[Cite as *State v. Curtis*, 2009-Ohio-6740.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BROWN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-01-004
	:	O P I N I O N
- vs -		12/21/2009
	:	
JOSHUA CURTIS,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BROWN COUNTY COURT OF COMMON PLEAS
Case No. 2006-2190

Jessica A. Little, Brown County Prosecuting Attorney, 200 East Cherry Street, Georgetown, Ohio 45121, for plaintiff-appellee

Kristopher A. Haines, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, for defendant-appellant

HENDRICKSON, J.

{¶1} Defendant-appellant, Joshua Curtis, appeals his conviction and sentence from the Brown County Court of Common Pleas for robbery and theft.

{¶2} On June 9, 2006, James Taylor, a Goshen Township police officer, and two of his co-workers traveled to Snapper's Saloon in Ripley, Ohio, where they had dinner and drinks. At some point in the evening, Taylor became intoxicated and went outside to lie down in the bed of his friend's truck. That night, or during the early hours

of June 10, 2006, Taylor awoke to a man in front of him, hitting him on the head. At trial, Taylor testified that when he started to get up and out of the truck, the man said, "Give me your wallet, or I'll beat your ass some – some more." Taylor remembered nothing else about the attack until he woke up at his friend's house without his wallet.

{¶3} Taylor reported the incident to the village of Ripley Police Department shortly thereafter. As a result of the investigation, the police arrested appellant for his alleged involvement with the robbery. A Brown County Grand Jury subsequently indicted appellant on one count of robbery, in violation of R.C. 2911.02(A)(2), and one count of theft, in violation of R.C. 2913.02(A)(1). On October 24, 2008, a jury found appellant guilty on both counts. The trial court sentenced him to an aggregate prison term of five years. Appellant timely appeals his conviction and sentence, asserting five assignments of error.

{¶4} Assignment of Error No. 1:

{¶5} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT SENTENCED MR. CURTIS TO MULTIPLE SENTENCES FOR ALLIED OFFENSES OF SIMILAR IMPORT COMMITTED WITH A SINGLE ANIMUS, IN VIOLATION OF R.C. 2941.25, AND IN VIOLATION OF MR. CURTIS'S RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND SECTIONS 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION. [CITATIONS OMITTED.]"

{¶6} Appellant argues the trial court committed reversible error when it sentenced him to multiple sentences for robbery and theft, which are allied offenses of similar import committed with a single animus. Because appellant failed to object when the trial court sentenced him on both charges, appellant has waived all but plain error. See *State v. Comen* (1990), 50 Ohio St.3d 206, 211; *State v. Smith,* 80 Ohio St.3d 89,

118, 1997-Ohio-355; *State v. Yarbrough,* 104 Ohio St.3d 1, ¶96, 2004-Ohio-6087. See, also, *State v. Crowell* (June 14, 1999), Preble App. No. CA98-10-019 (applying plain error analysis to defendant's waiver of allied offense argument).

{¶7} Crim.R. 52 governs harmless and plain error, stating that "plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court ." Ohio law recognizes that plain error does not exist unless, but for the error, the outcome of the trial would have been different. *State v. Cox*, Butler App. No. CA2005-12-513, 2006-Ohio-6075, at ¶21, citing *State v. Haney,* Clermont App. No. CA2005-07-068, 2006-Ohio-3899, ¶50. Further, "notice of plain error is to be taken with utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." Id.

{¶8} At the sentencing hearing, the trial court sentenced appellant to a prison term of five years for his robbery conviction, a felony of the second degree. The court also ordered appellant to serve six months in the county detention center for his theft conviction, a first-degree misdemeanor, but ordered the sentences to run concurrently.

{¶9} The state concedes, and we agree, that his two convictions should have been merged for sentencing purposes, as it is well-established that these two offenses are "so similar that the commission of one offense will necessarily result in commission of the other." R.C. 2941.25(A); *State v. Eckert*, Clermont App. No. CA2008-10-099, 2009-Ohio-3312, citing *State v. Cabrales,* 118 Ohio St.3d 54, 2008-Ohio-1625, paragraph one of the syllabus; *State v. Johnson* (1983), 6 Ohio St.3d 420, 423 (finding aggravated robbery and theft allied offenses); *State v. Reyna* (1985), 24 Ohio App.3d 79, 82.

