[Cite as *State v. McGee*, 2010-Ohio-2081.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92019

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

RICHARD MCGEE

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED;
REMANDED FOR RESENTENCING

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-507434

BEFORE: Blackmon, J., Rocco, P.J., and Jones, J.

RELEASED: May 13, 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).

PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant Richard McGee appeals his convictions for aggravated robbery and kidnapping. He assigns five errors for our review.[1]

{¶ 2} Having reviewed the record and pertinent law, we affirm McGee's convictions but remand for the merger of allied offenses. The apposite facts follow.

{¶ 3} A joint trial was conducted for McGee and his two co-defendants, Tyshya Moore and Gregory Holcomb. The trial concerned three robberies of check-cashing businesses.

October 31, 2007

{¶ 4} Angie Perdue testified that she was working alone at a check-cashing business located in Parma. A black male entered the business around 11:00 a.m. and inquired about obtaining a loan and then left. A few minutes later, he returned, forced Perdue into a bathroom, and robbed the store.

{¶ 5} Although the robbery occurred in October 2007, it was not until February 2008 that she was shown a photo array of possible suspects. The photo array was assembled after McGee and his co-defendants were arrested regarding robberies in February 2008 with similar fact patterns as the October 2007 robbery.

{¶ 6} Perdue identified McGee from the photo array as the person who robbed her. However, she testified at trial that she was not sure McGee was

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[1]See appendix.

the robber. Although fingerprints were obtained from the scene, they were not compared to McGee's fingerprints. The jury acquitted McGee from the charges arising out of this robbery.

February 11, 2008

{¶ 7} Yolanda Davis and Kristin Radzyminski were working at a cash-checking business located in Parma, Ohio. Radzyminski went outside for a smoke break. When Davis buzzed her back in through the security doors, McGee entered at the same time. McGee proceeded to Davis's counter and inquired about the process for obtaining a loan. Radzyminski felt uneasy about McGee because he kept the hood of his jacket pulled up. When he left, he pushed open the security door very wide and held it longer than would be usual. Two men ran inside, and McGee left.

{¶ 8} The men quickly proceeded to the area behind the counter. According to Davis, one of the men was wielding a gun that looked like her father's gun. She described it as a .38 revolver that was silver with a wooden handle. The security camera indicated the robbery occurred at 11:39 a.m.

{¶ 9} Davis testified that earlier that morning at around 10:30 a.m., she had observed a white truck circling the parking lot. She thought this was unusual. She identified McGee's truck from a photograph as the truck she saw. She was positive it was the same truck because it had unusual handles on the back. She also identified the gun retrieved from McGee's truck as the robber's gun.

{¶ 10} Davis was shown a photo array containing the Bureau of Motor Vehicles ("BMV") photo of McGee. She could not identify any of the robbers from that photo array. She also explained at trial that the reason she could not identify McGee from the array was because in McGee's BMV photo he was not as well groomed as he was in person.

{¶ 11} A second photo array was compiled using McGee's booking photo from the Garfield Heights robbery. Davis never reviewed this second array because the detective was unable to arrange a time for her to view the array. She positively identified McGee in court as the person who held the door open.

{¶ 12} Radzyminski was not able to identify McGee in the first photo array; however, she was able to identify him in the second photo array. She stated that she was positive McGee was the man that walked in behind her. She had a close view of his face when they stood next to each other when she was taking her smoke break.

{¶ 13} Matthew Crock lived on Chestnut Hill, a residential street located behind the check-cashing business. He stated on the morning of the robbery, he saw two black males walking down the street. A white truck pulled up, and the two men engaged in a conversation with the driver. The driver parked the truck near Crock's property. He thought it was a construction truck because the house it was parked in front of was for sale.

{¶ 14} A few minutes later, he saw the two black males running down the street and jump into the back of the truck. The men pulled the doors shut as the truck pulled away. Crock testified the truck was unusual because it had double doors on the back instead of a door that pulled up. He positively identified a photograph of McGee's truck as the truck. When he saw a patrol car, he flagged it down and told the officers what he had witnessed.

