

[Cite as *State v. Grable*, 2015-Ohio-788.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY**

STATE OF OHIO	:	
	:	Appellate Case No. 2014-CA-52
Plaintiff-Appellee	:	
	:	Trial Court Case No. 12-CR-785
v.	:	
	:	(Criminal Appeal from
BARRETT GRABLE, JR.	:	Common Pleas Court)
	:	
Defendant-Appellant	:	
	:	

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OPINION

Rendered on the 6th day of March, 2015.

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HALL, J.

{¶ 1} Barrett Grable, Jr. appeals from his conviction and sentence on charges of

aggravated robbery and kidnapping.

{¶ 2} Grable advances three assignments of error. First, he argues that aggravated robbery and kidnapping should have merged as allied offenses of similar import. Second, he claims the trial court erred in imposing consecutive sentences. Third, he challenges the legal sufficiency and manifest weight of the evidence to sustain his aggravated-robbery conviction. He also argues that his trial counsel provided ineffective assistance by failing to make a Crim.R. 29 motion.

{¶ 3} The record reflects that the charges against Grable stemmed from a robbery at Young's Jersey Dairy around 1:00 a.m. on August 25, 2012. One of the State's primary witnesses at trial was store manager Megan Roach. She testified that after closing the store for the night she exited a back door with a co-worker and proceeded to an employee parking area. Roach noticed an "extra" car in the lot, an older beige or silver car that she did not recognize. She nevertheless proceeded to her own car and got inside. Upon doing so, she saw two men approach her driver's-side door. One was wearing a Spiderman zip-up "hoodie" and the other was wearing black clothing and a ski mask. The men proceeded to grab Roach and remove her from her car. While brandishing aluminum baseball bats, they then directed her to take them to the store's safe. After Roach responded that she did not have a key to get back inside the store, the men took her behind a set of dumpsters and bound her hands behind her back with duct tape. They also placed duct tape over her mouth. Roach testified that she remained there with one of the men while the other man walked away. She recalled one of the men getting "frustrated" because they could not get into the store.

{¶ 4} When the second man returned about five minutes later, Roach helped her

captors devise a plan to enter the store. She did so because she was tied up behind the dumpsters and feared what they might do if she refused. The plan involved Roach ringing the store's doorbell to get another employee to open the locked door. Roach proceeded to ring the doorbell, which resulted in employee Brian Patterson opening the door. Still carrying baseball bats and wearing rubber gloves, the two men then entered the store with Roach, who used a pass code to get them into an office with the safe. Roach opened the safe, and the men took the cash and some of the change. They put the money in a duffle bag. They also bound Roach and Patterson with duct tape. The two men then exited the office, leaving Roach and Patterson alone there. A few minutes later, Roach heard the two men try to re-enter the office. They were unable to do so, however, because the door had locked behind them. The men then left the store, and Patterson called 911 after freeing himself from the duct tape.

{¶ 5} After police arrived, Roach told an officer she believed one of the perpetrators was Barrett Grable. Although she had not seen either man's face, she knew Grable because he was dating Candace Cumberland, another store employee with whom Roach was good friends. Roach stated that she had been around Grable four or five times and had seen him the prior week at Cumberland's house. She also had seen him on other occasions at the store. She testified that she was familiar with his voice, his build, and his mannerisms.¹ When asked why she believed Grable was one of the perpetrators, Roach

¹ On appeal, both parties also mention Roach testifying that one of the perpetrators smoked a "Black and Mild" cigar during the robbery and that Grable likes that type of cigar. Roach actually testified that she *assumed* a "Black and Mild" cigar may have been smoked when one of the perpetrators walked away from her near the dumpsters. (Trial Tr. at 92). She did not see or smell anyone smoking. (*Id.* at 99). Contrary to page two of Grable's appellate brief, no "Black and Gold" cigar was found at the crime scene near the dumpsters. (Tr. at 147).

explained: “Well, I definitely picked up on his voice. Before he spoke, I would not have known it was him, otherwise. I really couldn’t see him. But when he spoke, that was when I, kind of, suspected. But then, I think I was just nervous, and as he talked more, I became more sure it was him.” (Trial Tr. at 92). Roach also testified that Cumberland knew cash was kept in the store overnight and that bank deposits were not made until the following morning.