{¶10} Although the state argues the error does not amount to a manifest miscarriage of justice because appellant's sentence would not be different had the trial

court merged his convictions, "the failure to merge allied offenses of similar import constitutes plain error, even when the defendant received concurrent sentences." *State v. Underwood*, Montgomery App. No. 22454, 2008-Ohio-4748, citing *State v. Coffey*, Miami App. No. 2006 CA 6, 2007-Ohio-2; *State v. Winn*, 173 Ohio App.3d 202, 2007-Ohio-4327, at ¶26. See, also, *State v. Ortiz*, Cuyahoga App. No. 81919, 2009-Ohio-4982, at ¶34.

{¶11} Therefore, we find the trial court committed plain error when it failed to merge appellant's theft and robbery convictions. We hereby vacate appellant's sentence and remand the case for the limited purpose of resentencing appellant in accordance with this decision. *Eckert* at ¶20. Accordingly, we sustain appellant's first assignment of error.

{¶12} Assignment of Error No. 2:

{¶13} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT ALLOWED EVIDENCE OF THE VICTIM'S IDENTIFICATION OF MR. CURTIS AS ONE OF THE PERPETRATORS OF THE CRIME TO BE ADMITTED AT TRIAL, IN VIOLATION OF MR. CURTIS'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION, AND SECTIONS 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION. [CITATIONS OMITTED.]"

{¶14} Appellant argues the identification procedures used by the Ripley Police Department were suggestive and led to an unreliable identification of appellant by Taylor. Thus, appellant asserts the trial court erred when it admitted evidence of the identification at trial.

{¶15} Trial counsel challenged the pretrial identification of appellant in a motion to suppress, which was denied by the trial court. An appellate court may not disturb a trial court's decision on a motion to suppress where it is supported by competent,

credible evidence. *State v. Retherford* (1994), 93 Ohio App.3d 586, 592; *State v. Patterson*, Butler App. No. CA2001-01-011, 2002-Ohio-2065. When considering a motion to suppress, the trial court serves as the trier of fact and is the primary judge of the credibility of witnesses and the weight of the evidence. *State v. Fanning* (1982), 1 Ohio St.3d 19, 20. Relying on the trial court's findings, the appellate court determines "without deference to the trial court, whether the court has applied the appropriate legal standard." *State v. Anderson* (1995), 100 Ohio App.3d 688, 691.

{¶16} The relevant facts are not in dispute. Taylor reported the incident in person at the Ripley police station on June 10, 2006. Officer Edwin Apgar handled Taylor's report that some unknown males had attacked him and taken his wallet. When Officer Apgar asked Taylor if he had a description, Taylor responded that he could only remember a medium-sized guy with a white striped t-shirt. Because Officer Apgar had worked the night of June 9, he remembered seeing appellant in a white striped t-shirt and thought of him as the possible perpetrator.

{¶17} Officer Apgar had a photo on hand of appellant and then showed the single photo to Taylor and asked him whether appellant was the perpetrator in question. According to Officer Apgar's testimony at the suppression hearing, Taylor responded that he was not sure.

{¶18} 20 days later, Taylor returned to the police station to look at a photo array containing six pictures. Office Apgar testified that Taylor quickly identified appellant as the perpetrator.

{¶19} Appellant moved to have this identification suppressed, arguing that it was unduly suggestive. The trial court denied the motion. On appeal, appellant contends that the identification was so suggestive that it was inherently unreliable and should have been suppressed by the trial court.

{¶20} To warrant suppression of identification testimony, the accused bears the burden of showing that the identification procedure was unreliable under the totality of the circumstances and "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Neil v. Biggers* (1972), 409 U.S. 188, 199, 93 S.Ct. 375, 382; *State v. Murphy*, 91 Ohio St.3d 516, 533, 2001-Ohio-112 ("When a witness has been confronted with a suspect before trial, due process requires a court to suppress her identification of the suspect if the confrontation was unnecessarily suggestive of the suspect's guilt *and* the identification was unreliable under all the circumstances"). (Emphasis in original.) In most circumstances, a confrontation is unnecessarily or unduly suggestive when the witness has been shown but one subject. *Manson v. Brathwaite* (1977), 432 U.S. 98, 115, 97 S.Ct. 2243, 2253.

{¶21} In *State v. Jackson* (1971), 26 Ohio St.2d 74, 77, the Ohio Supreme Court strongly admonished the act of showing the witness a single photo prior to the line-up. That incident, alone, however, is not determinative of whether the witness' in-court identification of appellant during trial is admissible. Id.

