**[Cite as *State v. Pope*, 2013-Ohio-4091.]**

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

State of Ohio — Court of Appeals No. L-12-1168

Appellee — Trial Court No. CR0201102708

v.

Jason L. Pope — **DECISION AND JUDGMENT**

Appellant — Decided: September 20, 2013

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Andrew J. Lastra, Assistant Prosecuting Attorney, for appellee.

Edward J. Fischer, for appellant.

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**YARBROUGH, J.**

## I. Introduction

**{¶ 1}** Appellant, Jason Pope, appeals from the judgment of the Lucas County Court of Common Pleas, following a jury trial, convicting him of aggravated burglary, aggravated robbery, and felonious assault. For the following reasons, we affirm.

## A. Facts and Procedural Background

**{¶ 2}** On October 24, 2011, the Lucas County Grand Jury indicted appellant on three felony counts stemming from his alleged conduct on October 12, 2011: aggravated burglary in violation of R.C. 2911.11(A)(2), a felony of the first degree, aggravated robbery in violation of R.C. 2911.01(A)(1), a felony of the first degree, and felonious assault in violation of R.C. 2903.11(A)(2), a felony of the second degree. All three counts included a firearm specification pursuant to R.C. 2941.145. Appellant pleaded not guilty to the charges, and the matter proceeded to a jury trial.

**{¶ 3}** At the trial, the following evidence was elicited. On the night of October 12, 2011, the victim, Elliott Rayford, was at home in his apartment with his infant daughter. His wife, Kamisha Reese, was visiting. Rayford testified that around 10:30 p.m. he heard a knock at the door. Upon inquiry, the person at the door identified himself as J.P. Rayford testified that he had known J.P. for the past several months, and had spent time with him on numerous occasions. Rayford further identified appellant as J.P. Rayford went out into the hall to talk with appellant, shutting the apartment door behind him. After a few seconds of conversation, a second, unidentified male appeared from around the corner and held Rayford at gunpoint. Rayford stated that the second male said, "[W]e need everything you got." At that point, appellant moved behind Rayford to prevent him from backing away from the gunman. Rayford testified that he emptied his pocket, which contained $100-$150.

**{¶ 4}** Thereafter, Rayford was forced back inside his apartment and into the kitchen at gunpoint. In the kitchen, Rayford completely emptied his pockets, dropping his cell phones, money, credit cards, and keys on the floor. Rayford testified that the assailants then stated, "[W]e know you got more than this. Where (sic) the stash at?" Rayford testified that when he explained that he did not have a stash, appellant requested the gun from the other man, and then hit Rayford in the jaw with it, exclaiming, "[Y]ou think we playing with you. We need everything you got."

**{¶ 5}** At that point, Rayford proceeded into his bedroom, with the assailants following behind him. Appellant still had the gun. In his bedroom, Rayford ran and jumped through a closed window, shattering the glass. Pictures of the broken window, with the blinds outside on the ground, were entered into evidence. Rayford then took off running down an alley. He testified that appellant and the other man came out of the front door, and he could hear them calling him names. Rayford also testified that he heard three or four gunshots. Ultimately, Rayford made it safely to a neighbor's porch and called 9-1-1.

**{¶ 6}** Kamisha Reese, Rayford's wife, also testified regarding that night's events. Reese testified that appellant knocked on the door around 10:30 p.m. Reese recognized that it was appellant by the sound of his voice. Reese stated that Rayford went outside to talk to appellant and after about one or two minutes she saw Rayford walk backwards into the apartment. At that time, Reese knew something was wrong. Reese testified that as they came in, appellant was holding Rayford by the shirt and had a gun pointed at his

head. Reese reacted by trying to run to the bedroom to grab a baseball bat. She testified that the second, unidentified male also had a gun, and ordered her to come back.

**{¶ 7}** Reese then testified that appellant pushed Rayford into the kitchen and said that he is going to need everything in Rayford's pockets. She saw Rayford empty his pockets, and saw his keys, phone, and a couple hundred dollars fall to the floor. She stated that appellant then picked everything up and put it in his pocket. Reese testified that appellant then said, "I know you got more money than this." When Rayford replied that he did not, Reese observed appellant hit Rayford in the face with the gun.