{¶ 15} McGee presented Makeba Creagh as his alibi witness for the February 11th robbery. She testified that she and McGee had been friends for over twenty years. She stated that at the time of the February 11, 2008 robbery, McGee was assembling shelves at the day care she managed; however, she did not have any documentation to prove that he was there at that time.

{¶ 16} The jury found McGee guilty of two counts of aggravated robbery and two counts of kidnapping, but not guilty of the firearm specifications. The trial court sentenced McGee to a total of 12 years in prison to run consecutive to the sentence for the February 12th robbery.

February 12, 2008

{¶ 17} Lisa Gomersall testified that she was working alone at a check-cashing business in Garfield Heights. She stated that around 2:12 p.m., a black female entered the business and inquired about the process for obtaining a loan. The woman then left. Shortly after, she stated that

Richard McGee entered the vestibule area of the business. Gomersall refused to allow him to enter through the security doors until he lowered the scarf on his face. When he lowered the scarf she was able to have a good view of his face. As McGee entered, he held the door open for a second black male. The second male jumped over the counter and pulled out a gun that was silver with a wooden handle and robbed the store. Gomersall stated that while the second male emptied the cash drawers, McGee kept looking at the windows and doors. The police later took her to a white truck where she identified the passengers as the men who robbed her.

{¶ 18} Officers Timothy Baon and Ted Grendzynski testified they had received information that similar robberies had occurred in other cities and that in each robbery, a white box delivery truck was seen leaving the scene. Therefore, once they received information regarding the Garfield Heights robbery, they traveled along the back streets looking for a white delivery truck. They located the truck not too far from the cash-checking store and pulled it over. The occupants matched the description of the robbers. McGee was driving the truck, and co-defendant Tyshya Moore was the passenger. McGee told the officers there was no one else in the truck, but co-defendant Gregory Holcomb was found in the back. $3,794 and a gun were found in the center console compartment.

{¶ 19} Detective Murphy took McGee's statement. McGee admitted that he participated in the robbery and that the truck was his. He

contended, however, that he felt he had to assist Holcomb because he had a gun. The jury convicted him of aggravated robbery and kidnapping, and he was sentenced to eight years in prison.

{¶ 20} The instant appeal only addresses the convictions as to the February 11, 2008 robbery of the Parma business. McGee has appealed his conviction for the Garfield Heights robbery separately.

Joinder of Trials

{¶ 21} In his first assigned error, McGee argues that he should have been tried separately for each indictment.

{¶ 22} We conclude the trial court did not err by joining the cases for trial. Under Crim.R. 8(A), two or more offenses may be charged together if the offenses "are of the same or similar character, * * * or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct." In fact, "[t]he law favors joining multiple offenses in a single trial under Crim.R. 8(A) if the offenses charged 'are of the same or similar character.'" *State v. Lott* (1990), 51 Ohio St.3d 160, 163, 555 N.E.2d 293. Crim.R. 14 states that a trial court may grant a criminal defendant relief from prejudicial joinder upon the filing of a motion for severance.

{¶ 23} In the instant case, McGee failed to file a motion for severance and did not object to the joinder prior to trial. To demonstrate a trial court's error in denying severance, a defendant must establish (1) that his rights

were prejudiced, (2) "that at the time of the motion to sever he provided the trial court with sufficient information so that it could weigh the considerations favoring joinder against the defendant's right to a fair trial," and (3) "that given the information provided to the court, it abused its discretion in refusing to separate the charges for trial." *State v. Schaim* (1992), 65 Ohio St.3d 51, 59, 600 N.E.2d 661, citing *State v. Torres* (1981), 66 Ohio St.2d 340, 421 N.E.2d 1288, syllabus.