{¶22} Even when a confrontation is unnecessarily or unduly suggestive, the identification testimony derived from the confrontation is not inadmissible solely for that reason. Rather, reliability of the testimony is the linchpin in determining its admissibility. Id.; *Biggers* at 115, 97 S.Ct. at 2253. So long as the identification possesses sufficient aspects of reliability, there is no violation of due process. *Biggers* at 115, 97 S.Ct. at 2253.

{¶23} Reliability is determined from the totality of the circumstances. *Brathwaite* at 114, 97 S.Ct. at 2253, citing *Stovall v. Denno* (1967), 388 U.S. 293, 87 S.Ct. 1967. These circumstances include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description

of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself. *Brathwaite* at 114, 97 S.Ct. at 2253.

{¶24} In the present case, Taylor had the opportunity to view appellant during the crime when appellant was directly in front of him. Although Taylor consumed alcohol that evening and had been sleeping prior to the robbery, Taylor was a police officer and testified that he had been trained in making accurate observations of individuals. In addition, as the trial court reasoned in its entry, defense counsel was afforded the opportunity to cross-examine Taylor and Officer Apgar regarding Taylor's condition at the time of the attack and any inconsistent statements regarding the identification at trial. Furthermore, appellant himself admitted to Officer Apgar in a conversation during the investigation that he was there and pushed Taylor, but did not steal his wallet. Under these circumstances, Taylor's identification of appellant was sufficiently reliable, in spite of the suggestive nature of the photo identification. Accordingly, the trial court did not err by denying appellant's motion to suppress the evidence. We overrule appellant's second assignment of error.

{¶25} Assignment of Error No. 3:

{¶26} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT COMPELLED THE TESTIMONY OF STATE WITNESS BRIAN LANG, AND GRANTED MR. LANG IMMUNITY FROM PROSECUTION UNDER R.C. 2945.44, IN VIOLATION OF MR. CURTIS'S RIGHTS UNDER THE FIFTH SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND SECTIONS 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION. (CITATIONS OMITTED.)"

{¶27} During appellant's trial, the state called Brandon Lang, an alleged witness

to the robbery, to testify in its case-in-chief. Prior to testifying, Lang expressed his wish to consult with counsel. Thereafter, Lang's counsel notified the court that Lang chose to assert his Fifth Amendment rights under the United States Constitution and rights under the Ohio Constitution against self-incrimination. Although the state alluded to a written statement given by Lang during the investigation, wherein Lang stated he had no involvement in the offense, it proceeded to file a written motion compelling Lang's testimony pursuant to R.C. 2945.44.

{¶28} The trial court ordered Lang to testify and granted him transactional immunity from prosecution. Appellant's trial counsel did not object to the trial court's grant of immunity to Lang. Therefore, appellant has waived all but plain error.

{¶29} As stated, Crim.R. 52 governs harmless and plain error, and states that "plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court ." Plain error does not exist unless, but for the error, the outcome of the trial would have been different. *Cox* at ¶21, citing *Haney* at ¶50.

{¶30} Appellant argues his constitutional rights were prejudiced by the trial court's decision to compel Lang's testimony and grant transactional immunity to him. Appellant asserts that Lang indicated he wished to protect the interests of his cousin at the expense of appellant. Appellant also contends that the jury should have been aware of Lang's immunity.

{¶31} We find appellant has failed to prove that but for Lang's compelled testimony, the outcome of the trial would have been different. At trial, Lang proved to be an unreliable witness for the state. Lang testified that he saw Taylor come out of Snapper's Saloon and testified that Taylor was "drunk, puking over the rail," and "couldn't hardly stand up" before he "passed out." He then testified that he observed

appellant slap Taylor, but that appellant was not the one who stole Taylor's wallet, despite Lang's prior statement to the police. Lang testified that he lied in his previous statement, and his testimony at trial minimized appellant's involvement in the robbery.

{¶32} Even without Lang's testimony, the state presented evidence of Taylor's observations of the crime and of appellant's own statement that he was at the scene of the crime and pushed Taylor. In addition, Buddy Hensel, a disc jockey at The Riviera on June 9, 2006, testified that on the night in question, appellant wore a white-striped t-shirt, looked scared, and told Hensel that he needed a ride out of town because he fought someone in the back of a truck and did not want to get into trouble.

{¶33} Furthermore, the trial court instructed the jury on complicity or aiding and abetting. The jury could have found appellant guilty as a complicitor based upon appellant's own admission and Taylor's testimony. Accordingly, appellant has failed to prove without Lang's testimony at trial, the outcome would have been different. Appellant's third assignment of error is without merit.

