[Cite as *State v. Padgette*, 2020-Ohio-672.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO, :

Plaintiff-Appellee, :

No. 108525

v. :

TYRELL PADGETTE, :

Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: February 27, 2020

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-17-620679-B

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Anna Herceg, Assistant Prosecuting Attorney, *for appellee*.

Paul W. Flowers Co., L.P.A., and Louis E. Grube, *for appellant*.

PATRICIA ANN BLACKMON, P.J.:

{¶1} Tyrell Padgette ("Padgette") appeals from his aggravated robbery, felonious assault, theft, and kidnapping convictions, as well as his accompanying nine-year prison sentence, and assigns the following errors for our review:

I. The trial court erred by admitting and relying upon evidence that had not been authenticated in reaching a guilty verdict.

II. The trial court erred by admitting and relying upon inadmissible hearsay evidence in reaching a guilty verdict.

III. The trial court's verdict is against the manifest weight of the evidence.

IV. The trial court committed reversible error by failing to merge all of defendant's convictions at sentencing.

{¶2} Having reviewed the record and pertinent law, we affirm the trial court's judgment. The apposite facts follow.

{¶3} On July 29, 2017, Keyana Dotson ("Dotson") picked up her friend Dionta Willis ("Willis") in the W. 25th Street area of Cleveland. Dotson and Willis had been friends since September 2016, when they met on Facebook. While they were still parked in Dotson's car, a male wearing all black clothing, including gloves and a mask, got into the back seat. This male announced his intention to rob Dotson and Willis. The male ordered Dotson to the backseat of her own vehicle at gunpoint. He also ordered Willis to drive to a bank so Dotson could withdraw money. The man brandished a silver and black gun, at times hitting Dotson with it.

{¶4} They arrived at a Huntington ATM where Dotson withdrew $400 and gave it to the man. On the drive back to the W. 25th Street area, the male got out of Dotson's car. At this time, Dotson accused Willis of helping the male rob her, identifying him as Willis's best friend Padgette, who she knew only from social media as "Bookie Honcho." Dotson reported the robbery to the police that same day and showed them a picture from Facebook of Willis and Padgette.

{¶5} On September 18, 2017, Padgette and Willis were charged with aggravated robbery in violation of R.C. 2911.01(A)(1) and (3), a first-degree felony; felonious assault in violation of R.C. 2903.11(A)(2); a second-degree felony; theft in violation of R.C. 2913.02(A)(1), a first-degree misdemeanor; and kidnapping in violation of R.C. 2905.01(A)(2), a first-degree felony. These charges included firearm specifications. The case was tried to the bench, and on December 13, 2018, the court found Padgette guilty of one count of aggravated robbery, felonious assault, theft, and kidnapping along with the firearm specifications. The court found Willis not guilty of all counts.

{¶6} On April 16, 2019, the court sentenced Padgette to six years in prison for aggravated robbery and three years in prison for the accompanying firearm specification to run consecutively. The court merged the felonious assault and theft convictions into this prison term as allied offenses. Additionally, the court sentenced Padgette to six years in prison for kidnapping to run concurrent with this prison term for a total sentence of nine years in prison. It is from these convictions and sentence that Padgette appeals.

Admissibility of Evidence

{¶7} "The admission or exclusion of relevant evidence rests within the sound discretion of the trial court." *State v. Sage*, 31 Ohio St.3d 173, 180, 510 N.E.2d 343 (1987). Pursuant to Evid.R. 401, 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." Relevant evidence is not admissible, however, "if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Evid.R. 403(A). "Where evidence has been improperly admitted in derogation of a criminal defendant's constitutional rights, the admission is harmless 'beyond a reasonable doubt' if the remaining evidence alone comprises 'overwhelming' proof of defendant's guilt." *State v. Williams*, 6 Ohio St.3d 281, 290, 452 N.E.2d 1323 (1983).

