[Cite as *State v. Florencio*, 2019-Ohio-104.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 107023

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CARLOS FLORENCIO

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-17-617346-A

BEFORE: S. Gallagher, J., Kilbane, A.J., and Jones, J.

RELEASED AND JOURNALIZED: January 10, 2019

ATTORNEY FOR APPELLANT

Harvey B. Bruner
Harvey B. Bruner & Co.
700 W. St. Clair Avenue, Suite 110
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

Michael C. O'Malley
Cuyahoga County Prosecutor
By: Michael Lisk
Assistant Prosecuting Attorney
Justice Center - 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

SEAN C. GALLAGHER, J.:

{¶1} Carlos Florencio appeals his conviction for felonious assault, domestic violence, aggravated menacing, kidnapping, and child endangering, which included three-year firearm specifications attached to the felonious assault and kidnapping counts. The trial court imposed an aggregate six-year term of imprisonment, which is comprised of imposing the three-year sentence on the firearm specification consecutive to the associated three-year sentence imposed on the kidnapping charge. The trial court imposed the remaining sentences to be served concurrently, including the sentence imposed on the three-year firearm specification associated with the felonious assault count.

{¶2} Florencio and the victim were divorced. Florencio's son rented a neighboring house from the victim. Florencio came to the victim's house complaining that the water heater in the basement of the rental unit was not working. The victim tentatively followed Florencio

toward the stairway leading into the basement of the rental unit. Sensing danger, the victim turned to leave when Florencio grabbed her arm and neck, stuck his thumb in her mouth, and held a gun to the victim's head. It is unclear whether the gun was loaded. Hearing the victim's screams for help, and thinking her mother's life was in danger, the victim's daughter grabbed her mother's handgun and went outside to confront Florencio. Florencio's son and another neighbor also arrived. Everyone told Florencio to drop his weapon, and the victim's daughter fired a shot into the air to that end. Florencio released the victim and fled when police were called.

{¶3} In this appeal, Florencio claims that his trial attorney rendered ineffective assistance by failing to object to portions of the state's redirect examination as being outside the scope of the cross-examination, and also that the conviction for child endangerment was against the manifest weight of the evidence. Although not raised by either party, we sua sponte recognize the existence of a sentencing error.

{¶4} During the state's redirect examination of the victim, the state elicited testimony describing the injuries the victim suffered during the kidnapping and assault. Florencio claims that his trial attorney should have objected because the testimony was outside the scope of the cross-examination. There is no merit to Florencio's argument.

{¶5} In order to substantiate a claim of ineffective assistance of counsel, the appellant must show "(1) deficient performance by counsel, i.e., performance falling below an objective standard of reasonable representation, and (2) prejudice, i.e., a reasonable probability that but for counsel's errors, the proceeding's result would have been different." *State v. Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, 920 N.E.2d 104, ¶ 200, citing *Strickland v. Washington*, 466 U.S. 668, 687-688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136,

538 N.E.2d 373 (1989), paragraphs two and three of the syllabus. The defendant has the burden of proving his counsel rendered ineffective assistance. *Perez* at ¶ 223.

{¶6} Even if we presume that the failure to object demonstrates a deficient performance for the sake of this discussion, Florencio cannot demonstrate that the proceeding's result would have been different.

{¶7} We acknowledge the general proposition that the scope of redirect examination is limited to the matters inquired into by the adverse party on cross-examination. *State v. Rucker*, 8th Dist. Cuyahoga No. 105628, 2018-Ohio-1832, ¶ 59, citing *State v. Thomas*, 8th Dist. Cuyahoga No. 101797, 2015-Ohio-3226, ¶ 41, and *State v. Wilson*, 30 Ohio St.2d 199, 204, 283 N.E.2d 632 (1972). Exceeding the scope of cross-examination in a redirect, however, is not per se error because the redirect is not necessarily limited to the subject areas discussed in cross-examination. *Id.*, citing *State v. Faulkner*, 56 Ohio St.2d 42, 381 N.E.2d 934 (1978), and *State v. Capko*, 8th Dist. Cuyahoga No. 56814, 1990 Ohio App. LEXIS 1287 (Mar. 29, 1990). Further, a witness may be recalled for the purpose of correcting or changing testimony that the witness, through error, mistake, or oversight, has previously given in a trial before the proponent of the evidence rests his case in chief. *State v. McBride*, 5th Dist. Stark No. 2008-CA-00076, 2008-Ohio-5888, ¶ 33-35 (string citing authority); *State v. Bankston*, 8th Dist. Cuyahoga No. 92777, 2010-Ohio-1576, ¶ 16 (following *McBride*).

