

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

RICKY D. WILSON, JR.

Defendant-Appellant

JUDGES:

Hon. William B. Hoffman, P.J.

Hon. Sheila G. Farmer, J.

Hon. John W. Wise, J.

Case No. 14-CA-24

O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Fairfield County Common
Pleas Court, Case No. 2013CR00474

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

April 23, 2015

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Hoffman, P.J.

{¶1} Defendant-appellant Ricky D. Wilson appeals his conviction and sentence entered by the Fairfield County Court of Common Pleas. Plaintiff-appellee is the state of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On September 18, 2013 Appellant approached the victim herein in the parking lot of her work demanding her keys, threatening to "knock her out" if she did not comply. The victim did not comply, and Appellant forcibly attempted to take the keys. Bystanders called the police, and immediately came to the victim's aid. Appellant fled the scene, but was apprehended minutes later nearby. The victim was able to identify Appellant as the perpetrator to responding law enforcement.

{¶3} Appellant was indicted on one count of robbery, in violation of R.C. 2911.02(A)(2), a felony of the second degree. Following a jury trial, Appellant was convicted of the offense. The trial court imposed a five year prison sentence consecutive to a one-year prison term imposed due to Appellant's being on post-release control on an unrelated offense at the time of the offense, pursuant to R.C. 2929.141. The trial court further ordered Appellant serve a mandatory period of 3 years post release control following his prison sentence.

{¶4} Appellant appeals, assigning as error:

{¶5} "I. THE TRIAL COURT PREJUDICIALLY ERRED IN NOT INSTRUCTING THE JURY ON THE LESSER/LESSER-INCLUDED OFFENSE OF ROBBERY IN VIOLATION OF R.C. 2911.02(A)(3).

{¶6} "II. THE DEFENDANT-APPELLANT'S CONSECUTIVE TERM OF TWELVE MONTHS IS CONTRARY TO OHIO LAW AND THE STATE AND FEDERAL CONSTITUTIONS."

I.

{¶7} In the first assignment of error, Appellant maintains the trial court erred in failing to instruct the jury on robbery, in violation of R.C. 2911.02(A)(3), a felony of the second degree, as a lesser included offense. Appellant was charged and convicted of robbery, in violation of R.C. 2911.02(A)(2), a second degree felony.

{¶8} Appellant concedes he did not request an instruction on the lesser offense. Failure to object before the jury retires, absent plain error, constitutes waiver. *State v. Williford* (1990), 49 Ohio St.3d 247. In order to find "plain error," error must be an obvious defect in the trial's proceedings, it must have affected substantial rights, and it must have affected the outcome of the trial. *State v. Steele*, 138 Ohio St.3d 1, 2013 Ohio 2470.

{¶9} A trial court is required to instruct on a lesser included offense only where the evidence at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense. *State v. Deanda*, 136 Ohio St.3d 18, 2013-Ohio-1722.

{¶10} Here, Appellant was charged with and convicted of robbery, in violation of R.C. 2911.02(A)(2), which reads,

(A) No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following:

(2) Inflict, attempt to inflict, or threaten to inflict physical harm on another;

{¶11} At trial, the victim testified,

A. Well, the gentleman that's sitting right there walked up to me and asked me for the vehicle - - the keys to my vehicle. And I told him that that wasn't going to happen.

And he said, 'You will or I will knock you out.'

And I said, 'We'll see about that,' and grabbed at my cell phone.

He attempted to grab at my cell phone and then leaned over into my passenger seat. He had my left arm pinned behind my back and he was grabbing for my cell phone in this hand.

At that point, I realized that I couldn't - - couldn't fight him off. My knees were underneath the steering wheel. So I started yelling out my partially cracked window on the other side for help, and that's when people started to come out.