{¶ 6} The State also presented testimony from Brian Patterson. His testimony was generally consistent with Roach’s recollection of what happened inside the store. Unlike Roach, Patterson was unable to identify either of the perpetrators. Patterson recalled, however, seeing one of them wearing a torn glove. In addition, the State presented testimony from two police officers who responded to Patterson’s 911 call and from a detective who collected crime-scene evidence. The detective, David Perks, explained that he collected a baseball bat and pieces of duct tape found in the office and by the dumpsters. Another witness, Devonie Herdeman, a forensic scientist at the Bureau of Criminal Investigation, testified that she analyzed a DNA sample from Grable. She also analyzed DNA obtained from two small pieces of latex glove stuck to the duct tape collected at the crime scene. According to Herdeman, one of the pieces of latex contained a mixture of DNA from at least two contributors. She testified that “Grable was one of the contributors.” (*Id.* at 172-173). With regard to the second piece of latex glove, Herdeman was more specific. She identified Grable as a major contributor to the DNA found on the second piece of latex and opined that the chance of it being someone else was one in 108 trillion. (*Id.* at 175-177).

{¶ 7} For his part, Grable attempted to assert an alibi defense. Cumberland, his

girlfriend and the mother of his child, testified that Grable was taking medication that caused him to fall asleep early, that he was residing with an aunt in Columbus at the time of the robbery, and that he lacked a vehicle and could not drive anyway due to his medication. On cross examination, Cumberland admitted that she could not say Grable was in bed at his aunt's house when the robbery occurred because she was not there. She also admitted never contacting police to tell them she believed Grable had been at his aunt's house.

{¶ 8} Grable also presented testimony from Angela Howard, his aunt from Columbus. She testified that she knew he was with her at her house when the robbery occurred because she saw him there. She also testified that he had no vehicle available to him. Finally, Howard testified that she had no idea Grable had been charged with a crime until she received a subpoena to testify at trial.

{¶ 9} Based on the evidence presented, a jury found Grable guilty on one count of aggravated robbery and two counts of kidnapping (one each for kidnapping Roach and Patterson). The trial court found that the count related to the kidnapping of Patterson merged into the aggravated robbery, and the State elected to proceed to sentencing on aggravated robbery. The trial court also found, however, that the count related to the kidnapping of Roach did not merge into the aggravated robbery because a separate animus existed. (Sentencing Tr. at 11-12). After reviewing a presentence-investigation report, hearing arguments from counsel, and giving Grable an opportunity to make a statement, the trial court imposed consecutive prison sentences of ten years for aggravated robbery and five years for kidnapping. This appeal followed.

{¶ 10} In his first assignment of error, Grable challenges the trial court's failure to

merge the count related to the kidnapping of Roach into the aggravated robbery conviction. He argues that kidnapping Roach was essential to the robbery and was without independent significance. Therefore, he claims merger was required under R.C. 2941.25, Ohio's allied-offense statute.

{¶ 11} Because Grable preserved his allied-offense argument below, we review the trial court's merger ruling de novo. *State v. Forney*, 2d Dist. Champaign No. 2012-CA-37, 2013-Ohio-3034, ¶ 16. The allied-offense statute, 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.

{¶ 12} "When 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." *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, at syllabus. "[T]he 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." *Id.* at ¶ 48. "If the multiple offenses can be committed by the same conduct, then the court must determine whether the offenses were committed by the same

conduct, i.e., ‘a single act, committed with a single state of mind.’” (Citation omitted.) *Id.* at ¶ 49. “If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged.” *Id.* at ¶ 50. “Conversely, if the court determines that the commission of one offense will never result in the commission of the other, or if the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge.” *Id.* at ¶ 51.

