[Cite as *State v. Dowdell*, 2004-Ohio-5487.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 83829

STATE OF OHIO

Plaintiff-appellee

vs.

LEONARD C. DOWDELL

Defendant-appellant

JOURNAL ENTRY

AND

OPINION

DATE OF ANNOUNCEMENT OF DECISION:	OCTOBER 14, 2004
CHARACTER OF PROCEEDING:	Criminal appeal from Common Pleas Court, Case No. CR-440311
JUDGMENT:	Affirmed.
DATE OF JOURNALIZATION:	
APPEARANCES:	
For plaintiff-appellee:	WILLIAM D. MASON, ESQ. CUYAHOGA COUNTY PROSECUTOR ANDREW J. NICHOL, ESQ. Assistant County Prosecutor The Justice Center, 8th Floor 1200 Ontario Street Cleveland, Ohio 44113
For defendant-appellant:	RUSSELL S. BENSING, ESQ. 1148 Euclid Avenue C.A.C. Building, Suite 300 Cleveland, Ohio 44115

KARPINSKI, J.:

{¶ 1} Defendant appeals his convictions on one count of aggravated robbery with a firearm specification (Count 1) in violation of R.C. 2911.01, one count of kidnapping with a firearm specification (Count 3) in violation of 2905.01, and having a weapon while under disability (Count 5) in violation of 2923.13.[1]

{¶ 2} In May, 2003, while walking down Lorain Avenue in Cleveland, Ohio, Keith Novak and his father Edward were assaulted at gunpoint by two men. One of the men, later identified as defendant, put the gun[2] to Keith Novak's head and demanded all his money, which amounted to approximately thirty-eight dollars. Defendant and his accomplice fled. Keith and his father went to a relative's where Keith got a ride home.

{¶ 3} On his way home, Keith Novak saw defendant in the same vicinity. Arriving home, Novak called the police and gave them defendant's location. Novak met police at the location he had given them. At the scene, Novak identified defendant as one of the two men who had accosted him and his father earlier.

{¶ 4} Defendant waived his right to a jury trial and the case proceeded to a bench trial. Following his convictions and sentencing, defendant filed this timely appeal in which he asserts the following assignments of error:

I. THE TRIAL COURT ERRED IN PERMITTING TESTIMONY OF DEFENDANT'S POST ARREST SILENCE.

{¶ 5} Defendant argues that the trial court erred by allowing his post-arrest silence into evidence in violation of *Miranda v. Arizona*, (1966) 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602.

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[1]Defendant was originally indicted on five counts. Before trial, the state nolled Counts 2 and 4, aggravated robbery and kidnapping respectively.

[2]The firearm was never recovered.

Miranda precludes the substantive use of a defendant's silence during police interrogation to prove his guilt. Because defendant did not object to the testimony about his post-arrest silence, we review the admission of that evidence under a plain error standard. *State v. Gooden*, Cuyahoga App. No. 82621, 2004-Ohio-2699. "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." Id., at 49, citing *State v. Moreland* (1990), 50 Ohio St.3d 58, 552 N.E.2d 894.

{¶ 6} [A]dmitting evidence of post-arrest silence in a manner that implicitly suggests a defendant's guilt is impermissible. As recognized by this court, "the Miranda decision precludes the substantive use of a defendant's silence during police interrogation to prove his guilt." However, as the Ohio Supreme Court has recognized, "where evidence has been improperly admitted in derogation of a criminal defendant's constitutional rights, the admission is harmless 'beyond a reasonable doubt' if the remaining evidence alone comprises 'overwhelming' proof of defendant's guilt."

{¶ 7} Id., at ¶54, citing *State v. Correa* (May 15, 1997), Cuyahoga App. No. 70744, 1997 Ohio App. LEXIS 2076, and *State v. Williams* (1983), 6 Ohio St.3d 281, 452 N.E.2d 1323. See *Doyle v. Ohio* (1976), 426 U.S. 610, 49 L.Ed.2d 91, 96 S.Ct. 2240.

{¶ 8} In the case at bar, Detective Torok interviewed defendant after he was arrested. On direct examination, the state asked the detective about that interview and Torok explained what occurred:

{¶ 9} Q: Okay. Did you have occasion to come in contact with [Defendant]?

{¶ 10} A: Yes.

{¶ 11} Q: And would you tell the Court about that?

{¶ 12} A: The arrested male, Leonard Dowdell, was being housed at the Fifth District. I went there and asked to see if I could see the prisoner. They brought the prisoner out to me.

