[Cite as *State v. Brown*, 2011-Ohio-3159.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	No. 10AP-836 (C.P.C. No. 10CR03-1321)
v.	:	
		(REGULAR CALENDAR)
Paul R. Brown,	:	
Defendant-Appellee.	:	
State of Ohio,	:	
Plaintiff-Appellee,	:	No. 10AP-845 (C.P.C. No. 10CR03-1321)
v.	:	
Paul R. Brown,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 28, 2011

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for State of Ohio.

Todd W. Barstow, for Paul R. Brown.

APPEALS from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} In these consolidated cases, Paul R. Brown ("Brown"), appeals from a judgment of conviction and sentence entered by the Franklin County Court of Common Pleas. The State of Ohio ("state") appeals from the same judgment. For the following reasons, we reverse that judgment and remand the matter for resentencing.

Factual and Procedural History

{¶2} On March 2, 2010, a Franklin County Grand Jury indicted Brown with one count of robbery in violation of R.C. 2911.02(A)(2), a felony of the second degree, with a repeat violent offender ("RVO") specification pursuant to R.C. 2941.149, one count of robbery in violation of R.C. 2911.02(A)(3), a felony of the third degree, and one count of theft in violation of R.C. 2913.02. The charges arose out of an incident in which Brown and another man allegedly assaulted a man and took his van. Brown entered a not guilty plea to the charges and proceeded to trial. A jury found Brown guilty of all three charges.

{¶3} Before sentencing, the trial court held a hearing to consider the RVO specification. At that hearing, Brown's parole officer testified that Brown had two previous robbery convictions, one in 1993 and another in 2003, which were both felonies of the second degree. Accordingly, the trial court found Brown to be a RVO. The trial court then sentenced Brown to prison terms of seven years for his second-degree felony robbery conviction, two years for the other robbery conviction, and 17 months for his theft conviction. The trial court ordered Brown's sentences for the second-degree felony robbery conviction and his theft conviction to run consecutively, while the sentence for his other robbery conviction was to be served concurrently with the other sentences.

{¶4} Brown and the state each objected to portions of the trial court's sentence. The state argued that the trial court was required to sentence Brown to an eight-year prison term for his second-degree felony robbery conviction based upon the trial court's determination that Brown was a RVO. Brown argued that the trial court should have merged the theft conviction into the second-degree felony robbery conviction for purposes of sentencing. The trial court rejected both arguments.

{¶5} Brown appeals and assigns the following errors:

> I. THE TRIAL COURT ERRED AND DEPRIVED [BROWN] OF DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE SECTION TEN OF THE OHIO CONSTITUTION BY FINDING HIM GUILTY OF BEING A REPEAT VIOLENT OFFENDER AS THAT VERDICT WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE AND WAS ALSO AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.
>
> II. THE VERDICT FORM FOR COUNT ONE WAS INADEQUATE TO SUPPORT [BROWN'S] CONVICTION FOR ROBBERY AS A SECOND DEGREE FELONY, IN VIOLATION OF APPELLANT'S RIGHT TO DUE PROCESS OF LAW UNDER THE UNITED STATES AND OHIO CONSTITUTIONS.
>
> III. THE TRIAL COURT ERRED BY IMPOSING CONSECUTIVE SENTENCES WITHOUT MAKING THE REQUISITE FACTUAL FINDINGS; THEREBY DEPRIVING [BROWN] OF DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE SECTION SIXTEEN OF THE OHIO CONSTITUTION.
>
> IV. THE TRIAL COURT ERRED BY SENTENCING [BROWN] TO CONSECUTIVE TERMS OF IMPRISONMENT FOR BOTH ROBBERY AND THEFT AS THEFT IS A LESSER INCLUDED OFFENSE OF ROBBERY.

{¶6} The state also appeals and assigns the following error:

> THE TRIAL COURT ERRED WHEN IT IMPOSED THE DEFENDANT'S PRISON TERM.

{¶7} For analytical clarity, we address these assignments of error out of order. First, however, we summarily overrule Brown's third assignment of error. Contrary to Brown's contention, the trial court did not err when it imposed consecutive sentences without making the findings required by former R.C. 2929.14(E)(4). The trial court was not required to make these findings to impose consecutive sentences. See *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, ¶39; *State v. Cayne*, 10th Dist. No. 10AP-772, 2011-Ohio-1609, ¶7.