{¶ 13} Grable correctly argues that kidnapping and aggravated robbery can be committed with the same conduct. Indeed, implicit in every aggravated robbery is a kidnapping insofar as an offender at least temporarily must restrain the victim to commit a theft. *State v. Johnson*, 2d Montgomery No. 26323, 2015-Ohio-347, ¶ 14, citing *State v. Jenkins*, 15 Ohio St.3d 164, 198, 473 N.E.2d 264 (1984), fn. 29. Kidnapping and aggravated robbery are not always allied offenses of similar import subject to merger, however, because they can involve distinct acts. Even when they involve the same conduct, they also each can involve a separate animus. “A separate animus for kidnapping exists where (1) ‘the restraint is prolonged, the confinement is secretive, or the movement is so substantial as to demonstrate a significance independent of the other offense,’ or (2) ‘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.’” *Id.* at ¶ 14, citing *State v. Logan*, 60 Ohio St.2d 126, 397 N.E.2d 1345 (1975), syllabus.

{¶ 14} Here we see no error in the trial court’s failure to merge the kidnapping involving Roach with the aggravated robbery. At sentencing, the State persuasively argued that Grable committed an act of kidnapping when he and his accomplice pulled Roach from her car and escorted her to a secluded area behind a set of dumpsters, where

they bound her hands with duct tape and placed tape over her mouth after discovering that she did not have a key to the store. As set forth above, Roach remained confined behind the dumpsters for about five minutes until she helped the perpetrators devise a plan to gain entrance without a key.

{¶ 15} In *Logan*, the Ohio Supreme Court recognized that the “primary issue” when determining whether kidnapping merges with another offense “is whether the restraint or movement of the victim is merely incidental to a separate underlying crime or, instead, whether it has a significance independent of the other offense.” *Logan* at 135. In our view, the act of restraining Roach behind the dumpsters for several minutes went well beyond the restraint that has been recognized as being implicit in every aggravated robbery. The restraint behind the dumpsters was not merely incidental to the aggravated robbery that followed inside the store, and it was substantial enough to have significance independent of the later aggravated robbery. The animus, or immediate purpose, for restraining Roach behind the dumpsters appears to have been to keep her quiet and to avoid detection while Grable and his accomplice decided how to proceed without a store key. Roach’s continued confinement became incidental to the aggravated robbery only after she helped the perpetrators enter the store by ringing the doorbell and getting Patterson to open the door. Therefore, we see no error in the trial court’s finding that the kidnapping charge related to Roach did not merge with the aggravated robbery. Accordingly, the first assignment of error is overruled.

{¶ 16} In his second assignment of error, Grable asserts that the trial court erred in imposing consecutive sentences. He advances two related arguments in support. First, he contends the trial court made no determination that his conduct warranted consecutive

sentences. Second, he claims the trial court improperly imposed consecutive sentences based solely on his criminal history without considering his conduct.²

{¶ 17} Upon review, we find no error in the trial court's imposition of consecutive sentences. Under R.C. 2929.14(C), a trial court may impose consecutive sentences if it determines that (1) consecutive service is necessary to protect the public from future crime or to punish the offender; (2) consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public; and (3) one or more of the following three findings are satisfied:

(a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.

(b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.

(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

R.C. 2929.14(C)(4)(a)-(c).

² In connection with these arguments, Grable also maintains that consecutive sentences were improper because aggravated robbery and kidnapping should have merged. We adequately addressed the merger issue in our resolution of his first assignment of error.

{¶ 18} Here the trial court stated:

In reviewing [the statutory seriousness and recidivism factors] in order to determine a sentence that would adequately punish the Defendant and protect the community under [R.C.] 2929.11 and following the guidelines of [R.C.] 2929.13, the Court has found that the victim of the offense—and I'm referring to the victim in Count Two [Roach], the kidnapping, based on the presentence report of the victim-impact statement—suffered severe psychological and emotional harm to the extent that it actually has become—she has suffered physical harm with physical illness as a result of the event. She had to move out of the area, take a job in another location which has caused her economic difficulties; but I don't consider the economic harm to that victim as a factor here in that it was probably something that could not have been anticipated by the offense.

As to the business itself, it also suffered serious economic harm. Thousands of dollars were lost. They ended up having to pay a thousand dollars for the part that was not recovered by insurance. I don't find any factors that make this less serious.

For the record, I've taken into consideration prior psychological reports that were presented to the Court and the competency evaluation. I also read the information on the report that was prepared for the NGRI defense that the plea was subsequently withdrawn. The information in that report was substantively similar to the competency evaluation.