{¶8} Additionally, "[i]n a bench trial, the trial court is presumed to have considered only admissible evidence unless the record indicates otherwise." *State v. Reddy*, 192 Ohio App.3d 108, 2010-Ohio-5759, 948 N.E.2d 454, ¶ 58 (8th Dist.). *See also State v. White*, 15 Ohio St.2d 146, 151, 239 N.E.2d 65 (1968) (the Ohio Supreme Court will "indulge in the usual presumption that in a bench trial in a criminal case the court considered only the relevant, material, and competent evidence in arriving at its judgment unless is affirmatively appears to the contrary").

{¶9} In the case at hand, Padgette argues that the state's photographic evidence — state's exhibit Nos. 2 and 3, which are photographs of Willis and Padgette taken from Padgette's Facebook page that Dotson showed the police — was not authenticated, and the evidence connecting the "Bookie Honcho" Facebook page to Padgette is based on hearsay.

Authenticity

{¶10} Pursuant to Evid.R. 901(A), the "requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence

sufficient to support a finding that the matter in question is what its proponent claims." Dotson identified in court a picture that she "pulled up" from Facebook and showed the police approximately 30 minutes after she was robbed. According to Dotson, this picture was of Willis and Padgette.

{¶11} Cleveland Police Detective Robert Beveridge ("Det. Beveridge") testified that he handles "a lot of Facebook and Instagram cases" where the offenders are identified through, or evidence is found on, social media. Det. Beveridge testified that Dotson showed him a picture of Willis and Padgette that came from the Facebook page of "Bookie Honcho or Tyrell Padgette." At trial, defense counsel objected to the authenticity of this photo, arguing, "I don't know when it was posted, where it came from, what — who it was."

{¶12} Ohio courts have held that a "photograph is admissible if it is shown to be an accurate representation of what it purports to represent. It is unnecessary to show who took the photograph or when it was taken, provided there is testimony that the photograph is a fair and accurate representation of what it represents." *State Farm Mut. Auto. Ins. Co. v. Anders*, 197 Ohio App.3d 22, 2012-Ohio-824, 965 N.E.2d 1056, ¶ 30 (10th Dist.).

{¶13} Ohio courts have also held that the determination of admissibility and authentication of social media evidence is "based on whether there was sufficient evidence of authenticity for a reasonable jury to conclude that the evidence was authentic." *State v. Gibson*, 6th Dist. Lucas Nos. L-13-1222 and L-13-1223, 2015-Ohio-1679, ¶ 41.

> The hurdle the proponent of the document must overcome in order to properly authenticate a document is not great. * * * Thus, the purpose behind authentication is to connect the particular piece of evidence sought to be introduced to the facts in the case by giving some indication the evidence is relevant and reliable. The ultimate decision on the weight to be given to that piece of evidence is left to the trier of fact.

State v. Brown, 151 Ohio App.3d 36, 2002-Ohio-5207, 783 N.E.2d 539, ¶ 33-35 (7th Dist.).

{¶14} In *State v. Inkton*, 8th Dist. Cuyahoga No. 102706, 2016-Ohio-693, ¶ 72, the court admitted appellant's Facebook page into evidence, holding that "[t]here has been testimony sufficient to support, if believed, that it is what it purports to be." In *Inkton*, a detective and a codefendant testified that "there were 'numerous' pictures on appellant's Facebook page and that [they] were able to determine that appellant was in fact that person in the pictures" thus properly authenticating them. *Id.* at ¶ 78. *Compare with State v. Gordon*, 8th Dist. Cuyahoga No. 106023, 2018-Ohio-2292, ¶ 71 (holding that the state failed to identify a photograph allegedly from "a Facebook page using the name Yonko Boolin" when there was no evidence linking the photograph or the social media account to the defendant, no evidence of who retrieved the photo from Facebook, and no evidence that defendant was one of the people in the photograph).

{¶15} In the case at hand, Dotson testified that she and Bookie Honcho were Facebook friends, and she got the photograph in question from Bookie Honcho's Facebook page. Furthermore, she identified Padgette and Willis as the two people in the photo. Det. Beveridge testified that the photograph in question was the same

photograph that Dotson showed him to identify Padgette as Bookie Honcho and the man who robbed her.

