

[Cite as *State v. Howell*, 2010-Ohio-3403.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 92827**

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**GEORGE HOWELL**

DEFENDANT-APPELLANT

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**JUDGMENT:  
AFFIRMED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-510229

**BEFORE:** McMonagle, Kilbane, P.J., and Jones, J.

**RELEASED:** July 22, 2010

**JOURNALIZED:**

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CHRISTINE T. McMONAGLE, J.:

{¶ 1} Defendant-appellant, George Howell, appeals from the trial court's judgment finding him guilty of aggravated robbery, felonious assault, and having a weapon while under disability, and sentencing him to 34 years incarceration. Howell contends that his convictions were not supported by

sufficient evidence and are against the manifest weight of the evidence. He further contends that the trial court erred by (1) denying his motion to suppress, (2) giving an improper “consciousness of guilt” jury instruction, (3) not merging his convictions, (4) ordering him to serve a sentence that is contrary to law, and (5) not making the necessary findings before sentencing him to consecutive sentences. In a supplemental assignment of error filed pro se, Howell asserts that the indictment for aggravated robbery was defective because it failed to include the mens rea element of the offense. Finding no merit to any of these arguments, we affirm.

### **I. Facts and Procedural Background**

{¶ 2} Howell was indicted in a five-count indictment on one count of aggravated robbery in violation of R.C. 2911.01(A)(1), two counts of felonious assault in violation of R.C. 2903.11(A)(2), one count of carrying a concealed weapon in violation of R.C. 2923.12(A)(2), and one count of having a weapon while under disability in violation of R.C. 2923.13(A)(2). The aggravated robbery and felonious assault charges carried one- and three-year firearm specifications. All counts also carried a forfeiture specification that was subsequently dismissed by the trial court, as was the carrying a concealed weapon charge.

{¶ 3} Trial testimony indicated the following. On April 24, 2008, brothers Sammie and Khalid Fattah were working at the Dove Mini Market

in Cleveland. At approximately 9:15 p.m., as Khalid was standing by the front door of the market, a male entered the store, pointed a gun at Khalid and said, "Don't move. Where's the money? Where's the other guy?" The male was wearing a sweatshirt with the hood pulled up over his head, and his face was covered to just above his upper lip.

{¶ 4} Sammie, who had been sitting behind the counter, stood up. The robber, who was eight to ten feet away from him, turned and pointed the gun at him. Upon seeing the robber point the gun at his brother, Khalid, who was less than a foot away from the robber, grabbed the robber's arm and began struggling with him. The robber then shot Khalid twice.

{¶ 5} Sammie then grabbed a 9 mm handgun and fired shots at the robber until the gun jammed. Sammie testified that he shot at the robber's left shoulder and chest to avoid shooting his brother, who was still struggling with the robber. As they struggled, Khalid and the robber fell out the front door of the store. The covering on the robber's face slipped down, allowing Khalid to see his face, and the robber then ran away.

{¶ 6} Khalid came back inside the store and called 911; EMS transported him to MetroHealth Hospital shortly thereafter. Cleveland police responded to the scene and obtained a description of the suspect after talking to Sammie and viewing a videotape of the incident from the store's surveillance camera. The suspect was described as an African-American

male, about 5'8" with a heavy build, wearing a gray sweatshirt, blue jeans, and dark boots.

{¶ 7} A short time later, the police were advised by personnel at St. Vincent Charity Hospital that Howell had arrived there at 10:50 p.m. seeking treatment for gunshot wounds to his upper left shoulder and chest area. Cleveland patrol officer Joseph Sedlak went to St. Vincent and spoke with Howell, who said that he had been walking in the area of East 99<sup>th</sup> Street and Miles Avenue at approximately 9:30 p.m. that evening when a vehicle pulled up beside him and two males began shooting at him. Howell said that he fled to his girlfriend's house, which the police later determined was only a 15-minute walk from the Dove Mini Market. Howell was unable to give a description of the car or the suspects and could not explain why he did not call the police to report the incident or seek immediate medical attention. Officer Sedlak inspected Howell's clothes, which consisted of a tee shirt, blue jeans, and tan boots. A short time later, Howell was transferred to MetroHealth Hospital.

{¶ 8} Officer Sedlak then contacted Cleveland police detective Arthur Echols, who was investigating the robbery, and reported that Howell's physical description and clothing matched that of the suspect in the Dove Mini Market robbery and, further, that his explanation of how he was shot was questionable, given that Cleveland police dispatch had informed Sedlak

that no one had reported any shots fired that evening in the area of East 99<sup>th</sup> Street and Miles Avenue.

