[Cite as *State v. Johnson*, 2013-Ohio-353.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 12AP-35 (C.P.C. No. 10CR-4747)
v.	:	(REGULAR CALENDAR)
Terry B. Johnson,	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on February 5, 2013

Ron O'Brien, Prosecuting Attorney, and *Laura R. Swisher*, for appellee.

Yeura R. Venters, Public Defender, and *Allen V. Adair*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

DORRIAN, J.

I. Introduction

{¶ 1} Defendant-appellant, Terry B. Johnson, appeals from a judgment of the Franklin County Court of Common Pleas convicting him of multiple criminal offenses, including aggravated burglary, aggravated robbery, felonious assault, and kidnapping, following a jury trial.

{¶ 2} Appellant's original appellate counsel filed a motion to withdraw from this case pursuant to *Anders v. California*, 386 U.S. 738 (1967), asserting that she was unable to find in the record any meritorious issues for appeal. We conducted an independent review and identified an arguable non-frivolous sentencing issue involving the allied-offenses rule of R.C. 2941.25. We appointed new counsel for appellant and ordered supplemental briefs on that issue. In his supplemental brief, appellant's newly appointed counsel raised additional issues and assignments of error.

{¶ 3} We now conclude that the trial court committed error in sentencing appellant. We therefore reverse the judgment of the trial court and remand for resentencing. We also conclude, consistent with the position of both parties, that there is insufficient evidence in the record to support appellant's conviction for possessing a weapon while under disability ("WUD") and therefore vacate the same.

I. Facts

{¶ 4} On November 25, 2009, appellant and another individual (who was not thereafter definitively identified) entered a townhouse apartment that was the residence of Erica Owens, her brother, DeWayne Owens, and other members of the Owens family. A family friend, Diana Furches, was also present in the apartment, along with her infant daughter, whose father was DeWayne. Appellant was an acquaintance of the Owens family and had formerly dated Diana.

{¶ 5} Upon entering the apartment, both appellant and his companion pulled out guns and pointed them at Diana and Erica, who were on the first floor of the apartment preparing to go to a laundromat. During the encounter, appellant also pointed the gun at Diana's baby, who was being held by Diana. Appellant repeatedly asked "where's the money" and told Erica to give him the "stuff." (Tr. 67-68; 125-26.) Appellant remained downstairs with the two women while the second man proceeded upstairs, encountered DeWayne, and fired his gun, shooting DeWayne in the arm. During the incident, the shooter told DeWayne to "give me the shit," which DeWayne interpreted as meaning either drugs or money. (Tr. 206.) Both DeWayne and the shooter then came downstairs.

{¶ 6} DeWayne exited the residence through the back door, and appellant followed him. Appellant then returned to the apartment, kicked in the back door, which Erica had attempted to lock, and forced Erica to the basement by grabbing her by the shirt. He continued demanding money from her. Appellant ultimately fled the residence, again through the back door.

{¶ 7} The Grand Jury returned an indictment charging appellant with 12 criminal offenses, with gun specifications. The state ultimately dropped four counts, i.e., robbery (as opposed to aggravated robbery) of DeWayne, Erica, and Diana, and kidnapping of Diana. The jury returned guilty verdicts as to the following charges: aggravated burglary in violation of R.C. 2911.11 (Count 1); felonious assault of DeWayne in violation of R.C.

2923.11 (Count 2); aggravated robbery of DeWayne, Erica and Diana, in violation of R.C. 2911.02 (Counts 3, 4, and 5); kidnapping of DeWayne and Erica (Counts 9 and 10); and possessing a weapon while under disability (Count 12).

{¶ 8} At sentencing, the state took the position that the court should sentence appellant consecutively for aggravated burglary, felonious assault of DeWayne, and aggravated robbery of DeWayne, as well as for the weapons under disability offense. The prosecutor further stated that "the state is willing to concede a merger as to the two remaining aggravated robberies [i.e., of the two women] and the two kidnappings [i.e., of DeWayne and Erica]." (Tr. 618.)