{¶16} Upon review, we find that Dotson and Det. Beveridge testified as to the authenticity of the photograph taken from Padgette's "Bookie Honcho" Facebook page. There is no evidence that the "Bookie Honcho" Facebook page was created by anyone other than Padgette, nor is there evidence that the page was fabricated or tampered with. We find that this evidence satisfies the relatively low burden of authentication. Therefore, the court did not abuse its discretion in admitting this photograph into evidence. Accordingly, Padgette's first assigned error is overruled.

Hearsay

{¶17} Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C). "A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." Evid.R. 801(A).

{¶18} Padgette argues that Dotson identified him as Bookie Honcho "based upon content from Facebook that had been produced by others who did not testify." However, Padgette fails to set forth a "statement" that was admitted into evidence. This court has recently held that "[t]here is no 'statement' for hearsay purposes where a witness does not testify about 'what someone else said, wrote, or did.'" *State v. Wingfield*, 8th Dist. Cuyahoga No. 107196, 2019-Ohio-1644, ¶ 32 (quoting *State v. Maiolo*, 2d Dist. Clark No. 2015-CA-15, 2015-Ohio-4788, ¶ 14.

{¶19} Upon review, we find that the court did not improperly admit hearsay evidence at Padgette's bench trial, and his second assigned error is overruled.

Manifest Weight of the Evidence

{¶20} In *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, & 25, the Ohio Supreme Court addressed the standard of review for a criminal manifest weight challenge, as follows:

> The criminal manifest-weight-of-the-evidence standard was explained in *State v. Thompkins* (1997), 78 Ohio St.3d 380, 1997 Ohio 52, 678 N.E.2d 541. In *Thompkins*, the court distinguished between sufficiency of the evidence and manifest weight of the evidence, finding that these concepts differ both qualitatively and quantitatively. *Id.* at 386, 678 N.E.2d 541. The court held that sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, but weight of the evidence addresses the evidence's effect of inducing belief. *Id.* at 386-387, 678 N.E.2d 541. In other words, a reviewing court asks whose evidence is more persuasive C the state's or the defendant's? We went on to hold that although there may be sufficient evidence to support a judgment, it could nevertheless be against the manifest weight of the evidence. *Id.* at 387, 678 N.E.2d 541. "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." *Id.* at 387, 678 N.E.2d 541, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652.

{¶21} In reviewing a manifest challenge to a bench trial verdict, an appellate court may not merely substitute its view for that of the trial court, but must find that "in resolving conflicts in the evidence, the [trial court] 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. Accordingly, reversal on manifest weight grounds

is reserved for "the exceptional case in which the evidence weighs heavily against the conviction." *Id.*

{¶22} In the instant case, Padgette argues that Dotson's testimony "seems unlikely and contrived in light of the other evidence admitted at trial." Specifically, Padgette argues that Dotson's voice identification of "Bookie" was "flimsy" and Dotson's testimony was "internally inconsistent and contradictory."

{¶23} Dotson's testimony linking Padgette to the crimes at issue follows:

Q: Do you know who jumped in the back seat?

A: Yeah.

Q: Who jumped in the back seat?

A: Bookie.

Q: And how do you know Bookie?

A: I don't know him personally, but from Facebook. I seen him on Facebook.

Q: How could you tell it was Bookie?

A: His voice.

Q: Did you have an opportunity to hear his voice on Facebook?

A: Yes.

Q: And how is that?

A: I just heard it on Live earlier that day.

Q: And you said Live, is that Facebook Live?

A: Yes.

{¶24} Additionally, Dotson testified that the man who jumped in her car was wearing all black including a black mask. However, she could see "light skin" around the eyes and lips where the mask was "open." This man spoke as soon as he got in the car and Dotson knew it was Bookie when she heard his voice. According to Dotson, "It was crystal clear to me." Dotson testified that she heard his voice "more than ten" times on Facebook Live, and she showed these videos from Bookie Honcho's Facebook page to the police. Dotson testified that she "befriended" Bookie on Facebook, and his videos would show up on her news feed. "I would say he's on there a lot, but I don't watch it every day."

{¶25} Asked if there was anything distinct about Bookie's voice, Dotson replied, "Yes. He got — he had a grill in his mouth." Asked if that affected the way Bookie talked, Dotson answered, "Yeah. For sure."

{¶26} Det. Beveridge testified that Dotson showed him a video of Padgette from Facebook Live, as well as the photograph of Padgette and Willis from Bookie Honcho's Facebook page. According to Det. Beveridge, a Facebook Live video "does not stay up there all that long. So if you don't catch it while it's out there * * * if you don't catch it when it's on there or being displayed, you're not going to get it." Using the video, the photograph and her recognition of Padgette's voice, Dotson identified Padgette as the person who robbed her at gunpoint.

{¶27} Pursuant to Evid.R. 901(A)(5), voice identification is admissible in trials as follows: "Identification of a voice, whether heard firsthand or through

mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker."

{¶28} "There is no one way to authenticate a recorded voice, and there is no per se rule of live and in person experience with a voice." *State v. Spires*, 7th Dist. Noble No. 04 NO 317, 2005-Ohio-4471, ¶ 31. However, "the circumstances surrounding the authenticating witness's familiarity with the voice are relevant to the trial court's exercise of discretion." *State v. Martin*, 5th Dist. Delaware No. 19 CAA 01 0004, 2019-Ohio-4931, ¶23.

{¶29} In *Martin*, a police detective conducted controlled drug buys with a confidential informant and the defendant. The telephone calls to set up the drug buys were recorded, and the detective listened to those recordings. After the defendant was arrested for drug trafficking, this same detective interviewed the defendant as part of the investigation. At the trial, this detective testified that he recognized the defendant's voice on the drug buy recordings from two sources: interviewing him after his arrest and listening to recordings of telephone calls the defendant made from jail. The *Martin* Court held as follows: "We find [the detective's] testimony identifying [the defendant's] voice as the voice on the recording sufficient to authenticate the recordings. The jury was free to give whatever weight it felt appropriate to [the detective's] identification of [the defendant's] voice on the recordings." *Id.* at ¶ 25. *See also State v. Stokes*, 8th Dist. Cuyahoga No. 71654, 1997 Ohio App. LEXIS 5530 (Dec. 11, 1997) (affirming a robbery conviction based on the victim identifying the defendant by sight and sound after the defendant blindfolded

the victim and the victim "was with the defendant for 30 or 40 minutes and heard his voice during that time").

{¶30} In the case at hand, Dotson testified that Bookie Honcho's videos would appear on the news feed of her Facebook page and that she could tell by the voice that the person in these videos was the same person who robbed her. Dotson showed one of these videos to Det. Beveridge, who used Bookie Honcho's Facebook page and "individuals he ran with" to identify Bookie Honcho as Padgette. Det. Beveridge had another police officer put a picture of Padgette in "a six-pack photo array" and showed this to Dotson. Dotson picked Padgette "at a hundred percent" as the man who robbed her.

{¶31} Dotson further testified that she showed the police the photograph that she got from Bookie Honcho's Facebook page, and she identified Padgette and Willis as the two people in the photo. Furthermore, she made an in-court identification of Padgette as "Bookie Honcho" and as the man that robbed her.

{¶32} Padgette's second argument under this assigned error is that Dotson's testimony about him hitting her with the gun is inconsistent with what she told the police. Dotson's testimony about this follow:

Q: When did Bookie begin hitting you in the head?

A: On the way to the bank really.

Q: How many times did you get hit with the gun?

A: A lot.

Q: Did they hurt — did it hurt when it hit you?

A: I wouldn't say that he was necessarily trying to hurt me, more so scare me.

{¶33} On cross-examination, Dotson narrowed "a lot" down to "over twenty" times. However, Det. Beveridge testified that Dotson told him that Padgette hit her in the head with the gun two to three times. Asked about the difference between what she testified to and what Det. Beveridge testified to, Dotson stated that she did not recall what she told the police, but Padgette hit her with the gun "over twenty times."

{¶34} In rendering the verdict, the court made the following findings:

> All right. So the court has considered all this information, and reviewed the few exhibits here, and couple things, I believe, are clear.
>
> The evidence shows that Miss Dotson was robbed, that a firearm was used, and that her identifying of Defendant Padgette was produced with respect to her knowledge of him and his voice from hearing him earlier that day and at least ten times, as she testified to, on prior occasions, on Facebook Live.
>
> She was fairly precise in her testimony, in answering the questions, fairly precisely, and the only discrepancy really is what [the police officer] may have heard and wrote in his report versus what she told us here about how many times she was struck.
>
> * * *
>
> The state, therefore, I'm finding, * * * that her identification of Mr. Padgette is proved beyond a reasonable doubt, that she was very confident, she didn't waver one bit, she said she knew it was Mr. Padgette who entered the passenger back seat of her car.

{¶35} Upon review, we find that Dotson's testimony is credible and consistent that Padgette was the man who jumped in her car and robbed her at gunpoint. Additionally, we find that the inconsistency regarding how many times Padgette hit her with the gun should not control the outcome of this case. "Minor

inconsistencies in witness testimony will not render a conviction so against the manifest weight of the evidence as to cause a miscarriage of justice." *State v. McNamara*, 8th Dist. Cuyahoga No. 104168, 2016-Ohio-8050, ¶ 38. The weight of the evidence supports Padgette's convictions, and the court did not lose its way and create a manifest miscarriage of justice. Accordingly, Padgette's third assigned error is overruled.

Allied offenses

{¶36} We review a trial court's R.C. 2941.25 allied offenses determination under a de novo standard. *State v. Williams*, 134 Ohio St.3d 482, 2012-Ohio-5699, 983 N.E.2d 1245, & 28. Pursuant to R.C. 2941.25(A), "[w]here the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, * * * the defendant may be convicted of only one."

{¶37} In *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 896, & 30-31, the Ohio Supreme Court detailed the allied offenses analysis:

> Rather than compare the elements of two offenses to determine whether they are allied offenses of similar import, the analysis must focus on the defendant=s conduct to determine whether one or more convictions may result because an offense may be committed in a variety of ways and the offenses committed may have different import. No bright-line rule can govern every situation.
>
> 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? An affirmative answer to any of the above will permit separate convictions. The conduct, the animus, and the import must all be considered.

{¶38} In the case at hand, Padgette argues that all of his convictions should merge because they were committed "through the same course of conduct." When sentencing Padgette, the court merged the aggravated robbery, felonious assault, and theft convictions, and imposed a prison term of six years, plus three years for the gun specification. The court sentenced Padgette separately on the kidnapping conviction and ran the sentences concurrently.

> Ohio courts have long held that where captivity is prolonged, or the movement of the victim is so substantial that it becomes significantly independent of any other criminal act, there exists a separate animus to support the kidnapping conviction. * * * In such cases, the kidnapping offense ceases to be incidental to the underlying felony from which it might have originated.

State v. Cotton, 2015-Ohio-5419, 55 N.E.3d 573, ¶ 29 (8th Dist.).

{¶39} In *Cotton*, the defendants drove the victim at gunpoint to an ATM, ordered the victim to withdraw $560, then drove him to an alleyway, shot him, and left him on the ground outside of his car. In finding that the kidnapping and other offenses did not merge for the purpose of sentencing, the *Cotton* Court held as follows: "Although the kidnapping may have originated as a means of effectuating the aggravated robbery at the ATM, the kidnapping is not incidental to the aggravated robbery because the length of captivity long outlasted the duration of time necessary to commit the underlying offenses." *Id*. at ¶ 30.

{¶40} Dotson testified as follows about how long of a drive it was to the ATM: "It felt like real long. I don't know. Maybe fifteen, twenty minutes maybe." Dotson also testified that, after she took money out of the ATM, Willis drove them

back to the W. 25th Street area where Padgette got out of Dotson's car and left the scene. Similar to *Cotton*, we find that the kidnapping in the case at hand "long outlasted" the robbery. The trial court did not err in failing to merge Padgette's kidnapping conviction, and his fourth and final assigned error is overruled.

{¶41} Judgment affirmed.

It is ordered that appellee recover from 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 is terminated. 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.

PATRICIA ANN BLACKMON, PRESIDING JUDGE

ANITA LASTER MAYS, J., and
RAYMOND C. HEADEN, J., CONCUR