[Cite as *State v. Taylor*, 2011-Ohio-3162.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 10AP-939
v.	:	(C.P.C. No. 08CR-10-7835)
Ricky R. Taylor,	:	(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 appellee.

Kirk A. McVay, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Defendant-appellant, Ricky R. Taylor, appeals from the judgment of the Franklin County Court of Common Pleas convicting him of eight counts of robbery, four counts of theft, one count of possession of drugs with a firearm specification, and one count of having a weapon while under disability, and sentencing him to an aggregate term of 29 years incarceration.

{¶2} The convictions herein arise out of a series of pharmacy robberies that occurred in Franklin County, Ohio during the months of September and October 2008. The facts surrounding the incidents were adduced at trial as follows. The first robbery occurred on September 11, 2008, at approximately 1:40 p.m., at a CVS pharmacy on Parsons Avenue. According to the testimony, an African-American male wearing a red football jersey and holding a paper towel over his face approached the pharmacy counter and demanded OxyContin, a schedule II dangerous drug. Pharmacist Luke Slater testified that the man approached and told Slater that he had 30 seconds to put all of the OxyContin in a bag. In addition to giving the man the OxyContin, Slater gave him money from one of the cash registers. Slater described the perpetrator as tall and thin, and testified that the man kept his left hand in his pocket during the robbery. Pharmacy employee Heather Graff also described the incident; however, neither Graff nor Slater was able to identify the man. Additionally, though no weapons were seen, both Graff and Slater testified they felt threatened by the perpetrator's actions.

{¶3} The second robbery occurred on September 19, 2008, at approximately 9:30 p.m., at a CVS pharmacy on Lockbourne Road. According to CVS pharmacy technician Cathy Webster, a man approached her at the pharmacy counter and told her that she had 30 seconds to give him all of the OxyContin and that nobody would be hurt if she complied. After he was given the OxyContin, the man then demanded money from the cash register. The store employees complied with the perpetrator's demand, and he left the store. Webster testified the perpetrator was wearing sunglasses, a black hat, and black clothes, and had his face covered with something white. However, Webster was unable to make an identification of the perpetrator.

{¶4} The third robbery occurred on September 28, 2008 at a CVS pharmacy on Livingston Avenue. According to pharmacist Eric Obeng, an African-American male in his twenties or thirties and wearing a cap approached the pharmacy counter with his hand in his pocket and demanded that Obeng give him all the OxyContin. Obeng testified that he told the perpetrator he did not have any OxyContin, but that he did have Percocet, also a schedule II dangerous drug. Therefore, Obeng explained to the jury that he gave this to the perpetrator instead. Obeng was not able to identify the perpetrator. Pharmacy intern Erica Roddy testified the perpetrator was wearing sunglasses and a baseball cap and that his body language suggested he was carrying a weapon. From a photo array shown to her on October 12, 2008, Roddy identified appellant's son, Tarail Taylor ("Tarail"), as the perpetrator. Store employee Gerald Brown testified that he believed the perpetrator was an older man and that the man left in an olive-green Blazer. Brown was able to provide a partial license plate number of the Blazer to the police.

{¶5} The fourth robbery occurred on September 29, 2008 at the same CVS pharmacy on Parsons Avenue that was robbed weeks earlier on September 11. Pharmacist Ryan Healey testified that a man approached the pharmacy counter and told Healy that he wanted all of the OxyContin in 30 seconds. Healy testified that he complied with the perpetrator's demand and that he felt threatened by the perpetrator's conduct. From a photo array shown to him on October 1, 2008, Healy identified Tarail as the perpetrator. At the time the pharmacy was being robbed, Tarick Barton was with his wife at the drive-through window of the CVS pharmacy. Barton testified that he saw a green SUV with two people in it speeding out of the parking lot. Barton provided the license

plate number of the vehicle to the police. The license plate number provided by Barton matched that of a green SUV registered to appellant's sister, Kim Taylor, n.k.a. Kim Miller. According to Miller, though appellant registered the vehicle in her name, only appellant and Tarail drove the car as she had neither driven it nor ever had physical control of it.