{¶ 9} Det. Echols went to MetroHealth Hospital, where he spoke with Sammie, who was there visiting Khalid. Upon learning that Sammie might be able to identify the robber, Det. Echols told him to walk by Howell's bed. When Sammie confirmed that Howell was the robber, Det. Echols arrested him. Another officer took gunshot residue samples from Howell's hands, which subsequently tested positive for gunshot residue on his right hand.

{¶ 10} Four days later, Det. Echols met with Khalid at the police department. Det. Echols showed him a six-person photo array and Khalid identified Howell from the array as the robber. Khalid also gave a written statement and reported that the robber's blue jeans had a distinctive rainbow design on the back pockets. Det. Echols then showed Khalid Howell's jeans, which had a rainbow design on them, and Khalid identified them as those worn by the robber.

{¶ 11} The jury subsequently found Howell guilty of aggravated robbery and two counts of felonious assault. After a bench trial, the trial court found him guilty of having a weapon while under disability. The court subsequently sentenced him to 3 years incarceration on the three-year merged firearm specification, to be served prior to 10 years for aggravated robbery, 8 years on each of the felonious assault convictions, and 5 years for

having a weapon while under disability, all to be served consecutively, for a total of 34 years.

## **II. Motion to Suppress**

{¶ 12} In his first assignment of error, Howell contends that the trial court erred in denying his pretrial motion to suppress the cold stand<sup>1</sup> identification by Sammie at MetroHealth Hospital and Khalid's identification of him in the photo array. He argues that the police used unnecessarily suggestive procedures that rendered the eyewitness identifications unreliable and, hence, they should have been suppressed. He argues further that the trial court should have excluded Sammie and Khalid's in-court identifications of him as the robber because they were based on their earlier unreliable identifications.

{¶ 13} Due process requires suppression of an out-of-court identification if the confrontation procedure was "unnecessarily suggestive of the suspect's guilt and the identification was unreliable under all the circumstances." *State v. Davis*, 76 Ohio St.3d 107, 112, 1996-Ohio-414, 666 N.E.2d 1099; *In re Henderson*, 8<sup>th</sup> Dist. No. 79716, 2002-Ohio-483. No due process violation will be found where an identification does not stem from an impermissibly

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<sup>1</sup>In a cold stand, a victim or witness, in a relatively short time after the incident, is shown only one person and asked whether they can identify the individual as the perpetrator of the crime. *State v. Butler*, 8<sup>th</sup> Dist. No. 89755, 2008-Ohio-1924, ¶11.

suggestive confrontation but is instead the result of observations at the time of the crime. Id.

{¶ 14} In determining whether an identification is reliable, a court must consider (1) the witness's opportunity to view the suspect at the time of the incident, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description, (4) the witness's certainty when identifying the suspect at the time of the confrontation, and (5) the length of time elapsed between the crime and the identification. *Neil v. Biggers* (1972), 409 U.S. 188, 196-198, 93 S.Ct. 375, 34 L.Ed.2d 401; *State v. Waddy* (1992), 63 Ohio St.3d 424, 439, 588 N.E.2d 819.

{¶ 15} With these principles in mind, we consider whether the cold stand and photographic array were unreliable and impermissible suggestive.

{¶ 16} With respect to the cold stand, the record demonstrates that Sammie was only eight to ten feet away from the robber when the robber turned and pointed a gun at him. At the suppression hearing, Sammie testified that the store was well lit, and that he "looked directly" at the robber and got "a good look" at his face. He testified further that even though part of the robber's face was covered, he observed the robber's face from above his upper lip to his forehead, and noted his eyes, eyebrows, and cheeks. Sammie identified Howell approximately two hours after the



shooting. Contrary to Howell's argument that Sammie identified him at the hospital only because Sammie knew he had shot the robber, and Howell was lying in a hospital bed wounded, Sammie testified that his identification was based on Howell's appearance and build, and not on the fact that he had been shot. Sammie testified that he was "positive" that Howell was the robber.

{¶ 17} Under these circumstances, we find that Sammie's cold stand identification of Howell was reliable: he had sufficient opportunity to view Howell during the robbery, his identification of Howell took place close in time to the incident, his identification was based on physical characteristics he had observed during the incident, and he was certain of the identification.

{¶ 18} Howell contends that the photo array identification by Khalid was unreliable because Khalid's identification was based on only a five-second viewing when the robber, whom Khalid admitted he had never seen before, pointed a gun at him. Howell also contends that Khalid spoke to Sammie about the robbery after it happened, thereby tainting his identification. We find no merit to these arguments.

