[Cite as *State v. Rhodes*, 2010-Ohio-1207.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93133

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

VINCENT RHODES

DEFENDANT-APPELLANT

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

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-509952

BEFORE: Dyke, J., Gallagher, A.J., and Boyle, J.
RELEASED: March 25, 2010

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), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten 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. 2.2(A)(1).

ANN DYKE, J.:

{¶ 1} Defendant Vincent Rhodes appeals from his convictions for kidnapping and aggravated robbery. For the reasons set forth below, we affirm the findings of guilt as to both offenses, but we find the offenses to be allied, so we reverse and remand for conviction as to a single offense.

{¶ 2} On May 2, 2008, defendant was indicted for kidnapping and aggravated robbery at the Knight's Inn in North Randall. Defendant pled not guilty and was assigned counsel. On February 24, 2009, defendant filed a motion for self-representation. The matter proceeded to a jury trial on March 9, 2009. At this time, the trial court inquired regarding the motion for self-representation and defendant stated:

{¶ 3} "[Trial counsel] did not communicate effectively. I would say some is my fault; but, at the same time, I don't have enough information as far as in the discovery packet. * * * We have not been able to communicate and be on the same page."

{¶ 4} The court then cautioned defendant about waiving the attorney-client privilege and informed defendant that there was nothing in the record to indicate that counsel had the additional discovery information to which defendant referred and that hybrid representation is not permitted. The case proceeded with the assigned counsel representing defendant and without objection from defendant or further mention of the motion for self-representation.

{¶ 5} The state's witnesses established that Diretha Griffin, founder of Mates in Ministry, and Michael Hall, a friend of defendant's, rented a room for

defendant at the Knight's Inn in North Randall in March 2008. On March 29, 2008, at approximately 3:30 p.m., the man staying in room 215 of the Knight's Inn approached the desk manager and requested to check out of the room. Because the room had been rented for two additional days, the manager gave him a refund of $56.50. The manager then observed the man get a glass of water from the lobby. A short time later, the manager received a call for the occupant of room 215. When this individual returned to the lobby, the manager conveyed the message to him, and the man brandished a knife, grabbed the manager by the neck and directed him to the cash register. The assailant held the knife to the manager's neck, took at least $500 from the register and the cashier's cell phone, then fled.

{¶ 6} During the police investigation, the manager indicated that the assailant was the man who had been staying in room 215. The police presented a photograph to the manager and he identified the man in the photograph as the man who had attacked him and took the money. The manager could not identify defendant as the assailant during trial; however, he testified that defendant was around six feet tall, thin, and in his 40s. No DNA was recovered from the cup of water, but defendant could not be excluded as the source of DNA recovered from a cigarette butt found in room 215. In addition, defendant could not be excluded as one of the sources of DNA recovered from a hat found in room 215. Statistically, the expected frequency of occurrence of the DNA profile found on the cigarette butt is one in 332 sextillion, 900 quintillion unrelated individuals, and

the expected frequency of occurrence of the DNA profile found on the hat is one in 13 billion, 730 million unrelated individuals. Finally, a worker who cleaned rooms at the inn testified that defendant was the man who had been staying in room 215 prior to the robbery.

{¶ 7} After the inn had been robbed, defendant called Hall for help. According to Hall, defendant stated that he had been put out of the inn and was being falsely accused of robbing the front desk. Hall urged defendant to go to the North Randall Police Department for help. Hall later learned that defendant was staying with their friend "Donny" at the Day's Inn in North Randall. Hall went to the Day's Inn and spoke with Donny and defendant. Later, Hall drove Donny to the North Randall Police Department so that Donny could provide information to the police concerning the Knight's Inn robbery, and defendant was arrested a short time later.

{¶ 8} Defendant was subsequently convicted of both charges and sentenced to a total of 14 years of imprisonment. He now appeals and assigns five errors for our review.

{¶ 9} For his first assignment of error, defendant complains that the trial court failed to rule on and/or denied his motion for self-representation.

{¶ 10} A criminal defendant has the right to represent himself if he chooses to do so but he must first knowingly, intelligently, and voluntarily waive his right to counsel. *State v. Atkins* (Jan. 6, 2000), Cuyahoga App. No. 74925, citing *Faretta v. California* (1975), 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562. In *State v.*

Gibson (1976), 45 Ohio St.2d 366, 345 N.E.2d 399, the court explained the trial court's duty in this instance:

{¶ 11} "To discharge this duty properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such 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." Id., quoting *Von Moltke v. Gillies* (1948), 332 U.S. 708, 723, 68 S.Ct. 316, 92 L.Ed. 309.