**{¶ 8}** Reese testified that Rayford then led the assailants to the bedroom, and proceeded to jump out of the window. She stated that appellant and the other man ran through the apartment to chase after him. Shortly after they left through the front door, Reese testified that she heard two gunshots.

**{¶ 9}** Based on the evidence presented, the jury found appellant guilty of all three counts. However, the jury did not reach a verdict as to the firearm specifications. At sentencing, the trial court sentenced appellant to five years in prison on each count, to run consecutively, for a total prison term of 15 years.

### B. Assignments of Error

**{¶ 10}** Appellant now timely appeals, asserting three assignments of error for our review:

> I. The evidence was insufficient to support the convictions for the charges of aggravated burglary, aggravated robbery and felonious assault.

2. The appellant's trial counsel was ineffective with respect to the representation provided to appellant during pretrial negotiations and at trial.

3. The trial court erred at sentencing, as the appellant's convictions are for allied offenses of similar import, under O.R.C. 2941.25 and therefore the convictions should have been merged for purposes of sentencing.

## II. Analysis

### A. Sufficiency of the Evidence

**{¶ 11}** In his first assignment of error, appellant argues that his convictions were based on insufficient evidence. "In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law." *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). "The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

**{¶ 12}** In particular, appellant argues that the state failed to provide a motive for why appellant would commit a crime against someone that obviously knew him. Appellant argues it makes no sense that he would commit a crime of this nature when he could be so easily identified. Further, appellant contends that the testimony of Rayford and Reese was inconsistent. Finally, appellant notes that no shell casings were found

outside, no witness testified that Rayford came to his or her door in a frantic mood, no hospital report was presented as to Rayford's injuries, no pictures were offered of Rayford's face, and one of the responding officers testified that he did not notice any physical injury to Rayford.

**{¶ 13}** We find appellant's arguments to be without merit. Contrary to appellant's inference, the state is not required to prove motive. Instead, the state is tasked with proving the elements of the crime. In this case, the elements of aggravated burglary are that the appellant by force, stealth, or deception trespassed in an occupied structure when another person other than an accomplice of appellant is present, with purpose to commit in the structure any criminal offense with a deadly weapon or dangerous ordnance on or about his person or under his control. R.C. 2911.11(A)(2). The elements of aggravated robbery are that appellant had a deadly weapon on or about his person or under his control, and either displayed the weapon, brandished it, indicated that he possessed it, or used it while attempting or committing a theft offense. R.C. 2911.01(A)(1). Finally, the elements of felonious assault are appellant knowingly caused or attempted to cause physical harm to another by means of a deadly weapon or dangerous ordnance. R.C. 2903.11(A)(2).

**{¶ 14}** As an initial matter, we note that the fact that Rayford's testimony and Reese's testimony are inconsistent on a few points does not render the evidence insufficient. Rather, the inconsistency goes to the credibility and weight to be given to the evidence. Furthermore, the fact that some items, such as the shell casings or hospital

reports, were not found or admitted into evidence, has no bearing on whether the evidence that was admitted was sufficient to support the conviction. Here, looking at the evidence that was presented in the light most favorable to the prosecution, the testimony of Rayford and Reese establishes all of the elements of the crimes. Appellant and his accomplice robbed Rayford in the hall at gunpoint, and then forced him inside the apartment, where his wife and infant daughter were present, with the purpose to rob him further. When he did not provide what appellant was looking for, appellant struck Rayford in the face with the gun.

**{¶ 15}** Accordingly, appellant's first assignment of error is not well-taken.

### B. Ineffective Assistance of Counsel

**{¶ 16}** In his second assignment of error, appellant argues that his trial counsel was ineffective. Specifically, he complains of counsel's assertion during closing arguments that it was undisputed that appellant was present at Rayford's residence on the night in question. Appellant argues this constituted ineffective assistance because the only evidence linking him to the scene of the crime was the testimony of Rayford and Reese, who both had checkered histories. Appellant contends that if any juror had any doubt as to the credibility of Rayford and Reese, his trial counsel effectively removed that doubt by admitting that appellant was present.

