[Cite as *State v. Barstow*, 2003-Ohio-7336.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
HOCKING COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 02CA27
	:	
v.	:	
	:	
STEPHEN D. BARSTOW,	:	DECISION AND JUDGMENT ENTRY
	:	
Defendant-Appellant.	:	**RELEASED 12/30/03**

APPEARANCES:

COUNSEL FOR APPELLANT[1]:
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COUNSEL FOR APPELLEE:
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EVANS, P.J.

{¶1} Defendant-Appellant Stephen D. Barstow appeals from his conviction by the Hocking County Court of Common Pleas on several counts of burglary, receiving stolen property, theft by deception, grand theft, complicity to arson, and breaking and entering. Appellant argues that the trial court erred by accepting stipulations without specifically addressing appellant pursuant to Crim.R. 11 and

[1] Appellant was represented by other counsel below.

when it informed the jury of those stipulations, that he received the ineffective assistance of counsel, and that the trial court erred when it denied his motion for severance of the counts in the indictment. We disagree and affirm the judgment of the trial court.

I. Proceedings Below

{¶2} On April 23, 2002, the Hocking County Grand Jury returned a seventeen-count indictment alleging that Defendant-Appellant Stephen D. Barstow committed criminal acts on the following dates.

{¶3} On or about February 19, 2002: COUNT I, burglary, a second-degree felony in violation of R.C. 2911.12(A)(2); and COUNT II, theft, a fifth-degree felony in violation of R.C. 2913.71.

{¶4} On or about March 30, 2002: COUNT III, burglary, a fourth-degree felony in violation of R.C. 2911.12(A)(4); and COUNT IV, breaking and entering, a fifth-degree felony in violation of R.C. 2911.13(A).

{¶5} On or about March 24, 2002: COUNT V, tampering with evidence, a third-degree felony in violation of R.C. 2921.12(A)(1); COUNT VI, complicity to arson, a fourth-degree felony in violation of R.C. 2923.03(A)(2) and 2909.03(A)(1); COUNT VII, receiving stolen property, a fifth-degree felony in violation of R.C. 2913.51(A); and COUNT VIII, theft by deception, a fifth-degree felony in violation of R.C. 2913.02(A)(3).

{¶6} On or about March 26, 2002: COUNT IX, complicity to burglary, a fourth-degree felony in violation of R.C. 2923.03(A)(2) and 2911.12(A)(4); and COUNTS X and XI, complicity to grand theft,

fourth-degree felonies in violation of 2923.03(A)(2) and 2913.02(A)(1)(B)(4).

{¶7} On or about April 10, 2002: COUNT XII, burglary, a second-degree felony in violation of R.C. 2911.12(A)(2); COUNTS XIII and XIV, grand theft, fourth-degree felonies in violation of R.C. 2913.02(A)(1)(B)(4); COUNT XV, breaking and entering, a fifth-degree felony in violation of R.C. 2911.13(A); COUNT XVI, burglary, a third-degree felony in violation of R.C. 2911.12(A)(3); and COUNT XVII, breaking and entering, a fifth-degree felony in violation of R.C. 2911.13(A).

{¶8} On June 10, 2002, appellant filed a motion to sever the seventeen counts in such a way that would result in eight separate criminal trials. The trial court, instructing that the state was charging a series of theft and theft related offenses over a period of less than two months, overruled appellant's motion. In the court's judgment, it found that appellant would not be prejudiced so long as the jury was properly instructed.

{¶9} On June 24, 2002, the case proceeded to trial. Following the court's opening remarks and instructions to the jury, the court recessed. At that point, outside of the jury's presence, counsel for appellant asked for time to make stipulations. Appellant and his counsel stipulated to the facts as alleged in six counts in the indictment. The following colloquy took place in regard to those stipulations:

{¶10} "THE COURT: It is my understanding you are going to stipulate to five of these charges.

{¶11} "[Prosecuting Attorney] MR. BEAL: Your Honor, we are going to stipulate to Counts VII and VIII and we had agreed to – it was XII, XIII, XIV, XV and XVI that we had agreed to stipulate to, but XII was the F-3 so if that one is off the table then I guess it would be stipulating to XIII, XIV, XV and XVI.

{¶12} "THE COURT: All right. So there are six [counts], VII, VIII, XIII, XIV, XV, and XVI.

{¶13} "[Defense counsel] MS. NANGLE: VII, VIII, XIII, XIV, XV, and XVI.

{¶14} "THE COURT: That is a stipulation. Is that correct, Mr. Barstow, you are going to admit to all six of those?

