[Cite as *State v. Cardamone*, 2009-Ohio-5361.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92235

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOSEPH CARDAMONE

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-512606

BEFORE: Stewart, J., Cooney, A.J., and Rocco, J.

RELEASED: October 8, 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).

MELODY J. STEWART, J.:

{¶ 1} Defendant-appellant, Joseph Cardamone, appeals from a Cuyahoga County Common Pleas Court judgment convicting him of two counts of robbery and sentencing him to two concurrent prison terms of eight years. This appeal raises three errors for review, challenging the weight and sufficiency of the evidence supporting appellant's conviction and asserting that the sentence is inconsistent and disproportionate. While we find no merit to appellant's assignments of error, we find the trial court should have merged the convictions at sentencing. Therefore, we sua sponte reverse the judgment of conviction and remand for the limited purpose of having the state elect which robbery charge will merge into the other for purposes of conviction, and for resentencing following this election.

{¶ 2} On September 6, 2007, appellant and Rachel Starks drove to the Walgreens store at 6410 Broadway in Cleveland in appellant's sports utility vehicle ("SUV"). Appellant waited outside in his vehicle while Starks went into the store. While in the store, Starks hid baby formula and other items in her pants. A Cuyahoga County deputy sheriff, working as store security, observed Starks's actions and moved to the front of the store to stop her. When Starks saw the deputy, she ran out of the store and jumped into the SUV yelling, "go, go, go." Appellant started the vehicle.

{¶ 3} The deputy chased Starks out of the store and tried to grab her through the window. The deputy's left arm got caught between the passenger seat and the door. As Starks jumped into the vehicle, appellant backed the vehicle out of the parking space. The deputy jogged alongside with his arm trapped in the vehicle. The deputy yelled at appellant to stop. After the vehicle stopped, the deputy drew his weapon and pointed it at appellant, ordering him to stop. Appellant stopped and put his hands on his head.

{¶ 4} At that moment, Starks reached down and pushed the accelerator with her hand. The car lurched forward, dragging the deputy. The car turned sharply, freeing the deputy, who fell to the ground and struck his head. Appellant then sped away.

{¶ 5} The deputy got up, found his cell phone on the ground about 10 feet behind him, and called 911. The deputy was treated at the hospital. As a result of injuries sustained in the incident, the deputy was unable to work for a week. He continues to suffer pain in his shoulder.

{¶ 6} Appellant was subsequently arrested and charged in a six-count indictment with two counts of robbery, two counts of aggravated robbery, and two counts of felonious assault. At trial, the jury heard testimony from the deputy, the store's assistant manager, and Starks.[1] Starks testified that her

[1]Starks entered into a plea agreement in which she pleaded guilty to robbery and felonious assault in exchange for testifying. She received a two-year sentence.

plan was to go to Walgreens and shoplift items, then return the items to another store for cash. She claimed appellant was in on the plan. The jury found appellant guilty of the two robbery counts but not guilty of the aggravated robbery and felonious assault charges. He was sentenced to eight years imprisonment on each count, to run concurrently.

{¶ 7} Appellant now appeals and asserts three assignments of error for our review.

{¶ 8} "I. The evidence was insufficient as a matter of law to support a finding beyond a reasonable doubt that appellant aided and abetted the principal in committing the robbery."

{¶ 9} A challenge to the sufficiency of evidence supporting a conviction requires a court to determine whether the state has met its burden of production at trial. *State v. Thompkins*, 78 Ohio St.3d 380, 390, 1997-Ohio-52. The challenge raises a question of law. 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. Id. 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* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. A conviction based on insufficient evidence violates a defendant's Fifth Amendment right to due process. *Thompkins* at 386.

{¶ 10} Appellant was convicted of robbery in violation of R.C. 2911.02(A)(1) and (A)(2) which provides:

{¶ 11} "(A) No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following:

{¶ 12} "(1) Have a deadly weapon on or about the offender's person or under the offender's control;

{¶ 13} "(2) Inflict, attempt to inflict, or threaten to inflict physical harm on another[.]"

{¶ 14} Under R.C. 2923.11, an automobile can be classified as a deadly weapon when used in a manner likely to produce death or great bodily harm. *State v. Kilton*, Cuyahoga App. No. 80837, 2003-Ohio-423.

{¶ 15} Pursuant to R.C. 2923.03(A)(2), a person who aids and abets another in the commission of an offense shall be prosecuted and punished as if he were a principal offender. "To support a conviction for complicity by aiding and abetting pursuant to R.C. 2923.03(A)(2), the evidence must show that the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime, and that the defendant shared the criminal intent of the principal. Such intent may be inferred from the circumstances surrounding the crime." *State v. Johnson* (1991), 93 Ohio St.3d 240, 245. Aiding and abetting may be established by overt acts of assistance such as driving a getaway car or serving as a lookout. *State v. Langford*,

Cuyahoga App. No. 83301, 2004-Ohio-3733, citing, *State v. Cartellone* (1981), 3 Ohio App.3d 145, 150.

