[Cite as *State v. Brown*, 2010-Ohio-1698.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio — Court of Appeals No. WD-09-058

Appellee — Trial Court No. 08 CR 408

v.

William Brown, Jr. — **DECISION AND JUDGMENT**

Appellant — Decided: April 16, 2010

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, and
Carri Leathers, Assistant Prosecuting Attorney, for appellee.

Keith O'Korn, for appellant.

* * * * *

COSME, J.

{¶ 1} Appellant, William Brown, Jr., was found guilty of aggravated robbery, robbery, three counts of kidnapping, grand theft, grand theft of a motor vehicle, and failure to comply with the order or signal of a police officer. The trial court sentenced

him to the aggregate of 34 years of incarceration, and Brown appeals raising eight assignments of error. We affirm in part, and reverse in part.

I. BACKGROUND

{¶ 2} On the morning of July 24, 2008, the Fifth Third Bank branch in Bowling Green was robbed. Wearing a hooded sweatshirt and using a white handkerchief to cover his face, Brown entered the branch building and indicated that he had a gun. He told the teller to do what he told her – or he would kill her. During the robbery, he also told the other tellers that he had a gun and he would kill them if they did not do what they were told.

{¶ 3} The first teller Brown encountered was Ms. Noe. Brown grabbed hold of her and pressed a hard object against her back. Based on his threats and actions, Noe believed Brown had a gun though she did not see it. Once behind the counter, Brown forced Noe to the floor. He instructed another teller, Ms. Schroeder, to put money into a plastic garbage bag. Brown then demanded access to the vault, but Schroeder convinced him that she did not have a key – that only Ms. Sharpe had the key. Ms. Sharpe was at that time outside fixing the ATM, and was unaware that the bank was being robbed.

{¶ 4} Lacking access to the vault, Brown demanded Schroeder's car keys. He took Schroeder from behind the teller counter to the break room, locking her in that room. Brown then forced Noe to accompany him outside where he saw Sharpe. After collecting Sharpe, the three of them went back into the bank and Sharpe opened the vault.

Sharpe testified that Brown pressed a hard object into her back, which she also assumed was a weapon.

{¶ 5} After robbing the vault, Brown forced Noe outside with him to find Schroeder's vehicle. He left Noe in the parking lot and drove off with the police in pursuit. Attempting to elude capture, Brown reached speeds in excess of 100 m.p.h. before wrecking the vehicle.

{¶ 6} A small screwdriver, a black plastic bag, and $61,315 in cash were recovered from the vehicle. Brown was read his rights and signed a *Miranda* waiver before an interview the next day. Brown testified that he robbed the bank using a screwdriver, and admitted telling the women inside the bank that he had a gun. He denied, however, that he had threatened to harm or kill any of them.

{¶ 7} Immediately prior to trial, Brown executed a waiver of trial by jury and a two-day bench trial commenced. The trial court found Brown guilty on all counts and determined that Brown was a repeat violent offender.

{¶ 8} The trial court denied Brown's requests for a presentence investigation, for a continuance to allow counsel to prepare a statement, and for the opportunity to offer testimony of family members in support of mitigation of sentence. The trial court sentenced Brown to a maximum of ten years on the aggravated robbery charge and five years for the repeat offender specification, five years for each kidnapping charge, 18 months each for the two charges of grand theft, and four years for failure to comply with

the order or signal of a police officer. The trial court ordered that all counts, except for robbery and grand theft, be served consecutively for a total of 34 years of incarceration.

II. DEADLY WEAPON

{¶ 9} In his first assignment of error Brown asserts that:

{¶ 10} "Appellant's conviction for aggravated robbery was both against the manifest weight of the evidence and was not supported by the sufficiency of the evidence, in violation of the due process clause of the 14th Amendment to the U.S. Constitution, and Article I, Section 1 & 16 of the Ohio Constitution."

{¶ 11} Brown contends that the state failed to produce sufficient evidence for an essential element of aggravated robbery, i.e., that he used a deadly weapon. In the absence of a finding that he used a deadly weapon, Brown asserts that his conviction is against the manifest weight of the evidence.

A. The Screwdriver is a Deadly Weapon

{¶ 12} The aggravated robbery statute, R.C. 2911.01 states in part: "(A) No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following: (1) Have 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." Brown asserts that the screwdriver "was not capable of causing death" in the manner he used it. The state contends that from the manner in which the

screwdriver was used, a factfinder could reasonably conclude that it was a deadly weapon. For the foregoing reasons, we agree that the screwdriver is a deadly weapon.

{¶ 13} R.C. 2923.11(A) defines a deadly weapon as "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." Here, Brown challenges only the first element, i.e., whether the screwdriver was capable of inflicting death. Thus, he concedes the state presented sufficient evidence for a reasonable jury to conclude that the screwdriver was "possessed, carried, or used as a weapon." Therefore, our review will focus on whether a reasonable factfinder could conclude that the screwdriver was capable of inflicting death.

