

[Cite as *State v. Harris*, 2015-Ohio-2686.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO)	CASE NO. 13 MA 37
)	
PLAINTIFF-APPELLEE)	
)	
VS.)	OPINION
)	
CORNELIUS HARRIS)	
)	
DEFENDANT-APPELLANT)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Court of Common Pleas of Mahoning County, Ohio
Case Nos. 09 CR 499; 09 CR 821; 10 CR 98

JUDGMENT: Affirmed in part. Reversed and Remanded in part. Vacated.

APPEARANCES:
For Plaintiff-Appellee: Atty. Paul J. Gains
Mahoning County Prosecutor
Atty. Ralph M. Rivera
Assistant Prosecuting Attorney
21 West Boardman Street, 6th Floor
Youngstown, Ohio 44503

For Defendant-Appellant: Atty. Timothy Young
Ohio Public Defender
Atty. Francisco E. Lüttecke
Assistant State Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215

JUDGES:
Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Carol Ann Robb

Dated: June 29, 2015

[Cite as *State v. Harris*, 2015-Ohio-2686.]
WAITE, J.

{¶1} Appellant Cornelius Harris appeals a January 22, 2013 Mahoning County Common Pleas Court jury verdict finding him guilty on two counts of felonious assault and two counts of possession of a deadly weapon while under detention. Appellant has raised eight assignments of error, three of which are procedural in nature. The remaining five errors challenge the verdict and sentencing aspects of his case. In regard to the procedural arguments, Appellant first argues that despite his desire to represent himself, he did not knowingly, voluntarily, and intelligently waive his right to counsel. Second, he argues that the trial court erroneously granted the state's motion for joinder of the offenses despite the fact that each act should have been separated. Finally, Appellant argues that the trial court improperly permitted the state to introduce prior bad acts in violation of Evid.R. 403.

{¶2} In regard to the remaining assignments, Appellant claims that the two charges for possession of a deadly weapon while under detention were not supported by sufficient evidence, as the jury verdict form failed to include the requisite R.C. 2945.75 findings. He also argues that the trial court failed to make the requisite findings under R.C. 2929.14(C) before imposing consecutive sentences. Next, he contends that the trial court improperly failed to merge the convictions on felonious assault with his possession of a deadly weapon convictions at sentencing. Finally, he contends that the cumulative effect of all of the errors denied him his right to a fair trial. For the following reasons, Appellant's arguments regarding the insufficient jury verdict form and the trial court's failure to make the requisite R.C. 2929.14(C) findings before sentencing him to consecutive sentences have merit.

Accordingly, the trial court's rulings as to those issues are reversed and remanded for resentencing in accordance with this Opinion. Appellant's remaining assignments of error are without merit and the judgment of the trial court is affirmed on those issues.

Factual and Procedural History

{¶3} Appellant was serving a 99-year sentence at the Ohio State Penitentiary ("OSP") for aggravated robbery, felonious assault, and vandalism. While in detention, Appellant had a series of incidents with various corrections officers. The first occurred on October 19, 2008. Although some of the facts are in dispute, neither party disputes that Appellant punched Officer Timothy McVey in the face and caused him to fall down a flight of stairs. McVey suffered multiple injuries, including several broken teeth.

{¶4} The second incident occurred on December 30, 2008. Again, the facts are largely disputed. However, the parties agree that two corrections officers attempted to transport a prisoner from the cell next to Appellant's and when the control desk attempted to open the cell door, Appellant's door opened instead. Appellant came out of his cell armed with a shank and a struggle ensued. During the struggle, Appellant stabbed Officer James Burns.

{¶5} The third incident occurred on July 18, 2009 when Appellant was taken to receive a medical examination. After the examination, when Officer Waylon Wine attempted to cuff Appellant, he stabbed Wine with a shank.

{¶6} The fourth and final incident occurred on November 27, 2009 when Appellant covered the window of his cell and refused to leave the cell. After efforts to

remove him were unsuccessful, an extraction team was sent to handle the situation. As the team attempted to gain control of him, he stabbed several corrections officers with a shank.

{¶7} As a result of these incidents, Appellant was charged with two counts of attempted aggravated murder, one count of attempted murder, three counts of felonious assault, and two counts of possession of a deadly weapon while under detention. The trial court granted the state's motion for joinder of the offenses and denied Appellant's motion to sever.

{¶8} The trial court appointed Appellant counsel; however, Appellant did not agree with his counsel's strategy and the trial court granted counsel's motion to withdraw and Appellant's motion to remove counsel. The trial court then appointed Appellant a second attorney. Again, Appellant did not approve of his counsel's strategy and the trial court granted counsel's motion to withdraw. The trial court appointed Appellant an attorney for a third time. Again, Appellant did not agree with the defense strategy and the trial court granted counsel's motion to withdraw. After the third attorney was removed as counsel, Appellant chose to represent himself and the trial court accepted his signed judgment entry of waiver of counsel after holding a hearing. Despite Appellant's request to represent himself, the trial court ordered the third attorney to attend trial each day as stand-by counsel.