{¶ 12} Further, the defendant's desire to represent himself must be clear and unequivocal. *State v. Reed* (Nov. 06, 1996), Hamilton App. Nos. C-940315 and C-940322. "[C]ourts are to indulge in every reasonable presumption against the waiver of a fundamental constitutional right, including the right to be represented by counsel." *State v. Dyer* (1996), 117 Ohio App.3d 92, 689 N.E.2d 1034.

{¶ 13} Reviewing courts have applied a de novo standard of review on this issue. See *State v. Bristow,* Scioto App. Nos. 07CA3186 and 07CA3187, 2009-Ohio-523.

{¶ 14} In this matter, the record indicates that defendant filed a motion for self-representation approximately two weeks before trial. On the day of trial, the court asked defendant about the motion and he stated:

{¶ 15} "[Counsel] did not communicate effectively. I would say some is my fault; but, at the same time, I don't have enough information as far as in the discovery packet. * * * We have not been able to communicate and be on the same page."

{¶ 16} The court then cautioned defendant about waiving the attorney-client privilege and informed defendant that there was nothing in the record to indicate that counsel had the additional discovery information that defendant claimed to be seeking. The court also informed defendant that hybrid representation is not permitted. The court asked defendant if there was anything else, and he indicated that there was not. The case then proceeded with assigned counsel representing defendant and without further mention of the motion or the self-representation issue.

{¶ 17} From this record, we cannot conclude that defendant voluntarily, and knowingly and intelligently elected to represent himself. Although defendant stated that he wanted to represent himself, this statement alone is insufficient. See *State v. Gibson,* supra, quoting *Von Moltke v. Gillies,* supra. Defendant merely expressed dissatisfaction over not being provided with discovery information, and stated that his counsel did not communicate effectively. Following discussion with the court, defendant indicated that there was nothing

else. The issue was dropped and counsel represented defendant without further complaint by defendant. We therefore cannot say that defendant clearly and unequivocally expressed a desire to represent himself, and indulging in every reasonable presumption against the waiver of a fundamental constitutional right, as we must, we find that defendant's remarks are insufficient to constitute a waiver of counsel in this matter.

{¶ 18} Further, the record does not indicate that the level of trust and cooperation between defendant and his counsel had deteriorated or caused a breakdown of the attorney-client relationship. *State v. Coleman* (1988), 37 Ohio St.3d 286, 525 N.E.2d 792; *State v. Blankenship* (1995), 102 Ohio App.3d 534, 657 N.E.2d 559. The trial court therefore properly permitted assigned counsel to continue.

{¶ 19} The first assignment of error is overruled.

{¶ 20} In his second assignment of error, defendant asserts that the trial court erred in denying his motion for a judgment of acquittal of the charges.

{¶ 21} The standard of review with regard to the sufficiency of the evidence is set forth in *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 381 N.E.2d 184, syllabus, as follows:

{¶ 22} "Pursuant to Criminal Rule 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt."

{¶ 23} Thus, the test an appellate court must apply in reviewing a challenge based on a denial of a motion for acquittal is the same as a challenge based on the sufficiency of the evidence to support a conviction. *State v. Bell* (May 26, 1994), Cuyahoga App. No. 65356. In *State v. Jenks* (1991), 61 Ohio St.3d 259, 273, 574 N.E.2d 492, the Ohio Supreme Court set forth the test an appellate court should apply when reviewing the sufficiency of the evidence in support of a conviction:

{¶ 24} "[T]he relevant inquiry on appeal is whether any reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. In other words, an appellate court's function when reviewing the sufficiency of the evidence is to examine the evidence admitted at trial and determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt." (Citations omitted.)

{¶ 25} R.C. 2911.01(A)(1) defines aggravated robbery as:

{¶ 26} "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 of offense, shall * * * 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."

{¶ 27} The offense of kidnapping is set forth in R.C. 2905.01(A)(2) as follows:

{¶ 28} "(A) No person, by force, threat, or deception, * * * 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: * * *

{¶ 29} "(2) To facilitate the commission of any felony or flight thereafter[.]"

{¶ 30} In this matter, the evidence demonstrated that the individual who was staying in room 215 grabbed the inn's manager by the throat and led him to the cash register, held a knife to the manager's throat, and took money from the cash register and a cell phone. The state presented testimony from Griffin and Hall that showed that defendant was staying at the inn. DNA evidence linked defendant to the items in room 215, and a worker at the hotel testified that defendant had been staying in that room. The state also presented evidence that defendant made statements to Hall that suggest a consciousness of guilt. In total, the state's evidence, if believed, would convince a reasonable juror that defendant, in committing a theft offense had a deadly weapon on or about the offender's person or under the offender's control and brandished and used it. In addition, the evidence, if believed, would also convince a reasonable juror that defendant, by force, restrained the manager of his liberty in order to facilitate commission of the aggravated robbery. In accordance with the foregoing, we conclude that the state presented sufficient evidence to establish the essential elements of the offenses of aggravated robbery and kidnapping, and the trial court did not err in denying the Crim.R. 29 motion for acquittal.