{¶ 14} Ohio courts have held that a screwdriver may be considered a "deadly weapon" as that term is defined in R.C. 2923.11(A). In *State v. Umphries* (Feb. 4, 2003), 4th Dist. No. 02CA2662, the court observed, "It almost follows without the need to cite legal authority that either a knife or a screwdriver is capable of inflicting a deadly wound. This is especially so if either one were plunged into the victim's neck." See *State v. Jordan*, 4th Dist. No. 00CA2748, 2001-Ohio-2562 (stating that a knife is a deadly weapon) and *State v. Hubb* (Mar. 29, 1996), 10th Dist. No. 95APA08-1025 (stating that a screwdriver is a deadly weapon).

{¶ 15} A factfinder may infer that the defendant possessed a deadly weapon based on his words and conduct. In *State v. Haskins*, 6th Dist. No. E-01-016, 2003-Ohio-70, ¶ 42, this court upheld the conviction for the aggravated robbery of a gas station, even

though no gun had been displayed or found. The court concluded that "credible evidence was presented from which the jury could have found beyond a reasonable doubt that appellant did, in fact, have a deadly weapon on or about his person or under his control. Therefore, sufficient evidence was presented going to all the elements of the crime and the conviction was not against the manifest weight of the evidence." Id. See *State v. Green* (1996), 117 Ohio App.3d 644, 651 (state presented sufficient evidence of a deadly weapon when he made several threats to "blow the heads off" the victims, used his hand in a manner consistent with having a concealed gun, and the victims surrendered money based on their suspicions that he was armed and could carry out his threat); *State v. Cook*, 10th Dist. Nos. 02AP-896 and 02AP-897, 2003-Ohio-2483, ¶ 41-42 (sufficient evidence of aggravated robbery where the defendant concealed his hand and indicated that he had a gun and would kill the victims).

{¶ 16} Here, the state presented evidence that Brown concealed the screwdriver in the front pocket of his sweatshirt, told the tellers he had a gun and ultimately threatened to kill them. Both Noe and Schroeder testified that Brown pressed a hard object to their back during the robbery, and that they believed it was a weapon that could inflict serious harm. Brown's words and actions could lead a reasonable factfinder to infer that he in fact did have a gun.

B. Sufficiency of the Evidence

{¶ 17} Sufficiency and weight of the evidence are both quantitatively and qualitatively different as legal standards. *State v. Thompkins* (1997), 78 Ohio St.3d 380,

386. With respect to sufficiency of the evidence, "sufficiency" means the "legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law." Black's Law Dictionary (6 Ed.1990) 1433. See Crim.R. 29(A) (motion for judgment of acquittal can be granted by the trial court if the evidence is insufficient to sustain a conviction). In essence, sufficiency is a test of adequacy. "Whether the evidence is legally sufficient to sustain a verdict is a question of law." *Thompkins*, 78 Ohio St.3d at 386, citing *State v. Robinson* (1955), 162 Ohio St. 486. Although a court of appeals may determine that a judgment of a trial court is sustained by sufficient evidence, that court may nevertheless conclude that the judgment is against the weight of the evidence. Id. at 387.

{¶ 18} Convictions based on insufficient evidence violate a criminal defendant's right to due process of law. *Tibbs v. Florida* (1982), 457 U.S. 31, 45, 102 S.Ct. 2211, 2220, 72 L.Ed.2d 652, 663, citing *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560. We are required to construe the evidence in favor of the prosecution and determine whether the evidence would enable any rational trier of fact to find beyond a reasonable doubt the essential elements of the offense. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus, superseded by constitutional amendment on other grounds in *State v. Smith* (1997), 80 Ohio St.3d 89.

{¶ 19} We conclude that the state's evidence was legally sufficient. The tellers believed Brown had a gun. They testified that Brown pressed a hard object against their back, thus suggesting a concealed gun. A reasonable factfinder could have also

concluded either that the screwdriver was actually the barrel of a gun or that Brown would have used the screwdriver to stab the teller if she did not do what he said. In either situation, a reasonable factfinder, viewing the facts in the light most favorable to the state, could have concluded that the screwdriver in Brown's possession was capable of inflicting death. That it was actually a screwdriver and not a gun is irrelevant. Therefore, we find that the state presented sufficient evidence that the screwdriver was a deadly weapon and that Brown committed the robbery with a deadly weapon.

C. Manifest Weight of the Evidence

{¶ 20} Brown contends his conviction is against the manifest weight of the evidence because he did not have a deadly weapon. Weight of the evidence concerns "the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its effect in inducing belief." Black's at 1594.

