[Cite as *State v. Doubrava*, 2009-Ohio-2369.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91792

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

GARY DOUBRAVA

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-498662

BEFORE: Cooney, A.J., Celebrezze, J., and Jones, J.

RELEASED: May 21, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) 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(C) 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(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

COLLEEN CONWAY COONEY, A.J.:

{¶1} Defendant-appellant, Gary Doubrava ("Doubrava"), appeals nine convictions and his sentences for those convictions. Finding some merit to the appeal, we affirm in part, reverse in part, and remand for the trial court to merge four of Doubrava's convictions.

{¶2} In July 2007, Doubrava was indicted on ten counts of felonious assault. In May 2008, a jury trial was held. The trial court dismissed the third count pursuant to a Crim.R. 29 motion, and the jury found him guilty on the remaining counts. In June 2008, the trial court sentenced him to eight years in prison.

{¶3} This case arose from an incident that took place in the parking lot of Hotties Bar. An individual drove a vehicle through a crowd of people, injuring five. Police located the vehicle 15 minutes after the assault and found David Cotto ("Cotto"), intoxicated, inside. However, based upon eyewitness testimony, the State maintained that Doubrava was the driver of the vehicle at the time of the assault. Doubrava claimed Cotto was the driver.

{¶4} Doubrava now appeals, raising four assignments of error for our review.

Sufficiency and Manifest Weight of the Evidence

{¶5} We combine the first and second assignments of error as they involve the same evidence, even though the standards of review differ. In the first assignment of error, Doubrava claims the convictions are against the manifest weight of the evidence. In the second assignment of error, Doubrava claims that there was insufficient evidence for the jury to convict him.

{¶6} In *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 381 N.E.2d 184, the Ohio Supreme Court set forth the standard of review for a challenge to the sufficiency of the evidence. If "reasonable minds [could] reach different conclusions as to whether each material element of a crime has been proven beyond a reasonable doubt," then the criminal defendant may not prevail on a challenge to the sufficiency of the evidence. *State v. Hall*, Cuyahoga App. No. 90365, 2009-Ohio-461, ¶83, quoting *Bridgeman.* See, also, *State v. Walker*, Cuyahoga App. No. 89892, 2008-Ohio-4231, ¶36.

{¶7} *Bridgeman* must be interpreted in light of the sufficiency test outlined in *State v. Thompkins*, 78 Ohio St.3d 380, 386-87, 1997-Ohio-52, 678 N.E.2d 541, and *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492. A challenge to the sufficiency of the evidence supporting a conviction requires a court to determine whether the State has met its burden of production at trial. *Thompkins*, at 386. On review for sufficiency, courts are to assess not whether the State's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. *Jenks*, at 263. 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. Id.

{¶8} While the test for sufficiency requires the appellate court to determine whether the State has met its burden of production at trial, the test for manifest weight requires the appellate court to determine whether the State has met its burden of persuasion. *Thompkins,* at 390.

{¶9} When a defendant asserts that his or her conviction is against the manifest weight of the evidence, an appellate court sits as a thirteenth juror. Id. at 387. It must review the entire record, weigh the evidence and all reasonable inferences, and consider the credibility of witnesses. Id., citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

{¶10} We must be mindful that the weight of the evidence and the credibility of witnesses are matters primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus. A reviewing court will not reverse a verdict where the trier of fact could reasonably conclude from substantial evidence that the prosecution proved the offense beyond a reasonable doubt. Id*.; State v. Eley* (1978), 56 Ohio St.2d 169, 383 N.E.2d 132. Moreover, in reviewing a claim that a conviction is against the manifest weight of the evidence, the conviction cannot be reversed unless it is obvious that the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed

and a new trial ordered. *State v. Garrow* (1995), 103 Ohio App.3d 368, 659 N.E.2d 814.

{¶11} In the instant case, the jury convicted Doubrava of four counts of felonious assault under R.C. 2903.11(A)(1), and five counts of felonious assault under R.C.2903.11(A)(2). R.C. 2903.11 provides, in pertinent part:

> "(A) No person shall knowingly do either of the following: (1) Cause serious physical harm to another or to another's unborn; (2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance."

{¶12} In the first two assignments of error, Doubrava fundamentally claims that his conviction resulted from mistaken identity and that Cotto was driving the vehicle that struck the victims. Thus, he apparently concedes that the State proved all of the other elements of felonious assault – that the driver knowingly caused serious physical harm to others, in some cases using a deadly weapon or dangerous ordnance.

{¶13} Accordingly, we now evaluate the identity testimony. Several witnesses testified to the following: during the early morning hours of May 20, 2007, Doubrava and another patron of Hotties were arguing inside the bar. The argument began to "get physical." The two men went outside to the parking lot and most of the other patrons followed. That night, Doubrava was wearing a white shirt and white hat. Witnesses testified that a man in a white shirt and white hat entered a dark-colored car, steered it toward the crowd, and accelerated, striking three people. The driver then drove back through the crowd, striking two more people, before driving away.

{¶14} Based on the foregoing, the jury could have reasonably found that Doubrava was the individual driving the vehicle at the time of the attack. Accordingly, we overrule the first and second assignments of error.

