[Cite as *State v. Anderson*, 2009-Ohio-5136.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 2009 CAA 02 0020
RICHARD L. ANDERSON	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Delaware County Court of Common Pleas Case No. 07 CR I 11 0665
JUDGMENT:	AFFIRMED IN PART; REVERSED AND REMANDED IN PART
DATE OF JUDGMENT ENTRY:	September 28, 2009

APPEARANCES:

For Plaintiff-Appellee:

DAVID A. YOST
DELAWARE COUNTY PROSECUTING ATTORNEY

KYLE E. ROHRER
140 N. Sandusky St.
Delaware, OH 43015

For Defendant-Appellant:

WILLIAM T. CRAMER
470 Olde Worthington Rd., Suite 200
Westerville, OH 43082

Delaney, J.

{¶1} Defendant-Appellant Richard L. Anderson appeals his conviction and sentence for two counts of theft of property valued at $5,000 or more, but less than $100,000, in violation of R.C. 2913.02(A)(1) and (2).

STATEMENT OF THE FACTS AND THE CASE

{¶2} On June 12, 2007, Appellant entered Farah Jewelers at the Polaris Mall with a man known as Big Klein. Klein engaged the store owner in conversation regarding repairing Klein's bracelet. While Klein and the store owner were talking, Appellant asked a salesperson, Penny Wiseman, to show him a pair of diamond earrings. Wiseman placed the earrings on the counter. Appellant picked up the earrings and told Wiseman he was going to take the earrings over to the store owner for a price quote. The store owner continued his conversation with Klein and did not address Appellant. Wiseman turned her back to replace a mirror used to examine jewelry, and when she turned back around, Appellant was walking out of the store.

{¶3} Wiseman immediately asked the store owner whether Appellant had given him the earrings and the store owner replied that he was not given the earrings. The store owner then asked Klein to call Appellant to return to the store. Klein obliged, called Appellant, and Appellant returned to the store. Appellant and Klein stayed in the store and argued for approximately ten minutes after they had been advised police had been called; however, the men ultimately left the store before police arrived.

{¶4} The store owner testified he paid $3,600.00 for the earrings which would retail for $9,000.00. It was further revealed the store did not keep an inventory list, have security cameras, security tags, or insurance on store merchandise. Wiseman had

worked for the store for seven years at the time of the theft. She left soon thereafter and was employed by Target at the time of the trial.

{¶5} On November 28, 2007, Appellant was indicted on two counts of Theft in violation of R.C. 2913.02(A)(1) and (A)(2). After a jury trial on October 2, 2008, the jury found Appellant guilty of both counts. Upon accepting the jury's verdict, the trial court proceeded immediately to sentencing whereupon the State elected to have Appellant sentenced on Count 2. The Court orally sentenced Appellant only on Count 2. However, the sentencing entry issued February 5, 2009[1] imposed an 18-month sentence separately on each count of Theft, then declared its entry of conviction that they were merged:

{¶6} "It is hereby Ordered that the Defendant serve a term of eighteen months in prison on Count One for a violation of R.C. 2913.02(A)(1), AND; a term of eighteen months in prison on Count Two for a violation of R.C. 2913.02(A)(2). Pursuant to R.C. 2941.25(A), the sentences as to Counts One and Two merge for sentencing purposes."

{¶7} It is from this conviction and sentence Appellant now appeals. Appellant raises two Assignments of Error:

{¶8} "I. ANDERSON'S CONVICTIONS ARE NOT SUPPORTED BY THE WEIGHT OF THE EVIDENCE.

[1] The trial court originally sentenced Appellant on October 3, 2008 to eighteen months on both counts; however, because the two counts were allied offenses of similar import arising from a single incident, the parties agreed that the sentences were to be merged pursuant to R.C. 2941.25(A). Appellant appealed his conviction and sentence under Delaware App. No. 08 CAA 10 0060. This Court dismissed Appellant's appeal for lack of a final appealable order because the sentencing entry did not indicate the manner of conviction. The trial court issued a nunc pro tunc sentencing entry that specified Anderson was convicted by a guilty verdict following a jury trial. It is from this entry Appellant now appeals.

{¶9} "II. ANDERSON WAS UNLAWFULLY SENTENCED ON TWO ALLIED OFFENSES OF SIMILAR IMPORT IN VIOLATION OF R.C. 2941.25. [2/5/09 SENTENCE; RT 178-179]"

I

{¶10} Appellant argues in his first Assignment of Error that his convictions for two counts of Theft were against the manifest weight of the evidence.

{¶11} When analyzing a manifest weight claim, this court sits as a "thirteenth juror" and in 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." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, 678 N.E.2d 541, 548, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. The granting of a new trial "should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin* at 175, 485 N.E.2d 717.

{¶12} Appellant argues that his conviction for Theft was not supported by the manifest weight of the evidence based on Wiseman's testimony. It is his argument that Wiseman was a witness lacking credibility because Wiseman had the motive and opportunity to take the earrings.