{¶ 21} With respect to the manifest weight of the evidence, a reviewing court questions "'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 and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against conviction.'" *State*

v. Group, 98 Ohio St.3d 248, 2002-Ohio-7247, ¶ 77, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. The appellate court considers all of the evidence, sits as a "thirteenth juror," and decides whether a greater amount of credible evidence supports an acquittal such that the jury "clearly lost its way" in convicting the appellant. *Thompkins*, 78 Ohio St.3d at 387. See *Tibbs*, 457 U.S. at 42. See, also, *Martin*, 20 Ohio App.3d at 175.

{¶ 22} Based on the entire record, we find Brown's conviction is supported by the manifest weight of the evidence.

{¶ 23} Brown's first assignment of error is not well-taken.

III. POSTRELEASE CONTROL NOTIFICATION

{¶ 24} In his second assignment of error, Brown asserts that:

{¶ 25} "The trial court's sentencing entry contained an incorrect discretionary post-release control notification that violated R.C. § 2967.28 and rendered Appellant's sentence void."

{¶ 26} At the sentencing hearing, the trial court correctly notified Brown that he would be subject to five years of postrelease control following the completion of his prison term. The trial court's judgment entry, however, states that appellant "may be subject to three years of post-release control." Brown asserts that this error renders his sentence void and that his sentence must be vacated and remanded to the trial court for resentencing.

{¶ 27} In *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, paragraph two of the syllabus, superseded by statute, *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, the Supreme Court of Ohio held that the notice of the postrelease control requirement at sentencing is mandatory, and the trial court must also include that notice in its journal entry imposing sentence. The failure to notify a defendant about postrelease control requires reversal of the sentence and a remand for resentencing.

{¶ 28} In *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, ¶ 6, certiorari denied (2008), ___ U.S. ___, 129 S.Ct. 463, 172 L.Ed.2d 332, superseded by statute on other grounds as stated in *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, the Supreme Court of Ohio stated: "[I]n cases in which a defendant is convicted of, or pleads guilty to, an offense for which postrelease control is required but not properly included in the sentence, the sentence is void, and the state is entitled to a new sentencing hearing to have postrelease control imposed on the defendant unless the defendant has completed his sentence."

{¶ 29} The state suggests that this clerical error can easily be remedied by nunc pro tunc entry. We disagree. The state overlooks the fact that the General Assembly enacted Am.Sub.H.B. No. 137 ("H.B. 137"), effective July 11, 2006, which amended R.C. 2929.14, 2929.19, and 2967.28 and enacted R.C. 2929.191.

{¶ 30} R.C. 2929.191 authorizes the application of the remedial procedure set forth therein to add postrelease control to sentences imposed before its effective date. H.B. 137 demonstrates a legislative intent to apply the sentence-correction mechanism of

R.C. 2929.191 to sentences imposed after the act's effective date. R.C. 2929.191(C) provides that:

{¶ 31} "On and after the effective date of this section, a court that wishes to prepare and issue a correction to a judgment of conviction of a type described in division (A)(1) or (B)(1) of this section shall not issue the correction until after the court has conducted a hearing in accordance with this division. Before a court holds a hearing pursuant to this division, the court shall provide notice of the date, time, place, and purpose of the hearing to the offender who is the subject of the hearing, the prosecuting attorney of the county, and the department of rehabilitation and correction. The offender has the right to be physically present at the hearing, except that, upon the court's own motion or the motion of the offender or the prosecuting attorney, the court may permit the offender to appear at the hearing by video conferencing equipment if available and compatible. An appearance by video conferencing equipment pursuant to this division has the same force and effect as if the offender were physically present at the hearing. At the hearing, the offender and the prosecuting attorney may make a statement as to whether the court should issue a correction to the judgment of conviction."

{¶ 32} The original sentencing hearing in Brown's case occurred after the effective date of H.B. 137. R.C. 2929.191 affords a mechanism for trial courts to use in correcting sentences that lack proper imposition of postrelease control. The trial court shall conduct a limited resentencing hearing before correcting the defective postrelease control language. *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, paragraph two of the

syllabus. Thus, this matter is remanded to the trial court for a limited resentencing hearing. Brown's second assignment of error is well-taken.

IV. SEPARATE ANIMUS

{¶ 33} Brown's third assignment of error asserts that:

{¶ 34} "The trial court erred in convicting and sentencing the Appellant on the aggravated robbery and kidnapping counts in violation of the double jeopardy clause of the Fifth Amendment of the U.S. Constitution and Article 1, Section 10 of the Ohio Constitution and Ohio's multiple-count statute."

{¶ 35} We disagree.

{¶ 36} Ohio's multiple-count statute, R.C. 2941.25, determines whether cumulative punishments for two separate offenses stemming from the same conduct violate the Double Jeopardy Clause.

{¶ 37} 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.

{¶ 38} "(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."