{¶15} "MS. NANGLE: Yes, Your Honor.

{¶16} "THE COURT: We will bring the jury back in."

{¶17} From the indictment, the court informed the jury as to the facts in the counts that appellant stipulated to. At the conclusion of the trial, the jury found appellant guilty of those counts stipulated to as well as counts I, VI, IX, XII, and XVII. Appellant was acquitted of counts II, III, IV, V, X, and XI. On July 30, 2002, the court sentenced appellant to a total definite term of eight years and six months imprisonment with two years and six months to run concurrently.

II. The Appeal

{¶18} Appellant timely filed an appeal and argues the following assignments of error:

{¶19} First Assignment of Error: "The Trial Court committed reversible error in accepting the "Stipulation" to Six of the Seventeen Counts in the Indictment without properly inquiring of Defendant in accordance with Rule 11, Ohio Rules of Criminal Procedure, to determine whether or not the "Stipulation" was knowingly, voluntarily and intelligently made by Defendant."

{¶20} Second Assignment of Error: "The Trial Court committed reversible error in advising the jury, prior to the commencement of the trial, that a stipulation had been made to six of the seventeen counts in the Indictment."

{¶21} Third Assignment of Error: "Defendant was deprived of effective assistance of legal counsel when his attorney stipulated to Defendant's guilt on six of the seventeen counts in the Indictment and then proceeded to trial on the remaining eleven counts in the Indictment."

{¶22} Fourth Assignment of Error: "The Trial Court committed reversible error by refusing to grant Defendant's motion concerning severance of offenses for trial."

{¶23} In his First Assignment of Error, appellant argues that the court's acceptance of the stipulations violated Crim.R. 11 in that the stipulations were "tantamount to [c]onfessions" or "guilty pleas" and that the court never addressed appellant personally pursuant to Crim.R. 11. In his Second Assignment of Error, appellant argues that

the trial court erred by informing the jury of the stipulations at the outset of the trial and thereby "irreversibly taint[ing]" the remaining counts instead of informing the jury of the stipulations at the conclusion of the trial. In his Third Assignment of Error, appellant argues that he was denied the effective assistance of counsel when his trial counsel stipulated to the facts alleged in six counts of the indictment. In his Fourth Assignment of Error appellant asserts that the trial court erred in denying his motion to sever the counts in the indictment for separate trials.

{¶24} We will consider appellant's first three assignments of error together as those pertain to the propriety of the stipulations entered into by appellant at the beginning of the trial. We will address appellant's Fourth Assignment of Error separately.

1. The Stipulations

{¶25} In his First Assignment of Error, appellant asserts that the trial court's acceptance of the stipulations violated Crim.R. 11. Appellant asserts that the stipulations were more akin to "confessions" or "guilty pleas" and that the trial court was required to address appellant personally to see that the stipulations were being made knowingly, intelligently, and voluntarily. See Crim.R. 11(C). While appellant posits a novel argument, we disagree.

{¶26} Crim.R. 11 governs pleas and rights upon a plea. That section states, in pertinent part:

{¶27} "With reference to the offense or offenses to which the plea is entered:

{¶28} "(1) The plea of guilty is a complete admission of the defendant's guilt.

{¶29} "(2) The plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint, ***.

{¶30} "(3) When a plea of guilty or no contest is accepted pursuant to this rule, the court, except as provided in divisions (C)(3) and (4) of this rule, shall proceed with sentencing under Crim.R. 32." Crim.R. 11(B).

{¶31} With respect to pleas of guilty and no contest in felony cases, Crim.R. 11 states "[i]n felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

{¶32} "(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

{¶33} "(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence." Crim.R. 11(C)(2).

{¶34} To us, appellant's stipulations are more analogous to pleas of no contest than to guilty pleas as suggested by appellant. This is

so because, rather than admitting guilt, appellant merely stipulated to the truth of the facts as alleged in the indictment. However, appellant had already been arraigned and entered not guilty pleas to all seventeen counts in the indictment. Thus, the only way appellant could enter no contest pleas would be by withdrawing his not guilty pleas. In fact, appellant never withdrew his not guilty pleas.

{¶35} Further, we recognize several flaws with appellant's attempt to argue that the stipulations were in effect no contest pleas. First, "a trial court is only required to comply with Crim.R. 11(C)(2) in felony cases when the trial court is *accepting* a plea of guilty or no contest." *State v. Davidson,* 5th Dist. No. 2001CA00386, 2002-Ohio-2887. (Emphasis added.) Consequently, because the court was not, at that time, accepting a guilty or no contest plea, but merely accepting a stipulation to the facts as alleged in the indictment, the court was not required to comply with Crim.R. 11(C)(2).