{¶6} The fifth robbery occurred on October 14, 2008 at the same CVS pharmacy on Livingston Avenue that was robbed on September 28. According to witnesses, two men entered the pharmacy on October 14, and the first man told cashier Roryana Bowman to open the cash register drawer. When Bowman refused, the man went to the pharmacy and told pharmacist Mervat Nagib to give him the drugs from the safe. The second man, who appeared younger than the first, remained standing near Bowman. Bowman identified appellant out of a photo array as the older perpetrator and testified that the maroon shirt appellant was wearing on the day of his arrest looked like the shirt worn by the perpetrator on the day of the robbery. Nagib testified the perpetrator shouted at her to give him OxyContin and that she opened the safe and filled her lunch bag with Percocet, Adderall, Ritalin, and Methylphenidate that she then gave to the man. Nagib testified she felt frightened as the man's behavior was threatening. Nagib also identified appellant as the assailant.

{¶7} Appellant was arrested on October 20, 2008. After his arrest, appellant admitted that he was addicted to heroin and "high all the time." (Tr. 358.) Appellant also admitted driving the green Blazer on two occasions and driving his son to the CVS pharmacies on September 28 and 29, 2008. Additionally, appellant admitted using heroin and possessing the loaded operable firearm he was sitting on at the time of his arrest.

{¶8} Tarail testified during the state's case-in-chief. According to Tarail, he entered a plea of guilty to various offenses, including some arising out the robberies at issue here, and received a 10-year term of incarceration for his involvement in those offenses. Tarail testified he was in the car with appellant when appellant robbed the CVS pharmacy on September 11, 2008. Tarail told the jury that appellant came out of the pharmacy with a bag of pills that he and appellant proceeded to sell. Tarail testified that though he was not present at the September 28, 2008 robbery, appellant told Tarail about it afterwards and that appellant again had a bag of pills with him. Regarding the September 29, 2008 robbery, Tarail testified that he robbed the pharmacy while appellant waited outside in the car. With respect to the October 14, 2008 robbery, Tarail testified that he and appellant robbed it together. According to Tarail, they did not have a firearm with them during any of the robberies, but they acted as though they were armed. Tarail also testified that appellant obtained a gun after the robbery that occurred on October 14, 2008.

{¶9} During trial, it was stipulated that: (1) the drugs recovered at the time of appellant's arrest were tested and determined to be heroin; (2) the firearm recovered at the time of appellant's arrest was operable; and (3) appellant had a prior conviction for drug trafficking.

{¶10} Appellant and Tarail were charged in a 37-count indictment rendered by a Franklin County Grand Jury on October 30, 2008. Appellant was named in 20 of those counts as follows: Counts 1, 5, and 9 charged appellant with aggravated robbery, as first-degree felonies, in violation of R.C. 2911.01; Counts 2, 6, 10, 17, and 30 charged appellant with robbery, as second-degree felonies, in violation of R.C. 2911.02; Counts 3,

7, 11, 18, and 31 charged appellant with robbery, as third-degree felonies, in violation of R.C. 2911.02; Counts 4, 8, 12, 19, and 32 charged appellant with theft, as third-degree felonies, in violation of R.C. 2913.02; Count 36 charged appellant with possession of drugs, a fifth-degree felony, in violation of R.C. 2925.11, and a one-year gun specification in violation of R.C. 2941.141; and Count 37 charged appellant with having a weapon while under disability ("WUD"), a third-degree felony, in violation of R.C. 2923.13. In addition, Counts 1 through 12 contained firearm specifications.

{¶11} Counts 1 through 4 pertained to the robbery that occurred on September 11, 2008, Counts 5 through 8 pertained to the robbery that occurred on September 19, 2008, Counts 9 through 12 pertained to the robbery that occurred on September 28, 2008, Counts 17 through 19 pertained to the robbery that occurred on September 29, 2008, Counts 30 through 32 pertained to the robbery that occurred on October 14, 2008, and Counts 36 and 37 pertained to appellant's arrest at which time he was alleged to have been in possession of heroin and a firearm.

{¶12} A jury trial commenced on August 9, 2010, and on August 16, 2010, the trial court granted the state's motion to dismiss Counts 1, 5, and 9 of the indictment and all of the gun specifications for Counts 1 through 12. On August 20, 2010, the jury rendered a verdict of guilty of Counts 2, 3, 4, 10, 11, 12, 17, 18, 19, 30, 31, 32, 36 with specification, and 37, and not guilty of Counts 6, 7, and 8. In other words, the jury's verdicts indicated it found appellant guilty of the offenses alleged to have occurred on September 11, 28, 29, October 14 and 20, 2008, and not guilty of the offenses alleged to have occurred on September 19, 2008.