{¶9} At trial, Appellant defended the charges on the basis of self-defense. He was acquitted on both aggravated murder charges, the attempted murder charge, and eight counts of felonious assault. In case number 09 CR 499, Appellant was

convicted on one count of felonious assault, a felony of the first degree, and sentenced to nine years of incarceration. In case number 09 CR 821, Appellant was convicted on one count of felonious assault, a felony of the first degree, and one count of possession of a deadly weapon while under detention, a felony of the second degree. He was sentenced to nine years for the felonious assault and seven years for the possession charge, to be served consecutively. Finally, in case number 10 CR 98, Appellant was convicted on possession of a deadly weapon while under detention, a felony of the second degree, and was sentenced to seven years of incarceration. The trial court ordered each sentence to run consecutively for an aggregate total of 32 years, and concurrently with his original ninety-nine year sentence. This timely appeal followed.

First Assignment of Error

Mr. Harris was deprived of his right to counsel under the Sixth and Fourteenth Amendments to the United States Constitution and Section 10, Article I of the Ohio Constitution when the trial court failed to properly inquire into whether Mr. Harris knowingly, intelligently, and voluntarily waived his right to counsel and whether he knowingly, intelligently, and voluntarily asserted his right to self-representation.

{¶10} Although Appellant concedes that it was his wish to represent himself, he contends that he did not knowingly, voluntarily, and intelligently waive his right to counsel. Appellant claims that the trial court neglected to inform him of the charges against him, particularly the lesser-included offenses. Appellant claims this was

error, given the fact that most of his convictions actually were on the lesser-included offenses. Appellant further urges that the trial court failed to advise him of the maximum possible penalty for each offense, and complains that the maximum possible penalties were omitted from the written entry of waiver of counsel.

{¶11} In response, the state disputes Appellant's contention that the trial court failed to adequately inform him of the dangers of self-representation. In support of its argument, the state notes that Appellant acknowledged his understanding of the inherent dangers of self-representation after engaging in a colloquy with the trial court.

{¶12} "The Sixth Amendment, as made applicable to the states by the Fourteenth Amendment, guarantees that a defendant in a state criminal trial has an independent constitutional right of self-representation and that he may proceed to defend himself without counsel when he voluntarily, and knowingly and intelligently elects to do so." *State v. Gibson*, 45 Ohio St.2d 366, 345 N.E.2d 399 (1976), paragraph one of the syllabus, citing *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). According to Crim.R. 44(C), "[w]aiver of counsel shall be in open court and the advice and waiver shall be recorded as provided in Rule 22. In addition, in serious offense cases the waiver shall be in writing."

{¶13} The defendant may intelligently and voluntarily waive the right to counsel only after being informed of the inherent dangers in self-representation. *State v. Downie*, 183 Ohio App.3d 665, 2009-Ohio-4643, 918 N.E.2d 218, ¶22 (7th Dist.), citing *State v. Ebersole*, 107 Ohio App.3d 288, 293, 668 N.E.2d 934 (1995);

Faretta, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562. A reviewing court must review the totality of the circumstances to determine whether a defendant knowingly and intelligently waived his right to counsel. *Downie* at ¶26.

{¶14} In order for a defendant's waiver of his right to counsel to be effective, the trial court "must make a sufficient inquiry to determine whether the defendant fully understands and intelligently relinquishes his right to counsel." *Id.* at ¶22, citing *Gibson, supra*, at paragraph two of the syllabus. The waiver "must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter." *Gibson, supra*, at 377.

{¶15} While the charges against Appellant were not read into the record and were omitted from the written journal entry, based on the totality of circumstances here we find that Appellant knowingly, voluntarily, and intelligently waived counsel. Before accepting Appellant's waiver of counsel, the trial court engaged in a colloquy with him and warned him of the dangers inherent in self-representation, including that he would be held to the same standards as an attorney. He was also informed that his most recent counsel would be available throughout trial on stand-by. Importantly, Appellant had a representation from three separate attorneys who were appointed to represent him in this case. He was not satisfied with their representation and sought their removal. It was only after the third such incident that Appellant determined to represent himself.

{¶16} Appellant was first appointed counsel on February 18, 2010. Counsel represented Appellant during the arraignment process and continued to represent him until June 30, 2010. On that date, the trial court granted both Appellant's *pro se* motion to remove his counsel and counsel's motion to withdraw based on a stated difference of opinion regarding defense strategy. The trial court then appointed new counsel to represent Appellant.

{¶17} The second attorney represented Appellant from June 30, 2010 until March 19, 2012 when the trial court granted counsel's motion to withdraw, again, based upon a disagreement as to defense strategy. Once counsel was permitted to withdraw, the trial court appointed a third attorney to represent Appellant.