{¶34} Assignment of Error No. 4:

{¶35} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT ADMITTED INTO EVIDENCE THE RECORDED STATEMENT OF STATE WITNESS BRANDON LANG, IN VIOLATION OF EVID.R. 802 AND EVID.R. 803(5), AND IN VIOLATION OF MR. CURTIS'S RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS OF THE UNITED STATES CONSTITUTION, AND SECTIONS 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION. [CITATIONS OMITTED.]"

{¶36} As previously discussed, the trial court compelled Lang to testify at appellant's trial. During his testimony, the state asked Lang whether he saw Taylor and appellant at Snapper's Saloon on the night in question. Lang testified that he saw

appellant slap Taylor and then hit him again. The state then asked Lang to explain what else happened, but before Lang could answer, the state asked him whether he remembered giving a statement to police regarding the incident. Lang stated that he vaguely remembered giving a statement, at which point, the state handed him the written statement Lane had provided to Officer Apgar on June 27, 2006.

{¶37} Before reading its contents, the state asked Lang to identify the document, to which Lang responded that it was the statement he gave to police. After identifying the document, the state asked him to silently read an underlined portion of the statement. Then the state asked him to read it aloud. Lang read the statement: "Tried to take the man's wallet." When the state asked him who tried to take the man's wallet, Lang responded that he lied when he wrote the statement – that appellant was not the person who stole Taylor's wallet. The state then asked Lang several more questions and asked for the written statement back.

{¶38} The state then gave the statement back to Lang and asked him to read it to himself. When Lang was finished, the state asked Lang if the statement refreshed his memory as to what he wrote shortly after the incident. Lang replied that he remembered what he wrote, recalled the story, and then explained that he had lied in that statement to protect a cousin, Joshua Gilbert, an alleged participant in the robbery. Both the state and counsel for appellant examined Lang regarding the contents of the statement. At the conclusion of the state's case, the trial court admitted the statement into evidence without objection.

{¶39} Appellant has again waived all but plain error by failing to object to the admission of the exhibit during trial. Plain error does not exist unless it can be said that but for the error, the outcome of the trial clearly would have been different. *State v. Long* (1978), 53 Ohio St.2d 91.

{¶40} Although the state's purpose for asking Lang to review and read his statement into evidence at that particular point in his testimony is unclear from the record, it is clear that the trial court erred in admitting such testimony and later admitting the statement as an exhibit.

{¶41} Although the state argues it was trying to impeach Lang pursuant to Evid.R. 607, a party may not impeach its own witness with a prior inconsistent statement without showing surprise and affirmative damage. Evid.R. 607; *State v. Keenan* (1993), 66 Ohio St.3d 402, 412. At that point in the testimony, Lang had yet to indicate any inconsistencies with his prior statement. Lang's statement that he had seen appellant hit Taylor was not inconsistent with his prior statement, and the state interrupted its own line of questioning about what else Lang had witnessed with the presentation of the recorded statement.

{¶42} It was also improper for the state to use the prior recorded statement to refresh Lang's memory pursuant to Evid.R. 612, as the rule permits a party to review the prior statement to refresh his memory after his memory has been exhausted or nearly exhausted and then to testify on the basis of his present knowledge of the facts. Evid.R. 612; *Johnson v. Cassens Transport Co.*, 158 Ohio App.3d 193, 2004-Ohio-4011, at ¶9. It does not allow a party to bring an out-of-court statement before the jury. *Keenan* at 412.

{¶43} We also cannot accept the assertion the state properly admitted the evidence pursuant to Evid.R. 803(5), as Lang had not stated that he had insufficient memory to accurately testify to the events he witnessed. Furthermore, pursuant to Evid.R. 803(5), the contents of a prior recorded statement may be read into evidence, but the writing itself may not be received as an evidentiary exhibit unless offered by the adverse party. Evid.R. 803(5); *Johnson* at ¶9;

{¶44} Although the admission of the statement during Lang's testimony and as an exhibit at the close of the state's case was inappropriate, the error did not affect the outcome of the trial. As thoroughly discussed above, the state presented ample evidence that appellant was present during the incident, struck Taylor at least once, threatened to take his wallet, and that in the course of events, Taylor's wallet was stolen. From this evidence, a jury could believe that appellant committed the offenses or supported, assisted, encouraged, cooperated with, advised or incited another in the commission of the crimes with a shared criminal intent. See *State v. Johnson*, 93 Ohio St.3d 240, 2001-Ohio-1336, syllabus; R.C. 2923.03. Thus, appellant's fourth assignment of error is overruled.