{¶ 31} The second assignment of error is without merit.

{¶ 32} For his third assignment of error, defendant challenges the manifest

weight of the evidence supporting the convictions.

{¶ 33} In evaluating a challenge to the verdict based on the manifest weight of the evidence, 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 trial court 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, 1997-Ohio-52, 678 N.E.2d 541.

{¶ 34} In this matter, the state's evidence demonstrated that Griffin rented a room for defendant at the inn and Hall paid for it. The state's evidence also indicated that the man who had been staying in room 215 checked out early and requested a partial refund. After the manager gave him the refund and took a phone message for him, the man returned to the desk, grabbed the manager by the neck and then led him to the cash register. The man then held a knife to the cashier's throat while he robbed the cash register. A worker at the inn observed defendant in room 215, and DNA evidence strongly linked defendant to a cigarette butt and a hat found in room 215. From our review of the entire record, we cannot say that the jury clearly lost its way and created a manifest miscarriage of justice in convicting defendant of the offenses.

{¶ 35} This assignment of error is without merit.

{¶ 36} For his fourth assignment of error, defendant maintains that he was denied the effective assistance of counsel because there was a breakdown in the

attorney-client relationship, counsel failed to cross-examine Diretha Griffin, failed to request a curative instruction regarding the Mates in Ministry's finding housing for felons, and failed to call witnesses, including Donny and defendant. In order to prevail on a claim for ineffective assistance of counsel, the defendant must show (1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373.

{¶ 37} To show error in counsel's actions, the defendant must overcome the strong presumption that licensed attorneys are competent and that the challenged action is the product of sound trial strategy and falls within the wide range of reasonable professional assistance. *Strickland,* 466 U.S. at 690-691, 104 S.Ct. at 2066, 80 L.Ed.2d at 695-696. Since judicial scrutiny of counsel's performance is highly deferential, reviewing courts must refrain from second-guessing the strategic decisions of trial counsel. Id. To show resulting prejudice, the defendant must establish a reasonable probability that, but for counsel's unprofessional conduct, the result of the proceedings would have been different. Id.

{¶ 38} With regard to the contention that there has been breakdown of the attorney-client relationship due to a lack of communication, the Supreme Court of Ohio has held that a defendant seeking to discharge a court-appointed attorney bears the burden of showing that the attorney-client relationship has broken down

to such a degree as to jeopardize her right to effective assistance of counsel. *State v. Henness,* 79 Ohio St.3d 53, 1997-Ohio-405, 679 N.E.2d 686; *State v. Coleman* (1988), 37 Ohio St.3d 286, 525 N.E.2d 792, paragraph four of the syllabus. When an indigent defendant questions the effectiveness of assigned counsel, the trial court must inquire into the complaint and make the inquiry part of the record. *State v. King* (1995), 104 Ohio App.3d 434, 662 N.E.2d 389.

{¶ 39} Here, as we noted previously, the record does not indicate that the level of trust and cooperation between defendant and his counsel had deteriorated or caused a breakdown of the attorney-client relationship. *State v. Coleman,* supra; *State v. Blankenship,* supra. The trial court therefore properly permitted assigned counsel to continue.

{¶ 40} With regard to defendant's decision not to cross-examine Diretha Griffin, we note that "'[t]he extent and scope of cross-examination clearly fall within the ambit of trial strategy, and debatable trial tactics do not establish ineffective assistance of counsel." *State v. Leonard,* 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229.

{¶ 41} In this matter, Griffin appeared to be a credible witness, but her testimony on direct did not place defendant in room 215. Accordingly, counsel could have strategically determined that nothing more was needed from this witness and that additional inquiry on cross could further inculpate defendant rather than help his case.

{¶ 42} As to the decision not to call Donny or defendant, we note that the

decision whether to call a defendant as a witness falls within the purview of trial tactics. *State v. Adkins* (2001), 144 Ohio App.3d 633, 761 N.E.2d 94. In this matter, Hall testified that Donny was uncomfortable with defendant staying in his room following the Knight's Inn robbery, and that Hall drove Donny to the North Randall Police Station immediately before defendant was arrested. From this record, it cannot reasonably be asserted that Donny would have provided information helpful to the defense. Further, defendant gave a rambling and incredible statement at the time of sentencing, and using such statement as an indication of what defendant would have stated during trial, counsel could have reasonably determined, in the exercise of sound trial strategy, that it would not be helpful to have defendant testify.

