

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 13AP-973
James H. Smith,	:	(C.P.C. No. 13CR-1342)
Defendant-Appellant.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on March 3, 2015

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for appellee.

Bellinger & Donahue, and *Kerry M. Donahue*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶ 1} James H. Smith is appealing from several convictions for aggravated robbery, kidnapping and other related felonies and specifications. As a result of his conviction, he was ordered to be incarcerated for a total of 84 years.

{¶ 2} Counsel for Smith has assigned ten errors for our consideration:

First Assignment of Error: The trial court improperly exposed the jury to inadmissible hearsay testimony in violation of Evid.R. 801.

Second Assignment of Error: The trial court erred in admitting statements given by out-of-court declarants in violation of the Confrontation Clauses of the Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution.

Third Assignment of Error: The trial court erred in allowing stipulations of the parties that violated Appellant's right to confrontation under the Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution without first ensuring Appellant understood his right of confrontation and thereafter knowingly, intelligently and voluntarily waived that right.

Fourth Assignment of Error: Counsel for Appellant fell short of providing adequate representation and as a result Appellant's right to effective assistance of counsel, was violated.

Fifth Assignment of Error: The trial court erred when it allowed the jury to receive articles and information during deliberations that had not been admitted into evidence at trial in violation of Appellant's statutory and constitutional due process rights.

Sixth Assignment of Error: The trial court erred in its finding that the firearm specifications associated with each robbery had to all be served consecutively.

Seventh Assignment of Error: The cumulative effect of the errors advanced in this brief resulted a violation of Appellant's right to a fair trial and thus entitles him to a new trial.

Eighth Assignment of Error: The trial court erred when it entered judgment against the defendant when the evidence was insufficient to sustain the convictions.

Ninth Assignment of Error: The judgment of the trial court was against the manifest weight of the evidence.

Tenth Assignment of Error: The trial court erred by failing to merge Appellant's convictions at sentencing in violation of R.C. 2941.25(A), the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 16 of the Ohio Constitution.

{¶ 3} Smith was indicted on 34 counts of aggravated robbery, 34 counts of robbery, 54 counts of kidnapping, and 19 counts of having a weapon under disability and

one count of tampering with evidence. Most of the charges carried repeat violent offender ("RVO") specifications and three-year firearm specifications.

{¶ 4} The State of Ohio narrowed the charges somewhat before the trial started, dismissing the robbery charges which were uniformly lesser included offenses of the aggravated robbery charges. The State also dismissed the tampering with evidence charge and the charges related to the armed robbery of one Chipotle restaurant. This left charges involving 18 separate incidents.

{¶ 5} The RVO specifications and the weapon under disability charges were tried to the trial court judge in order to avoid exposing jurors to details of Smith's prior felony record.

{¶ 6} There does not seem to be serious debate that the 18 sets of robberies occurred, at least based upon the record before us on appeal. The sole issue at the trial was whether James H. Smith was the robber. The jury and the trial court judge were convinced beyond a reasonable doubt that he was in several instances.

{¶ 7} Unknown to the jury was the fact that Smith's trial counsel was struggling with a series of allegations that counsel had been involved in a series of rapes. Eventually, trial counsel was convicted of rape charges, sentenced and disbarred. Appellate counsel alleges that trial counsel's personal problems affected the representation Smith received at trial and deprived Smith of effective assistance of trial counsel. We will address the assignments of error which touch on that allegation first.

{¶ 8} The State and Smith's trial counsel reached an agreement about a wide range of stipulations about the underlying facts of the armed robberies. From the perspective of defense counsel, this minimized the exposure of the jury to the human terror and suffering caused by the robber. From a different perspective, the stipulations made it easier for the State to convict Smith of the robberies and cause Smith to receive basically a life sentence of imprisonment.