The Defendant is 26 years of age. He was under post-release control at the time of the commission of this offense. Again, this was for similar activity, after spending a significant amount period of time in prison.

He does have a prior adjudication of delinquency. Those adjudications were for burglary and receiving stolen property.

It's already been pointed out his history of criminal convictions, being on post-release control at the time of the offense. The Defendant has not responded favorably to sanctions previously imposed with the prior conviction. I have not found any genuine remorse. I have limited personal information other than the psychological reports and I don't have any information regarding, and it doesn't appear, that he has any military record to consider.

There was no ORAS evaluation in this case. The aggravated robbery is a felony of the first degree; kidnapping, a felony of the second degree.

Based on the factors that have been found by the Court and the facts of the case, the harm done, circumstances under which the event occurred, the Defendant being on post-release control at the time, it's the order of the Court as to the aggravated robbery, felony of the first degree, that the Defendant be sentenced to ten years in the State penitentiary. He's ordered to pay \$1,000 in restitution to the Court's Probation Department plus a 5 percent handling fee.

As to Count Two, the kidnapping charge, the Defendant is to serve five years in the State penitentiary.

* * *

Count Two is ordered to be served consecutive to Count One. The Court having found that consecutive sentences [are] necessary to protect the public from future crimes, punish the offender, and that consecutive sentences are not disproportionate to the seriousness of the Defendant's conduct which is a danger he poses to the public. The Court also finds the Defendant committed offenses while on post-release control, and his criminal history demonstrates that consecutive sentences are necessary to protect the public from future crimes by the Defendant.

(Sentencing Tr. at 12-15).

{¶ 19} The foregoing statements by the trial court reflect that it properly considered, among other things, the statutory seriousness and recidivism factors. The seriousness factors address the relative seriousness of Grable's conduct in this case. See R.C. 2929.12(B) and (C). As quoted above, the trial court also stated that it had considered "the facts of the case, the harm done, [and the] circumstances under which the event occurred[.]" (Sentencing Tr. at 14). This statement further demonstrates the trial court's consideration of Grable's conduct. In addition, with regard to the imposition of consecutive sentences, the last paragraph quoted above reflects that the trial court made all of the findings necessary under R.C. 2929.14(C)(4). It also properly included the findings in its judgment entry. (Doc. #47 at 2). The consecutive-sentence findings themselves obligated the trial court to consider, among other things, "the seriousness of the offender's conduct[.]" R.C. 2929.14(C)(4). Therefore, we are unpersuaded by Grable's claim that the trial court improperly imposed consecutive sentences based solely

on his criminal history without addressing or considering his conduct in this case.

{¶ 20} Finally, we do not clearly and convincingly find under R.C. 2953.08(G)(2) that the record fails to support the trial court's consecutive-sentence findings. The trial court's statements during the sentencing hearing regarding Grable's criminal record in particular are supported by the PSI. It reflects that twenty-six year-old Grable had a prior juvenile record for offenses including burglary and receiving stolen property. As a juvenile, he received a suspended commitment to the Department of Youth Services. As an adult, Grable served approximately four years in prison for aggravated robbery of a motel with a firearm before being paroled in June 2011. He committed the present offenses a year later. The record reflects that he refused to cooperate with the Clark County Adult Probation Department in the preparation of the PSI and, as noted above, the trial court found no genuine remorse. The second assignment of error is overruled.

{¶ 21} In his third assignment of error, Grable disputes the legal sufficiency and manifest weight of the evidence to sustain his aggravated-robbery conviction. He also argues that his trial counsel provided ineffective assistance by failing to make a Crim.R. 29 motion to challenge the legal sufficiency of the State's evidence.

{¶ 22} In support of his legal-sufficiency argument, Grable contends the State failed to prove that he used, brandished, or displayed a "deadly weapon," which is required for an aggravated-robbery conviction under R.C. 2911.01(A)(1). He claims the State presented no evidence about the baseball bats the perpetrators carried being weapons. More specifically, he argues:

* * * Here, there was no evidence that the bat was a weapon. It is not
a device designed to cause death, nor was there evidence that it was

capable of causing death or that it was possessed or used as a weapon in this case. The testimony was that the males told both victims they had no intention of hurting them. There was no evidence that the bats were ever raised or that anyone was threatened with a bat, or that a bat was ever waved or exhibited in a menacing or challenging way. This element was not satisfied and the trial court should not have allowed the offense of aggravated robbery to be presented to the jury.