{¶ 16} Appellant asserts that the evidence is insufficient to prove beyond a reasonable doubt that he aided and abetted Starks in the commission of a robbery. Appellant contends that he drove to Walgreens with Starks but had no expectation that a robbery was to occur. He argues that Starks's testimony and the circumstances suggest that he was unaware that Starks entered Walgreens to shoplift. We disagree.

{¶ 17} Appellant cites to the case of *State v. Ratkovich*, Jefferson App. No. 02-JE-16, 2003-Ohio-7286, for support. In that case, the Seventh District found that the trial court did not err in failing to give the jury an instruction on aiding and abetting where the evidence showed that the mother merely drove her son to a store and did not know he was going to steal from the store when she dropped him off.

{¶ 18} Unlike in *Ratkovich*, there is evidence in the instant case to show that appellant knew what Starks was going to do when they drove to the store, and that he went along with her plan.

{¶ 19} Starks testified that she and appellant were partying at a friend's house. She said they wanted to buy more drugs but ran out of money. She told appellant they could get money by going to a store, shoplifting some items, and then returning the items to another store for cash. She called it "borrowing" and told appellant she had done it before.

{¶ 20} Starks and appellant then drove to Walgreens in appellant's vehicle. Starks went into the store, stole some items, then fled the store to elude capture by the deputy. Appellant waited outside the store for her. As she jumped in the car, instructing appellant to "go, go, go," he put the car in reverse and backed up to leave.

{¶ 21} He was ordered to stop by the deputy but, after briefly doing so, appellant sped out of the lot. The store's assistant manager also witnessed these events and testified that after the deputy fell, the vehicle "took off and it shot out through the back of the parking lot."

{¶ 22} This evidence, if believed, is sufficient to prove that appellant shared Starks's criminal intent and assisted her in the commission of the crime by driving the getaway car. Accordingly, appellant's first assignment of error is overruled.

{¶ 23} "II. Appellant's convictions for robbery were against the manifest weight of the evidence."

{¶ 24} In reviewing a claim that a verdict is against the manifest weight of the evidence, this court considers the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and, in considering conflicts in the evidence, determines whether 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. See *Thompkins*, 78 Ohio St.3d at 387. In doing so, we remain mindful that the weight to be given the evidence and the

credibility of the witnesses are primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. This gives the trier of fact the authority to "believe or disbelieve any witness or accept part of what a witness says and reject the rest." *State v. Antill* (1964), 176 Ohio St. 61, 67.

{¶ 25} The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. *Thompkins* at 387.

{¶ 26} Appellant asserts that the evidence of his involvement in the robbery was of such poor and unreliable quality that it cannot support his conviction. He argues that the only evidence that he knew Starks went into the store to commit a theft offense came from Starks's own self-serving testimony. He complains that Starks is an admitted drug user and thief, and therefore none of her testimony is credible. He points out that in the written statement made to the police when she was arrested, Starks does not say she talked about her theft plan with appellant. Appellant also calls our attention to Starks's testimony where she insists, in direct contrast to the testimony of the deputy and store manager, that the deputy did not get knocked to the ground.

{¶ 27} The jury heard testimony that Starks admitted her guilt in this matter and agreed to testify against appellant in return for a favorable result in her case. She admitted to her drug use and her practice of shoplifting to get money. The trial court instructed the jury that Starks's testimony should be subject to grave suspicion and weighed with great caution.

{¶ 28} Additionally, with the exception of the testimony about the deputy falling when the car lurched forward, Starks's testimony relating to the incident is corroborated by the video surveillance tapes and the testimony of the deputy and the store manager. There is no question that it was Starks who first caused the vehicle to go forward. However, at that point, appellant chose to flee rather than to step on the brake and stop.

{¶ 29} After consideration of the entire record, we do not find that the jury lost its way or that this is one of those rare cases where the evidence weighs heavily against the convictions. Accordingly, appellant's second assignment of error is overruled.

{¶ 30} "III. The trial court failed to make a finding that the appellant's sentence is consistent with similarly situated offenders."

{¶ 31} Appellant asserts that when the trial court sentenced him to a prison term greater than the one Starks received, the court violated R.C. 2929.11(B). That section requires courts to impose punishment "consistent with sentences imposed for similar crimes committed by similar offenders." Appellant argues that Starks was fully culpable in the offense but received only a two-year sentence, while he with much less participation, received an eight-year sentence.

{¶ 32} After *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the trial court is no longer required to make findings or state its reasons for imposing sentence. The trial court is required only to carefully consider the statutory

factors before imposing its sentence. Id. at ¶42; *State v. Mathis*, 109 Ohio St.3d 54, 62, 2006-Ohio-855.