{¶18} Appellant's third attorney represented him from March 19, 2012 until August 2, 2013 when the trial court accepted Appellant's signed judgment entry of waiver of counsel. The attorney was ordered to remain on the case as stand-by counsel. Importantly, this stand-by counsel attended court each day of trial and was immediately available to Appellant.

{¶19} We recognize that Ohio courts have held that stand-by counsel does not relieve a trial court from its duty to inform a defendant of the perils of self-representation. See *State v. Irvin*, 8th Dist. No. 90772, 2009-Ohio-848, ¶39; *State v. Guess*, 4th Dist. No. 11CA33, 2014-Ohio-771, ¶14. However, this Appellant not only had stand-by counsel available but he also had been counseled by three different attorneys appointed to represent him, all of which were removed based on differences of opinions with Appellant regarding trial strategy. Clearly, at the time

Appellant sought to represent himself he had a very firm opinion as to the management of his case, an opinion he reached only after months of discussion with his various attorneys. By this point in the proceeding, it is equally clear from the record that Appellant was steadfast in his determination to proceed on his own.

{¶20} We also must note that Appellant acknowledged his understanding of the lesser-included felony assault charges during a motion hearing. At the hearing, Appellant asked the court to reconsider its denial of his motion to sever the charges and he stated “that [severance] will result in a single trial of all four of the alleged actions for attempted murder and felonious assault.” (4/29/10 Motion Hrg., p. 11.) In addition, through the indictment and superseding indictment, Appellant was placed on notice that he was charged with attempted aggravated murder, attempted murder, and possession of a deadly weapon while under detention. Thus, this record reflects that Appellant was aware of the charges against him, including some of the lesser-included offenses.

{¶21} This record reflects that Appellant was represented by various counsel at every stage of the proceedings up until trial. He sought removal of each appointed counsel because he did not agree with their trial strategy. The trial court engaged in a colloquy with Appellant and warned him of the inherent dangers of self-representation. His stand-by counsel was present at court and was made available to him at the waiver of counsel hearing and throughout trial. The only information omitted from the colloquy were the charges against Appellant and the maximum possible punishment, information that Appellant was clearly already aware of based

on a totality of circumstances. Hence, Appellant's waiver of counsel was knowingly, voluntarily, and intelligently made and Appellant's first assignment of error is without merit and is overruled.

Second Assignment of Error

The trial court committed reversible error when it overruled Mr. Harris's motion to sever and granted the State's motion for joinder in violation of Crim.R. 8 and Crim.R. 14, and in violation of Mr. Harris's rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 16 of the Ohio Constitution.

{¶22} Appellant contends that the trial court erred in granting the state's motion for joinder and denying Appellant's motion to sever. Although the trial court permitted joinder based on an overlap between the evidence and the witnesses, Appellant urges that this purported overlap was illusory. In support of his argument, Appellant notes that only one witness testified regarding more than one incident. As such, Appellant asserts that the witnesses would not have been inconvenienced by separate trials. Further, Appellant states that each incident took place at a different part of the prison over a thirteen-month span, thus there was no evidence of a common scheme or plan.

{¶23} Appellant complains that although the trial court requested a proposed jury instruction regarding the separate nature of the offenses from both sides, neither side complied with the court's request. Appellant asserts that the trial court also failed to hold a hearing to determine the frequency with which such an instruction

would be given to the jurors. According to Appellant, this error resulted in the trial court's decision to give the instruction only once. As the cumulative effect of the offenses could have influenced the jury, Appellant contends that the trial court erred by failing to instruct the jury multiple times on the separate nature of the offenses.

{¶24} The state asserts that joinder is the general rule rather than the exception. As such, the state notes that the law favors joinder in the absence of actual prejudice. The state argues that the evidence presented on each offense was simple and direct, thus the stricter test of admissibility need not be met. The state argues that Appellant's acquittal on several charges demonstrates a lack of prejudice. As the evidence was simple and direct for each incident and Appellant cannot show prejudice, the state contends that the trial court properly granted joinder of the offenses.

{¶25} Pursuant to Crim.R. 8(A), joinder is permitted if the offenses are: (1) of the same or similar character; (2) based on the same act or transaction; (3) based on two or more acts or transactions connected together or constituting parts of a common scheme; or, (4) part of a course of criminal conduct. The defendant bears the burden of proving that the trial court abused its discretion in denying a motion to sever and the burden of proving prejudice if joinder has been granted. *State v. Moore*, 2013-Ohio-1435, 990 N.E.2d 625, ¶23 (7th Dist.), citing *State v. Coley*, 93 Ohio St.3d 253, 259, 754 N.E.2d 1129 (2001). Accordingly, we must first determine whether Appellant's conduct fits within at least one of these categories.