**{¶ 17}** To demonstrate ineffective assistance of counsel, appellant must satisfy the two-prong test developed in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). That is, appellant must show counsel's performance fell

below an objective standard of reasonableness, and a reasonable probability exists that but for counsel's error, the result of the proceedings would have been different. *Id.* at 687-688, 696. Under the first prong, "[j]udicial scrutiny of counsel's performance must be highly deferential. * * * [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance * * *." *State v. Bradley*, 42 Ohio St.3d 136, 142, 538 N.E.2d 373 (1989), quoting *Strickland* at 689. In addition,

> a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. *Id.* at 143, quoting *Strickland* at 697.

**{¶ 18}** We do not find that appellant has established that a reasonable probability exists that but for counsel's error, the result of the proceeding would have been different. Here, Rayford and Reese were unequivocal in their identification of appellant as the perpetrator, having both known him for several months. Furthermore, no evidence was presented alleging that appellant was in another location at the time of the incident. Appellant called two witnesses in his defense. The first, Michael Gold, testified that he lived across the street from Rayford, and that appellant left Gold's apartment around 10:00 p.m. to go visit his friend Mercedes Sumrow. However, appellant's second

witness, Sumrow, testified that she never saw appellant that day. Thus, the jury was not provided with evidence that contradicted the testimony of Rayford and Reese that appellant knocked on the door around 10:30 p.m. Therefore, we cannot conclude that a reasonable probability exists that the result of the proceedings would have been different but for counsel's assertion that appellant was undisputedly present at Rayford's apartment.

**{¶ 19}** Accordingly, appellant's second assignment of error is not well-taken.

### C. Allied Offenses

**{¶ 20}** In his third assignment of error, appellant argues that the conviction for felonious assault should have merged with either the conviction for aggravated robbery or aggravated burglary. The Ohio Supreme Court has established a two-step test to determine whether offenses are allied offenses of similar import under R.C. 2941.25(A). First, we must examine "whether it is possible to commit one offense *and* commit the other with the same conduct." (Emphasis sic.) *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, ¶ 48. If the answer is yes, we must then determine "whether the offenses were committed by the same conduct, i.e., 'a single act, committed with a single state of mind.'" *Id.* at ¶ 49, quoting *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, ¶ 50 (Lanzinger, J., dissenting).

**{¶ 21}** In addressing the first step, we find that in either case it is possible to commit both offenses with the same conduct. An examination of the elements reveals that aggravated robbery under R.C. 2911.01(A)(1) prohibits the use of a deadly weapon

while committing a theft offense, and felonious assault under R.C. 2903.11(A)(1) prohibits knowingly causing or attempting to cause physical harm by means of a deadly weapon. Thus, the single act of striking a person with a deadly weapon to effectuate a theft could constitute both offenses. Similarly, aggravated burglary under R.C. 2911.11(A)(2) prohibits, in part, trespassing with a purpose to commit any criminal offense with a deadly weapon. Such an offense could be felonious assault under R.C. 2903.11(A)(1). Therefore, the first step is satisfied.

**{¶ 22}** We must now turn our attention to whether the offenses in this case actually were committed by the same conduct. We hold that they were not. Here, the aggravated robbery occurred and was completed outside of the apartment when appellant and the unknown male took Rayford's money at gunpoint. Thus, the aggravated robbery does not merge with the felonious assault, which was committed by separate conduct inside of the apartment.

**{¶ 23}** After committing the aggravated robbery, appellant then engaged in a separate act to force his way into the apartment for the purpose of taking Rayford's "stash." This act constituted the aggravated burglary. When Rayford stated that he did not have anything else to take, appellant again formed a separate intent to strike him in the face, thereby committing the felonious assault. Notably, there is no evidence in the record to suggest that appellant forced his way into the residence with the purpose of inflicting physical harm. Thus, the aggravated burglary does not merge with the

felonious assault because the two were committed by separate acts with separate states of mind.

**{¶ 24}** Accordingly, appellant's third assignment of error is not well-taken.

## III. Conclusion

**{¶ 25}** For the foregoing reasons, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

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

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE