a shooting. Darling testified that initially he lied to the police because he did not want to get Gordon in trouble and deal with the consequences of snitching on Gordon, who is a member of the "Loyal Always" gang.

Darling testified that he changed his mind and decided to tell the police that Gordon shot him and took his money and the rental car. Darling made a statement, which was recorded, to Detective Glenn Daniels ("Detective Daniels") of the Bedford Heights Police Department. When Detective Daniels asked Darling where they could locate Gordon, Darling responded, "[h]e runs with the gang Loyal Always."

Darling further testified that a video of his recorded statement to the police was posted on Instagram on or about May 21, 2015. The video was edited to make it appear as though he was telling the police information about the Loyal Always gang when he was not. Darling received numerous threats as a result of this video being posted on Instagram. Darling told the prosecutor and the Bedford

Heights Police Department about this video. After meeting with the prosecutor, Darling observed Gordon in his car in the parking lot. Gordon rolled down his window and yelled to Darling, "Mr. Officer, Mr. Officer." Darling interpreted Gordon's comments as being called a snitch. Darling also testified about photos and Facebook comments calling him a rat.

Buckner testified that she, Darling, Gordon, and other friends went out on Friday, January 9, 2015, to celebrate Darling's birthday. Darling spent a large amount of cash that night. When they returned home, they noticed that the windows to Darling's car were broken. She further testified that Gordon spent the weekend with her and Darling. On Monday, January 12, 2015, around 5:00 p.m., she left Darling and Gordon to get Darling's car repaired. She left a rental car at their home. Approximately one-half hour later, she received a call from Darling telling her that she needed to take Darling to the hospital because Gordon shot him in the foot. When she got home, she observed blood smeared across the floor from the kitchen to the back bedroom. Buckner took Darling to the emergency room. She told the police the same version of events that Darling initially told the officers.

Buckner also testified about the Instagram post of Darling's statement. She was afraid because they were snitching and snitches get killed. She testified that Gordon's friends were in the Loyal Always gang and she feared they would hurt them both as a result of the Instagram video.

Detective Daniels testified that he was assigned to Darling's case. As part of his investigation, he presented Darling with a photo array, where Darling selected Gordon as his assailant. The police also went to Darling's home where they discovered a shell casing that was consistent with that of a .45 caliber handgun. Detective Daniels took a video-recorded statement from Darling. Detective Daniels provided the prosecutor with a copy of Darling's statement. Gordon's retained defense counsel testified that on or about May 20, 2015, he showed Darling's recorded statement to Gordon during a private meeting between defense counsel and Gordon.

On May 27, 2015, Detective Daniels received several phone calls from Darling stating that there is an edited version of his statement to the police that was posted on Instagram on May 22, 2015. The video appears to be a cell phone recording of Darling's statement. Darling indicated to Detective Daniels that he was afraid for his life and this Instagram video has ruined his life. Detective Daniels requested information from Facebook about the video, but he could not identify the source of the post. Detective Daniels testified about the Loyal Always gang. He acknowledged that he is not a gang expert, but has basic knowledge of the gang. He testified that the Loyal Always gang is an offshoot of the former LA Gunners gang. The LA Gunners were raided by the ATF in 2008 because of an

investigation into various criminal activity, including murder, firearm violations, rape, assaults.

At the conclusion of trial, the jury returned a verdict of guilty of all counts of the indictment, including the firearm specifications in Case No. CR-15-594287-A (two counts of aggravated robbery, two counts of felonious assault, and one count of kidnapping). The jury found Gordon not guilty of the charge of intimidation in Case No. CR-15-596591-A.

That same day, the court proceeded to sentencing. The court merged Counts 1 and 2 (aggravated robbery) and Counts 4 and 5 (felonious assault) for purposes of sentencing. The court then proceeded to sentence Gordon on Counts 1, 3 [kidnapping], and 5. On each of Counts 1 and 3, the court sentenced Gordon to four years in prison on the underlying offenses, plus the one- and three-year firearm specifications. On Count 5, the court sentenced Gordon to three years in prison on the underlying offense, plus the one- and three-year firearm specifications. In accordance with R.C. 2929.14(B)(1)(g), the court ordered that the two most serious firearm specifications be served consecutive to each other and the underlying offenses in Counts 1, 3, and 5. The court further ordered that the underlying offenses in Counts 1, 3, and 5 be served concurrently to one another for an aggregate of ten years in prison.

Id. at ¶ 4-15.

Witness Testimony

{¶5} In the second assignment of error, Gordon argues that Darling’s testimony regarding his fear of gang reprisal for accusing Gordon as his assailant and testimony from other witnesses that the Loyal Always gang would probably kill Darling had no relevance to the convicted offenses.

{¶6} He contends that most of this irrelevant evidence stems from the improper joinder of the intimidation case. Since the Supreme Court in *Gordon II* found that joinder was proper, our focus is on whether this evidence was admissible as relevant evidence.

{¶7} Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Evid.R. 401. Evid.R. 402 provides that relevant evidence is

generally admissible. Relevant evidence, however, may be excluded on the grounds of prejudice, confusion, or undue delay. Evid.R. 403.

{¶8} Here, the evidence that Darling’s fear stemmed from his knowledge of Gordon’s gang affiliation was relevant to the intimidation charge. This relevance was not outweighed by the prejudicial effect. Moreover, we note that “evidence of threats or intimidation of witnesses reflect a consciousness of guilt and are admissible as admission by conduct. *State v. Richey* (1992), 64 Ohio St.3d 353, 357, 595 N.E.2d 915. Hence, intimidation of a witness is not ‘wholly independent’ of the charged offenses.” *State v. Soke*, 105 Ohio App.3d 226, 250, 663 N.E.2d 986 (8th Dist.1995), citing *State v. Leonard*, 4th Dist. Lawrence No. CA92-12, 1993 Ohio App. LEXIS 2725 (May 21, 1993); *State v. Reese*, 8th Dist. Cuyahoga Nos. 53115 and 53116, 1988 Ohio App. LEXIS 272 (Jan. 7, 1988).

{¶9} Therefore, the second assignment of error is overruled.

Allied Offenses

{¶10} In the third assignment of error, Gordon argues that the trial court should have merged his aggravated robbery, kidnapping, and felonious assault convictions because they all arose out of the same incident and were part of the same animus — to obtain Darling’s money. We note that while Gordon requested the merger of all offenses, the trial court merged the two aggravated robbery counts with each other and the two felonious assaults with each other.

{¶11} R.C. 2941.25, the allied offenses 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.

{¶12} In *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, the Ohio Supreme Court explained that when a defendant's conduct constitutes a single offense, the defendant may only be convicted and sentenced for that offense. *Id.* at ¶ 24. However, when the conduct "supports more than one offense, the court must determine whether the offenses merge or whether the defendant may be convicted of separate offenses." *Id.*_ The *Ruff* court stated:

As a practical matter, when determining whether offenses are allied offenses of similar import within the meaning of R.C. 2941.25, courts must ask three questions when defendant's conduct supports multiple offenses: (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._

{¶13} If the answer is "yes" to any of the above, the defendant may be convicted of all of the offenses separately. *Id.* at ¶ 25. The court explained that two or more offenses are dissimilar within the meaning of R.C. 2941.25(B) "when the defendant's conduct constitutes offenses involving separate victims or if the harm that results from each offense is separate and identifiable." *Id.* at paragraph two of the syllabus. Two or more offenses of dissimilar import are not subject to merger because the harm to each victim is "separate and distinct." *Id.* at ¶ 26.

{¶14} Gordon contends that the harm to Darling was not separate and distinct because the use of the gun was the same force for the aggravated robbery and felonious assault charges and the same injury formed the basis for both offenses. With regard to the kidnapping, he contends the "dragging" was not a separate harm from the aggravated robbery or the felonious assault.

{¶15} We note that this court has not merged offenses where the conduct did not result in separate, identifiable harms if the offenses were committed with a separate animus. *State v. Sutton*, 8th Dist. Cuyahoga Nos. 102300 and 102302, 2015-Ohio-4074, ¶ 60-62. In *State v. Bailey*, 8th Dist. Cuyahoga No. 100993, 2014-Ohio-4684, we stated that

the issue of whether two offenses are allied depends not only on whether the two crimes were committed in the same act, but also with a single state of mind. The Ohio Supreme Court has defined the term “animus” to mean “purpose or, more properly, immediate motive.” *State v. Logan*, 60 Ohio St.2d 126, 131, 397 N.E.2d 1345 (1979). Because animus is often difficult to prove directly, it may be inferred from the surrounding circumstances. When “an individual’s immediate motive involves the commission of one offense, but in the course of committing that crime he must, a priori, commit another, then he may well possess but a single animus, and in that event may be convicted of only one crime.” *Id.*

Thus, when determining whether two offenses were committed with a separate animus, the court must consider (1) whether the first offense was merely incidental to the second offense or whether the defendant’s conduct in the first offense demonstrated a significance independent of the second, and (2) whether the defendant’s conduct in the first offense subjected the victim to a substantial increase in the risk of harm apart from that involved in the second offense. *State v. Shields*, 1st Dist. Hamilton No. C-100362, 2011-Ohio-1912, ¶ 17.

Id. at ¶ 34-35.

{¶16} In the instant case, we cannot say that the trial court erred in refusing to merge the aggravated robbery with felonious assault because the record contains evidence that establishes the crimes were committed with separate animus. This court has previously held that where a defendant uses greater force than necessary to complete aggravated robbery, he shows a separate animus. *Bailey* at ¶ 37. Darling testified that Gordon came out of the bathroom wearing a hood and carrying a .45 caliber gun. Gordon told Darling to “give me everything you got.” At first, Darling thought Gordon was joking. Gordon then shot Darling in the foot and dragged him from the kitchen into a back bedroom. Gordon took \$5,000 out of Darling’s dresser drawer and

approximately \$2,300 out of Darling's pocket. Gordon threatened to kill Darling if he told anyone about the incident. The shooting and removal of Darling from the kitchen and into the back bedroom were not necessary to complete the robbery. Therefore, the felonious assault and kidnapping were not merely incidental to the aggravated robbery and the convictions do not merge.

{¶17} Accordingly, the third assignment of error is overruled.

Manifest Weight

{¶18} In the fourth assignment of error, Gordon argues that his convictions are against the manifest weight of the evidence.

{¶19} In a manifest weight challenge, the question is whether the state met its burden of persuasion. *State v. Bowden*, 8th Dist. Cuyahoga No. 92266, 2009-Ohio-3598, ¶ 13, citing *Thompkins*, 78 Ohio St.3d at 390, 1997-Ohio-52, 678 N.E.2d 541. The Ohio Supreme Court in *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 25, has stated:

[T]he reviewing court asks whose evidence is more persuasive — the state's or the defendants? * * * "When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony." [*Thompkins* at 387], citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652.

{¶20} Moreover, an appellate court may not merely substitute its view for that of the jury, but must find that "in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 485 N.E.2d 717 (1st Dist.1983). Accordingly, reversal on manifest weight grounds is reserved for "the

exceptional case in which the evidence weighs heavily against the conviction.” *Id.*, quoting *Martin*.

{¶21} We note that when considering a manifest weight challenge, the trier of fact is in the best position to take into account inconsistencies, along with the witnesses’s manner, demeanor, gestures, and voice inflections, in determining whether the proffered testimony is credible. *State v. Kurtz*, 8th Dist. Cuyahoga No. 99103, 2013-Ohio-2999, ¶ 26; *see also State v. Lilliard*, 8th Dist. Cuyahoga Nos. 99382, 99383, and 99385, 2013-Ohio-4906, ¶ 93 (In considering the credibility of witnesses on a manifest weight challenge, an appellate court is “guided by the presumption” that the jury, or the trial court in a bench trial, is “best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.” *Id.*, quoting *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984)). Therefore, we afford great deference to the factfinder’s determination of witness credibility. *State v. Ball*, 8th Dist. Cuyahoga No. 99990, 2014-Ohio-1060, ¶ 36.

{¶22} Gordon argues that Darling’s testimony lacks credibility because there were no witnesses to the incident and the gun was never located. He contends the evidence is much more consistent with Darling shooting himself accidentally in the foot, and blaming Gordon for his injuries so he would not be convicted of felony gun possession because of his previous criminal history.

{¶23} Darling testified that he and Gordon had been celebrating his birthday all weekend and Darling admitted to having large amounts of cash on him and paying for Gordon all weekend. Darling testified that Gordon always had a .45 caliber handgun on him. When Darling told Gordon it was time to go home, Gordon went into the bathroom and came out with a

black hoody on, pointed the .45 caliber gun at him, and demanded money. Gordon then shot Darling in the foot, dragged him back into the bedroom. Gordon threatened to kill Darling if he told anyone. He then stole Darling's rental car, which was located less than one mile from Darling's house.

{¶24} Darling further testified that he has previous drug convictions. Defense counsel questioned Darling about his criminal history on cross-examination. Darling also testified that he initially lied to the police because he did not want to get Gordon in trouble and to deal with the consequences of snitching on a member of the Loyal Always gang.

{¶25} Based on the foregoing, it cannot be said that the jury "lost its way" in finding Gordon guilty of aggravated robbery, kidnapping, and felonious assault. The trier of fact was able to judge Darling's credibility and determined him to be credible. This is not the rare case where the trier of fact clearly lost its way and created a manifest miscarriage of justice.

{¶26} Accordingly, the fourth assignment of error is overruled.

{¶27} In the fifth assignment of error, Darling argues defense counsel was ineffective failing to object to irrelevant testimony.

{¶28} In order to establish ineffective assistance of counsel, Gordon must demonstrate that: (1) counsel's performance fell below an objective standard of reasonable representation, and (2) he was prejudiced by that performance. *Strickland v. Washington*, 466 U.S. 668, 687-688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Prejudice is established when the defendant demonstrates "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

{¶29} In light of the Ohio Supreme Court's decision in *Gordon II*, we do not find defense

counsel was ineffective with regard to joinder. Therefore, our discussion will focus on Gordon's claim that defense counsel was ineffective for failing to object to all of the testimony about the gang activity in the neighborhood. We do not find that defense counsel was ineffective. As discussed above, this evidence was permissible testimony. Therefore, Gordon is unable to demonstrate that he was prejudiced by this alleged error.

{¶30} Accordingly, the fifth assignment of error is overruled.

{¶31} Judgment is affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, PRESIDING JUDGE

TIM McCORMACK, J., and
PATRICIA A. BLACKMON, J., CONCUR