{¶36} Second, although the parties stipulated to the facts as alleged in six counts of the indictment, from a reading of the record it appears that both parties proffered additional evidence during the trial concerning those counts. Thus, if the stipulations rose to the level of no contest pleas, appellant would have "waive[d] his right to present additional affirmative factual allegations to prove that he was not guilty." *State v. Gilbo* (1994), 96 Ohio App.3d 332, 337, 645 N.E.2d 69. Furthermore, "'[t]he essence of the "no contest" plea, is that the accused cannot be heard in defense. Thus any statement by him must be considered as in mitigation of penalty.'" *State v. Herman*

(1971), 31 Ohio App.2d 134, 140, 286 N.E.2d 296, 300, quoting Schneider, Ohio Criminal Code (3 Ed.1963), Section 10.1, fn. 4. Had the court been accepting the stipulations as no contest pleas, appellant would have been barred from putting on additional evidence in defense. From the record, appellant offered "blame-shifting" evidence in an attempt to prove his non-guilt as to those counts. Appellant will not now be allowed to receive a benefit by labeling the stipulations as no contest pleas. Moreover, even though appellant, in essence, admitted to the facts as alleged in the indictment as to those counts, the jury was still bound to make findings of guilt or non-guilt on each of those counts.

{¶37} During the course of trial, parties can enter into agreements to stipulate to facts. A stipulation is "a voluntary agreement between opposing parties concerning some relevant point ***." Black's Law Dictionary (7 Ed.Rev.1999) 1427. "It is elementary that when an adverse party is willing to stipulate to the truth of a certain allegation, the party having the burden of proving that allegation is relieved from proving it." *Markert v. Bosley* (1965), 2 Ohio Misc. 109, 113, 207 N.E.2d 414. Therefore, although the stipulations in this case are admissions to the truth of all the facts as alleged in the indictment, because they were offered and agreed to at trial the stipulations will not be categorized as "no contest pleas." Thus, Crim.R. 11 was not invoked, and the trial court was not required to address appellant personally to ensure that the stipulations were made knowingly, voluntarily, and intelligently.

{¶38} Appellant further argues that the stipulations should be given no effect because appellant's attorney, and not appellant himself, agreed to them. The record is clear that appellant's attorney answered affirmatively when the court asked "That is a stipulation. Is that correct, Mr. Barstow, you are going to admit to all six of those?" However, the law does not side with appellant's contention. "Agreements, waivers and stipulations made by persons accused of crimes, *or by their counsel in their presence*, during the course of trial for crimes are, after termination of trial, as binding and enforceable on such persons as like agreements, waivers and stipulations are upon parties to civil actions." *State v. Robbins* (1964), 176 Ohio St. 362, 199 N.E.2d 742, paragraph two of the syllabus, following *State ex rel. Warner v. Baer*, 103 Ohio St. 585, 134 N.E. 786, paragraph four of the syllabus. (Emphasis added.) Thus, appellant is bound to all matters of fact and law concerned in the stipulation. See *State v. Martin*, 6th Dist. No. L-01-1214, 2002-Ohio-1870.

{¶39} Accordingly, appellant's First Assignment of Error is overruled.

{¶40} In his Second Assignment of Error, appellant asserts that the trial court committed reversible error by advising the jury of the stipulations at the outset of the trial. In so doing, appellant posits that the trial court served to irreversibly "taint" the remaining eleven counts in the indictment. Instead, appellant suggests that the trial court should have waited until the conclusion

of the trial to submit the stipulations to the jury. We find no merit to this contention.

{¶41} At the outset, we note that, in his brief, appellant failed to cite any authority in support of this assignment of error. See App.R. 16(A)(7). The only plausible explanation for a lack of authority, which we can garner through our research, is that there exists no authority in support of appellant's assertions. While appellant's contention rests on a supposed "tainting" of the jury, we believe the opposite may be true. A fair reading of the record suggests that appellant gained favor with the jury by stipulating to facts in six counts of the indictment. Plausible explanations for this include that such an acquiescence bolsters appellant's credibility in front of the jury, and also that it creates an impression that appellant is willing to take responsibility for those acts he did, in fact, commit. Our supposition is even more convincing when considered in light of the trial's outcome. If the jury was indeed tainted, as appellant asserts, appellant presumably would have been convicted of all eleven other counts; in actuality, he was convicted of only five of the eleven remaining counts.

