[Cite as *State v. Banks*, 2009-Ohio-4229.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91992

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

WON BANKS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART; REVERSED
IN PART AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-510667

BEFORE: Sweeney, J., Stewart, P.J., and Boyle, J.

RELEASED: August 20, 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).

JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellant, Won Banks ("defendant"), appeals following his convictions for robbery and kidnapping. Defendant maintains that his conviction for kidnapping was against the manifest weight of the evidence and was an allied offense of similar import to his robbery conviction. For the reasons that follow, we affirm in part, reverse in part and remand for further proceedings.

{¶ 2} This matter proceeded to a bench trial on three counts against defendant: aggravated robbery with a firearm, robbery, and kidnapping by force, threat, or deception.

{¶ 3} The victim testified at trial to the following: He owns an auto repair garage in Cuyahoga County, Ohio. On April 16, 2008, he changed the left front tire on a Ford Explorer that was driven by a female and occupied by defendant, a boy, and a dog. The cost of the repair was approximately $46. Defendant said he had a $100 bill and wanted to pay in the victim's office. The victim agreed. Once inside, the victim handed the defendant $50 from his wallet and requested the $100 in exchange. Instead, defendant, with his hand "in his pocket like he had a gun," demanded the victim's wallet. Defendant said, "Get on the floor, b----, I'll blow your f------ head off." Defendant told the victim to count to 20. The victim complied, gave defendant his wallet with approximately $250, got on the floor, and began counting. After realizing the group had left, the victim got his own gun and pursued them. The victim saw the Ford Explorer parked on the

side of the street and defendant was coming towards him. The victim "stuck [his] gun in [defendant's] face" and demanded his wallet back. The defendant ran away and the victim then called the police.

{¶ 4} After being arrested, defendant admitted he was at the scene and that he threatened the victim. At trial, defendant claimed his "threat" consisted solely of refusing to pay for the services. Defendant denied having a weapon.

{¶ 5} According to the evidence, defendant was a 6'1", 300-pound, 35-year-old man, and the victim was a 5'8", 180-pound, 72-year-old man.

{¶ 6} The trial court found defendant not guilty of aggravated robbery with a firearm, but guilty of robbery and kidnapping. The court believed the victim's testimony was more credible than the defendant's testimony. Defendant received concurrent sentences comprised of a two-year sentence for the robbery conviction and three years for the kidnapping conviction. Defendant now appeals asserting two assignments of error for our review.

{¶ 7} "I. The trial court erred in failing to vacate the kidnapping charge as an allied offense of similar import."

{¶ 8} Determining whether offenses are allied requires a two-step analysis. The first being whether the elements of the offenses "correspond to such a degree that the commission of one crime will result in the commission of the other. In the second step, the court must determine whether the crimes were committed separately or with a separate animus." *State v. Harris*, Slip Opinion

No. 2009-Ohio-3323, at ¶10, citing R.C. 2941.25 and *State v. Blakenship* (1988), 38 Ohio St.3d 116, 117.

{¶ 9} "In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), courts are required to compare the elements of offenses in the abstract without considering the evidence in the case, but are not required to find an exact alignment of the elements. Instead, if in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in the commission of the other, then the offenses are allied offenses of similar import." *State v. Cabrales*, 118 Ohio St.3d 54, 886 N.E.2d 181, 2008-Ohio-1625, paragraph one of the syllabus.

{¶ 10} In *State v. Winn*, 121 Ohio St.3d 413, 2009-Ohio-1059, the Ohio Supreme Court held that kidnapping as defined under R.C. 2905.11(A)(2) and aggravated robbery as defined by R.C. 2911.01(A)(1) were allied offenses of similar import. "In essence, the elements to be compared in the abstract are the restraint, by force, threat, or deception, of the liberty of another to 'facilitate the commission of any felony' * ** and having 'a deadly weapon on or about the offender's person or under the offender's control and either display[ing] the weapon, brandish[ing] it, indicat[ing] that the offender possesses it, or us[ing] it' in attempting to commit or committing a theft offense." Id. at ¶21. The court found that the elements did not exactly align, but were so similar that the commission of one resulted in the commission of the other.

{¶ 11} In *Harris*, the Ohio Supreme Court held that aggravated robbery and robbery as defined under R.C. 2911.02(A)(2) and R.C. 2911.01(A)(1) are allied offenses as are felonious assault under R.C. 2903.11(A)(1) and (A)(2). *Harris*, 2009-Ohio-3323, ¶¶17 and 20.

{¶ 12} In *State v. Logan* (1979), 60 Ohio St.2d 126, syllabus, the Ohio Supreme Court set forth the following guidelines for establishing whether kidnapping and another offense of the same or similar kind are committed with a separate animus:

{¶ 13} "Where the restraint or movement of the victim is merely incidental to a separate underlying crime, there exists no separate animus sufficient to sustain separate convictions; however, where the restraint is prolonged, the confinement is secretive, or the movement is substantial so as to demonstrate a significance independent of the other offense, there exists a separate animus as to each offense sufficient to support separate convictions.