{¶26} Under the first category, each incident involved an aggressive act by Appellant towards a corrections officer. Three out of the four acts involved Appellant stabbing a corrections officer. In the fourth, he severely injured an officer by punching him in the face and knocking him down a flight of stairs. Although this fourth incident does not involve the exact same conduct as the other three incidents, the law requires only that the conduct be similar. Because all four incidents involved assault against a corrections officer, we find that each incident had a similar character and joinder was proper. Although only one category needs to be met to uphold joinder, it is clear that Appellant meets every standard of the test.

{¶27} The second and third categories are similar, distinguished only by the number of acts or transactions involved. As the facts clearly show that four acts were committed, the third category applies and we must determine whether the offenses were based on two or more acts or transactions connected together or constituting parts of a common scheme. In this case, Appellant admitted at trial that his actions constituted retaliation against the corrections officers who repeatedly tormented him. As each incident arose from his desire to seek vengeance against the officers, this conduct could be seen as a part of a common scheme or plan. Thus, joinder was proper.

{¶28} Turning to the fourth category, whether Appellant's motivation was to injure the officers or an act of self-defense, at the time the motion was granted there was evidence that his conduct was part of an overall string of violence and defiance of authority. As it appears that Appellant was targeting corrections officers, his

conduct could arguably be characterized as part of a course of criminal conduct. Thus, joinder was proper under the fourth category, as well.

{¶29} As the nature of the offenses warranted joinder, we must next determine whether Appellant suffered prejudice. A prosecutor can defeat a claim of prejudice through two methods. The first is accomplished by showing that the evidence presented at trial for each offense was simple and direct. *Moore, supra*, at ¶23, citing *Coley, supra*. Under the second method, the prosecutor must show that all of the evidence presented at trial would be separately admissible in separate trials. *Id.* If the state is able to show that the evidence is simple and direct, then there is no need to prove the stricter admissibility test. *State v. Johnson*, 88 Ohio St.3d 95, 109, 723 N.E.2d 1054 (2000). Thus, we will begin with a discussion of whether the evidence was simple and direct.

{¶30} Evidence is simple and direct when it is apparent that the jury was not confused as to which evidence proved which act. *Coley, supra*, at 259. Our decision in *State v. Burns*, 7th Dist. No. 09-MA-193, 2012-Ohio-2698 provides guidance for our current analysis. In *Burns*, the defendant was charged with nine offenses stemming from five incidents that occurred while he was incarcerated at the OSP. The charges were based on allegations that the defendant assaulted several corrections officers. Similar to the instant case, the trial court denied his motion to sever the charges and held one trial. After trial, the jury found the defendant not guilty on seven of the charges and guilty on the remaining two charges. On appeal, we found that joinder was proper under Crim.R. 8(A) because the defendant was

unable to show prejudice and the evidence presented at trial was simple and direct.
Id.

{¶31} Under a simple and direct analysis, in *Burns* we found several facts to be critical. First, each officer who was a victim of one of the offenses provided testimony solely about the incident that caused his injury. Second, none of the officers' testimony was long or involved. Finally, the jury was clearly able to separate the charges, as the defendant was acquitted of seven out of the nine offenses, which accounted for four out of the five incidents. *Id.*

{¶32} Similar to *Burns*, each officer in the instant case limited his testimony to details about the incident that caused his injury. Each officer testified as to the date and the location of the incident within the prison and none of the officers' testimony was particularly lengthy or involved. Finally, the jury acquitted Appellant of nine out of the eleven counts that he faced. Thus, this record demonstrates that the jury was able to separate the evidence as to each offense. Accordingly, we find that the evidence in this case was simple and direct and there is no need to proceed further on this issue.

{¶33} As joinder was proper and Appellant is unable to show prejudice, the trial court did not err in granting the state's motion for joinder and denying Appellant's motion to sever. Although not contained within the heading of his assignment of error, Appellant also presents an argument that the trial court erred in regard to the accompanying jury instruction.

{¶34} Specifically, Appellant contends that the trial court erred because the jury was instructed on the separate nature of the offenses on only one occasion. Appellant argues that although the trial court ordered both sides to submit proposed jury instructions, neither side complied with the order and that the trial court failed to hold a hearing to determine how many times this instruction would be given to the jury. As the cumulative effect of the offenses could have influenced the jury, Appellant contends that the trial court erred by instructing the jury as to this issue only one time.

{¶35} Appellant appears to be correct that proposed jury instructions were not submitted by either party. He seeks to have this declared an error of the trial court even though he admits that he also failed to comply with the court's order. Appellant also concedes that he failed to object at any point during the trial on this issue prior to closing arguments. Appellant similarly failed to object to the content of the instruction given by the court after closing arguments. Generally, a failure to object to the giving or failure to give instructions before the jury begins deliberations waives all but plain error. *State v. Moore*, 7th Dist. No. 12 MA 8, 2013-Ohio-1435, ¶56.