{¶42} Accordingly, appellant's Second Assignment of Error is overruled.

{¶43} In his Third Assignment of Error, appellant argues that he was deprived of the effective assistance of counsel when his attorney made the stipulations and then proceeded to trial on the eleven remaining counts. This argument reiterates the argument asserted in

appellant's Second Assignment of Error, that is, that appellant was deprived of an unbiased jury after entering the stipulations. Appellant argues that because the jury was informed of the stipulations at the beginning of the trial, the jury could not exercise its function in an unbiased manner as to the remaining counts. Appellant argues that this, in effect, deprived him of the effective assistance of counsel. We disagree.

{¶44} First, we note that appellant cited no authority in support of this assignment of error. See App.R. 16(A)(7). However, in the interest of justice, we will examine the issues he presents.

{¶45} In order to succeed on a claim of ineffective assistance of counsel, appellant must show that: (1) counsel's actions fell below an objective standard of reasonable professional representation; and (2) appellant was prejudiced as a result of counsel's actions. See *Stickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052; *State v. Bradley* (1989) 42 Ohio St.3d 136, 538 N.E.2d 373. Thus, the first prong requires appellant to show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. at 687. The second prong requires appellant to show that he was prejudiced in some way by counsel's performance. "Prejudice will not be found unless appellant demonstrates there is a reasonable probability that, if not for counsel's errors, the result of the proceeding would have been different." *State v. Bradley*, 42 Ohio St.3d at 143. "A reasonable probability is a probability sufficient

to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. at 694. Further, courts are admonished to indulge a "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland v. Washington*, 466 U.S. at 689.

{¶46} In the case sub judice, appellant has failed to satisfy either prong of the *Strickland* analysis. From the entire record, we cannot say that counsel's performance fell below an objective standard of reasonable professional assistance. The stipulations appear to be part of counsel's trial strategy and will not be second guessed by this Court. See *Strickland v. Washington*, supra. We note that stipulating to the facts in six counts of a seventeen-count indictment is certainly unparalleled in any case we have considered, however, we do not find that this fell outside the "wide range of reasonable professional assistance." *Strickland v. Washington*, supra. As we mentioned earlier, we can posit several strategies underlying counsel's reasons for making the stipulations to those facts, rather than challenging them in front of the jury.

{¶47} Further, appellant has failed to demonstrate that he suffered prejudice from counsel's performance. From reading the entire record we are confident that appellant's trial counsel was not ineffective. At trial, the state presented overwhelming evidence against appellant. Further, appellant was acquitted of six counts in

the indictment. Moreover, appellant failed to demonstrate that the result of the trial would have been different had he not entered the stipulations. Therefore, appellant was not denied the effective assistance of counsel.

{¶48} Accordingly, appellant's Third Assignment of Error is overruled.

2. Appellant's Motion to Sever the Counts

{¶49} In his Fourth Assignment of Error, appellant argues that the trial court erred in denying his pretrial motion to sever certain counts in the indictment from others. Appellant's motion requested the court to sever the seventeen counts in such a way as to require eight separate trials.

{¶50} Appellant now argues that the trial court should have severed the counts so that the crimes committed on the separate dates were tried separately. That is, appellant argues Counts I and II, alleged to have been committed on February 19, 2002, should have been tried separately; that Counts III and IV, alleged to have been committed on March 30, 2002, should have been tried separately; that Counts V, VI, VII, and VIII, alleged to have been committed on March 24, 2002, should have been tried separately; that Counts IX, X, and XI, alleged to have been committed on March 26, 2002, should have been tried separately; and that Counts XII - XVII, alleged to have been committed on April 10, 2002, should have been tried separately. Severing the counts in this manner would result in five separate trials.

{¶51} Pursuant to Crim.R. 8(A), joinder of multiple offenses is permitted when the charged offenses are "of the same or similar character, or are based on the same act or transaction, or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct." However, Crim.R. 14 provides a defendant relief from prejudicial joinder and provides: "If it appears that a defendant or the state is prejudiced by a joinder of offenses *** in an indictment, information, or complaint, or by such joinder for trial together of indictments, informations or complaints, the court shall order an election or separate trial of counts, ***, or provide such other relief as justice requires."

{¶52} It is a general rule that "joinder of offenses is favored to prevent successive trials, to minimize the possibility of incongruous results in successive trials before different juries, to conserve judicial resources, and to diminish inconvenience to witnesses." *State v. Powell* (Dec. 15, 2000), 2nd Dist. Nos. 18095, 99-CR-631, citing *State v. Torres* (1981), 66 Ohio St.2d 340, 343, 421 N.E.2d 1288. Further, the Supreme Court of Ohio has indicated that joinder is to be "liberally permitted." *State v. Schaim* (1992), 65 Ohio St.3d 51, 58, 600 N.E.2d 661.