{¶ 24} McGee never moved for severance; therefore, he did not provide the trial court with sufficient information to weigh considerations in favor of joinder against his right to a fair trial. Thus, but for plain error, he has waived any error as to the joinder. Plain error does not exist unless the appellant establishes that the outcome of the trial clearly would have been different but for the trial court's allegedly improper actions. *State v. Waddell*, 75 Ohio St.3d 163, 166, 1996-Ohio-100, 661 N.E.2d 1043. We conclude plain error did not occur because even without the evidence from the Garfield Heights robbery, there was sufficient evidence of McGee's participation in the Parma robbery to convict him. Davis and Radzyminski both identified McGee as the man who inquired about the loan process. They both stated that as McGee left, he held the door wide open and for an unusual length of time, until the two men who robbed the store entered. Davis identified the gun retrieved from McGee's truck as being the same gun used to commit the robbery. Davis identified McGee's truck as the one she had

observed circling the parking lot about an hour before the robbery. This is the same truck that Matthew Crock observed two black males jump into the back of after running down the street.

{¶ 25} Additionally, the evidence of the other robberies would have been admissible pursuant to Evid.R. 404(B), as evidence of the modus operandi used in committing the robbery. The Parma robbery was almost identical to the Garfield Heights robbery, which occurred the next day. Both robberies involved cash-checking businesses with only one or two employees working. The robbers scouted the scene by having one of them inquire about a loan. They were able to enter the secured doors by having the first person hold the door open for the rest. The two robberies for which McGee was convicted also had a white delivery truck as the get-away vehicle. Thus, this evidence was admissible even without the cases being joined. Accordingly, McGee's first assigned error is overruled.

Manifest Weight of the Evidence

{¶ 26} In his second assigned error, he argues his convictions were against the manifest weight of the evidence.

{¶ 27} In *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, the Ohio Supreme Court addressed the standard of review for a criminal manifest weight challenge, as follows:

> **"The criminal manifest-weight-of-the-evidence standard was explained in *State v. Thompkins* (1997), 78 Ohio St.3d**

380, 678 N.E.2d 541. In *Thompkins*, the court distinguished between sufficiency of the evidence and manifest weight of the evidence, finding that these concepts differ both qualitatively and quantitatively. Id. at 386, 678 N.E.2d 541. The court held that sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, but weight of the evidence addresses the evidence's effect of inducing belief. Id. at 386-387, 678 N.E.2d 541. In other words, a reviewing court asks whose evidence is more persuasive -- the state's or the defendant's? We went on to hold that although there may be sufficient evidence to support a judgment, it could nevertheless be against the manifest weight of the evidence. Id. at 387, 678 N.E.2d 541. 'When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a "thirteenth juror" and disagrees with the factfinder's resolution of the conflicting testimony.' Id. at 387, 678 N.E.2d 541, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652."

{¶ 28} However, an appellate court may not merely substitute its view for that of the jury, but must find that "in resolving conflicts in the evidence, the jury 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. Thompkins* (1997), 78 Ohio St.3d 380, 387, 678 N.E.2d 541. Accordingly, reversal on manifest weight grounds is reserved for "the exceptional case in which the evidence weighs heavily against the conviction." Id.

{¶ 29} McGee contends the witness identification of him was not as strong as his alibi witness. Because Davis never viewed the second photo array, this discussion only relates to Radzyminski's identification of McGee.

{¶ 30} Radzyminski testified that while taking her smoke break prior to the robbery, McGee stood next to her. Therefore, she was able to view McGee in close proximity. She could not identify him from the first photo array, which used McGee's BMV photo. However, she immediately identified McGee in the second array, which was shown to her three days after the robbery. The second photo array contained the recent photo of McGee taken the day before at his booking for his involvement in the Garfield Heights robbery. Radzyminski stated she was positive McGee was the person who held open the door. Thus, we cannot say the jury erred by concluding the witness identification, in conjunction with the fact the gun found in McGee's truck was identical to the one used in the robbery, was credible.

{¶ 31} McGee contends his alibi witness provided credible testimony. Makeba Creagh testified McGee was at her day care center assembling shelves on February 11th. Regarding the credibility of witnesses, we defer to the jury who was best able to weigh the evidence and judge the credibility of witnesses by viewing the demeanor, voice inflections, and gestures of the witnesses testifying. See *Seasons Coal Co. v. Cleveland* (1994), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273; *State v. DeHass* (1967), 10 Ohio St.2d 230, 231, 227 N.E.2d 212. The jury may have discounted Creagh's testimony because she had been McGee's friend for over 20 years, and she did not have any documentation to prove he was there that day.