{¶ 14} "Where the asportation or restraint of the victim subjects the victim to a substantial increase in risk of harm separate and apart from that involved in the underlying crime, there exists a separate animus as to each offense sufficient to support separate convictions."

{¶ 15} In this case, robbery and kidnapping were allied offenses of similar import. The evidence sufficiently establishes the movement of the victim and his subsequent restraint in the office were merely incidental to the underlying robbery. The victim's "movement" into the office and his restraint had no

significance apart from facilitating the robbery. Indeed, in *Logan*, the Court noted, "when a person commits the crime of robbery, he must, by the very nature of the crime, restrain the victim for a sufficient amount of time to complete the robbery. Under our statutes, he simultaneously commits the offense of kidnapping (R.C. 2905.01(A)(2)[sic] by forcibly restraining the victim to facilitate the commission of a felony. In that instance, without more, there exists a single animus, and R.C. 2941.25 prohibits convictions for both offenses." Likewise, the momentary restraint of the victim in his office did not substantially increase the risk of harm to him apart from the robbery.

{¶ 16} Although defendant urges us to vacate his conviction for kidnapping, there is no precedential basis in Ohio to do so. The Ohio Supreme Court has recently reiterated, where an accused has been convicted of allied offenses of similar import "the choice is given to the prosecution to pursue one offense or the other, and it is plainly the intent of the General Assembly that the election may be of either offense." *Harris,* at ¶21. Accordingly, we sustain this assignment of error in part and overrule it in part. Defendant's convictions for robbery and kidnapping are allied offenses of similar import and must be merged into one conviction as determined by the State on remand.

{¶ 17} "II. The appellant's first degree kidnapping conviction was against the manifest weight of the evidence and contrary to due process."

{¶ 18} To warrant reversal from a verdict under a manifest weight of the evidence claim, this Court must review the entire record, weigh the evidence and

all reasonable inferences, consider the credibility of witnesses, and determine whether, in resolving conflicts in evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52.

{¶ 19} Defendant maintains his conviction for first degree kidnapping is against the manifest weight of the evidence because he contends the evidence establishes that the victim was released in a safe place unharmed.

{¶ 20} "Kidnapping is generally a first degree felony, but if the offender releases the victim in a safe place unharmed, it is a second degree felony. R.C. 2905.01(C)." *State v. Abdullah,* Franklin App. No. 05AP-1316, 2006-Ohio-5412, ¶28. We review this issue under the manifest weight of the evidence standard. Id.

{¶ 21} The evidence establishes that the defendant never touched the victim and left him in his work office unharmed. The victim, upon realizing the defendant had left, went and obtained his own gun and pursued the defendant. Under similar factual circumstances, courts have found a first degree kidnapping conviction is against the manifest weight of the evidence. E.g., *State v. Carson* (Apr. 22, 1999), Franklin App. No. 98AP-784. In *Carson*, the defendant was convicted of aggravated robbery and kidnapping for holding employees at gunpoint as the store was being robbed. In *State v. Butler*, Cuyahoga App. No. 89755, 2008-Ohio-1924, the evidence supported only a second degree kidnapping conviction where the defendant robbed his victims of their belongings

in a parking lot at knife-point but released them unharmed. See, also, *State v. Taogaga* (Dec. 2, 1999), Cuyahoga App. No. 75055 (defendant convicted of second degree felony kidnapping where nine people were held hostage at gunpoint while the residence was ransacked in a search for money).

{¶ 22} "The provision in R.C. 2905.01(C) reducing kidnapping to a felony of the second degree '[i]f the offender releases the victim in a safe place unharmed' is a circumstance the establishment of which mitigates a defendant's criminal culpability. It is not an element of the crime of kidnapping, but it is in the nature of an affirmative defense and is to be treated as such. *State v. Cook*, Cuyahoga App. No. 82777, 2004-Ohio-365; *State v. Leslie* (1984), 14 Ohio App.3d 343, 345; *State v. Cornute* (1979), 64 Ohio App.2d 199. * * * If, at trial, the defendant puts forth any evidence tending to establish that the victim was released in a safe place unharmed, the court is required to submit this issue to the jury under proper instructions. Id."

{¶ 23} In this case, there is no evidence to suggest anything other than that the victim was released in a safe place unharmed. Accordingly, defendant's conviction for first degree felony kidnapping is against the manifest weight of the evidence. Accordingly, this assignment of error is sustained to the extent that the evidence only supports a conviction for a second degree felony kidnapping.

{¶ 24} Judgment affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion.

It is ordered that appellant and appellee share equally 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 Court of Common Pleas to carry this judgment into execution. Case remanded to the trial court for further proceedings.

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

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JAMES J. SWEENEY, JUDGE

MARY J. BOYLE, J., CONCURS
MELODY J. STEWART, P.J., CONCURS IN JUDGMENT ONLY