Brown's Second Assignment of Error - Verdict Form

{¶8} In this assignment of error, Brown contends that the guilty verdict form for his second-degree robbery conviction violated R.C. 2945.75. We disagree.

{¶9} R.C. 2945.75 provides, in pertinent part, that "[w]hen the presence of one or more additional elements makes an offense one of more serious degree * * * [a] guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional element or elements are present. Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged."

{¶10} In *State v. Pelfrey,* 112 Ohio St.3d 422, 2007-Ohio-256, the Supreme Court of Ohio interpreted this statute and held that in order to find a defendant guilty of an offense of more serious degree, "a verdict form signed by a jury must include either the degree of the offense of which the defendant is convicted or a statement that an aggravating element has been found to justify convicting a defendant of a greater degree of a criminal offense." Id. at ¶14. In that case, the defendant was convicted of one count of tampering with evidence in violation of R.C. 2913.42. He was sentenced for the third-degree felony form of the offense because the tampering involved government records. See R.C. 2913.42(B)(4).

{¶11} The Supreme Court of Ohio noted that a conviction for tampering with evidence would normally be a misdemeanor. But, R.C. 2913.42(B)(4) elevates the offense to a third-degree felony if the state proves the additional element that the evidence at issue was a governmental record. In *Pelfrey*, the jury's guilty verdict form did not indicate the degree of the offense or the fact that governmental records were involved. *Pelfrey* at ¶13. Under these circumstances, the court concluded that R.C. 2945.75 mandates that the defendant be convicted of the least degree of the tampering

offense. To support a conviction for an enhanced offense, the court concluded that the verdict form itself must contain either the degree of the offense of which the defendant is convicted or a statement that an aggravating element has been found by the jury. *Id.* at ¶14.

{¶12} Brown raises this challenge in connection with his conviction for the second-degree felony form of robbery, R.C. 2911.02(A)(2). The jury signed a verdict form for that count which read, in pertinent part: "[w]e the jury find defendant, Paul R. Brown GUILTY OF ROBBERY, as he stands charged in * * * the Indictment." Brown was indicted under R.C. 2911.02(A)(2) and (3). The verdict form does not contain the degree of the offense or any statement of an aggravating element. Based upon *Pelfrey*, Brown contends that he can be convicted only of the least degree of the offense. We disagree.

{¶13} R.C. 2911.02(A) prohibits three different kinds of conduct while the offender is attempting or committing a theft offense, or in fleeing immediately thereafter the attempt or offense: (1) have a deadly weapon on the offender's person; (2) inflict, attempt to inflict, or threaten to inflict physical harm on another; or (3) use or threaten the immediate use of force against another. Each provision creates a separate offense and has a separate penalty. R.C. 2911.02(B). There are no additional elements or attendant circumstances, unlike the statute in *Pelfrey*, that can increase the degree of the offense or the penalty. Therefore, Brown's reliance on *Pelfrey* is misplaced. See *State v. Kepiro*, 10th Dist. No. 06AP-1302, 2007-Ohio-4593, ¶33-34 (distinguishing *Pelfrey* in similar manner in analyzing verdict form for violation of R.C. 2907.05); *State v. Crosky*, 10th Dist. No. 06AP-655, 2008-Ohio-145, ¶143-53.

{¶14} Here, the verdict form did not need to include the degree of the offense or a statement that an aggravating element has been found by the jury because R.C.

2911.02(A)(2) is a separate and distinct offense with its own penalty. Accordingly, the verdict form did not violate R.C. 2945.72 and we overrule Brown's second assignment of error.

Brown's First Assignment of Error - Repeat Violent Offender Specification

{¶15} Having found that Brown was properly convicted of a second-degree felony form of robbery, we next address Brown's first assignment of error and the state's sole assignment of error, which both address the RVO specification in this case.

{¶16} If an indictment contains a repeat violent offender specification, it is the court that shall determine the issue of whether the offender is a RVO. R.C. 2941.149(B). A RVO is a person who: (1) is being sentenced for committing or complicity in committing aggravated murder, murder, a felony of the first or second degree that is an offense of violence, an attempt to commit any of these offenses if the attempt is a felony of the first or second degree, or a substantially equivalent offense; and (2) was previously convicted of or pleaded guilty to one of the aforementioned offenses. R.C. 2929.01(DD).

{¶17} The trial court found Brown to be a RVO. Brown presents two arguments why this finding was in error. First, as argued in his second assignment of error, Brown disputes whether he was properly convicted of the second-degree felony form of robbery, as required by the first part of the RVO definition in this case.[1] We have already rejected that argument. Thus, Brown was correctly sentenced for a felony of the second degree that is an offense of violence and he meets the first part of the RVO definition.

{¶18} Second, Brown argues that the state did not present sufficient evidence to prove his prior convictions as required by the second part of the RVO definition. We disagree.

---

[1] Robbery is defined as an offense of violence. R.C. 2901.01(A)(9)(a).

{¶19} Pursuant to R.C. 2945.75(B)(1), when it is necessary to prove a prior conviction, a certified copy of the entry of judgment in such prior conviction together with evidence sufficient to identify the defendant named in the entry as the offender in the present case is sufficient to prove such prior conviction. Brown first contends that this statute mandates that the state present certified copies of judgment entries to prove Brown's prior convictions. We disagree. The statute does not make a judgment entry the sole method to prove a prior conviction but, rather, provides that it is a sufficient method to do so. *State v. Volpe*, 10th Dist. No. 06AP-1153, 2008-Ohio-1678, ¶51; *State v. Lewis*, 4th Dist. No. 10CA24, 2011-Ohio-911, ¶17. Other means of proving prior convictions are available to the state.

{¶20} Here, the state presented testimony from Brown's parole officer to prove Brown's prior convictions. The parole officer testified that she was familiar with Brown's prior record and had discussed his record with him. She testified that Brown had two prior robbery convictions and that both of those convictions were felonies of the second degree. This testimony is sufficient to prove that Brown had two prior second-degree felony robbery convictions and, therefore, satisfies the second part of the RVO definition. Therefore, the trial court did not err by finding Brown to be a RVO.

{¶21} Once the court determines a person to be a RVO, penalty enhancement is governed by R.C. 2929.14(D). As relevant here, R.C. 2929.14(D)(2)(b) mandates that:

> (b) The court shall impose on an offender the longest prison term authorized or required for the offense and shall impose on the offender an additional definite prison term of one, two, three, four, five, six, seven, eight, nine, or ten years if all of the following criteria are met:
>
> (i) The offender is convicted of or pleads guilty to a specification of the type described in section 2941.149 of the Revised Code that the offender is a repeat violent offender.

> (ii) The offender within the preceding twenty years has been convicted of or pleaded guilty to three or more offenses described in division (CC)(1) of section 2929.01 of the Revised Code, including all offenses described in that division of which the offender is convicted or to which the offender pleads guilty in the current prosecution and all offenses described in that division of which the offender previously has been convicted or to which the offender previously pleaded guilty, whether prosecuted together or separately.
>
> (iii) The offense or offenses of which the offender currently is convicted or to which the offender currently pleads guilty is aggravated murder and the court does not impose a sentence of death or life imprisonment without parole, murder, terrorism and the court does not impose a sentence of life imprisonment without parole, any felony of the first degree that is an offense of violence and the court does not impose a sentence of life imprisonment without parole, or any felony of the second degree that is an offense of violence and the trier of fact finds that the offense involved an attempt to cause or a threat to cause serious physical harm to a person or resulted in serious physical harm to a person.

{¶22} Under this statute, a trial court shall impose the maximum sentence on the instant conviction and an additional term of imprisonment if Brown: (1) was found to be a RVO, (2) has three or more qualifying convictions (including the instant conviction), and (3) if the instant conviction is one of the offenses listed in R.C. 2929.14(D)(2)(b)(iii).

{¶23} Pursuant to the first and third requirements of the statute, we have concluded that the trial court properly found Brown to be a RVO and that Brown was

properly convicted of robbery as a felony of the second degree.[2] Yet, Brown also argues that the state failed to prove that he had three qualifying convictions as required by the second statutory requirement. We disagree. As we determined above, the testimony of Brown's parole officer was sufficient evidence to prove two prior second-degree felony robbery convictions and, by statute, his instant conviction accounts for the third such conviction. Thus, the requirements set forth in R.C. 2929.14(D)(2)(b) are satisfied, and therefore, penalty enhancement was mandated.