{¶36} Regardless, the instruction given by the trial court appears to be both proper and adequate:

The charges set forth in each count of the indictment constitute a separate and distinct matter. You must consider each count and the evidence applicable to each count separately and you must state your finding as to each count uninfluenced by your verdict as to any other

count. The defendant may be found guilty or not guilty of any one or all of the offenses charged.

(Tr. Vol. V, pp. 950-951.)

{¶37} Appellant has not presented any authority to show why multiple instructions were necessary, other than mere speculation that the jury could have been swayed by the number of offenses. In fact, the opposite appears to be true, as the jury's not guilty verdict on nine counts indicates that they were not swayed by the number of charged offenses. Accordingly, Appellant has not shown that the trial court's failure to give his desired instruction to the jury more than one time affected the outcome of trial. Appellant's second assignment of error is without merit and is overruled.

Third Assignment of Error

The trial court denied Mr. Harris his state and federal constitutional rights to due process of law when it erred in admitting evidence of Mr. Harris's prior bad acts and character to prove he acted in conformity with these past acts. Fifth and Fourteenth Amendments, United States Constitution; Sections 10 and 16, Article I, Ohio Constitution; Evid.R. 403(A), 404(B); R.C. § 2945.59.

{¶38} Statements made by counsel in opening statements are not evidence; thus, latitude is given "as long as counsel stays within the boundaries of the record." *State v. Frazier*, 73 Ohio St.3d 323, 338, 652 N.E.2d 1000 (1995), citing *State v. Byrd*, 32 Ohio St.3d 79, 82, 512 N.E.2d 611 (1987).

{¶39} When a party fails to object at trial, any error on appeal relative to that testimony is waived unless there was plain error. *State v. Ballew*, 76 Ohio St.3d 244, 251, 667 N.E.2d 369 (1996). “Plain error does not exist unless it can be said that but for the error, the outcome of the trial would clearly have been otherwise.” *State v. Moreland*, 50 Ohio St.3d 58, 62, 552 N.E.2d 894 (1990).

{¶40} Appellant contends that the trial court erred in admitting evidence that he was housed at OSP because of misconduct that occurred while he was at another prison. Appellant urges that it was already abundantly clear that he was incarcerated at the time of the incidents, thus the statement was unnecessary. Although Appellant concedes that he failed to object at trial, he argues that the statement affected his substantial rights and the outcome of the trial.

{¶41} Although Appellant frames his argument under the authority of Evid.R. 403, we note that opening statements are not evidence and Evid.R. 403 does not apply. Rather, the question is whether the state stayed within the boundaries of the record. In relevant part, in the opening statement the prosecutor declared:

You are going to hear that the Ohio State Penitentiary isn't where people get sent directly after they commit a crime. They are sentenced to the Department of Corrections. They go through a process assigned to what the Department of Corrections feels is an appropriate institution.

The people that are at the Ohio State Penitentiary aren't there because of the crimes they have committed. They are there because those are

the inmates that cause problems in other prisons. These are the worst of the worst.

(Tr. Vol. II, p. 234.)

{¶42} The state does not specifically mention Appellant or the acts that led him to be housed at the OSP. The state appears to have used the statement to set up Officer Wiley's testimony, which discussed how the OSP was designed, which inmates were sent to the OSP, and other background information. Further, testimony was presented about the security procedures which are in place largely because of the makeup of the inmates.

{¶43} The security procedures were relevant in this case as several of the incidents occurred while these procedures were being carried out. For instance, one incident occurred when Appellant refused to leave his cell and an extraction team was sent in to remove him. As the team carried out the extraction, Appellant stabbed one of the corrections officers. Given the fact that the opening statement was relevant to later testimony, the statement was within the bounds of the record.

{¶44} Appellant has also not shown how the comments may have affected the outcome of the trial. This is especially important as Appellant was acquitted of nine of the eleven charges he faced. We must also note that the jury was already aware of this information, as Appellant himself stated during *voir dire*, "[t]hen you got the supermax. That's going up the other step. That's basically the worst of the worst. Ohio looks at that if you are supermax security -- I am supermax." (Tr. Vol. I, p. 124.)

{¶45} Appellant also discussed the acts that led him to be placed at the OSP during his opening statement: “I was in population [at Lucasville] when I got there, and I got into a fight when I was there, and they put me in 4B. That’s another -- it’s a lockdown max.” (Tr. Vol. IV, p. 760.) He acknowledged that his involvement in an incident with several corrections officers while at Lucasville led to his transfer to OSP. As Appellant not only informed the jury of the type of prisoners housed at the OSP but additionally chose to explain the specific acts that led to his transfer, he cannot show that but for the state’s comments his outcome would have been different. Accordingly, Appellant’s third assignment of error is without merit and is overruled.

Fourth Assignment of Error

Mr. Harris's convictions for possession of a weapon while under detention violated his rights to due process of law, because the evidence presented at trial was insufficient to establish all the requisite elements of that offense. Fifth and Fourteenth Amendments, United States Constitution; Sections 10 and 16, Article I, Ohio Constitution.