{¶ 9} Ultimately, in an amended sentencing entry, the court imposed a sentence for each and every count upon which the jury returned a guilty verdict, as follows:

> The Court hereby imposes the following sentence: **Five (5) years** for Count One [aggravated burglary]**; Five (5) years** for Count Two [felonious assault—DeWayne]; **Five (5) years** for Count Three [aggravated robbery—DeWayne]; **Five (5) years** for Count Four [aggravated robbery—Erica]; **Five (5) years** for Count Five [aggravated robbery-Diana]; **Five (5) years** for Count Nine [kidnapping-DeWayne]; **Five (5) years** for Count Ten [kidnapping-Erica; **Three (3) years** for Count Twelve [WUD] to be served at **THE OHIO DEPARTMENT OF REHABILITATION AND CORRECTION. Counts Four, Five, Nine, and Ten MERGE for sentencing purposes. Counts One, Two, Three, and Twelve shall run concurrent with each other and the merged offenses. It is further ordered that the Defendant serve an additional, consecutive three (3) years actual incarceration as to the firearm specification on Count One, for a total of eight (8) years. The gun specifications as to Counts Two, Three, Four, Five, Nine and Ten merge with the gun specification for Count One for sentencing purposes.**

(Emphasis sic.) (Nov. 2, 2011 Amended Judgment Entry.)

{¶ 10} In short, the court imposed an actual prison sentence of eight years for all of appellant's criminal offenses at the Owens' apartment—five years for the eight criminal counts, plus an additional three years for the firearm specifications. At the same sentencing hearing, the court imposed a 13-year sentence upon appellant based on

violation of probation in a separate case. The court ordered the 8-year sentence in the instant case to run consecutively to that 13-year sentence.

{¶ 11} Before the court for consideration are six assignments of error, which we summarize as follows: (1) appellant's convictions are against the manifest weight of the evidence; (2) the trial court erred in imposing separate, albeit concurrent, sentences contrary to proper application of the allied-offenses statute; (3) the state offered insufficient evidence to support appellant's conviction of having a weapon under disability; (4) the trial court erred in overruling appellant's Crim.R. 29 motion for acquittal as to Count 2 (felonious assault of DeWayne), Count 5 (aggravated robbery of Diana), and Count 10 (kidnapping of Erica); (5) the trial court committed plain error in instructing the jury on the kidnapping charge of Count 10 (kidnapping of Erica); and (6) the evidence was insufficient to support conviction of Counts 2, 5 and 10.

{¶ 12} Because we identified as a non-frivolous issue in our *Anders* review and requested supplemental briefs regarding the issue of sentencing of allied offenses, we will address that assignment of error first.

II. Analysis

Sentencing of allied offenses of similar import

{¶ 13} We first address appellant's second assignment of error, which challenges appellant's sentencing. Specifically, appellant argues that the trial court should not have imposed sentences, albeit concurrent sentences, on offenses which the trial court "merged," presumably because the court found certain offenses to be allied offenses subject to merger pursuant to R.C. 2941.25.

{¶ 14} "We review a sentence for an allied-offenses error under a contrary-to-law standard. Pursuant to R.C. 2953.08(G)(2), if the sentence is contrary to law, we may vacate the sentence and remand for a new sentencing hearing." (Citations omitted.) *State v. Damron*, 10th Dist. No. 12AP-209, 2012-Ohio-5977, ¶ 7.

{¶ 15} R.C. 2941.25 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.

{¶ 16} Under this statute " 'a trial court is required to merge allied offenses of similar import at sentencing. Thus, when the issue of allied offenses is before the court, the question is not whether a particular sentence is justified, but whether the defendant may be sentenced upon all the offenses.' " *State v. Williams*, ___ Ohio St.3d ___, 2012-Ohio-5699, ¶ 15, quoting *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1. A trial court commits plain error by sentencing a defendant for multiple counts that are allied offenses of similar import. *Underwood* at ¶ 31. "[E]ven when the sentences are to be served concurrently, a defendant is prejudiced by having more convictions than are authorized by law." *Id. Accord, State v. Damron*, 10th Dist. No. 12AP-209, 2012-Ohio-5977, ¶ 5 ("[U]pon determining that the offenses are allied offenses, the trial court must merge the crimes into a single conviction and impose a sentence based on that conviction, as '[t]he imposition of concurrent ssentences is not the equivalent of merging allied offenses.' ").

{¶ 17} Where a jury returns guilty verdicts on allied offenses, the trial court must allow the state to elect a single allied offense upon which the state wishes to proceed to sentencing. *See State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, paragraph two of the syllabus ("Upon finding reversible error in the imposition of multiple punishments for allied offenses, a court of appeals must reverse the judgment of conviction and remand for a new sentencing hearing at which the state must elect which allied offense it will pursue against the defendant."). *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, paragraph one of the syllabus ("When a cause is remanded to a trial court to correct an allied-offenses sentencing error, the trial court must hold a new sentencing hearing for the offenses that remain after the state selects which allied offense or offenses to pursue.").