(Appellant's brief at 13).

{¶ 23} With respect to his manifest-weight argument, Grable repeats his argument about the baseball bats not being deadly weapons in this case. He also asserts that his alibi defense was strong, that Roach's voice identification of him was weak, and that the DNA evidence "did not positively identify him." (*Id.* at 14).

{¶ 24} When a defendant challenges the sufficiency of the evidence, he is arguing that the State presented inadequate evidence on an element of the offense to sustain the verdict as a matter of law. *State v. Hawn*, 138 Ohio App.3d 449, 471, 741 N.E.2d 594 (2d Dist.2000). "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. 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." *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

{¶ 25} Our analysis is different when reviewing a manifest-weight argument. When

a conviction is challenged on appeal as being against the weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider witness credibility, and 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.” *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). A judgment should be reversed as being against the manifest weight of the evidence “only in the exceptional case in which the evidence weighs heavily against the conviction.” *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶ 26} With the foregoing standards in mind, we conclude that Grable’s aggravated-robbery conviction is supported by legally sufficient evidence and is not against the manifest weight of the evidence. The aggravated robbery statute provides, in relevant part, that no person attempting or committing a theft offense shall “[h]ave a deadly weapon on or about the offender’s person or under the offender’s control and either display the weapon, brandish it, indicate that the offender possesses it, or use it[.]” R.C. 2911.01(A)(1). “A deadly weapon” includes “any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon.” R.C. 2911.01(D)(1) citing R.C. 2923.11(A).

{¶ 27} Here the jury reasonably could have found that the aluminum baseball bats carried by the perpetrators qualified as deadly weapons. The State presented evidence that a baseball bat can cause death if it is used to strike someone in the head. (Trial Tr. at 138). Moreover, the record supports a finding that Grable possessed and carried a baseball bat as a weapon rather than as a piece of sports equipment. We see no plausible

reason for him to be carrying a baseball bat at 1:00 a.m. while robbing a store other than to threaten and intimidate Roach and Patterson into complying with his demands. In fact, one of the perpetrators told Roach she would not get hurt *if* she took them to the safe. (*Id.* at 98). The implication was that she might get hurt, apparently with a baseball bat, if she did not comply.

{¶ 28} The record also supports a finding that Grable displayed or brandished a baseball bat, a deadly weapon, while committing a theft offense, as required for a conviction under R.C. 2911.01(A)(1). Roach recalled seeing each perpetrator holding a baseball bat when she encountered them in the parking area. (*Id.* at 81). They continued to carry the baseball bats when they entered the store and proceeded to the safe. (*Id.* at 84-85, 104). Patterson likewise recalled seeing the two perpetrators inside the store with baseball bats. One had a bat over his shoulder, and the other had a bat “down between his hands.” (*Id.* at 114). In light of this testimony, we find legally sufficient evidence to sustain Grable’s aggravated robbery conviction. We also find no ineffective assistance of counsel resulting from the lack of a Crim.R. 29 motion. Because the State presented legally sufficient evidence to sustain Grable’s aggravated robbery conviction, such a motion properly would have been denied.

{¶ 29} Grable’s manifest-weight argument is equally unpersuasive. As set forth above, the record supports a finding that he displayed or brandished a deadly weapon while committing a theft offense. With regard to his alibi defense and Roach’s voice identification of him, those were issues for the jury to consider in its role as trier of fact. We note too that the DNA evidence alone was essentially dispositive of Grable’s identity as one of the two perpetrators. Contrary to Grable’s argument, the DNA evidence did not

merely “fail to exclude” him as a contributor. As set forth above, the State’s DNA analyst testified that he *was* one of the contributors. In short, this is not an exceptional case in which the evidence weighs heavily against his conviction. Accordingly, the third assignment of error is overruled.

{¶ 30} Having overruled Grable’s assignments of error, we affirm the judgment of the Clark County Common Pleas Court.

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FROELICH, P.J., and WELBAUM, J., concur.

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