{¶46} R.C. 2923.131(B) and (C)(2)(b)(i) states that:

(B) No person under detention at a detention facility shall possess a deadly weapon.

(C) Whoever violates this section is guilty of possession of a deadly weapon while under detention.

* * *

(b) A felony of the second degree if any of the following applies:

(i) The most serious offense for which the person was under detention is a felony of the first degree committed on or after July 1, 1996, or an aggravated felony of the first degree committed prior to July 1, 1996.

{¶47} A sufficiency of the evidence review focuses on the prosecution's burden of production, as opposed to a manifest weight of the evidence review which centers on the prosecution's burden of persuasion. *State v. Merritt*, 7th Dist. No. 09 JE 26, 2011-Ohio-1468, ¶34. An appellate court does not determine "whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." *Id.* at ¶35, citing *State v. Thompkins*, 78 Ohio St.3d 380, 390, 678 N.E.2d 541 (1997).

{¶48} Pertaining to his convictions on possession of a deadly weapon while under detention, Appellant contends that the state failed to provide evidence to establish that he was under detention for a statutorily defined type and level of crime, which is an element of the offense. Appellant asserts that while the state presented evidence that he was under detention for aggravated robbery, felonious assault, and vandalism, it failed to present evidence as to the felony level associated with those charges.

{¶49} The state argues in response that testimony was presented to show that Appellant was under detention for the crimes of aggravated robbery, felonious assault, and vandalism. Further, the state noted that evidence was presented to show that Appellant was sentenced to 99 years of incarceration for those crimes.

Thus, the state contends that it presented sufficient evidence to show that Appellant was convicted of a first-degree felony.

{¶50} The heart of this issue is whether the state presented sufficient evidence to show that Appellant was under detention for a first-degree felony at the time of the incident. Through Officer Wiley and Appellant's own testimony, the state presented evidence that Appellant was incarcerated for several counts of aggravated robbery, felonious assault, and vandalism. Appellant informed the jury that his sentence for those offenses was 99 years and that he had originally been sent to serve his sentence at Lucasville, a maximum security prison.

{¶51} First and foremost, the aggravated nature of the robbery charge is enough for a reasonable juror to find that Appellant was incarcerated for a first-degree felony. In addition, Appellant informed the jury that his sentence was 99 years, which again is enough for a reasonable juror to find that Appellant was incarcerated for a first-degree felony. Appellant told the jury that after the intake procedure following those convictions, he was sent to a maximum security prison. Taken together, the aggravating nature of the offense, the lengthy sentence, and the level of his prison presents sufficient evidence from which a reasonable juror could find that Appellant was incarcerated for a first-degree felony.

{¶52} As there is sufficient evidence showing that Appellant was under detention for a first-degree felony, the state has met its burden. Accordingly, Appellant's fourth assignment of error is without merit and is overruled.

Fifth Assignment of Error

The trial court committed reversible error when it entered a judgment of conviction against Mr. Harris for two second-degree felony counts of possession of a deadly weapon while under detention, in violation of R.C. 2945.75(A)(2), and in violation of Mr. Harris's rights to due process under the Fourteenth Amendment to the United States Constitution, and Article I, Section 16 of the Ohio Constitution.

{¶53} In relevant portion, R.C. 2923.131 provides the degrees for the crime of possession of a deadly weapon while under detention:

(C)(2) If the offender, at the time of the commission of the offense, was under detention in any other manner, possession of a deadly weapon while under detention is one of the following:

* * *

(b) A felony of the second degree if any of the following applies:

(i) The most serious offense for which the person was under detention is a felony of the first degree committed on or after July 1, 1996, or an aggravated felony of the first degree committed prior to July 1, 1996.

{¶54} R.C. 2945.75(A)(2) states that:

When the presence of one or more additional elements makes an offense one of more serious degree:

* * *

(2) A guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional element or elements are present. Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged.

{¶55} Appellant states that he was charged with two separate counts of possession of a deadly weapon, which includes offense levels predicated on the severity of the offense for which a defendant was being detained at the time of the newly charged offense. As the type of offense for which a defendant was detained affects the level of the offense being charged, Appellant argues the statute contains an aggravating element and falls within the purview of R.C. 2945.75(A)(2).

{¶56} Appellant explains that when a charged offense includes an aggravating element, R.C. 2945.75(A)(2) requires the verdict form to state either the degree of the offense for which the defendant is convicted, or that an aggravating element has been found. In this case, Appellant argues that the verdict form does not include either the degree of the offense or that an aggravating element was found. Thus, Appellant contends that his jury verdict constitutes only a finding of the lowest degree of the offense, a fifth-degree felony.

{¶57} The state disputes Appellant's contention that R.C. 2945.75(A)(2) applies in this case. The state argues that while a statute containing an enhancing element invokes R.C. 2945.75(A)(2), a statute that merely includes differing levels of offense does not. The state argues that the charged offense in this case merely contains different levels, thus R.C. 2945.75(A)(2) does not apply.