{¶ 39} Application of this statute involves a two-tiered analysis. *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, ¶ 18, citing *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, ¶ 14. "'In the first step, the elements of the two crimes are compared. If the elements of the offenses correspond to such a degree that the commission of one crime will result in the commission of the other, the crimes are allied offenses of similar import and the court must then proceed to the second step. In the second step, the defendant's *conduct* is reviewed to determine whether the defendant can be convicted of both offenses. If the court finds either that the crimes were committed separately or that there was a separate animus for each crime, the defendant may be convicted of both offenses.'" *Brown* at ¶ 19, quoting *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117. Brown's assignment of error challenges the trial court's determination that he had a separate animus for the kidnapping and aggravated robbery, so we must address that issue.

A. Comparison of the Crimes

{¶ 40} The first step for determining whether two offenses are allied offenses of similar import requires comparing the statutory elements in the abstract, rather than comparing the offenses as charged in a particular indictment. In *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, ¶ 22, the Supreme Court of Ohio cautioned that "nowhere does [*State v. Rance*, 85 Ohio St.3d 632, 1999-Ohio-291] mandate that the elements of compared offenses must exactly align for the offenses to be allied offenses of

similar import under R.C. 2941.25(A)." Under *Cabrales*, elements need not be identical for offenses to be allied. *Cabrales* at ¶ 29.

{¶ 41} Turning to the elements of the offenses involved in this case, R.C. 2905.01 defines kidnapping as follows: "(A) No person, by force, threat, or deception, * * * shall remove another from the place where the other person is found or restrain the liberty of the other person, for any of the following purposes: * * * (2) To facilitate the commission of any felony or flight thereafter."

{¶ 42} R.C. 2911.01 defines aggravated robbery as follows: "(A) No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following: (1) Have 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."

{¶ 43} In comparing aggravated robbery to kidnapping, the Ohio Supreme Court in *State v. Winn*, 121 Ohio St.3d 413, 2009-Ohio-1059, ¶ 21, observed, "It is difficult to see how the presence of a weapon that has been shown or used, or whose possession has been made known to the victim during the commission of a theft offense, does not also forcibly restrain the liberty of another. These two offenses are 'so similar that the commission of one offense will necessarily result in commission of the other.'" Citing *Cabrales* at paragraph one of the syllabus. We agree and find that comparison of the

elements pursuant to *Cabrales* suggest that aggravated robbery and kidnapping are allied offenses.

B. Brown's Conduct

{¶ 44} We must next review Brown's conduct to determine whether he committed those offenses "separately or with a separate animus as to each," so as to allow him to be convicted of both crimes. R.C. 2941.25(B).

{¶ 45} In *State v. Logan* (1979), 60 Ohio St.2d 126, the Supreme Court of Ohio adopted the following guidelines for reviewing the defendant's conduct to determine whether kidnapping and another offense of the same or similar kind are committed: "(a) Where the restraint or movement of the victim is merely incidental to a separate underlying crime, there exists no separate animus sufficient to sustain separate convictions; however, where the restraint is prolonged, the confinement is secretive, or the movement is substantial so as to demonstrate a significance independent of the other offense, there exists a separate animus as to each offense sufficient to support separate convictions; (b) Where 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, there exists a separate animus as to each offense sufficient to support separate convictions." The court defined "animus," for purposes of R.C. 2941.25(B), as meaning "purpose or, more properly, immediate motive." *Logan*, 60 Ohio St.2d 126.

{¶ 46} Applying the guidelines established by *Logan*, we conclude that Brown did commit the aggravated robbery and kidnapping separately or with a separate animus as to all three tellers.

{¶ 47} In this case, Noe and Schroeder were inside the bank when Brown robbed it, and Sharpe was outside. Brown took Noe and Schroeder from behind the counter, locked Schroeder in a room and left the bank with Noe. Upon discovering Sharpe outside, he took her into the bank along with Noe. After robbing the vault, he left Sharpe behind and took Noe back outside with him and left Noe in the parking lot when he saw the police. On the facts of this case, we find that the movement of the victims was not merely incidental to the underlying crime of aggravated robbery, but it subjected them to a substantial increase in risk of harm beyond that of the robbery itself. Accordingly, Brown's third assignment of error is not well-taken.

V. SENTENCING STATUTE

{¶ 48} Brown contends, in his fourth assignment of error, that:

{¶ 49} "The trial court erred in following *State v. Foster* after the U.S. Supreme Court issued its ruling in *Oregon v. Ice* when the trial court imposed maximum, consecutive sentencing upon the Appellant without making the required findings of fact."

{¶ 50} We disagree.

{¶ 51} In *Oregon v. Ice* (2009), 129 S.Ct. 711, 172 L.Ed.2d 57, the United States Supreme Court upheld an Oregon sentencing statute which provided judges with discretion in determining whether a defendant's sentences for distinct offenses should run

concurrently or consecutively and which also required judges to make certain predicate findings of fact before imposing consecutive sentences. *Ice* held that the Oregon statute was not unfaithful to the goals of the Sixth Amendment and the right to a jury trial. However, in upholding an Oregon sentencing statute, the U.S. Supreme Court was not reversing Ohio sentencing statutes or decisions of the Ohio Supreme Court.