Ineffective Assistance of Counsel

{¶15} In the third assignment of error, Doubrava claims that he received ineffective assistance of counsel.

{¶16} In a claim of ineffective assistance of counsel, the burden is on the defendant to establish that counsel's performance fell below an objective standard of reasonable representation and prejudiced the defense. *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph two of the syllabus; *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. To determine whether counsel was ineffective, Doubrava must show that: (1) counsel's performance was deficient, in that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment, and (2) counsel's deficient performance prejudiced the defense in that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different. *Bradley*, at paragraph three of the syllabus; *Strickland*.

{¶17} In the instant case, Doubrava alleges ineffective assistance of counsel because his counsel failed to: (1) move to suppress an impermissible out-of-court identification, (2) object to hearsay testimony of police officer Marty Compton

("Compton"), (3) object to evidence that Doubrava may have been on probation or parole at the time of the crime, and (4) request a jury instruction on aggravated assault. We address these claims in turn.

{¶18} Doubrava claims that his counsel should have moved to suppress the police photo arrays that were introduced into evidence.[1] Specifically, he alleges that the photo arrays were unduly suggestive and that the witnesses who viewed them identified him as merely being present at the bar on the night of the assault but not as the driver of the vehicle.

> "A failure to file a motion to suppress may constitute ineffective assistance of counsel where there is a solid possibility that the court would have suppressed the evidence. However, even when some evidence in the record supports a motion to suppress, we presume that defense counsel was effective if defense counsel could reasonably have decided that the filing of a motion to suppress would have been a futile act." (Internal citations omitted.)

State v. Jackson, Cuyahoga App. No. 86542, 2006-Ohio-1938, ¶18.

{¶19} Consequently, Doubrava must prove that there existed a "solid possibility" that the trial court would have suppressed the photo arrays had his counsel moved to suppress them.

{¶20} Courts determine the admissibility of challenged identification testimony using a two-step process. First, the defendant must demonstrate that the identification procedure was unnecessarily suggestive. If the defendant meets this burden, the court must consider whether the procedure was so unduly suggestive as

[1]Doubrava identifies State's Exhibits 3, 9, 22, 28, and 29 as the objectionable photo arrays.

to give rise to irreparable mistaken identification. *State v. Page*, Cuyahoga App. No. 84341, 2005-Ohio-1493. "Stated differently, the issue is whether the identification, viewed under the totality of the circumstances, is reliable despite the suggestive procedure." *State v. Wills* (1997), 120 Ohio App.3d 320, 324-325, 697 N.E.2d 1072, citing *Manson v. Brathwaite* (1977), 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140.

{¶21} The United States Supreme Court has set forth the following factors to consider regarding potential misidentification: "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." *Neil v. Biggers* (1972), 409 U.S. 188, 199-200, 93 S.Ct. 375, 34 L.Ed.2d 401. The court must review these factors under the totality of the circumstances. Id.

{¶22} In the instant case, Doubrava has failed to show that the identification was unreliable or procured through unnecessarily suggestive means. Indeed, he makes no argument regarding any of the customary factors leading to potential misidentification. He has failed to show that there is a solid possibility that the trial court would have suppressed the photo arrays; thus, his ineffective assistance of counsel claim fails on this ground.

{¶23} Doubrava next claims that his counsel was ineffective for failing to object to Compton's inadmissible hearsay testimony and "character evidence" that he was on probation at the time of the assault.

{¶24} Doubrava identifies three allegedly objectionable hearsay statements: (1) Compton's testimony that Cotto identified Doubrava as the driver of the vehicle, (2) Compton's testimony that witness Jim Yashnyk ("Yashnyk") identified Doubrava as the driver of the vehicle, and (3) Compton's testimony that witness Kriste Hines ("Hines") said that Doubrava "stands out for some reason."

{¶25} We have held, "absent demonstration of prejudice, this court must indulge in a strong presumption that the failure to object at trial constitutes sound strategy." *State v. Sloan*, Cuyahoga App. No. 79832, 2002-Ohio-2669, ¶39, citing *Strickland*; *State v. Moore* (1994), 97 Ohio App.3d 137, 646 N.E.2d 470. See, also, *State v. Catlin* (1990), 56 Ohio App.3d 75, 564 N.E.2d 750.

{¶26} Doubrava claims that these statements confused the jury on the issue of the driver's identity. However, he has not demonstrated how these statements would have confused the jury, nor has he shown that he was prejudiced by their admission. Neither Yashnyk nor Hines identified Doubrava as the driver during their testimony, and Cotto failed to appear at trial to testify, despite being subpoenaed.

{¶27} Doubrava also faults "character evidence" contained in the statement of witness Nicole Rutkowski ("Rutkowski") to police. In his brief, he highlights the following question and answer found on page three of State's Ex. 23, which he claims "may also have caused the jury to lose its way":

> "Q: Can you think of any reason anyone would cover for Gary Doubrava if he was the person who was driving the car?
>
> A: I heard he is on probation or parole and would probably be going back to prison if he was involved."