{¶58} While not addressed by the parties, Appellant failed to object to the verdict form. However, the Ohio Supreme Court in *State v. McDonald*, 137 Ohio St.3d 517, 2013-Ohio-5042, 1 N.E.3d 374, has held that there must be strict compliance with the statutory mandates when looking at this issue. In *State v. Barnette*, 7th Dist. No. 13 MA 183, 2014-Ohio-5405, we applied *McDonald* and ruled that “the verdict form itself is the only relevant thing to consider in determining whether the dictates of R.C. 2945.75 have been followed.” *Id.* at ¶38.

{¶59} Accordingly, our discussion begins with an analysis of R.C. 2923.131, as the outcome here is predicated on whether the statute setting out the offense contains an aggravating or enhancing element. R.C. 2923.131 contains five degrees which are based on the nature of the offense for which the offender was originally placed in detention. There is no question that the five degrees of R.C. 2923.131 are based on the severity of the underlying offense. The more severe the underlying offense, the more severe the degree of resulting punishment. Thus, it appears plain that the statute contains aggravating or enhancing elements.

{¶60} Since the statute includes aggravating or enhancing elements, R.C. 2945.75 applies. The jury verdict form in this matter was required to state either the degree of the offense for which Appellant was convicted or that an aggravating element was found. The record clearly demonstrates that neither were included on the form. Thus, the jury verdict did not comply with R.C. 2945.75.

{¶61} R.C. 2945.75(A)(2) states that when there is a failure to comply, “a guilty verdict constitutes a finding of guilty of the least degree of the offense

charged.” Accordingly, Appellant’s fifth assignment of error is sustained and his two convictions on second-degree felony possession of a deadly weapon while under detention are vacated and the matter is remanded to the trial court. Upon remand, the trial court is instructed to enter a judgment convicting Appellant on the two fifth-degree felonies and to sentence him accordingly.

Sixth Assignment of Error

The trial court erred when it imposed separate sentences for offenses that arose from the same conduct, were not committed separately or with a separate animus, and should have been merged for sentencing purposes under R.C. 2941.25.

{¶62} R.C. 2941.25(A) provides that when the same conduct involves two or more allied offenses of similar import, the defendant may only be convicted of one offense. On the other hand, R.C. 2941.25(B) states that when a defendant’s conduct involves two or more dissimilar offenses, or when the conduct is similar but is committed separately or with a separate animus, the defendant may be convicted of all offenses. As merger of an allied offense is a question of law, an appellate court must conduct a *de novo* review. *State v. Burns*, 7th Dist. No. 09-MA-193, 2012-Ohio-2698, ¶60.

{¶63} Appellant asserts that the trial court erred by failing to merge his convictions for felonious assault and possession of a deadly weapon while under detention. Appellant cites to *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061 for the proposition that when two offenses can be committed by the

same conduct, they are considered allied offenses. Under *Johnson*, Appellant urges that as his offenses are allied and of similar import they must merge for sentencing purposes.

{¶64} In response, the state contends that each conviction in this case was based on a separate animus, thus Appellant's convictions were not allied offenses of similar import. The state argues that although our opinion in *Burns, supra*, held that the felonious assault and possession of a deadly weapon while under detention convictions should have merged, this case presents with different facts. The state asserts that the weapon in *Burns* was never recovered and prevented the state from proving that the weapon, standing alone, was deadly. The state explains that, as a result, the evidence only showed that the weapon became deadly when it was used to injure the officer. As such, the simple act of possession was not an independent act from the assault.

{¶65} In contrast, the state urges that Appellant admitted that he possessed his weapon, a shank, for some time prior to the incident. Thus, the state contends that the evidence here shows that the defendant not only possessed a deadly weapon, which has one animus, he then used the weapon, under a separate animus.

{¶66} We agree that *Burns* is distinguishable from the instant case. The record in this case clearly demonstrates that Appellant possessed the deadly weapon, the shank, for some period of time without using it. This established one animus. The record also reveals that Appellant later used this shank to stab

corrections officers, a crime which reflects a separate animus from his mere possession.

{¶67} Accordingly, this case is distinguishable from *Burns* and requires a different result. Since this record demonstrates separate animus, the trial court did not err in sentencing Appellant separately on the felonious assault and the possession of a deadly weapon charges. Accordingly, Appellant's sixth assignment of error is without merit and is overruled.

Seventh Assignment of Error

The trial court committed reversible error when it imposed consecutive prison sentences against Mr. Harris without making statutorily mandated findings in support of consecutive sentences, in violation of Mr. Harris's rights under the Fourteenth Amendment to the United States Constitution, and Article I, Section 16 of the Ohio Constitution.