1. **First thing I did was I advised Mr. Dowdell, who I was, and I advised him of his constitutional rights and I made sure that he understood them. He said that he did.**

> **2. I then proceeded to ask him if he would like to, you know, talk to me. And he said: Well, there's not much I got to say to you. I'll say what I got to say in court.**
>
> 3. **I says: That's fine. I says: I understand, then, you don't want to talk to me. He says: No.**

{¶ 13} Tr. 135-136.

{¶ 14} In *State v. Ervin*, Cuyahoga App. No. 80473, 2002-Ohio-4093, this court held that an isolated remark concerning a defendant's post-arrest silence was not reversible error. In *Ervin,* defendant was convicted of rape and attempted rape. On direct examination, the state questioned Detective Lessman, the police officer who arrested defendant. When asked about defendant's willingness to initially speak with him about the rape charges, Lessman testified that defendant refused to discuss anything with him. On appeal, this court found no error in allowing Lessman's single reference to defendant's post-arrest silence because

> **{¶ 15} the State did not use the witness' post-silence comment in any prejudicial manner. The State did not use defendant's post-arrest silence for impeachment purposes in cross-examination or in closing argument. The State did not make evidentiary use of defendant's silence as evidence of defendant's guilt. In fact, defendant's post-arrest silence was never mentioned again in any context throughout the trial**.

{¶ 16} Id., at ¶65. As in *Ervin*, we find no error in Torok's isolated comment about defendant's post-arrest silence. Under *Gooden*, however, it is necessary to assess the entire evidentiary context within which Torok's testimony was admitted.

{¶ 17} Keith Novak described what happened the day he was robbed at gunpoint. Novak, sixteen years old, testified that he and his father were walking to a cousin's house. Novak stated that his father was intoxicated and carrying a bottle of wine. As they walked, a man approached his father and asked him for a drink. That same man then pushed Novak and his father into a hallway

where defendant was waiting. In the hallway, Novak stated that defendant put a gun to his head and told him, "[g]ive me your money and everything you have or you're going to die." Tr. 21. Novak testified that defendant was holding the gun in "his left hand" and that he was blocking the hallway with his right hand on the wall. Tr. 21.

{¶ 18} When Novak emptied his pocket, he recalled that defendant took the money with his right hand. Novak also recalled exactly what defendant was wearing: "an orange over-pulled sweatshirt,[3] *** [and] a Dallas Cowboys hat."[4] Tr. 27. Novak was also able to describe the gun defendant had: "It was black *** a medium-sized gun." Tr. 28. He was also close enough to the defendant to see the trigger of the gun and that defendant had a "lazy eye." Tr. 29.

{¶ 19} When Novak was being driven home by his cousin, he testified they drove through the same area where the robbery had occurred. He described what he saw as follows:

{¶ 20} Q: Okay. And when you drove by, what did you see?

{¶ 21} A: I seen that man and the guy that was with him *.**

{¶ 22} Q: How do you know it was that man?

{¶ 23} A: Because I seen the shirt and the hat and the way he looked. He – he was just really familiar and I couldn't forget that.

{¶ 24} Q: Couldn't forget what?

{¶ 25} A: The way he looked.

{¶ 26} Tr. 35.

{¶ 27} When the police responded to his call from home, Novak told them he had been robbed at gunpoint by a man wearing an orange sweatshirt and a Dallas Cowboy cap. Novak told

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[3]Marked as State's Exhibit 1.

[4]Marked as State's Exhibit 2.

police where they could find the man. When Novak went back to where he saw defendant, the police were already there and asked him to identify the man sitting in a police car. Novak positively identified the defendant as the man who robbed him.

{¶ 28} Torok testified that he interviewed Novak the day after the robbery. Torok confirmed every aspect of what Novak described about the robbery and the man who put the gun to his head and threatened to kill him.

{¶ 29} In light of all the evidence, we conclude that Torok's comment about defendant's post-arrest refusal to speak with him was an isolated remark. As in *Ervin*, the state did not use defendant's post-arrest silence to prove his guilt. Since defendant did not take the stand, his post-arrest silence was not used to impeach him. State's counsel never referred to Torok's comment during trial or in closing argument. There is, moreover, an independent and substantive basis to support the trial court's verdict of guilty beyond a reasonable doubt.

{¶ 30} From this record, we cannot conclude, therefore, that but for the error, the outcome of the trial would clearly have been otherwise. Accordingly, defendant's first assignment of error is overruled.

{¶ 31} II. DEFENDANT WAS DEPRIVED OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, IN THAT COUNSEL FAILED TO FILE A MOTION TO SUPPRESS THE OUT-OF-COURT IDENTIFICATION OF DEFENDANT.