{¶8} Even if the state inadvertently omitted evidence during the direct examination of the victim, nothing precluded the state from recalling the witness in its case in chief if counsel had objected to the redirect examination. Further, Florencio was offered the opportunity to cross-examine the victim based on the redirect. He cannot demonstrate that the results of the trial would have been different had an objection been preserved. Tellingly, Florencio has not

offered any citations to authority in support of his claim that he was prejudiced by the failure to object to the redirect examination. App.R. 16(A)(7). We overrule Florencio's first assignment of error.

{¶9} With respect to the child endangering claim, Florencio claims that the conviction is against the weight of the evidence because he did not bring the daughter into the situation. R.C. 2919.22(A) provides that no parent or person in loco parentis of a child shall create a substantial risk to the health or safety of the child by violating a duty of care or protection. According to Florencio's logic, because he did not cause the daughter to enter the situation, he cannot "be said to have 'recklessly created a substantial risk' to her 'health or safety.'"

{¶10} When reviewing a claim challenging the manifest weight of the evidence, the court, reviewing the entire record, must weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *State v. Thompkins,* 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541. Generally, determinations of credibility and weight of the testimony are reserved for the trier of fact. *State v. Lipkins*, 2017-Ohio-4085, 92 N.E.3d 82, ¶ 36 (10th Dist.), citing *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus.

{¶11} In this case we cannot say that the trier of fact clearly lost its way and created a manifest miscarriage of justice. Florencio violently attacked the victim and thereby created the situation that caused the daughter to intervene. Although Florencio claims the firearm he placed to the victim's head was unloaded, even if true, the daughter had no reason to know that fact at the time. Florencio instigated the confrontation, and his use of a deadly weapon escalated the

severity of the situation. Florencio's action set a series of events in motion and placed everyone present at substantial risk of harm, including the daughter. Florencio's argument is overruled; his conviction is not against the weight of the evidence.

{¶12} Finally, we must recognize the existence of a void sentence. "It is a longstanding principle that an offender's sentence that does not properly include a statutorily mandated term is contrary to law." *State v. Moore*, 135 Ohio St.3d 151, 2012-Ohio-5479, 985 N.E.2d 432, ¶ 14, citing *Colegrove v. Burns*, 175 Ohio St. 437, 195 N.E.2d 811 (1964), and *State v. Beasley*, 14 Ohio St.3d 74, 75, 471 N.E.2d 774 (1984). An appellate court has inherent authority to vacate a void judgment. *Lingo v. State*, 138 Ohio St.3d 427, 2014-Ohio-1052, 7 N.E.3d 1188, ¶ 48. The trial court, in this case, imposed the sentences on the felonious assault and kidnapping counts to be served concurrently, including the sentences imposed on the three-year firearm specifications attached to each count. This resulted in a six-year aggregate term of imprisonment. The trial court was without authority to impose the sentences on the firearm specifications to be served concurrently.

{¶13} This court sought supplemental briefing on the following question: whether the trial court was authorized under R.C. 2929.14(B)(1)(a) and 2929.14(B)(1)(g) to impose the sentences on the firearm specifications to be served concurrently, and if not, whether the trial court plainly erred in failing to merge the felonious assault count with the kidnapping one. Both parties filed supplemental briefs, and importantly, the state offered its concession to the following analysis.

{¶14} Under R.C. 2929.14(B)(1)(b), the trial court can only impose one prison term on an offender for a firearm specification if the underlying felonies are committed as part of the same act or transaction. There is an exception to that limiting language. Under R.C.

2929.14(B)(1)(g), if the offender is convicted, as pertinent to this case, of felonious assault and another felony offense to which firearm specifications are attached, the trial court must impose separate sentences on the two most serious specifications under R.C. 2929.14(B)(1)(a), to be served consecutively. *State v. Sheffey*, 8th Dist. Cuyahoga No. 98944, 2013-Ohio-2463, ¶ 28; *State v. Steele*, 10th Dist. Franklin No. 18AP-187, 2018-Ohio-3950, ¶ 12; *State v. Rouse*, 9th Dist. Summit No. 28301, 2018-Ohio-3266, ¶ 11. The trial court has no authority to disregard the statutory mandate. *State v. Vanderhorst*, 8th Dist. Cuyahoga No. 97242, 2013-Ohio-1785, ¶ 10; *State v. Isreal*, 12th Dist. Warren No. CA2011-11-115, 2012-Ohio-4876, ¶ 73. Further, the effect of R.C. 2929.14(B)(1)(g) cannot be circumvented through an agreement; the parties cannot agree to a void sentence. *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, paragraph one of the syllabus.