{¶ 18} In this case, upon the return of guilty verdicts on all charges submitted to the jury, the trial court improperly sentenced appellant on each and every one of those charges, even though the court stated it was "merging" some of the offenses. The court thereby implicitly recognized that some of the charges were allied offenses. As discussed

above, the trial court could not impose sentence on every offense of which appellant was found guilty if some of those offenses were allied to others of those offenses. Accordingly, appellant's second assignment of error is well-taken.

{¶ 19} In its supplemental brief, the state agrees that the trial court failed to correctly apply the merger doctrine and concedes that the case should be remanded for resentencing. It contends, however, that the prosecutor at the sentencing hearing incorrectly acquiesced to merger of Counts 4, 5, 9, and 10. The state asserts that, on remand, it intends to argue that these counts involved different victims and were therefore not allied offenses. The state's current position is that the trial court should have allowed the state to choose which of the allied offenses upon which it wished to proceed to sentencing and entry of conviction.

{¶ 20} We express no opinion as to which, if any, of the charged offenses were allied; i.e., whether they had parallel elements, or whether the offenses appellant committed against the three victims occurred during the same, or a different, course of conduct and whether those offenses were committed with the same or a separate animus as to each victim. Those inquiries, as well as the issue as to whether the state is entitled to change its previously expressed position concerning merger, have not been briefed in this court and are, accordingly, matters that are best reviewed in the first instance by the trial court.

{¶ 21} Accordingly, we sustain appellant's second assignment of error asserting that the trial court misapplied the merger doctrine in sentencing appellant and remand the case to the trial court for it to conduct a new sentencing hearing.

Counts 2, 5, and 10—Crim. R. 29 motion for acquittal; sufficiency of evidence; manifest weight; alleged instructional error

{¶ 22} In his first assignment of error, appellant contends that the judgment of conviction was, in its entirety, against the manifest weight of the evidence. Appellant asserts in his fourth assignment of error that the trial court erred in not granting his Crim.R. 29 motion for acquittal as to the charges of felonious assault of DeWayne, aggravated robbery of Diana, and kidnapping of Erica. In his fifth assignment of error, appellant argues that the trial court erred in instructing the jury on the charge of kidnapping Erica. In his sixth assignment of error, appellant asserts that the jury's guilty

verdicts as to those charged offenses were not supported by sufficient evidence. Because each of these assignments of error require review of the evidence produced by the state, we will address them together.

{¶ 23} An appellate court applies the same standard in reviewing the denial of a Crim.R. 29 motion for acquittal as it does in reviewing whether the evidence was sufficient to support a conviction. *State v. Massey*, 10th Dist. No. 12AP-122, 2012-Ohio-5771, ¶ 9. In *Massey*, we stated:

> We examine the evidence in the light most favorable to the state and conclude whether any rational trier of fact could have found that the state proved beyond a reasonable doubt the essential elements of the crime. We will not disturb the verdict unless we determine that reasonable minds could not arrive at the conclusion reached by the trier of fact. In determining whether a conviction is based on sufficient evidence, we do not assess whether the evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction.

(Citations omitted.) *Id.*

{¶ 24} In determining whether a conviction is contrary to the manifest weight of the evidence "we weigh the evidence to determine whether 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. The trier of fact is afforded great deference in our review. And we reverse a conviction on manifest weight grounds for only the most exceptional case in which the evidence weighs heavily against a conviction." (Citations omitted.) *Id.* at ¶ 14.

Count 2—felonious assault of DeWayne Owens

{¶ 25} Appellant argues that the evidence failed to establish that he aided and abetted in the shooting of DeWayne and that the court should, therefore, have acquitted him of the charge of felonious assault of DeWayne. We disagree.

{¶ 26} The complicity statute, R.C. 2923.03, states, in relevant part, as follows:

> (A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:
>
> * * *

> (2) Aid or abet another in committing the offense;
>
> * * *
>
> (F) Whoever violates this section is guilty of complicity in the commission of an offense, and shall be prosecuted and punished as if he were a principal offender. A charge of complicity may be stated in terms of this section, or in terms of the principal offense.