{¶13} A sentencing hearing was held on September 2, 2010, at which time the trial court imposed the following sentence: five years incarceration on each Count 2, 10, 17, and 30; Counts 3, 11, 18, and 31 merged with Counts 2, 10, 17, and 30, respectively; one year incarceration on each Count 4, 12, 19, and 32; 12 months incarceration on Count 36 consecutive to one year for the firearm specification; and three years incarceration on Count 37. All sentences were imposed consecutive to one another for an aggregate sentence of 29 years incarceration. Additionally, the trial court awarded appellant 673 days of jail-time credit.

{¶14} This appeal followed, and appellant brings the following three assignments of error for our review:

> FIRST ASSIGNMENT OF ERROR
>
> DEFENDANT-APPELLANT WAS DENIED DUE PROCESS OF LAW AND A FAIR TRIAL IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION WHEN THE COURT FAILED TO MERGE COUNTS FOUR, TWELVE, NINETEEN, AND THIRTY-TWO AS ALLIED OFFENSES OF SIMILAR IMPORT TO COUNTS TWO, TEN, SEVENTEEN, AND THIRTY, RESPECTIVELY FOR PURPOSES OF SENTENCING.
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> SECOND ASSIGNMENT OF ERROR
>
> THE TRIAL COURT ERRED WHEN IT ENTERED JUDGMENT AGAINST THE DEFENDANT AS TO COUNTS TWO, THREE, FOUR OF THE INDICTMENT WHEN THE VERDICTS OF THE JURY ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, IN VIOLATION OF DEFENDANT-APPELLANT'S RIGHTS TO DUE PROCESS OF LAW AND A FAIR TRIAL GUARANTEED BY AMENDMENTS V AND XIV OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 10 AND 16 OF THE OHIO CONSTITUTION.

THIRD ASSIGNMENT OF ERROR

DEFENDANT-APPELLANT WAS DENIED DUE PROCESS OF LAW AND A FAIR TRIAL IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION WHEN THE COURT FAILED TO CURB THE PROSECUTOR'S PERSISTENT USE OF LEADING QUESTIONS ON DIRECT EXAMINATION IN THE STATE'S CASE-IN-CHIEF OVER THE REPEATED OBJECTIONS OF DEFENDANT-APPELLANT'S COUNSEL.

{¶15} For ease of discussion, we will discuss appellant's assignments of error out of order.

{¶16} In his second assignment of error, appellant asserts several of his convictions are against the manifest weight of the evidence. In determining whether a verdict is against the manifest weight of the evidence, we sit as a "thirteenth juror." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52. Thus, we review the entire record, weigh the evidence and all reasonable inferences, and consider the credibility of witnesses. Id. Additionally, we 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.' " Id., quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. We reverse a conviction on manifest weight grounds for only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " Id., quoting *Martin* at 175. Moreover, " 'it is inappropriate for a reviewing court to interfere with factual findings of the trier of fact * * * unless the reviewing court finds that a reasonable juror could not find the testimony of the witness to be credible.' "

State v. Brown, 10th Dist. No. 02AP-11, 2002-Ohio-5345, ¶10, quoting *State v. Long* (Feb. 6, 1997), 10th Dist. No. 96APA04-511.

{¶17} A defendant is not entitled to a reversal on manifest weight grounds merely because inconsistent evidence was presented at trial. *State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶21. The determination of weight and credibility of the evidence is for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230. The rationale is that the trier of fact is in the best position to take into account inconsistencies, along with the witnesses' manner and demeanor and determine whether the witnesses' testimony is credible. *State v. Williams*, 10th Dist. No. 02AP-35, 2002-Ohio-4503, ¶58; *State v. Clarke* (Sept. 25, 2001), 10th Dist. No. 01AP-194. The trier of fact is free to believe or disbelieve all or any of the testimony. *State v. Jackson*, 10th Dist. No. 01AP-973, 2002-Ohio-1257; *State v. Sheppard* (Oct. 12, 2001), 1st Dist. No. C-000553. Consequently, although an appellate court must act as a "thirteenth juror" when considering whether the manifest weight of the evidence requires reversal, it must give great deference to the fact finder's determination of the witnesses' credibility. *State v. Covington*, 10th Dist. No. 02AP-245, 2002-Ohio-7037, ¶22; *State v. Hairston*, 10th Dist. No. 01AP-1393, 2002-Ohio-4491, ¶17.