{¶ 43} As to counsel's actions with regard to the Mates in Ministry testimony, the record reflects that Griffin was permitted to testify that she works for this organization and that it provides assistance to individuals who have completed terms of incarceration. Defendant's trial counsel requested a motion in limine to bar testimony linking defendant to this organization. The court denied the motion, stating, "[s]he's not said one word about your client." Griffin then testified that she rented a room for defendant at the Knight's Inn. We conclude that the brief references to the ministry formed part of the immediate background of the offense and was not introduced to demonstrate defendant's propensity to commit crimes. Defendant has failed to demonstrate error resulting from the admission of the challenged testimony or the absence of the

curative instruction. *State v. Allen* (Sept. 9, 1993), Cuyahoga App. No. 62275. Absent a trial error, the claim of ineffective assistance must fail. *State v. Henderson* (1988), 39 Ohio St.3d 24, 528 N.E.2d 1237.

{¶ 44} In accordance with all of the foregoing, the fourth assignment of error is without merit.

{¶ 45} In his fifth assignment of error, defendant contends that the trial court erred in failing to merge the aggravated robbery and kidnapping convictions.

{¶ 46} R.C. 2941.25(A) provides that there may be only one conviction for allied offenses of similar import. The Supreme Court of Ohio has determined that a court's analysis pursuant to R.C. 2941.25 requires two steps. *State v. Cabrales,* 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181.

{¶ 47} "'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 then proceed to the second step.'" Id., quoting *State v. Blankenship* (1988), 38 Ohio St.3d 116, 526 N.E.2d 816.

{¶ 48} "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 commission of the other, then the offenses

are allied offenses of similar import." *State v. Cabrales,* supra, paragraph one of the syllabus.

{¶ 49} "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." Id.

{¶ 50} In *State v. Winn,* 121 Ohio St.3d 413, 2009-Ohio-1059, 905 N.E.2d 154, at syllabus, the Ohio Supreme Court recently reaffirmed its holding that "[t]he crime of kidnapping, defined by R.C. 2905.01(A)(2), and the crime of aggravated robbery, defined by R.C. 2911.01(A)(1), are allied offenses of similar import pursuant to R.C. 2941.25." The *Winn* Court, however, did not apply the second step of the allied offenses analysis because the state conceded that the defendant lacked a separate animus for each offense. Id.

{¶ 51} The Ohio Supreme Court has held that prolonged restraint, even in the absence of asportation of the victim, may support a conviction for kidnapping as a separate act or animus from that of the underlying crime. *State v. Logan* (1979), 60 Ohio St.2d 126, 397 N.E.2d 1345. "The primary issue, however, is whether the restraint or movement of the victim is merely incidental to a separate underlying crime or, instead, whether it has a significance independent of the other offense." Id. The question for consideration is "whether the victim, by such limited asportation or restraint, was subjected to a substantial increase in

the risk of harm separate from that involved in the underlying crime." Id.

{¶ 52} In this matter, the record does not support a separate animus as to both kidnapping and aggravated robbery. The evidence demonstrated that defendant restrained the manager of his liberty in connection with the aggravated robbery, but such restraint did not have a significance independent of the aggravated robbery and did not subject the manager to a greater harm separate from the aggravated robbery.

{¶ 53} Because a defendant may be convicted of only one offense for such conduct, the defendant may be sentenced for only one offense and allied offenses of similar import are to be merged at sentencing. See *State v. Brown,* 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149. The determination of the defendant's guilt for committing allied offenses remains intact, both before and after the merger of allied offenses for sentencing. *State v. Whitfield,* 124 Ohio St.3d 319, 2010-Ohio-2. This court, however, is required to reverse the judgment of conviction and remand for a new sentencing hearing at which the state must elect which allied offense it will pursue against the defendant. Id., paragraphs one and two of the syllabus.

{¶ 54} In accordance with all of the foregoing, the offenses at issue herein are allied offenses. As such, the determinations of guilt remain intact but defendant may be sentenced for only one of the offenses, so we must remand for re-sentencing. At resentencing, the state may elect whether it will pursue the kidnapping or aggravated robbery conviction.

{¶ 55} The fifth assignment of error is well-taken.

{¶ 56} The determinations of guilt remain intact for both the kidnapping and aggravated robbery charges, the convictions are reversed and the matter is remanded for resentencing.

It is, therefore, considered that said appellant and appellee split the costs herein.

It is ordered that a special mandate be sent to said 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.

ANN DYKE, JUDGE

SEAN C. GALLAGHER, A.J., CONCURS
MARY J. BOYLE, J., CONCURS IN JUDGMENT ONLY