{¶ 32} McGee also argues that the fact he willingly admitted his involvement in the Garfield Heights robbery makes it more plausible that he was not involved in the Parma robbery. The jury was aware that McGee admitted his involvement in the Garfield Heights robbery in his statement to the police. It was within their discretion to determine if that lessened the likelihood he was involved in the Parma robbery.

{¶ 33} McGee also contends his convictions were against the manifest weight of the evidence because the police never investigated other suspects, like his brother. However, there was no evidence at trial that there were other suspects regarding the robberies. Accordingly, McGee's second assigned error is overruled.

Suggestive Photo Array

{¶ 34} In his third assigned error, McGee claims his attorney was ineffective for failing to seek the suppression of Radzyminski's out-of-court identification of McGee after being shown a second photo array.

{¶ 35} To establish ineffective assistance of counsel for failure to file a motion to suppress, a defendant must prove that there was a basis to suppress the evidence in question. *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, 817 N.E.2d 29, at ¶35. However, even when some evidence in the record supports a motion to suppress, we presume that defense counsel was effective if "'counsel could reasonably have decided that the filing of a motion to suppress would have been a futile act.'" *State v. Chandler*, Cuyahoga App. No. 81817, 2003-Ohio-6037, at ¶37, quoting *State v. Edwards* (July 11, 1996), Cuyahoga App. No. 69077, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 485 N.E.2d 717.

{¶ 36} McGee argues the circumstances surrounding the photo array rendered the process "unduly suggestive." Specifically, McGee contends that Radzyminski identified him because his photo also appeared in the first photo array in which she could not identify him. He claims he looked familiar to her in the second photo array because she saw him in the first one. We disagree.

{¶ 37} The first array contained McGee's BMV photo that was several months old. The second array contained a more recent photo of McGee, which Radzyminski immediately identified as the person who held open the door for

the robbers. Comparing the two photographs, McGee looks well-groomed in the second photograph compared to the first and has a different hair style.

{¶ 38} Even if the use of the two photographs was suggestive, that does not invalidate the witness's identification. In *Neil v. Biggers* (1972), 409 U.S. 188, 199-200, 93 S.Ct. 375, 34 L.Ed.2d 401, the United States Supreme Court stated that when reviewing suggestive identification procedures, the crucial inquiry is "whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive. * * * The factors to be considered in evaluating the likelihood of misidentification include 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." See, also, *State v. Williams*, 73 Ohio St.3d 153, 163, 1995-Ohio-275, 652 N.E.2d 721.

{¶ 39} Radzyminski had the opportunity to view McGee closely when she was smoking her cigarette outside the business prior to the robbery. She stated that McGee stood next to her and she "got a real good look at him." She was able to pick McGee out the photo line-up three days after the robbery. She was positive McGee was the person who held the door open. The first photo array was shown on the day of the robbery; therefore, she did not view the photo arrays in immediate succession. Given the indicia of

reliability regarding Radzyminski's identification, counsel was not ineffective for failing to move to suppress the photo identification. Accordingly, McGee's third assigned error is overruled.

Sentence

{¶ 40} In his fourth assigned error, McGee argues the trial court erred by ordering his sentence in the Parma robbery to be served consecutively with the Garfield Heights robbery.

{¶ 41} McGee argues that after *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, excised R.C. 2929.14(E)(4), the trial court's statutory authority for imposing consecutive sentences was removed and the language of R.C. 5145.01 mandated the court to order his sentences to be served concurrently. R.C. 5145.01, found under the Chapter on "State Correctional Institutions," provides in pertinent part that: "If a prisoner is sentenced for two or more separate felonies, the prisoner's term of imprisonment shall run as a concurrent sentence, except if the consecutive sentence provisions of sections 2929.14 and 2929.41 of the Revised Code apply."