{¶24} However, the trial court did not sentence Brown to the maximum prison term for his second-degree felony robbery conviction. Neither did the trial court impose an additional term of imprisonment for the RVO specification. Because these sentencing enhancements were mandatory, the trial court's sentence was in error. Accordingly, we overrule Brown's first assignment of error and sustain the state's sole assignment of error.

Brown's Fourth Assignment of Error - Sentencing

{¶25} Lastly, Brown argues that the trial court improperly sentenced him because his theft conviction is a lesser included offense of his second-degree felony robbery conviction. We disagree.

{¶26} Although not clearly stated, Brown appears to argue that the trial court should have merged these two convictions for purposes of sentencing because they were lesser included offenses. Even assuming that Brown's theft conviction is a lesser

[2] We note that robbery in violation of R.C. 2911.02(A)(2) does not require serious physical harm. However, in this case, the state alleged in the indictment for this robbery count that the offense involved an attempt to cause or a threat to cause serious physical harm to a person or resulted in serious physical harm to a person in order to support the RVO specification. Additionally, the jury was instructed that in order to find Brown guilty of this count of robbery, it had to find that Brown inflicted or attempted to inflict serious physical harm. Thus, by finding Brown guilty of this robbery count, the trier of fact found that the offense involved either an attempt to inflict serious physical harm or resulted in serious physical harm as required by R.C. 2929.14(D)(2)(b)(iii) in this case.

included offense of his second-degree felony robbery conviction,[3] the mere fact that one offense is a lesser included offense of another does not require a finding that the two offenses are allied offenses of similar import, and therefore subject to the merger requirements of R.C. 2941.25(A). *State v. Whited*, 2d Dist. No. 02CA38, 2003-Ohio-5747, ¶6; *State v. Boldin*, 11th Dist. No. 2007-G-2808, 2008-Ohio-6408, ¶105. These are two separate analyses.

{¶27} The Supreme Court of Ohio has recently clarified the process by which courts determine whether offenses are allied offenses of similar import. *State v. Johnson,* 128 Ohio St.3d 153, 2010-Ohio-6314. Specifically:

> Under R.C. 2941.25, the court must determine prior to sentencing whether the offenses were committed by the same conduct. Thus, the court need not perform any hypothetical or abstract comparison of the offenses at issue in order to conclude that the offenses are subject to merger.
>
> In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), the question is whether it is possible to commit one offense *and* commit the other offense with the same conduct, not whether it is possible to commit one *without* committing the other. * * * If the offenses correspond to such a degree that the conduct of the defendant constituting commission of one offense constitutes commission of the other, then the offenses are of similar import.
>
> If the multiple offenses can be committed by the same conduct, then the court must determine whether the offenses were committed by the same conduct, i.e., 'a single act committed with a single state of mind. *State v. Brown,* 119 Ohio St.3d 447, 2008-Ohio-4569, ¶ 50 (Lanzinger, J., dissenting).
>
> If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged.

[3] See *State v. Ward* (July 23, 1991), 10th Dist. No. 91AP-96 (grand theft of motor vehicle not lesser included offense of robbery).

> Conversely, if the court determines that the commission of one offense will *never* result in the commission of the other, or if the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge.

Id. at ¶47-51.

{¶28} Here, Brown does not argue that his offenses should merge under R.C. 2941.25 or the above analysis in *Johnson*. Instead, he argues that the offenses are lesser included offenses. That conclusion by itself would provide no basis for this court to disturb the trial court's sentencing. *Whited*; *Boldin*. Accordingly, we overrule Brown's fourth assignment of error. See *Brothers v. Morrone-O'Keefe Dev. Co.,* 10th Dist. No. 06AP-713, 2007-Ohio-1942, ¶59 (overruling assignment of error that would not impact trial court's judgment).

{¶29} In conclusion, we overrule Brown's four assignments of error and sustain the state's sole assignment of error. Accordingly, we reverse the judgment of the Franklin County Court of Common Pleas and remand the matter for resentencing.

Judgment reversed and cause remanded for resentencing in case No. 10AP-836; and judgment affirmed in case No. 10AP-845.

BROWN and FRENCH, JJ., concur.