{¶ 9} The standards to be applied in determining if a criminal defendant has been denied effective assistance of counsel are set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Four principle holdings are contained in the case:

1. The Sixth Amendment right to counsel is the right to the effective assistance of counsel, and the benchmark for

judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

2. A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction * * * requires that the defendant show, first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial.

3. The proper standard for judging attorney performance is that of reasonably effective assistance, considering all the circumstances. When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness. Judicial scrutiny of counsel's performance must be highly deferential, and a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. A court must indulge a strong presumption that counsel's conduct fall within the wide range of reasonable professional assistance.

4. With regard to the required showing of prejudice, the proper standard requires the defendant to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. A court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury.

{¶ 10} The *Strickland* standards were adopted by the Supreme Court of Ohio in *State v. Bradley*, 42 Ohio St.3d 136 (1989) (An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment). The application to this case of the requirement of the *Strickland* case that an appellate court must find the outcome of the trial would have been different if defense counsel had conducted the trial differently leads us to overrule the fourth assignment of error.

{¶ 11} The evidence that Smith was involved in a series of armed robberies was overwhelming. We do not find it necessary to set forth all the evidence here, as to the robberies for which Smith was convicted, but note that Smith was arrested while fleeing from the last robbery wearing the clothes he had worn in several of the robberies and carrying the firearm he had used in several of the robberies. The robberies had a strikingly consistent method of operation, namely the robbery of a restaurant at or after closing time. The employees, forced at gunpoint to assist the robber, were handled in similar ways. The surveillance tapes of several of the robberies revealed other striking similarities. Really the only question was whether Smith would be convicted of some robbery charges following a longer trial or a shorter trial. We note, in addition, that the jury found Smith not guilty of six of the robbery incidents as a result of trial counsel's representation.

{¶ 12} The fourth assignment of error is overruled.

{¶ 13} The eighth and ninth assignments of error respectively allege that there was an insufficiency of evidence to sustain the judgments as to the ten robberies for which Smith was convicted and that the convictions were against the manifest weight of the evidence.

{¶ 14} When reviewing the sufficiency of the evidence to support a conviction, an appellate court must examine the evidence that, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus. "The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *Id.* The claim of insufficient evidence invokes an inquiry about due process. It raises a question of law, the resolution of which does not allow the court to weigh the evidence. *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983).

{¶ 15} Even though supported by sufficient evidence, a conviction may still be reversed as being against the manifest weight of the evidence. *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997). In so doing, the court of appeals, sits as a " 'thirteenth juror' " and, after " 'reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving

conflicts in the evidence, the jury 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 *Martin*; see also *Columbus v. Henry*, 105 Ohio App.3d 545, 547-48 (10th Dist.1995). Reversing a conviction as being against the manifest weight of the evidence should be reserved for only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Thompkins* at 387.

{¶ 16} The analysis of the evidence to address the fourth assignment of error also applies to the eighth and ninth assignments of error. There is no serious question that the 18 aggravated robberies occurred. The kidnapping charges each involved the restraint of people at the restaurant. The robber was armed with a handgun, apparently the same handgun found in Smith's possession. The handgun was operable. Smith had an extensive criminal record which meant he was barred from possessing a firearm, let alone using it to restrain and to rob personnel at closed or closing restaurants. The jury clearly carefully evaluated the evidence which was sufficient to support convictions as to more charges than the charges which resulted in guilty verdicts.

{¶ 17} The evidence was sufficient to support all the charges and specifications. There was no evidence to support a different set of verdicts. The verdicts of guilty were in accord with the manifest weight of the evidence.

{¶ 18} The eighth and ninth assignments of error are overruled.