{¶ 33} The judgment entry states that the trial court considered all required factors of law. Moreover, a review of the trial transcript shows that the trial court considered the R.C. 2929.12 sentencing factors. The court addressed appellant's failure to stop the vehicle and the deputy's resultant injuries. Referencing the presentence investigation report ("PSI"), the court noted that appellant showed no remorse for his actions and refused to accept responsibility in the matter. The court also noted appellant's criminal past and that appellant had been to prison in two different states and had a history of violence.

{¶ 34} "The goal of felony sentencing is to achieve 'consistency' not 'uniformity.'" *State v. Eperson*, Cuyahoga App. No. 91009, 2009-Ohio-234. "Consistency in sentencing is achieved by weighing the sentencing factors." *State v. Dowell*, Cuyahoga App. No. 88864, 2007-Ohio-5534, ¶8. There is no requirement that codefendants receive the same sentence. *State v. Hall*, 179 Ohio App.3d 727, 2008-Ohio-6228, ¶8. "Differences between defendants allow trial courts to impose different sentences upon individuals convicted of similar crimes." *State v. Franklin*, Franklin App. No. 08AP-900, 2009-Ohio-2664.

{¶ 35} Appellant failed to present any evidence to the trial court to demonstrate that he and Starks were "similarly situated." Additionally, contrary to appellant's contention, the record reflects that the court did consider the sentence imposed upon Starks. However, because Starks was sentenced by

another judge in another case, there was no PSI or other information relating to Starks's background or criminal history for the trial court to consider. Thus, the trial court properly found that it was unable to compare the two offenders and relied upon the sentencing guidelines as they applied to appellant in imposing sentence. Accordingly, the third assignment of error is overruled.

{¶ 36} Notwithstanding our resolution of appellant's assignments of error, we find the trial court's failure to merge the two robbery convictions at sentencing constitutes plain error. It is clear from the record that appellant's separate convictions for robbery arose out of a single criminal act. Therefore, while the state could charge appellant with both counts and the jury could find appellant guilty of both counts, the trial court could convict appellant of only one. R.C. 2941.25(A); *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569. Under these circumstances, "the state must elect which of [the] two * * * charges will merge into the other for purposes of * * * conviction and sentence." Id. at ¶43. The proper remedy, therefore, is to reverse the judgment of conviction and remand for the state to elect which charge will merge into the other and for the trial court to then resentence on the single conviction. See *State v. Porter*, Cuyahoga App. No. 91575, 2009-Ohio-3373.

{¶ 37} This cause is reversed and remanded for proceedings consistent with this opinion.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas 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.

MELODY J. STEWART, JUDGE

KENNETH A. ROCCO, J., CONCURS WITH
SEPARATE OPINION

COLLEEN CONWAY COONEY, A.J., CONCURS
IN JUDGMENT ONLY WITH SEPARATE OPINION

KENNETH A. ROCCO, J., CONCURRING:

{¶ 38} I fully agree with the writing judge that *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, requires us to remand for merger and resentencing. The supreme court's express directions in *Brown* must take precedence over any implications to be drawn from its affirmance of our decision. The court expressly directed that that case was remanded "with instructions to merge Brown's convictions and resentence her in accordance with our opinion." *Brown* at ¶2; see, also, ¶43. In my opinion, we are constrained by *Brown* to remand for the trial court to merge the convictions and resentence the defendant, not for the court to vacate one conviction and sentence.

{¶ 39} I would ordinarily agree with the concurrence that resentencing is unnecessary when the offender has already been sentenced and the underlying

conviction is valid. However, there is a very good reason to resentence the defendant who has been erroneously convicted of two allied offenses. When it originally sentenced the defendant, the trial judge may have taken into account that the defendant was convicted of two separate felonies in determining the length of the concurrent sentences. On remand, the court may wish to reconsider the length of the sentence in light of the merger of the offenses.

COLLEEN CONWAY COONEY, A.J., CONCURRING IN JUDGMENT ONLY:

{¶ 40} I concur in judgment only because I would not order a resentencing on remand. I would affirm in part and reverse in part, and remand to vacate one of the robbery convictions. Consistent with *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, the trial court should vacate both the finding of guilt and sentence in one of the robbery convictions. The Supreme Court never directed the trial court to resentence Brown nor is there any reason to resentence. I believe this court was mistaken in *State v. Porter*, Cuyahoga App. No. 91575, 2009-Ohio-3373, when it relied on *Brown* to order resentencing. The Supreme Court affirmed our decision in *Brown* that merely directed the trial court to vacate both the finding of guilt and sentence for one of the aggravated assault convictions. *Brown* at ¶6, 43. The court never suggested resentencing was required.