{¶ 32} Defendant argues his trial counsel was ineffective because he did not file a motion to suppress Novak's identification of him as his assailant. Defendant says the police identification procedure, known as a "cold stand," was unreliable and impermissibly suggestive. In a "cold stand" the victim, in a relatively short time after the incident, is shown only one person and asked whether the victim can identify the perpetrator of the crime. *State v. Scott* (May 11, 2000), Cuyahoga App.

No. 76171, 2000 Ohio App. LEXIS 2023, at *6. This court has previously explained the conditions necessary for a proper "cold stand."

{¶ 33} A cold stand or one-on-one show-up identification is permissible as long as the trial court considers the following factors:

1. **The opportunity of the witness to view the criminal at the time of the crime;**

2. **The witness' degree of attention;**

3. **The accuracy of the witness' prior description of the criminal;**

4. **The level of certainty demonstrated by the witness;**

{¶ 34} 5. The length of time between the crime and the confrontation. (Citations omitted.)

{¶ 35} *State v. Thompson*, Cuyahoga App. No. 79938, 2002 Ohio App. LEXIS 2351, at *6.

{¶ 36} In the case at bar, Novak testified that while he was being robbed at gunpoint he was close enough to the man to see his "lazy eye" and what he was wearing. He also saw the trigger of the gun at his head along with its color and size. On his way home, Novak saw the same man again. Police were called and told where they would find Novak's assailant. At the scene, Novak positively identified defendant.

{¶ 37} The basis of Novak's cold stand identification of defendant was reliable: he had sufficient opportunity to view his attacker at the time of the crime; his attention was not diverted; his description of the man who robbed him was consistent with the appearance of defendant at the cold stand; and he was certain defendant and his assailant were one and the same person. Most significant is that Novak's identification arose from his unaided earlier identification that helped police find the defendant.

{¶ 38} We conclude from the record before this court that Novak's cold stand identification of defendant satisfies the conditions established in *Thompson* and is, therefore, reliable. Because Novak's out-court-identification is reliable, defendant's further claim that his counsel was ineffective for not attempting to suppress that identification, is moot. Accordingly, defendant's second assignment of error is without merit.

{¶ 39} III. THE TRIAL COURT ERRED IN FAILING TO MERGE THE CONVICTION FOR KIDNAPPING WITH THE CONVICTION FOR AGGRAVATED ROBBERY.

{¶ 40} Defendant argues that the crimes of aggravated robbery and kidnapping are allied offenses and, therefore, they should have been merged. R.C. 2941.25 provides:

{¶ 41} 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.

{¶ 42} 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.

{¶ 43} In determining whether crimes are allied offenses of similar import under R.C. 2941.25(A), the court must assess whether the statutory elements of the crimes correspond to such a degree that the commission of one crime will result in the commission of the other. *State v. Cobbins*, Cuyahoga App. No. 82510, 2004-Ohio-3736; *State v. Rance*, 85 Ohio St.3d 632, 1999-Ohio-291, 710 N.E.2d 699. If the elements correspond, the defendant may not be convicted of both unless the court finds that the defendant committed the crimes separately or with separate animus. Id. The defendant has the burden of establishing that two offenses are allied. *Cobbins*, supra.

{¶ 44} Relevant to this appeal are R.C. 2911.01,[5] aggravated robbery, and R.C. 2905.01,[6] kidnapping. Comparing the elements of these statutes, we conclude that each offense requires proof of an additional fact that the other does not.

{¶ 45} Aggravated robbery requires proof that defendant brandished a deadly weapon in order to facilitate the theft offense. And kidnapping requires proof that defendant restrained Novak's

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[5]2911.01. Aggravated robbery.

(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;

(2) Have a dangerous ordnance on or about the offender's person or under the offender's control;

(3) Inflict, or attempt to inflict, serious physical harm on another.

***.

[6]2905.01. Kidnapping.

(A) No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, 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:

(1) To hold for ransom, or as a shield or hostage;

(2) To facilitate the commission of any felony or flight thereafter;

(3) To terrorize, or to inflict serious physical harm on the victim or another;

***.

liberty. Each of the crimes require proof of an element not included in the others. Accordingly, aggravated robbery and kidnaping are distinguishable because the elements do not correspond to such a degree that the commission of one will result in the commission of the other.

{¶ 46} Because the offenses are not allied offenses of similar import, we find no error in the court's judgment. Accordingly, Assignment of Error No. III is without merit.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

TIMOTHY E. MCMONAGLE, J., CONCURS.

ANN DYKE, P.J., CONCURS IN JUDGMENT ONLY.

DIANE KARPINSKI
JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of

the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).