{¶ 19} Turning to the first assignment of error, Smith argues that the trial court improperly exposed the jury to inadmissible hearsay that the court allowed as background information. "[T]rial court has broad discretion in admission and exclusion of evidence, and unless it has clearly abused its discretion and defendant has been materially prejudiced thereby." *State v. Hymore*, 9 Ohio St.2d 122, 128 (1967). Such hearsay evidence must also meet the standard provided by Evid.R. 403(A). *State v. Faris*, 10th Dist. No. 93APA08-1211 (Mar. 24, 1994). Evid.R. 403(A) states: "Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." A statement that goes to an element of the offense poses a danger of being highly prejudicial. *Faris*; see also *State v. Blevins*, 36 Ohio App.3d 147 (10th Dist.1987).

{¶ 20} The statements being questioned on appeal by and large were background statements about the facts of the robberies. The fact that the robberies occurred was never in serious dispute. No prejudicial error could be found by this court based upon statements that merely showed a robbery or robberies occurred when that issue was not in serious debate.

{¶ 21} For admission of the statements to be prejudicial error, the statements had to go to identification of Smith as the robber. Further, the trial court judge limited the jury's consideration of any such statements to background, i.e., that a robbery occurred.

{¶ 22} We do not find prejudicial error based upon the statements admitted. The first assignment of error is overruled.

{¶ 23} The second assignment of error argues that statements admitted by the court given by out-of-court declarants were in violation of the Confrontation Clauses of the U.S. Constitution and the Ohio Constitution.

{¶ 24} For purposes of the second assignment of error, we do not find any arguable confrontation problem affected the outcome of the trial. The statements complained of did not identify Smith as the robber, and many went to undisputed issues. Their admission was not prejudicial error.

{¶ 25} The second assignment of error is overruled.

{¶ 26} The third assignment of error argues that stipulations in general constitute a denial to a criminal defendant of the right to confront witnesses. We do not see this as being so. Stipulations reduce the trial to a trying of key issues, not an analysis of collateral issues. Stipulations can be to the benefit of all involved and served as a potential benefit to this defendant. Further, this issue can be classified as falling within the invited error doctrine which prohibits a party from being "permitted to take advantage of an error which he himself invited or induced the trial court to make." *Lester v. Leuck*, 142 Ohio St. 91 (1943); *State v. Jones*, 10th Dist. No. 12AP-1091, 2014-Ohio-674, ¶ 22.

{¶ 27} The third assignment of error is overruled.

{¶ 28} The fifth assignment of error argues that the jury was allowed to receive articles and information during deliberations that had not been admitted into evidence. R.C. 2945.35 states:

Upon retiring for deliberation, the jury, at the discretion of the court, may take with it all papers except depositions, and all articles, photographs, and maps which have been offered in evidence. No article or paper identified but not admitted in evidence shall be taken by the jury upon its retirement.

{¶ 29} The record shows that video files not admitted into evidence were taken into deliberations but the jury was unable to play them. A piece of evidence taken into deliberations which could not have been prejudicial does not require a reversal. *State v. Graven*, 52 Ohio St.2d 112, 114 (1977). We do not find any indication in the record that the jury received any articles or information not admitted into evidence.

{¶ 30} The fifth assignment of error is overruled.

{¶ 31} The sixth assignment of error addresses the sentences imposed as a result of the firearm specification. Smith argues that the firearm specification associated with each robbery was not required to be served consecutively. That the two firearm specifications must be run consecutively but the remaining firearm specifications could run concurrently.

{¶ 32} The statutes involving sentences for gun specifications have been modified in recent years. They are now a mixture of mandatory incarceration and incarceration based upon judicial discretion. R.C. 2929.14(B)(1)(a)(ii) states in part: "A prison term of three years if the specification is of the type described in *section 2941.145 of the Revised Code* that charges the offender with having a firearm." (Emphasis sic.) R.C. 2929.14(B)(1)(b) states in part: "[A] court shall not impose more than one prison term on an offender under division (B)(1)(a) of this section for felonies committed as part of the same act or transaction." R.C. 2929.14(B)(1)(g) states:

If an offender is convicted of or pleads guilty to two or more felonies, if one or more of those felonies are aggravated murder, murder, attempted aggravated murder, attempted murder, aggravated robbery, felonious assault, or rape, and if the offender is convicted of or pleads guilty to a specification of the type described under division (B)(1)(a) of this section in connection with two or more of the felonies, the sentencing court shall impose on the offender the prison term specified under division (B)(1)(a) of this section for each of the two most serious specifications of which the offender is convicted or to which the offender pleads guilty and, in its discretion,

also may impose on the offender the prison term specified under that division for any or all of the remaining specifications.