{¶13} The State presented evidence from Wiseman who testified she placed the earrings on the counter. Appellant took the earrings and walked over to the store owner. The store owner testified Appellant did not give him the earrings. Wiseman testified she immediately called police when she realized the store owner did not have

the earrings. A review of the record demonstrates there was no evidence presented that anyone other than Appellant was in possession of the earrings after Wiseman placed the earrings on the counter. Further, Wiseman's credibility was not challenged in any way during her testimony.

{¶14} Upon review of the record, we find the jury did not clearly lose its way and create such a manifest miscarriage of justice warranting reversal of Appellant's conviction and a new trial.

{¶15} Appellant's first Assignment of Error is overruled.

II

{¶16} Appellant argues in his second Assignment of Error that the trial court erred in sentencing Appellant on both counts of Theft. Appellant argues he was convicted of allied offenses of similar import stemming from one incident; therefore, Appellant could only be sentenced on one of the counts.

{¶17} Appellant acknowledges he could have been tried on both counts of Theft; however, he maintains he could only be convicted of and sentenced on one of those counts. Appellee argues the trial court did in fact orally sentence Appellant on one of the two counts, therefore, any error in the trial court's sentencing entry is harmless error.

{¶18} It is axiomatic a court speaks through its entries. *State ex rel. Worcester v. Donnellon* (1990), 49 Ohio St.3d 117, 551 N.E.2d 183. The sentencing entry in this case contains two convictions and two sentences of eighteen months on each count of theft. The sentencing entry also ordered that the sentences be merged pursuant to R.C. 2941.25(A).

{¶19} As the Supreme Court instructed in *State v. Brown*, "[W]e [have] acknowledged that R.C. 2941.25 is a legislative attempt to codify the judicial doctrine of merger, i.e., the principle that 'a major crime often includes as inherent therein the component elements of other crimes and that these component elements, in legal effect, are merged in the major crime.' See also *State v. Roberts* (1980), 62 Ohio St.2d 170, 172-173, 16 O.O.3d 201, 405 N.E.2d 247; *State v. Thomas* (1980), 61 Ohio St.2d 254, 15 O.O.3d 262, 400 N.E.2d 897; *State v. Logan* (1979), 60 Ohio St.2d 126, 14 O.O.3d 373, 397 N.E.2d 1345. Therefore, the proper disposition of matters involving allied offenses of similar import committed with a single animus is to merge the crimes into a single conviction.

{¶20} "Regarding the doctrine of merger, we have previously stated: 'An accused may be tried for both [allied offenses of similar import] but may be convicted and sentenced for only one. The choice is given to the prosecution to pursue one offense or the other, and it is plainly the intent of the General Assembly that the election may be of either offense.' *Maumee v. Geiger* (1976), 45 Ohio St.2d 238, 244, 74 O.O.2d 380, 344 N.E.2d 133. See also Legislative Service Commission Summary of Am. Sub. H.B. 511, supra, at 69 (stating that pursuant to R.C. 2941.25 a defendant may be charged with multiple offenses of similar import committed with a single animus, but that he may be convicted of only one, and further stating that 'the prosecution sooner or later must elect as to which offense it wishes to pursue')." *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, ¶42-43.

{¶21} In the present case, the sentencing transcript reveals the State did elect to have Appellant sentenced only upon Count Two; however, the trial court in its judgment

entry sentenced Appellant on both counts. Because the sentencing entry in this case contains two convictions and two sentences, we find the sentence does not comply with R.C. 2941.25.

{¶22} Appellee argues this is harmless error; however, it has been established that it is plain error to impose multiple sentences for allied offenses even if those sentences are ordered served concurrently. *State v. Crowley* (2002), 151 Ohio App.3d 249, 255, 783 N.E.2d 970, citing *State v. Jones,* Franklin App. No. 98-AP-129, 1998 Ohio App. LEXIS 5024; *State v. Lang* (1995), 102 Ohio App.3d 243, 656 N.E.2d 1358; and *State v. Sullivan* 2003 WL 22510808, 6 (Ohio App. 8 Dist.).

{¶23} Accordingly, the second Assignment of Error is sustained requiring remand for the limited purpose of merging the theft counts and imposing a sentence for the remaining count.

{¶24} The judgment of the Delaware County Court of Common Pleas is therefore affirmed in part, reversed in part and cause remanded.

By: Delaney, J.
Farmer, P.J. and
Wise, J. concur.

HON. PATRICIA A. DELANEY

HON. SHEILA G. FARMER

HON. JOHN W. WISE

PAD:kgb

[Cite as *State v. Anderson*, 2009-Ohio-5136.]

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
RICHARD L. ANDERSON	:	
	:	Case No. 2009 CAA 02 0020
Defendant-Appellant	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Delaware County Court of Common Pleas is affirmed in part; reversed in part and remanded for the limited purpose of merging the theft counts and imposing a sentence for the remaining count. Costs split between Appellant and Appellee.

HON. PATRICIA A. DELANEY

HON. SHEILA G. FARMER

HON. JOHN W. WISE