{¶15} In this case, the three-year term of imprisonment on the firearm specification associated with the felonious assault must be served consecutive with the three-year term imposed on the firearm specification attached to the kidnapping count. R.C. 2929.14(B)(1)(g). The mandatory minimum should have been a nine-year term of imprisonment — the minimum three-year term of imprisonment on the base kidnapping count, to be served concurrent with the two-year base term on the felonious assault, plus each of the two three-year terms of imprisonment on the firearm specifications to be served consecutively.

{¶16} In light of this conclusion, however, we also recognize the existence of plain error in failing to merge the felonious assault and the kidnapping counts as being allied offenses. Although Florencio failed to raise the merger issue, he has not waived the challenge altogether. The failure to object forfeits all but plain error. *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 23. We acknowledge that plain error review is generally

hampered by the lack of a record; for example, in criminal cases involving guilty pleas, the record is generally rather sparse. In this case, however, a trial was conducted. The facts underlying the offenses were developed and are part of the appellate record. *State v. Caldwell*, 2d Dist. Montgomery No. 27856, 2018-Ohio-4639, ¶ 19 (under plain error the trial court erred by failing to merge allied offenses because the facts adduced at trial demonstrated that the offenses were allied); *State v. A.M.*, 8th Dist. Cuyahoga No. 106400, 2018-Ohio-4209, ¶ 72 (same). As a result, it can be concluded that there is a reasonable probability that the convictions are in fact for allied offenses of similar import, and the defendant could demonstrate that the trial court's failure to inquire whether the convictions merged for sentence is plain error. *State v. Williams*, 148 Ohio St.3d 403, 2016-Ohio-7658, 71 N.E.3d 234, ¶ 25.

{¶17} In the exercise of the utmost caution, we must notice the existence of plain error in order to prevent a manifest miscarriage of justice. The failure to merge the felonious assault and the kidnapping offenses would subject the defendant to a substantially longer sentence than the trial court and the parties anticipated in light of the failure to consider the impact of R.C. 2929.14(B)(1)(g). During closing arguments, the state claimed that the conduct constituting the felonious assault — the acts of grabbing the victim, holding a gun to her head, and shoving his finger in the victim's mouth — also constituted the restraint and force underlying the kidnapping conviction, both of which were committed against the same victim. Tr. 525:2-12; tr. 521:15-21.

{¶18} Under R.C. 2941.25, multiple sentences may be imposed if the conduct constituting the offenses are of dissimilar import, or if the conduct demonstrates that the crimes were committed separately or with a separate animus. *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, paragraph three of the syllabus. Two or more offenses are of dissimilar import if the conduct constituting the offenses involves separate victims or if the

resulting harm of the two offenses is separate and identifiable. *Id.* at paragraph two of the syllabus. In this case, the same acts constituted the commission of both the kidnapping and the felonious assault, which were committed against a single victim with no separate identifiable harm, and the offenses were not committed separately or with a separate animus. The offenses should have merged.

{¶19} Although we recognize the sentences imposed with respect to the firearm specifications are void, we also recognize the existence of plain error in the failure to merge the kidnapping and felonious assault counts as allied offenses of similar import. The merger would have eliminated one of the firearm specifications, thereby rendering R.C. 2929.14(B)(1)(g) inapplicable. The six-year, aggregate term of imprisonment is therefore permitted if the merger was recognized. Accordingly, and based on the particular facts and procedural history of this case, we vacate the sentences imposed on the felonious assault and the kidnapping counts. We remand for resentencing on those counts with the state electing on which to proceed. Affirmed in part, reversed in part, and remanded for further proceedings.

It is ordered that appellant and appellee share 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. Case remanded to the trial court for execution of sentence.

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

SEAN C. GALLAGHER, JUDGE

MARY EILEEN KILBANE, A.J., and
LARRY A. JONES, SR., J., CONCUR