{¶ 33} In the context of Smith's case, all agree that two three-year gun specifications must be imposed and ordered to be served consecutively. Appellate counsel for Smith argues that the trial court judge mistakenly believed that all the gun specifications had to be imposed to be served consecutively and asserts the trial court judge was wrong based on R.C. 2929.141(B)(1)(g).

{¶ 34} The trial court judge carefully followed the applicable sentencing statutes and imposed a mandatory 72 years of imprisonment for the gun specifications, imposing 6 years for each set of robberies for which Smith was convicted. The applicable statute requires that the gun specifications for each indictment be run consecutively. R.C. 2929.14(C)(1)(a) ("[I]f a mandatory prison term is imposed upon an offender pursuant to division (B)(1)(a) of this section for having a firearm * * * the offender shall serve any mandatory prison term imposed under either division consecutively.").

{¶ 35} The trial court imposed only one year of incarceration for the many RVO specifications and one maximum sentence of 11 years for the aggravated robbery convictions, running all the other sentences concurrent except for the gun specifications and the RVO.

{¶ 36} Nothing about the sentence was incorrectly done. The sixth assignment of error is overruled.

{¶ 37} Smith's seventh assignment of error argues that if the trial court errors are found to be harmless, then the case should be reversed based on the cumulative error doctrine. A conviction will be reversed where the cumulative effect of errors in a trial deprives a defendant of the constitutional right to a fair trial even though each of the numerous instances of trial court error does not individually constitute cause for reversal. *State v. Garner*, 74 Ohio St.3d 49, 64 (1995). We have found no cumulative errors presented by the record before us or the errors assigned.

{¶ 38} The seventh assignment of error is overruled.

{¶ 39} The tenth assignment of error alleges that the trial court failed to abide by R.C. 2941.25(A), which reads:

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.

Appellate counsel argues that Smith is committing a single act with a single state of mind, to rob the restaurant, arguing that both the aggravated robberies and kidnappings occurred as one course of conduct.

{¶ 40} The Supreme Court has made clear the guidelines in establishing whether kidnapping and another offense of the same or similar kind are committed with a separate animus as to each pursuant to R.C. 2941.25(B):

(a) Where the restraint or movement of the victim is merely incidental to a separate underlying crime, there exists no separate animus sufficient to sustain separate convictions; however, where the restraint is prolonged, the confinement is secretive, or the movement is substantial so as to demonstrate a significance independent of the other offense, there exists a separate animus as to each offense sufficient to support separate convictions;

(b) Where the asportation or restraint of the victim subjects the victim to a substantial increase in risk of harm separate and apart from that involved in the underlying crime, there exists a separate animus as to each offense sufficient to support separate convictions.

State v. Logan, 60 Ohio St.2d 126 (1979), syllabus.

{¶ 41} Although in some cases aggravated robbery and kidnapping can constitute allied offenses of similar import, the restraint imposed on the victims here was more than merely incidental to an aggravated robbery. Victims were restrained for more than a few seconds. Some victims were moved to other rooms. Some victims were restrained after the theft portion of the robbery was completed.

{¶ 42} We also note that the trial court judge ordered the aggravated robbery sentences to be served concurrently with each other and concurrently with the kidnapping sentences. The "merger" argued in this assignment of error would have no effect on Smith's time of incarceration for his crime spree.

{¶ 43} The tenth assignment of error is overruled.

{¶ 44} All ten assignments of error having been overruled, the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BROWN, P.J., and KLATT, J., concur.