{¶18} Appellant challenges the weight of the evidence, but only as to the three convictions arising out of the robbery that occurred at the CVS pharmacy on Parsons Avenue on September 11, 2008. Therefore, our disposition of appellant's second assignment of error focuses likewise. Arising out of the September 11, 2008 incident, appellant was convicted of robbery in violation of R.C. 2911.02(A)(2), which provides, "[n]o person, in attempting or committing a theft offense or in fleeing immediately after the

attempt or offense, shall * * * [i]nflict, attempt to inflict, or threaten to inflict physical harm on another." Appellant was also convicted of robbery in violation of R.C. 2911.02(A)(3), which provides, "[n]o person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall * * * [u]se or threaten the immediate use of force against another." Additionally, appellant was convicted of theft in violation of R.C. 2913.02, which provides, in relevant part:

> (A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways:
>
> (1) Without the consent of the owner or person authorized to give consent;
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> (2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent;
>
> (3) By deception;
>
> (4) By threat;
>
> (5) By intimidation.
>
> (B) (1) Whoever violates this section is guilty of theft.
>
> * * *
>
> (6) If the property stolen is any dangerous drug, a violation of this section is theft of drugs, a felony of the fourth degree, or, if the offender previously has been convicted of a felony drug abuse offense, a felony of the third degree.

{¶19} According to appellant, the jury clearly lost its way when it found the state proved the essential elements of each offense beyond a reasonable doubt. We disagree. The evidence presented at trial regarding the September 11, 2008 robbery is as follows. Slater testified he was in the process of purchasing an over-the-counter product for

himself when he was approached from behind by a man who said Slater "had 30 seconds to put all the Oxy in a bag." (Tr. 57.) Therefore, Slater proceeded to remove one full and one partial bottle of OxyContin from the safe and put it in a bag. The man then demanded money. Because it appeared to Slater that the pharmacy technician was unable to open the cash register, Slater opened the second cash register and gave the man the money. Slater recalled the man as a tall, thin African-American that was wearing a red Ohio State jersey and holding a paper towel in front of his face. Because the man kept his left hand in his pocket during this time, Slater believed that the man was indicating that he had a weapon. Slater also testified that he felt threatened with physical harm by the man's actions.

{¶20} Graff testified she was assisting Slater with his purchase when a man approached Slater and asked for the OxyContin. According to Graff, the man told her she "had 30 seconds to open [her] drawer," and that she interpreted this as a threat of physical harm if she failed to comply. (Tr. 74.) Graff thought the perpetrator's approximate age range may have been "[b]etween 30 and 40." (Tr. 79.)

{¶21} Brown testified that when she went to the CVS pharmacy that day, there was a car backed into a parking space two parking spaces away from her that was running with a gentleman in it. Brown described the car as a gold or tan "Dodge Stratus or something like that." (Tr. 81.) As Brown entered the store, she testified a man with a paper towel over his face passed her as he was exiting the store and that he went in the direction of the car she described. When asked to approximate the man's age, Brown stated, "[t]hirty, 40, maybe. Just guessing." (Tr. 87.)

{¶22} Tarail testified he was currently serving an aggregate ten-year sentence for his convictions arising out of his plea of guilty to several offenses pertaining to a string of robberies that occurred in September and October 2008. Tarail explained that the plea he entered into on June 30, 2009 was not contingent upon his testimony in appellant's case. However, since that time the law had changed, which prompted the state to indicate it would not oppose Tarail's request for judicial release if Tarail cooperated and testified truthfully in appellant's trial. Tarail also testified about other prior convictions and time spent in prison.

{¶23} According to Tarail, appellant was a "very heavily using addict" of heroin and crack who supported his habit by selling OxyContin that he stole from pharmacies. (Tr. 425.) Regarding the September 11, 2008 robbery at the CVS pharmacy on Parsons Avenue, Tarail testified he sat in the passenger's side of a "tannish-gold color" Plymouth Breeze while appellant went in to rob the pharmacy. (Tr. 429.) Tarail testified appellant came out with a bag of pills that he later sold. Tarail explained to the jury that appellant told him that appellant "[w]alked up to the counter with his hand under his shirt and basically demanded the OxyContins. Told the teller that they got 30 seconds." (Tr. 433.) Tarail also testified that at the time of the September 11, 2008 robbery, appellant had a napkin on his face and was wearing sunglasses and a hat. From the surveillance video showing a man in an Ohio State jersey with a cap holding something over his face, Tarail identified the man as appellant because of "[t]he hat and the shoes." (Tr. 434.) Tarail also testified that as of September 28, 2008, appellant was driving a green Blazer registered to Tarail's aunt.