{¶68} In Ohio, legislation requiring certain findings be made before consecutive sentences can be imposed was reenacted in R.C. 2929.14(C)(4) on September 30, 2011. It provides:

If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the

seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

(a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.

(b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.

(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶69} In addition to making the requisite findings at the sentencing hearing, the trial court must also make the findings regarding consecutive sentences within the sentencing entry. *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, syllabus.

{¶70} Appellant contends that the trial court failed to indicate both at his hearing and in the sentencing entry that it considered the R.C. 2929.14(C) factors

before imposing consecutive sentences against Appellant. The state has failed to respond to Appellant's argument on this issue.

{¶71} The trial court sentenced Appellant in case number 09 CR 821 to nine years of imprisonment on one count of felonious assault and seven years on one count of possession of a deadly weapon, to be served consecutively, for an aggregate total of sixteen years. The trial court sentenced Appellant in case number 10 CR 98 to seven years for possession of a weapon while under detention. The trial court sentenced Appellant in case number 09 CR 499 to nine years on one count of felonious assault. The trial court ran the sentences in each case consecutively to one another, for an aggregate total of thirty-two years. This sentence was to run concurrently with his original ninety-nine year sentence.

{¶72} The record clearly demonstrates that the trial court failed to state that the R.C. 2929.14(C) factors were considered before imposing consecutive sentences. In relevant part, the trial court stated

The Court has considered the record and the oral statements made on both parties' behalf, as well as the principles and purposes of sentencing under Ohio Revised Code 2929.19, and has considered the seriousness and recidivism factors * * * pursuant to 2929.11, and has considered the seriousness and recidivism factors under 2929.12.

Sentencing Hearing, p. 14.

{¶73} Appellant was sentenced under separate sentencing entries pertaining to each case number. However, none of the sentencing entries mention R.C.

2929.14(C) or its factors. As the trial court not only omitted the R.C. 2929.14(C) factors from the sentencing hearing but also from all relevant sentencing entries, the trial court's imposition of consecutive sentences is contrary to the law. Thus, Appellant's seventh assignment of error has merit and is sustained. Accordingly, we remand the matter to the trial court for purposes of resentencing on this issue, also.

Eighth Assignment of Error

The trial court's errors in admitting character evidence, failing to sever the indictments and individual counts, and improper counsel waiver colloquy cumulatively denied Mr. Harris his federal and state rights to a fair trial and due process of law. Fifth, Sixth, and Fourteenth Amendments, United States Constitution; Sections 10 and 16, Article I of the Ohio Constitution; Crim. R. 31(A).

{¶74} Separate errors, while harmless, may violate the right to a fair trial when considered together. *State v. Madrigal*, 87 Ohio St.3d 378, 397, 721 N.E.2d 52 (2000). To affirm a conviction despite multiple errors, a reviewing court must find that the cumulative effect of the errors is harmless beyond a reasonable doubt. *State v. Anderson*, 7th Dist. No. 03 MA 252, 2006-Ohio-4618, ¶18, citing *State v. DeMarco*, 31 Ohio St.3d 191, 195, 509 N.E.2d 1256 (1987). If the appellant's substantial rights were not affected, or if the record reveals that the errors did not contribute to the conviction, then the conviction can be affirmed. *Id.*, citing Crim.R. 52(A); Evid.R. 103(A); *State v. Martin*, 103 Ohio St.3d 385, 2004-Ohio-5471, 816 N.E.2d 227, ¶51.

{¶75} In the event that any of the errors he alleges are found to be harmless, Appellant argues that the cumulative effect of these errors violated his right to a fair trial. The state has failed to respond to Appellant's arguments, here.

{¶76} While we have determined that the trial court erred, these errors pertain to sentencing issues and cannot be said to have contributed to the conviction. We find no other error in Appellant's convictions. Thus, we find Appellant's arguments regarding cumulative error to be without merit. Appellant's eighth assignment of error is overruled.

Conclusion

{¶77} As the jury verdict form failed to comply with R.C. 2945.75, it fails to convict Appellant of the higher level of offense. Similarly, the trial court erred in failing to make the requisite findings under R.C. 2929.14(C) before imposing consecutive sentences. Accordingly, the judgment of the trial court is reversed, Appellant's two convictions for second-degree felony possession of a deadly weapon while under detention are vacated and the trial court is instructed, instead, to enter the convictions as fifth-degree felonies. The matter is remanded for resentencing consistent with this Opinion.

{¶78} However, as the totality of the circumstance show that Appellant knowingly, intelligently, and voluntarily waived his right to counsel, the trial court did not err in accepting his signed waiver of counsel. There are similarly no errors in the trial court's decisions to grant the state's motion for joinder, as to the comments in the state's opening statement, or the trial court's decision to sentence Appellant

separately for felonious assault and possession of a deadly weapon while under detention. Further, his cumulative effect argument regarding the denial of his right to a fair trial is without merit.

Donofrio, P.J., concurs.

Robb, J., concurs.