{¶ 52} In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the Supreme Court of Ohio struck down parts of Ohio's sentencing scheme. The court held that "[t]rial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." Id. at paragraph seven of the syllabus.

{¶ 53} Although Brown asks that we disregard *Foster*, we decline to do so because such re-examination can only be taken by the Supreme Court of Ohio. See *State v. Miller*, 6th Dist. No. L-08-1314, 2009-Ohio-3908; *State v. Winters*, 6th Dist. Nos. L-08-1195, L-08-1263, L-08-1264, 2009-Ohio-5592; *State v. Franklin*, 182 Ohio App.3d 410, 2009-Ohio-2664. See, also, *State v. Mickens*, 10th Dist. No. 08AP-743, 2009-Ohio-2554; *State v. Potter*, 10th Dist. No. 09AP-580, 2010-Ohio-372.

{¶ 54} This court held recently in *State v. Miller*, 6th Dist. No. L-08-1314, 2009-Ohio-3908, ¶ 18, "[w]hile *Oregon v. Ice* may necessitate a re-examination of Ohio's current sentencing statutes, as well as some of those which immediately preceded the decision in *Foster*, such a re-examination can only be taken by the Supreme Court of

Ohio. As it stands now, we are bound to follow the law and decisions of the Supreme Court of Ohio, unless or until they are reversed or overruled."

{¶ 55} Accordingly, we find Brown's fourth assignment of error not well-taken.

VI. CONSECUTIVE SENTENCES

{¶ 56} Brown contends in his fifth assignment of error that:

{¶ 57} "The trial court's 34 year prison sentence for bank robbery, wherein no individual was physically harmed, violated Appellant's right against cruel and unusual punishment as guaranteed by the 8th and 14th Amendments of the U.S. Constitution and Article 1, Section 9 of the Ohio Constitution."

{¶ 58} Because none of the individual sentences imposed on Brown are grossly disproportionate to their respective offenses, and the aggregate prison term resulting from consecutive imposition of those sentences does not constitute cruel and unusual punishment, we find Brown's fifth assignment of error not well-taken.

{¶ 59} The Eighth Amendment to the United States Constitution applies to the states pursuant to the Fourteenth Amendment. See *Robinson v. California* (1962), 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758. The amendment provides: "* * * nor cruel and unusual punishments inflicted." Section 9, Article I of the Ohio Constitution sets forth the same restriction: "* * * nor cruel and unusual punishments inflicted."

{¶ 60} In *State v. Weitbrecht* (1999), 86 Ohio St.3d 368, 371-372, the Ohio Supreme Court applied the Eighth Amendment analysis set forth in *Harmelin v. Michigan* (1991), 501 U.S. 957, 997, 111 S.Ct. 2680, 115 L.Ed.2d 836, in which the U.S.

Supreme Court held, "'[t]he Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are "grossly disproportionate" to the crime.'" The court in *Weitbrecht* observed that "'only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality'" may a court compare the punishment under review to punishments imposed in Ohio or in other jurisdictions. *Weitbrecht* at 373, quoting *Harmelin*, 501 U.S. at 1005.

{¶ 61} In *McDougle v. Maxwell* (1964), 1 Ohio St.2d 68, 69, the Supreme Court of Ohio stated that "[a]s a general rule, a sentence that falls within the terms of a valid statute cannot amount to a cruel and unusual punishment." Citing *Martin v. United States* (C.A.9, 1963), 317 F.2d 753 (overruled on other grounds, *United States v. Bishop* (1973), 412 U.S. 346, 93 S.Ct. 2008, 36 L.Ed.2d 941); *Pependrea v. United States* (C.A.9, 1960), 275 F.2d 325; and *United States v. Rosenberg* (C.A.2, 1952), 195 F.2d 583.

{¶ 62} Here, each of Brown's individual prison terms is within the range authorized by the General Assembly. Trial courts have discretion to impose a prison sentence within the statutory range for the offense. *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, paragraph seven of the syllabus. Thus we are bound to give substantial deference to the General Assembly, which has established a specific range of punishment for every offense and authorized consecutive sentences for multiple offenses. *Weitbrecht* at 373-374.

{¶ 63} Because the individual sentences imposed by the court are within the range of penalties authorized by the legislature, they are not grossly disproportionate or shocking to a reasonable person or to the community's sense of justice and do not constitute cruel and unusual punishment. Accordingly, Brown's aggregate prison term of 34 years, which resulted from the consecutive imposition of the individual sentences, does not violate the Eighth Amendment to the United States Constitution or Article I, Section 9, Ohio Constitution.

{¶ 64} The fifth assignment of error is not well-taken.

VII. SENTENCING

{¶ 65} In his sixth assignment of error, Brown complains that:

{¶ 66} "The trial court's sentence was contrary to law and constituted an abuse of discretion, and the trial court's failure to grant a continuance or order a PSI prior to sentencing violated Appellant's rights to due process under the 14th Amendment to the U.S. Constitution and Article I, Sections 10 and 16 of the Ohio Constitution."

{¶ 67} The trial court's sentencing entry demonstrates, however, that it considered the applicable sentencing factors. Further, its refusal to grant a continuance was not an abuse of discretion. The trial court had all of the information it needed. Since the trial court was prepared to send Brown to prison, it did not need to consider a PSI. In this case, because one of his convictions was for aggravated burglary, appellant was not even eligible for community control.

A. Abuse of Discretion

{¶ 68} In *Foster*, the Supreme Court of Ohio severed and excised R.C. 2929.14(C) and (E), which required judicial fact-finding for an imposition of maximum and consecutive sentences, respectively. Trial courts have full discretion to impose a prison sentence within the statutory range. *Foster* at paragraph seven of the syllabus. Consequently, when a trial court imposes such punishment on a defendant, it no longer reviews the record to determine if the record supports its findings. *State v. Swank*, 11th Dist. No. 2008-L-019, 2008-Ohio-6059, ¶ 28.

{¶ 69} Although *Foster* invalidated parts of the sentencing statute requiring judicial fact-finding for an imposition of maximum and consecutive sentences, we are required to engage in a two-step analysis set forth by the Supreme Court of Ohio in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 26. The applicable statutes to be applied by a trial court include the felony sentencing statutes R.C. 2929.11 and 2929.12, which are not fact-finding statutes like R.C. 2929.14. See *Foster* at ¶ 17. Appellate courts are now required to "examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law." *Kalish* at ¶ 26.

{¶ 70} If a reviewing court is satisfied that the sentence is not clearly and convincingly contrary to law under the first prong, the court must then engage in the second prong of the analysis, which requires an appellate court to determine whether the trial court abused its discretion in selecting a sentence within the permissible statutory

range. *Kalish* at ¶ 17. "R.C. 2929.11 and 2929.12 are not fact-finding statutes like R.C. 2929.14. Instead, they serve as an overarching guide for trial judge to consider in fashioning an appropriate sentence." Id. *Foster* accords the trial court full discretion to determine whether the sentence satisfies the overriding purpose of Ohio's sentencing structure – "R.C. 2929.12 explicitly permits trial courts to exercise their discretion in considering whether its sentence complies with the purposes of sentencing. It naturally follows, then, to review the actual term of imprisonment for an abuse of discretion." *Kalish* at ¶ 17.

{¶ 71} In the instant case, the trial court expressly stated that it considered the complete record, and its judgment entry clearly indicated that it had considered the principles and purposes of sentencing under R.C. 2929.11, and has balanced the seriousness and recidivism factors under R.C. 2929.12. Although Brown disagrees, the transcript and the sentencing entry show the trial court noted several factors under R.C. 2929.12 indicating his conduct is "more serious" than conduct normally constituting the offense. It was pointed out the victims had all suffered serious psychological harm and the offender has a substantial history of criminal convictions including a prior armed bank robbery. Applying the first prong of the *Kalish* analysis, we do not find the trial court's sentence to be contrary to law.

{¶ 72} Applying the second prong of the *Kalish* analysis, we next determine if the trial court abused its discretion in selecting a sentence within the permissible statutory range. Reviewing the record, we are satisfied that the trial court gave careful and

substantial deliberation to the relevant statutory considerations. See *Kalish* at ¶ 20. Brown's sixth assignment of error is without merit. Nothing in the record suggests that the court's imposition of maximum and consecutive sentence was unreasonable, arbitrary, or unconscionable and therefore we find no abuse of discretion.

B. Pre-Sentence Investigation Report

{¶ 73} Brown argues that the trial court erred by overruling his motion for a PSI prior to imposing his sentence for 34 years incarceration. Brown contends that order and review of the PSI was necessary for possible mitigation of his sentence. Again, we find that Brown's assignment of error is not well-taken.

{¶ 74} Crim.R. 32.2 reads: "In felony cases the court shall, and in misdemeanor cases the court may, order a presentence investigation and report before imposing community control sanctions or granting probation." The Supreme Court of Ohio has interpreted the former version of this rule to mean that "[a] trial court need not order a presentence report pursuant to Crim.R. 32.2(A) in a felony case when probation is not granted." *State v. Cyrus* (1992), 63 Ohio St.3d 164, syllabus. Because the trial court did not place Brown on community control or probation, Brown had no right to a presentence investigation and report prior to sentencing.

C. Continuance for Mitigation

{¶ 75} We disagree with Brown's assertions that the trial court abused its discretion when it denied him a continuance. We find that the trial court was under no obligation to continue the matter to allow counsel additional time to prepare a statement

arguing for mitigation of sentence. Counsel should have been prepared for the possibility that sentencing would occur on the same day Brown was found guilty of the offenses. See *State v. Steffen* (1987), 31 Ohio St.3d 111, 121. See, also, *State v. Grant* (1993), 67 Ohio St.3d 465, 479; *State v. Powell* (Aug. 17, 1988), 1st Dist. No. C-870091. The grant or denial of a continuance is entrusted to the broad, sound discretion of the trial judge. *State v. Powell* (1990), 49 Ohio St.3d 255, 259; *State v. Unger* (1981), 67 Ohio St.2d 65, 67.

{¶ 76} The sixth assignment of error is therefore not well-taken.

VIII. DEADLINE OF PLEA OFFER

{¶ 77} In his seventh assignment of error, Brown claims that:

{¶ 78} "Trial counsel rendered ineffective assistance of counsel in violation of the 6th Amendment to the U.S. Constitution and Article I, Section 10, 16 of the Ohio Constitution."

{¶ 79} Specifically, Brown claims prejudice, asserting that he would have accepted the plea offer had he been aware there was a deadline. Browns' conduct, however, belies his claim that he would have accepted the plea – in fact, he had rejected the plea. As such, we find that Brown fails to demonstrate ineffective assistance of counsel, and prejudice resulting from his lack of knowledge of the state's offer deadline.

{¶ 80} To prevail on a claim of ineffective assistance of counsel, appellant must satisfy the two-prong test enunciated in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; accord *State v. Bradley* (1989), 42 Ohio St.3d 136,

paragraph two of the syllabus. Initially, Brown must show that counsel's performance was deficient. To meet that requirement, Brown must show counsel's error was so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Once the first prong is established, Brown must show that the error was prejudicial. "[F]ailure to satisfy one prong of the Strickland test negates a court's need to consider the other." *State v. Beavers*, 10th Dist. No. 08AP-1070, 2009-Ohio-4214, ¶ 8, citing *Strickland*, 466 U.S. at 697.

{¶ 81} Under the first prong, there is a strong presumption that defense counsel's conduct falls within a wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689. Brown must overcome the presumption that his trial counsel communicated to him the existence of a deadline for the acceptance of the plea offer.

{¶ 82} We find that Brown cannot show any evidence that the deadline was not communicated to him. Even assuming that he could, the evidence demonstrates that Brown would not have accepted the plea. In fact, he rejected the plea. Brown was unwilling to accept the plea unless his period of incarceration was limited to six months. The state refused Brown's counter-offer, leading Brown to complain at sentencing that counsel "refused to get me a type of plea that would be fair." Brown's statement demonstrates that he was unsatisfied with the terms of the plea and would not have accepted it even if he knew of the deadline.

{¶ 83} Thus, we find the seventh assignment of error is not well-taken.

IX. WAIVER

{¶ 84} In his final assignment of error, Brown complains that:

{¶ 85} "The trial Court lacked jurisdiction to try the Appellant without a jury."

{¶ 86} Specifically, Brown claims that the trial court lacked jurisdiction to conduct a bench trial because his written waiver was not filed by the court prior to the start of trial and the language of the written waiver did not sufficiently mirror the language set forth in the Ohio statute concerning waiver of trial by jury.

A. Filing of Waiver

{¶ 87} The record reflects that Brown signed a written jury waiver. Brown argues only that his jury waiver was not "filed" with the clerk of court prior to commencement of trial. He does not dispute that all other requirements of R.C. 2945.05 were satisfied.

{¶ 88} We distinguish the instant matter from the facts in *State v. Pless* (1996), 74 Ohio St.3d 333. In *Pless*, the Supreme Court of Ohio held that, "[a]bsent strict compliance with the requirements of R.C. 2945.05, a trial court lacks jurisdiction to try the defendant without a jury." Id. at paragraph one of the syllabus. See *State v. Tate* (1979), 59 Ohio St.2d 50, and *State ex rel. Jackson v. Dallman*, 70 Ohio St.3d 261, 1994-Ohio-235, construed and applied. In *Pless*, a jury waiver was never filed. *Pless*, 74 Ohio St.3d at 339. Here, the trial court accepted the waiver and it was journalized after the bench trial.

{¶ 89} In *State v. Sekera*, 8th Dist. No. 80690, 2002-Ohio-5972, ¶ 23, the court observed "*Pless* makes no rule pertaining to when the filing occurs. * * * The fact that

the waiver was not journalized until after the trial concluded is not fatal." In *State v. McKinney*, 8th Dist. No. 80991, 2002-Ohio-7249, the court again rejected a challenge to the trial court's jurisdiction where the signed jury waiver was not filed prior to the commencement of trial and, in fact, was filed after trial concluded. The court in *McKinney* held, "strict compliance with R.C. 2945.05 is met upon filing the jury waiver; there is no rule pertaining to when the filing must occur." *McKinney* at ¶ 7, citing *Sekera*, 2002-Ohio-5972, ¶ 21.

{¶ 90} We find that the trial court complied with the mandate of R.C. 2945.05. Accordingly, the trial court was not divested of jurisdiction to proceed with a bench trial.

B. Language of Waiver

{¶ 91} Brown next complains that the language of the written waiver did not sufficiently mirror the language set forth in R.C. 2945.05. R.C. 2945.05 and Crim.R. 23(A) mandate that waiver be in writing and signed by the defendant, and the requirements must appear of record for the trial court to have jurisdiction to try the defendant without a jury. See *Tate*, 59 Ohio St.2d 50; *State v. Riley* (1994), 98 Ohio App.3d 801. A written jury trial waiver is required to ensure that the defendant's waiver is intelligent, knowing, and voluntary. See *State v. Foust*, 105 Ohio St.3d 137, 2004-Ohio-7006, ¶ 52; *State v. Otte* (2002), 94 Ohio St.3d 167, 168. The written waiver must be time-stamped, filed with the clerk's office, and made part of the record. Brown complains only that the language on the waiver form did not exactly match the statute and that it made reference to his right to a jury trial under the United States Constitution.

{¶ 92} The Sixth Amendment to the United States Constitution and Section 10, Article I, Ohio Constitution, guarantee a criminal defendant the right to a jury trial. See *State ex rel. City of Columbus v. Boyland* (1979), 58 Ohio St.2d 490, fn. 1. Pursuant to Crim.R. 23(A), a criminal defendant may knowingly, voluntarily, and intelligently waive this constitutional right to a jury trial. *State v. Bays* (1999), 87 Ohio St.3d 15, 19, citing *State v. Ruppert* (1978), 54 Ohio St.2d 263, 271.

{¶ 93} Crim.R. 23(A) does not specifically detail the form of the waiver, but R.C. 2945.05 does. The written waiver of jury trial must contain similar language to that set forth in R.C. 2945.05. Brown does not cite any cases, however, that require that the language of the jury waiver be exactly the same as that set forth in R.C. 2945.05. Substantial compliance with the statutory language is sufficient. See *State v. Walker* (1993), 90 Ohio App.3d 352, 356.

{¶ 94} Ohio courts have declined to find that the language of the waiver must be a verbatim recitation of R.C. 2945.05. Based upon our review of the record, including a reading of the transcript of the trial, we find that the waiver language substantially complies with that required by R.C. 2945.05. In addition, the transcript reveals that Brown reaffirmed his waiver orally, in open court, following an admonition and explanation by the trial judge immediately preceding the trial. See *State v. Morris* (1982), 8 Ohio App.3d 12, 14 ("a written waiver signed by the defendant prior to trial and followed by a one sentence inquiry by the trial judge is sufficient to insure defendant's rights," citing *State v. Johnson* (Mar. 5, 1981), 8th Dist. No. 42722).

{¶ 95} Even though the waiver included the additional reference to Brown's right to a jury trial under the United States Constitution, the specific reference to the United States Constitution does not invalidate the waiver. We fail to see how it could. The source of the right to a trial by jury cannot be limited solely to Section 10, Article I, of the Ohio Constitution which guarantees a criminal defendant the right to a jury trial. The inclusion of "United States" in the waiver form does not invalidate it. As such, we find that the language in this waiver substantially complies with R.C. 2945.05.

{¶ 96} The eighth assignment of error is not well-taken.

X. CONCLUSION

{¶ 97} Brown's conviction for aggravated robbery was not against the sufficiency of the evidence or the manifest weight of the evidence. Brown had a screwdriver that he used as a weapon to facilitate the crime. The trial court did not err in sentencing Brown on both aggravated robbery and kidnapping. Although we find that the offenses were allied offenses of similar import, we conclude that they were committed with a separate animus as to each. We also find that Brown's aggregate sentence of 34 years was not an abuse of discretion. It was not disproportionate to the offenses committed. The trial court properly considered the sentencing factors. Brown failed to demonstrate ineffective assistance of counsel – he cannot accept a plea that he has already rejected. Additionally, Brown's waiver of jury trial was valid. The trial court had jurisdiction to hear this matter. We find, however, that the trial court failed to comply with the requirements set forth in

R.C. 2967.28. Under R.C. 2929.191, the trial court must conduct a limited resentencing hearing before it can correct the language of the sentencing entry.

{¶ 98} Wherefore, based upon the foregoing, this court finds that appellant was not prejudiced or prevented from having a fair trial and the judgment of the Wood County Court of Common Pleas is affirmed in part, and reversed in part, and remanded for resentencing in accordance with this decision. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED IN PART,
AND REVERSED IN PART.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
JUDGE

Keila D. Cosme, J. _____
CONCUR.
JUDGE