{¶ 42} This court in *State v. Shie*, Cuyahoga App. No. 88677, 2007-Ohio-3773 rejected this same argument. In *Shie*, we explained:

> **"Appellant and his counsel misread the severance remedy applied by the court in *Foster*. *Foster* does not excise R.C. 2929.14(E)(4) in its entirety. It only severed the part of R.C. 2929.14(E)(4) which required judicial factfinding before the court could impose consecutive sentences. Thus,**

> **'[a]fter the severance, judicial factfinding is not required before imposition of consecutive prison terms.' *Foster*, at ¶99. Furthermore, 'trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences.' Id. at ¶100."** Id. at ¶11.

{¶ 43} Additionally, since *Foster*, the Ohio Supreme Court has stated that the trial court has the discretion and inherent authority to determine whether a prison sentence within the statutory range shall run consecutively or concurrently. *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478, 912 N.E.2d 582, at ¶33, citing *State v. Bates*, 118 Ohio St.3d 174, 2008-Ohio-1983, 887 N.E.2d 328, at ¶19.

{¶ 44} As the Twelfth District in *State v. Paugh*, 12th Dist. No. CA2008-11-144, 2009-Ohio-4682, noted:

> **"The federal district court in *Shie v. Smith* (N.D.Ohio Feb.13, 2009), No. 1:08 CV 194, 2009 WL 385617 (habeas petition), noted that the Ohio Supreme Court made several statements in *Bates* in reference to Ohio's statutory scheme after *Foster*. The *Shie* court stated, 'It is hard to imagine, after making these unambiguous proclamations with full knowledge of the existence of [R.C.] 5145.01, that the Ohio Supreme Court would now find that a statute that addresses the governance of state prisons trumps the Ohio sentencing statutes, creates a**

liberty interest in concurrent sentences[,] and forms a basis for overturning, in less than three years, its decisions in *Foster* and *Bates*.' Id. at 5, 887 N.E.2d 328."

{¶ 45} We conclude the trial court was not required to run the sentences concurrently. Accordingly, McGee's fourth assigned error is overruled.

Allied Offenses

{¶ 46} In his fifth assigned error, McGee argues that the trial court erred by failing to merge the kidnapping and aggravated robbery offenses because they are allied offenses of similar import. He contends that the kidnapping and aggravated robbery of the victims in this case were all part of the same transaction and committed with the same animus.

{¶ 47} 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.

{¶ 48} "'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.

{¶ 49} "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.

{¶ 50} "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.

{¶ 51} McGee was convicted of two counts of aggravated robbery pursuant to R.C. 2911.01(A)(1) and two counts of kidnapping pursuant to R.C. 2905.01(A)(2). In *State v. Winn*, 121 Ohio St.3d 413, 2009-Ohio-1059, 905 N.E.2d 154, the Ohio Supreme Court held "in keeping with 30 years of precedent * * * [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." Id. at the syllabus. Thus, following the established precedent, we conclude aggravated robbery

under R.C. 2911.01(A)(1) and kidnapping, under R.C. 2905.01(A)(2) are allied offenses.

{¶ 52} Next, we consider whether the offenses were committed with a separate animus. 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.

{¶ 53} In the instant case, we conclude there was no evidence to suggest that the kidnapping was anything but incidental to the aggravated robbery. Therefore, there was no separate animus. Thus, the court erred by not merging the aggravated robbery and kidnapping counts.

{¶ 54} McGee may be found guilty of both offenses but sentenced for only one. See *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, at ¶17; *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147, 922 N.E.2d 937. Thus, we must remand for resentencing. At resentencing, the state

may elect whether it will pursue the kidnapping or aggravated robbery convictions. Accordingly, McGee's fifth assigned error is sustained.

Conviction affirmed; case remanded for resentencing.

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 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.

PATRICIA ANN BLACKMON, JUDGE

KENNETH A. ROCCO, P.J., and
LARRY A. JONES, J., CONCUR

APPENDIX

Assignments of Error

"I. The trial court erred in joining the trials of separate cases from different cities with different accomplices."

"II. The jury erred in convicting Richard McGee against the manifest weight of the evidence."

"III. Assigned counsel failed to move to suppress the photo lineup identification, which if granted would have had an effect on the outcome of the trial."

"IV. The trial court erred in assigning consecutive sentences for robberies under a single indictment."

"V. The trial court erred in failing to merge the kidnapping and aggravated robbery convictions."