{¶45} Assignment of Error No. 5:

{¶46} "TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF MR. CURTIS'S RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND SECTIONS 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION. [CITATIONS OMITTED.]"

{¶47} Appellant argues that trial counsel acted in an objectively unreasonable manner, provided deficient performance, and prejudiced the outcome of his trial when counsel failed to objected to the imposition of multiple sentences for allied offenses, failed to effectively cross-examine the state's witnesses regarding the identification of appellant as the perpetrator, failed to object at trial to the identification of appellant, failed to object to compelled testimony, and failed to object to the admission of Lang's prior hearsay statement as an exhibit.

{¶48} In order to establish ineffective assistance of counsel, appellant must show that his trial counsel's performance was both deficient and prejudicial. *Strickland v.*

Washington (1984), 466 U.S. 668, 687-688, 693, 104 S.Ct. 2052; *State v. Bradley* (1989), 42 Ohio St.3d 136, 142. Specifically, appellant must show that his counsel's performance "fell below an objective standard of reasonableness," and that there is a reasonable probability that but for his counsel's deficient performance, the outcome of the trial would have been different. *Strickland* at 688, 693-694. There is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional conduct;" as a result, a reviewing court's "judicial scrutiny of counsel's performance must be highly deferential." Id. at 689.

{¶49} A reviewing court is not permitted to use the benefit of hindsight to second-guess the strategies of trial counsel. *State v. Hoop,* Brown App. No. CA2004-02-003, 2005-Ohio-1407, ¶20. A criminal defendant must overcome a presumption that his counsel's actions or inactions "might be considered sound trial strategy." *Strickland* at 689. Even debatable trial strategies and tactics do not constitute ineffective assistance of counsel. *Hoop* at ¶20. Further, "it is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Bradley,* 42 Ohio St.3d at 142.

{¶50} First, appellant argues trial counsel was ineffective in failing to effectively cross-examine the state's witnesses regarding the identification of appellant as the perpetrator, in failing to object at trial to the identification of appellant, in failing to object to compelled testimony, and in failing to object to the admission of Lang's prior hearsay statement as an exhibit.

{¶51} "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack

of sufficient prejudice, which we expect will often be so, that course should be followed." *Strickland* at 697.

{¶52} Even if we were to find that trial counsel's performance was objectively unreasonable, appellant has still failed to show that he was prejudiced during the jury trial by trial counsel's performance. As previously discussed, appellant admitted to Officer Apgar that he was present during the incident and pushed Taylor. The state presented additional evidence that appellant threatened to take Taylor's wallet and in the course of the events, Taylor's wallet was stolen. Because the court instructed the jury on complicity and because a jury could have found appellant guilty based upon his own admission and other evidence properly admitted at trial, appellant has failed to show how the outcome of the trial would have been different, but for trial counsel's alleged errors during the jury trial.

{¶53} Appellant also argues counsel was ineffective in failing to object to the imposition of multiple sentences for allied offenses.

{¶54} As previously discussed, the trial court erred in imposing multiple sentences for appellant's theft and robbery convictions, as they are allied offenses of similar import. "Inasmuch as it is reversible error for a trial court to convict and impose sentence for offenses of similar import, trial counsel's failure to object demonstrates a serious deficiency in trial counsel's performance." *State v. Mathis*, Summit App. No. 23507, 2008-Ohio-4077, at ¶8, citing *State v. Rance* (1999), 85 Ohio St.3d 632, 634; *State v. Moss* (1982), 69 Ohio St.2d 515, 518. But for trial counsel's failure to object to appellant's conviction and sentence, there is a reasonable probability that the outcome of his trial would have been different. Id., citing *Strickland,* 466 U.S. at 694. Therefore, the failure to argue a meritorious allied-offenses-of-similar-import claim constitutes ineffective assistance of counsel. *State v. Stevenson*, 181 Ohio App.3d 292, 2009-

Ohio-901, at ¶5.

{¶55} Accordingly, we sustain appellant's fifth assignment of error as to counsel's failure to object at the sentencing hearing only. In all other respects, the fifth assignment of error is overruled.

{¶56} Judgment affirmed in part, reversed in part, and remanded for further proceedings.

YOUNG, P.J., and RINGLAND, J., concur.