* * *

Q. So during this encounter with the Defendant, did he inflict physical harm on you?

A. It did hurt. He had my arm twisted behind my back, this arm.

Q. Okay. And did he also threaten you with physical harm?

Yes, he threatened to knock me - - and I'm not sure if you're allowed to say the words, but exactly what he said was, 'I will knock you - -
- "

Tr. at 45-46; 65.

{¶12} Upon review, we find the evidence in this matter does not support an acquittal on the crime charged. Accordingly, we find the trial court did not commit plain error in not instructing the jury on the lesser charge of robbery, in violation of R.C. 2911.02(A)(3).

{¶13} The first assignment of error is overruled.

II.

{¶14} In the second assignment of error, Appellant challenges the twelve month prison term imposed pursuant to R.C. 2929.141 for violation of post-release control. Appellant maintains the indictment did not specify he committed the offense of robbery while under post-release control.

{¶15} R.C. 2929.141 reads,

(A) Upon the conviction of or plea of guilty to a felony by a person on post-release control at the time of the commission of the felony, the court may terminate the term of post-release control, and the court may do either of the following regardless of whether the sentencing court or another court of this state imposed the original prison term for which the person is on post-release control:

(1) In addition to any prison term for the new felony, impose a prison term for the post-release control violation. The maximum prison

term for the violation shall be the greater of twelve months or the period of post-release control for the earlier felony minus any time the person has spent under post-release control for the earlier felony. In all cases, any prison term imposed for the violation shall be reduced by any prison term that is administratively imposed by the parole board as a post-release control sanction. A prison term imposed for the violation shall be served consecutively to any prison term imposed for the new felony. The imposition of a prison term for the post-release control violation shall terminate the period of post-release control for the earlier felony.

(2) Impose a sanction under sections 2929.15 to 2929.18 of the Revised Code for the violation that shall be served concurrently or consecutively, as specified by the court, with any community control sanctions for the new felony.

{¶16} The state maintains the 12-month prison sentence imposed pursuant to R.C. 2929.141 was not an additional sentence for the crime convicted in this case; rather, part of the original sentence imposed in Medina County Court of Common Pleas Case No. 12CR0302, for which he was placed on community control. See, *Woods v. Telb* (2000), 89 Ohio St.3d 504.

{¶17} The Eleventh District Court of Appeals addressed the issue raised herein in *State v. Ervin*, Lake Nos. 2009-L-025 and 2009-L-026, 2009-Ohio-6382, holding,

Ervin argues, alternatively, that the imposition of an additional sentence for the post release control violation constitutes “structural error,” as defined in *State v. Colon*, 118 Ohio St.3d 26, 885 N.E.2d 917, 2008-

Ohio-1624, inasmuch as neither an Indictment nor any Specification to the Indictment was brought against him with respect to the violation. As Ervin correctly notes, structural errors cannot be waived. *Id.* at ¶ 20, 885 N.E.2d 917.

Contrary to this position, it was not necessary to indict Ervin for violating post release control before the trial court acquired jurisdiction to impose an additional sentence pursuant to R.C. 2929.141. The Ohio Supreme Court has held that “the General Assembly has indicated its clear intent that the prison term imposed for the violation of post-release control is a reinstatement of part of the original sentence for violating the conditions of supervision, and is not meant to be a separate criminal punishment.” *State v. Martello*, 97 Ohio St.3d 398, 780 N.E.2d 250, 2002-Ohio-6661, at ¶ 19; *Woods v. Telb*, 89 Ohio St.3d 504, 512, 733 N.E.2d 1103, 2000-Ohio-171 (“post-release control is part of the original judicially imposed sentence”). Inasmuch as a prison term imposed for the violation of post release control is not a “separate criminal punishment,” there is no need for a separate criminal indictment

{¶18} Based upon the above, we do not find the trial court erred in imposing the additional twelve-month consecutive sentence pursuant to a R.C. 2929.141 herein.

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

{¶20} Appellant's conviction and sentence in the Fairfield County Court of Common Pleas is affirmed.

By: Hoffman, P.J.

Farmer, J. and

Wise, J. concur