{¶24} In his manifest weight argument, appellant challenges the credibility of Tarail's testimony. According to appellant, because Tarail was his alleged accomplice, Tarail's testimony is highly suspect. As the Supreme Court of Ohio has recognized, however, a jury is not precluded from basing a criminal conviction on the uncorroborated testimony of an accomplice. *State v. O'Dell* (1989), 45 Ohio St.3d 140, 145; *State v. Lowry*, 10th Dist. No. 03AP-415, 2004-Ohio-759, ¶19.

{¶25} Moreover, the trial court instructed the jury that "claimed complicity of a witness may affect his credibility and make his testimony subject to grave suspicion and require that it be weighed with great caution." (Tr. 554.) "Having been given a cautionary instruction, it remains that the jury was in the best position to evaluate [the witness's] demeanor and credibility" and to determine the weight of the evidence. *Lowry* at ¶18.

{¶26} Here, the jury was aware of the potential credibility concerns presented by Tarail's testimony, but, nonetheless, chose to believe the version of events as presented by Tarail. A conviction is not against the manifest weight of the evidence simply because the jury believed the prosecution testimony. *State v. Anderson*, 10th Dist. No. 10AP-302, 2010-Ohio-5561, ¶19. Reviewing the record as a whole, we cannot say that the evidence weighs heavily against the convictions, that the trier of fact lost its way, or that a manifest miscarriage of justice has occurred. The jury was in the best position to determine the credibility of the testimony presented, and we decline to substitute our judgment for that of the jury.

{¶27} Accordingly, we find appellant's three convictions arising out of the September 11, 2008 robbery are not against the manifest weight of the evidence and overrule appellant's second assignment of error.

{¶28} In his third assignment of error, appellant contends he was denied a fair trial by the trial court's error of allowing the prosecutor to repeatedly ask leading questions of its own witnesses on matters related to essential elements of the state's case. A leading question is one that suggests to the witness the answer desired by the examiner. *State v. Penn* (Dec. 14, 2000), 10th Dist. No. 99AP-1410. Evid.R. 611(C), provides that leading questions should not be used on direct examination of witnesses except as may be necessary to develop the witness' testimony. A trial court's decision to allow leading questions on direct is reviewed under an abuse of discretion standard. *State v. Moss* (Apr. 12, 2001), 10th Dist. No. 00AP-574, citing *Ramage v. Cent. Ohio Emergency Servs., Inc.* (1992), 64 Ohio St.3d 97, paragraph six of the syllabus. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶29} Though appellant states leading questions were asked of all of the state's 17 witnesses, appellant focuses on the testimony of the pharmacy personnel used to establish the perpetrator threatened physical harm or use of force. To exemplify this, appellant attached excerpts of the trial transcript that includes portions of testimony from seven witnesses.

{¶30} In the selected portions of transcript, however, many of the questions posed do not suggest the answer desired by the examiner, and, therefore, are not leading questions. *Penn*. Our review reveals that in the challenged testimony, the use of a leading question is demonstrated in 13 instances. Out of these 13 instances, objections were lodged against all but one of the leading questions, and from those objections

approximately half resulted in the trial court overruling the objections. We have reviewed the transcript and do not find that the trial court abused its discretion in overruling the same.

{¶31} In the remaining half of the objections, the trial court sustained the objections and the prosecutor rephrased the questions. Such an action does not deprive a defendant of a fair trial. *State v. Kleekamp*, 2d Dist. No. 23533, 2010-Ohio-1906 (the trial court's repeated sustaining of objections to leading questions and the prosecutor's rephrasing to elicit the same testimony did not deprive the defendant of a fair trial); *State v. Joseph* (Dec. 23, 1993), 3d Dist. No. 1-91-11 (no denial of a fair trial where the trial court sustained defense counsel's objections to leading questions and the prosecutor rephrased the question); *State v. Lorenzano* (Aug. 9, 1978), 9th Dist. No. 2644 (upon objection a leading question may be rephrased in one or more questions in non-objectionable form).

{¶32} Given the above, we do not find appellant was denied the right to a fair trial where the trial court acted within its discretion in overruling certain objections to the use of leading questions, and where in other instances the trial court sustained certain objections to the use of leading questions and the prosecutor rephrased the questions to elicit testimony. Accordingly, we overrule appellant's third assignment of error.

{¶33} In his first assignment of error, appellant contends the trial court erred in failing to merge his convictions for theft as contained in Counts 4, 12, 19, and 32, and robbery as contained in Counts 2, 10, 17, and 30, respectively, because they are allied offenses of similar import.