{¶28} Rutkowski's statement does not constitute character evidence. It was not offered to show that Doubrava was the driver because he had committed prior crimes. See Evid.R. 404(B) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person *in order to show action in conformity therewith*.") (Emphasis added.) Instead, the evidence related to other witnesses' motives to lie on his behalf.

{¶29} Additionally, even if his counsel erred in failing to object, Doubrava has not demonstrated prejudice sufficient to demonstrate ineffective assistance of counsel.

{¶30} Finally, Doubrava points out that his counsel should have requested a jury instruction on the lesser included offense of aggravated assault. But "[f]ailure to request instructions on lesser-included offenses is a matter of trial strategy and does not establish ineffective assistance of counsel." *State v. Griffie*, 74 Ohio St.3d 332, 333, 1996-Ohio-71, 658 N.E.2d 764. Indeed, in the instant case, Doubrava's theory of the case was mistaken identity – that he was not the driver of the vehicle that struck the victims. An aggravated assault instruction would have been inconsistent with this theory and may have created a compromise verdict. Accordingly, all of Doubrava's ineffective-assistance-of-counsel claims fail. The third assignment of error is overruled.

Convictions and Sentences for Allied Offenses of Similar Import

{¶31} In his fourth and final assignment of error, Doubrava claims that the trial court erred in convicting him of and sentencing him on allied offenses of similar import. We agree.

{¶32} In the instant case, Doubrava was convicted of two counts of felonious assault regarding four of the five victims. For each of the four, he was convicted under R.C. 2903.11(A)(1) for knowingly causing serious physical harm to another and also under R.C. 2903.11(A)(2) for knowingly causing or attempting to cause physical harm to another by means of a deadly weapon.

{¶33} The trial court then sentenced him to two years on Counts 1, 2, and 4; two years each on Counts 5 and 6, to run concurrent with one another but consecutive to Counts 1, 2, and 4; two years on Counts 7 and 8, to run concurrent with each other but consecutive to Counts 1, 2, 4, 5, and 6; and two years on Counts 9 and 10, to run concurrent with each other but consecutive to all other counts. In total, Doubrava was sentenced to eight years in prison.

{¶34} We note that Doubrava did not object to this issue at trial, so he waives all but plain error. Crim.R. 52. During oral argument, the State conceded the necessity of merging four convictions.

{¶35} It is plain error to impose multiple sentences for allied offenses of similar import, even if the sentences are run concurrently. *State v. Crowley*, 151 Ohio App.3d 249, 255, 2002-Ohio-7366, 783 N.E.2d 970, citing *State v. Jones* (Oct. 22,

1998), Franklin App. No. 98-AP-129; *State v. Lang* (1995), 102 Ohio App.3d 243, 656 N.E.2d 1358.

{¶36} The allied offense statute, R.C. 2941.25, prohibits multiple convictions and states as follows:

> "(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.
>
> "(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."

{¶37} R.C. 2941.25 requires a two-step analysis. *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181. The Ohio Supreme Court in *Cabrales* explained:

> "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 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." (Emphasis sic.) ¶14, quoting *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117, 526 N.E.2d 816.

{¶38} The Court clarified that "in determining whether offenses are allied offenses of similar import under R.C. 2941.25(A) *** courts [must] compare the elements of offenses in the abstract, i.e., without considering the evidence in the case, but [there need not be] an exact alignment of elements." *Cabrales*, at ¶27.

{¶39} As this court acknowledged in *State v. Wilson*, Cuyahoga App. No. 91091, 2009-Ohio-1681, "We have held that felonious assault charges pursuant to R.C. 2903.11(A)(1) and R.C. 2903.11(A)(2) are allied offenses of similar import if the State is unable to show that there was separate animus for each count of felonious assault." See *State v. Cotton*, 120 Ohio St.3d 321, 2008-Ohio-6249, 898 N.E.2d 959; *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149; *State v. Sellers*, Cuyahoga App. No. 91043, 2009-Ohio-485, ¶37. "Animus" is the defendant's "purpose or, more properly, immediate motive." *Wilson*, fn. 1, quoting *State v. Logan* (1979), 60 Ohio St.2d 126, 131, 397 N.E.2d 1345.

{¶40} In the instant case, the State proved that Doubrava drove a vehicle into a crowd, striking five people, four of whom were seriously injured. He drove the vehicle into each of these victims once, not twice. Therefore, the court should have merged the convictions for each of the two offenses involving the same victim, rather than impose concurrent sentences. As previously noted, the State conceded this issue during argument.

{¶41} Accordingly, we sustain the fourth assignment of error.

{¶42} The trial court must vacate one of the convictions and sentences as to each of the four victims for which Doubrava was convicted twice. The State must determine which of Doubrava's two charges should merge into the other for the purpose of each conviction.[2] See *Brown*, ¶43.

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[2]In the future, the State would be well advised to do this prior to the court's imposing sentence.

{¶43} Judgment is affirmed in part, reversed in part, and case is remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant and appellee share the 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.

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

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COLLEEN CONWAY COONEY, ADMINISTRATIVE JUDGE

FRANK D. CELEBREZZE, JR., J., AND
LARRY A. JONES, J., CONCUR