{¶53} The decision to grant a motion for severance of counts is charged to the sound discretion of the trial court and such a decision will not be disturbed absent a showing of an abuse of discretion. See *State v. Humphrey*, 2nd Dist. No. 02CA0025, 2003-Ohio-2825, at ¶55. An

abuse of discretion connotes more than just an error of law or an error in judgment. It implies an arbitrary, unreasonable, unconscionable attitude on the part of the trial court. See *State v. Adams* (1980), 62 Ohio St.2d 151, 404 N.E.2d 144.

{¶54} To effectively claim error in the joinder of multiple counts in a single trial, appellant must make an affirmative showing that his rights were prejudiced. See *State v. Powell*, supra. The state can rebut a defendant's claim of prejudice in two different ways. Under the first method, appropriately referred to as the "other acts" test, the state must exhibit that the evidence to be introduced at the trial of one offense would also be admissible at the trial of the other severed offense under the "other acts" portion of Evid.R. 404(B). *State v. Schiebel* (1990), 55 Ohio St.3d 71, 86-87, 564 N.E.2d 54; *State v. Miller* (1995), 105 Ohio App.3d 679, 691, 664 N.E.2d 1309; *State v. Van Sickle* (1993), 90 Ohio App.3d 301, 305, 629 N.E.2d 39. Alternatively, under the second method, referred to as the "joinder test," the state "is merely required to show that evidence of each crime joined at trial is simple and direct." (Citations omitted.) *State v. Lott* (1990), 51 Ohio St.3d 160, 163, 555 N.E.2d 293. The purpose of the "joinder test" is to ensure that the jury does not confuse the offenses or improperly cumulate the evidence of the various crimes. *State v. Van Sickle,* 90 Ohio App.3d at 307, citing *State v. Lott,* 51 Ohio St.3d at 163-164. Instead, this test "focuses on whether the trier of fact is likely to consider 'evidence of one

[offense] as corroborative of the other. '" (Citation omitted.) *State v. Wiles* (1991), 59 Ohio St.3d 71, 77, 571 N.E.2d 97.

{¶55} Here, appellant has failed to show that the trial court abused its discretion in denying his motion to sever the counts. First, appellant's motion requested the court to sever the counts in such a manner that would require eight separate trials; even now, he argues for severance of the counts resulting in five separate trials. Undoubtedly, severing the counts in either manner would put a substantial strain on judicial resources and not serve the underlying policy favoring joinder of counts. Second, appellant has not shown that he suffered prejudice from the joinder. Appellant asserts that he suffered prejudice at trial because evidence of other criminal acts were before the jury when that evidence would not have been admissible at separate trials of the other offenses. We disagree. First, Evid.R. 404(B) allows the introduction of evidence of other crimes if that evidence is introduced "as proof of *** identity." Such evidence includes proof of modus operandi: that appellant perpetrated another offense that bears an unmistakable resemblance to the offense on trial. Second, if appellant's claim of prejudice held merit, the jury would not have acquitted him of six counts. Furthermore, we find that the "joinder test" is also satisfied; that is that the evidence of each crime is simple and direct so that the jury was not confused. As the trial court correctly held when it overruled appellant's motion to sever the counts, the state charged a series of theft and theft-

related offenses that were a part of "a course of criminal conduct." Crim.R. 8(A).

{¶56} Therefore, since appellant did not make a showing of prejudice, we find that the trial court did not abuse its discretion by denying appellant's motion to sever the counts. Accordingly, appellant's Fourth Assignment of Error is overruled.

III. Conclusion

{¶57} We find that appellant is bound by the stipulations that were made at trial and that the trial court was not restricted by Crim.R. 11 when accepting the stipulations. Appellant has not demonstrated that he suffered prejudice from the court's acceptance of the stipulations. Accordingly, appellant's first three assignments of error are overruled. Furthermore, appellant has not demonstrated that the trial court abused its discretion in denying appellant's motion to sever the counts in the indictment for separate trials, and thus, appellant's Fourth Assignment of Error is overruled. The sound judgment of the trial court is affirmed.

Judgment affirmed.

Harsha, J., and Kline, J.: Concur in Judgment Only.

FOR THE COURT

BY: _____
David T. Evans
Presiding Judge