{¶34} Because appellant did not raise the merger issue at trial, the plain error standard applies. *State v. Sidibeh*, 10th Dist. No. 10AP-331, 2011-Ohio-712, ¶55, citing *State v. Elmore*, 111 Ohio St.3d 515, 2006-Ohio-6207, ¶127; Crim.R. 52(B). Plain error exists when there is error, the error is an obvious defect in the trial proceedings, and the error affects substantial rights, i.e., affects the outcome of the trial. *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68. A court recognizes plain error with the utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. Id. Plain error exists when a trial court was required to, but did not, merge a defendant's offenses because the defendant suffers prejudice by having more convictions than authorized by law. *Sidibeh* at ¶55, citing *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, ¶31.

{¶35} R.C. 2941.25, Ohio's multiple count 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.

{¶36} As recently held by the Supreme Court of Ohio in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, "[w]hen determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25, the conduct of the accused must be considered." Id. at syllabus. In so holding, the *Johnson* court expressly overruled *State v. Rance*, 85 Ohio St.3d 632, 1999-Ohio-291, "to the extent that it calls for

a comparison of statutory elements solely in the abstract" to determine whether offenses are subject to merger under R.C. 2941.25. *Johnson* at ¶44.

{¶37} In construing the plurality opinion of *Johnson*, this court stated in *State v. White*, 10th Dist. No. 10AP-34, 2011-Ohio-2364, that to determine whether offenses are allied and of similar import, " 'the question is whether it is possible to commit one offense and commit the other 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.' " Id. at ¶62, quoting *Johnson* at ¶48, citing *State v. Blankenship* (1988), 38 Ohio St.3d 116, 119.

{¶38} If the 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.' " Id. at ¶63, quoting *Johnson* at ¶49, quoting *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, ¶50. " '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., quoting *Johnson* at ¶51. However, if the answer to both questions is in the affirmative, "then the offenses are allied offenses of similar import and will be merged." Id., quoting *Johnson* at ¶50.

{¶39} Here, appellant contends the trial court improperly failed to merge the theft convictions with the corresponding robbery convictions. In contrast, the state argues robbery and theft of dangerous drugs do not share a "similar import" because the commission of one offense does not necessarily result in the commission of the other. According to appellee, robbery involves theft or attempted theft committed with an

element of actual or potential harm to a person, while theft of a dangerous drug proscribes the theft of certain items.

{¶40} In accordance with *White*, we must first ask whether it was possible to commit the offense of robbery and the offense of theft, as they were charged in the matter before us, with the same conduct. This question, we must answer in the affirmative. Accordingly, we next ask whether the facts herein establish that the robbery and the corresponding theft convictions were committed with the same conduct. We conclude that they were. As indicted, the theft counts were based on appellant taking OxyContin (Counts 4 and 19) and Percocet (Counts 12 and 32), which also formed the basis for the robbery counts (Counts 2, 10, 17, and 30, respectively). This is evidenced by the instructions to the jury that "the theft offense at issue [in the robbery counts] is the theft of dangerous drugs from the CVS." (Tr. 558.)

{¶41} We find that under the facts presented herein the robbery and theft charges arising from each robbery stemmed from the same conduct as they involved the same items and the same victim. *State v. Reives-Bey*, 9th Dist. No. 25138, 2011-Ohio-1778 (robbery and theft of goods of a certain type such as a motor vehicle or of a certain dollar amount may be subject to merger if the facts warrant the same); *State v. Jones*, 5th Dist. No. 10 CA 50, 2011-Ohio-2306 (robbery and theft convictions merged because they arose from the same conduct of shoplifting the same items from the same victim); *State v. Davis*, 8th Dist. No. 94914, 2011-Ohio-1067 (conviction for theft of a vehicle merged with robbery conviction). Consequently, we conclude the offenses are allied offenses of similar import such that the offenses in Counts 4, 12, 19, and 32 should have been merged prior to sentencing with Counts 2, 10, 17, and 30, respectively.

{¶42} Accordingly, appellant's first assignment of error is sustained.

{¶43} In conclusion, appellant's first assignment of error is sustained, and appellant's second and third assignments of error are overruled. Therefore, the judgment of the Franklin County Court of Common Pleas is hereby affirmed in part and reversed in part, and this matter is remanded to that court for resentencing consistent with this decision.

Judgment affirmed in part, reversed in part; cause remanded.

BRYANT, P.J., and KLATT, J., concur.

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