{¶ 27} The mere presence of an accused at the scene of a crime does not establish that a defendant has aided and abetted that crime. *State v. Maynard*, 10th Dist. No. 11AP-697, 2012-Ohio-2946, ¶ 32. The state must establish that the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime and that the defendant shared the criminal intent of the principal. *Id.* That is, aiding and abetting requires the accused to have taken some role in causing the offense. *Id.*

{¶ 28} In this case, the evidence more than amply justified the jury's conclusion that appellant aided and abetted the shooting of DeWayne and that appellant may therefore be found guilty of the crime of felonious assault, even though he did not himself shoot the victim. It is a direct, natural, and reasonably foreseeable consequence of the commission of an aggravated burglary that, where an offender enters a residence armed with a weapon and knowing occupants of the residence are within, another person will be harmed or killed. *Id.* at ¶ 31. The evidence supported the conclusion that appellant and the shooter approached the Owens' apartment together; that both simultaneously pulled out guns and threatened the occupants on the first floor; that appellant gave instructions to the shooter to go upstairs and "get the nigger," i.e., DeWayne. (Tr. 126.) The jury could well conclude that appellant supported, assisted, encouraged, cooperated with, advised, or incited DeWayne's shooter in the commission of the felonious assault.

{¶ 29} In view of this evidence, the court did not err in denying appellant's Crim.R. 29 motion to acquit appellant of the charge of felonious assault. Nor does the evidence justify the conclusion that the jury lost its way in returning a guilty verdict contrary to the manifest weight of the evidence. The verdict was supported by sufficient evidence and did not reflect a manifest miscarriage of justice. We therefore overrule appellant's fourth and sixth assignments of error relative to the charged offenses involving DeWayne.

Count 5—aggravated robbery of Diana Forches

{¶ 30} Appellant argues that the evidence failed to establish a theft offense or an attempted theft offense with respect to Diana and that the court should therefore have acquitted appellant of the charge of aggravated robbery of Diana. He argues that the evidence supported the inference that, after entering the apartment, appellant attempted to rob Erica, but did not intend to rob Diana. We disagree. The evidence was sufficient to support the jury's conclusion that appellant intended to rob Erica, or Diana, or DeWayne, or all of them. Specifically, the jury could rationally find that appellant intended to rob Diana.

{¶ 31} The evidence indicates that appellant and his companion entered the apartment in order to get either drugs or money from the people inside the apartment and that appellant believed that one of the occupants had possession of the "stuff" he wanted. Diana testified that appellant "was telling Erica to give him some stuff," and thereafter "came at [Diana]." (Tr. 69.) She later testified that appellant said he was there because he wanted the "stuff that Diana gave to [Erica] in West Virginia." (Tr. 111.) Diana testified that, during the encounter, appellant pointed the gun directly at her and her infant daughter. Diana told appellant she was scared, and appellant replied "you should be scared, bitch." (Tr. 67.)

{¶ 32} We conclude that the jury could reasonably infer that appellant, by brandishing his weapon at both women and pointing the gun in Diana's and her baby's faces, while repeating the words, "[w]here's the money, where's the money," was attempting to rob both Diana and Erica. (Tr. 125.) Clearly, appellant was seeking property that he believed was in the possession of someone in the apartment. While the evidence supports the inference that appellant believed it was more likely that either Erica or DeWayne had "the stuff" or "the money," it was reasonable for the jury to believe that appellant would have taken that property from Diana as well if he found it in her possession.

{¶ 33} The court did not err in denying appellant's Crim.R. 29 motion to acquit appellant of the charge of aggravated robbery of Diana. Nor does the evidence justify the conclusion that the jury lost its way in returning a guilty verdict contrary to the manifest weight of the evidence. The verdict was supported by sufficient evidence and did not

reflect a manifest miscarriage of justice. We therefore overrule appellant's fourth and sixth assignments of error relative to the charge of aggravated robbery of Diana.

Count 10—kidnapping of Erica Owens

{¶ 34} Appellant argues that the evidence failed to establish a felony in the first degree as to the kidnapping of Erica. Appellant contends that the evidence permitted only the conclusion that Erica was released in a safe place, unharmed, and that appellant should therefore have been convicted of kidnapping, a felony of the second degree, rather than kidnapping as a first-degree felony, pursuant to R.C. 2905.01(C)(1). That statute provides that, with certain exceptions not applicable here, "kidnapping is a felony of the first degree * * * if an offender who violates division (A)(1) to (5), (B)(1), or (B)(2) of this section releases the victim in a safe place unharmed, kidnapping is a felony of the second degree." In his fifth assignment of error, appellant similarly asserts that the trial court erred in failing to instruct the jury concerning the reduction of kidnapping from a second-degree felony to a first-degree felony pursuant to R.C. 2905.01(C)(1).

{¶ 35} Appellant's arguments fail. We have recognized that R.C. 2905.01(C) reduces the offense of kidnapping from a first-degree felony to a second-degree felony "if the offender releases the victim in a safe place unharmed." *State v. Bankston*, 10th Dist. No. 08AP-668, 2009-Ohio-754, ¶ 16. Release of a kidnapping victim in a safe place, however, is in the nature of an affirmative defense, which the defendant is required to plead and prove in order to benefit from R.C. 2905.01(C)(1). *Id. Accord State v. Shaw*, 2d Dist. No. 24263, 2011-Ohio-4723, ¶ 24; *State v. Carroll*, 8th Dist. No. 93938, 2010-Ohio-6013, ¶ 13. In order to establish the crime of kidnapping, "there is no requirement on the part of the state to allege or establish that the defendant failed to release the victim in a safe place unharmed." *Bankston* at ¶ 16. "If, at trial, the defendant puts forth any evidence tending to establish that the victim was released in a safe place unharmed, the court is required to submit this issue to the jury under proper instructions." *Id.*

{¶ 36} In the case before us, Erica testified that appellant dragged her to the basement, where her room was located, while continuing to threaten her. She testified that, at one point, he "just started running * * * back up the steps," and exited the apartment. (Tr. 157.) But appellant did not ask the court to instruct the jury to determine whether Erica had been released unharmed in a safe place. Accordingly, unless deemed

plain error, appellant waived any argument that the trial court erred in failing to apply R.C. 2905.01(C)(1) to reduce the degree of appellant's felony kidnapping.

{¶ 37} In a similar case, this court failed to find plain error where a defendant was charged with both aggravated burglary and kidnapping. *State v. White*, 10th Dist. No. 06AP-607, 2007-Ohio-3217. In *White*, the defendant, while holding a gun to the head of his victim, forced the victim out of her residence to the driveway. The defendant fled when a neighbor responded to the victim's screams and came out of her own house. At trial, the defendant did not seek an instruction on the question as to whether the defendant had released the occupant unharmed in a safe place.

{¶ 38} This court first recognized that plain error exists only where it is clear that, but for the error, the result of the trial would have been different. *Id.* at ¶ 21, citing *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391. We found that it was reasonable to characterize the facts as showing that the victim had escaped, rather than been released. We further noted that, "[w]hen the victim of a kidnapping escapes of her own accord, a defendant cannot establish the affirmative defense that the victim was released unharmed." *White* at ¶ 21. We therefore held that the kidnapper had not demonstrated that the court committed plain error in failing to reduce the kidnapping conviction to a second-degree felony.

{¶ 39} In the case before us, the record is ambiguous as to the circumstances at the time appellant fled from the basement. The appellant failed to provide any evidence that might have supported his contention that appellant "released" Erica, as opposed to having fled out of fear of capture or for his own personal safety. The jury could have determined the issue as to whether appellant had released Erica in a safe place unharmed had it been so instructed, but appellant did not seek such an instruction. In light of the factual ambiguity in the record, we do not find that appellant met his burden of establishing that he released Erica unharmed or that the result of the trial would necessarily have been different had appellant sought that instruction. The trial court did not commit plain error in failing to reduce appellant's kidnapping conviction from a first-degree felony to a second-degree felony pursuant to R.C. 2905.01(C)(1).

{¶ 40} Because we find no plain error in the court's instructions to the jury on the charge of kidnapping Erica, we overrule appellant's fifth assignment of error. We further

reject his arguments that his conviction of kidnapping Erica, a felony of the first degree, was not supported by sufficient evidence or was against the manifest weight of the evidence. Therefore, we overrule appellant's fourth and sixth assignments of error relative to the charged offenses involving Erica.

Sufficiency of evidence of weapons under disability offense

{¶ 41} The state has acknowledged in its supplemental brief that the record contains insufficient evidence to support appellant's conviction for having a weapon under disability. We therefore summarily sustain appellant's third assignment of error and reverse appellant's conviction for that offense.

III. Conclusion

{¶ 42} Having reviewed all of appellant's assignments of error, we conclude that only his second and third assignments of error have merit, and we overrule his remaining four assignments of error. We therefore vacate the conviction for having a weapon under disability and remand the case to the trial court to conduct a new sentencing hearing on the remaining offenses. If, on remand, the court determines any of the offenses are allied offenses of similar import pursuant to R.C. 2941.25, the court shall allow the state to elect a single allied offense upon which the state wishes to proceed to sentencing, and impose a sentence on only that offense.

Judgment affirmed in part, reversed in part, and cause remanded with instructions.

BROWN and SADLER, JJ., concur.

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