{¶ 19} The record reflects that Khalid observed the robber from less than one foot away when the robber first entered the store. Further, the cloth covering the robber's face slipped down as Khalid struggled with him,

and Khalid was then able to see his face. Both the store and the area in front of the store where Khalid struggled with the robber were well-lit. Khalid's identification of Howell from the photo array occurred only four days after the incident and Khalid testified he was "absolutely" sure that Howell was the robber. Further, Det. Echols testified at the suppression hearing that he put six similarly-looking individuals in the photo array. Even if Khalid did speak with Sammie about the robbery after it happened, it is not reasonable to conclude that their conversation somehow influenced Khalid's identification of Howell from a six-person photo array that included at least five individuals he had never seen before. Under these circumstances, Khalid's identification of Howell from the photo array was reliable.

{¶ 20} Accordingly, the trial court did not err in denying Howell's motion to suppress nor in allowing Sammie and Khalid's subsequent in-court identifications of Howell as the robber. Appellant's first assignment of error is therefore overruled.

### **III. Sufficiency and Manifest Weight of the Evidence**

{¶ 21} In his second and third assignments of error, Howell contends that his convictions were not supported by sufficient evidence and are against the manifest weight of the evidence.

{¶ 22} The test for sufficiency requires a determination of whether the prosecution met its burden of production at trial. *State v. Bowden*, 8<sup>th</sup> Dist. No. 92266, 2009-Ohio-3598, ¶12. 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, 574 N.E.2d 942, paragraph two of the syllabus.

{¶ 23} A manifest weight challenge, on the other hand, questions whether the prosecution met its burden of persuasion. *State v. Thomas* (1982), 70 Ohio St.2d 79, 80, 434 N.E.2d 1356. A reviewing court may reverse the judgment of conviction if it appears 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. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541. A finding that a conviction was supported by the manifest weight of the evidence necessarily includes a finding of sufficiency. *Id.* at 388.

{¶ 24} Howell does not dispute that an aggravated robbery and felonious assaults occurred at the Dove Mini Market on April 24, 2008, but contends there was insufficient evidence to establish that he was the perpetrator. He argues there were no fingerprints or DNA evidence to connect him to the crimes, and neither a gun nor the gray sweatshirt worn

by the robber were ever found. He asserts that his explanation of how he was shot was “perfectly reasonable,” but that he was convicted solely on the “unreliable” eyewitness testimony of Sammie and Khalid.

{¶ 25} Our review of the record demonstrates that Howell’s convictions are not against the manifest weight of the evidence. Both victims identified him as the robber and, despite Howell’s argument otherwise, Sammie and Khalid’s identifications were reliable (see our discussion *supra* regarding appellant’s first assignment of error). Further, there was ample evidence in addition to Sammie and Khalid’s identification testimony to demonstrate that Howell was indeed the robber. The State produced still photos taken from the surveillance video of the incident showing a rainbow design on the robber’s jeans. Howell’s jeans, identified by Khalid as those worn by the robber, contained the same rainbow design depicted on the video. Similarly, the video showed the robber carrying a gun in his right hand, and the gun residue tests performed on Howell’s hands were positive for gun residue on his right hand. Howell reported to the hospital with gunshot wounds to his left shoulder and chest areas, the same areas where Sammie testified he shot the robber. Further, Howell said that he had been shot at 9:30 p.m., around the time of the robbery and in a location only a 15-minute walk from the Dove Mini Market, but could not describe the alleged shooters nor explain why he had not called the police to report the shooting.

{¶ 26} On this evidence, the jury did not lose its way in concluding that Howell was the perpetrator of the aggravated robbery and felonious assaults at the Dove Mini Market on April 24, 2008. Appellant's second and third assignments of error are therefore overruled.

#### **IV. Consciousness of Guilt Jury Instruction**

{¶ 27} The trial court instructed the jury that if it found that Howell had changed his appearance to avoid apprehension, such evidence could indicate his consciousness or awareness of guilt. Howell contends the trial court erred in giving this instruction because there was no evidence that he attempted to flee or avoid apprehension.

{¶ 28} A court's instructions to the jury should be addressed to actual issues in the case as posited by the evidence and the pleadings. *State v. Guster* (1981), 66 Ohio St.2d 266, 271, 421 N.E.2d 157. We review a trial court's issuance of a jury instruction for an abuse of discretion. *State v. Williams*, 8<sup>th</sup> Dist. No. 90845, 2009-Ohio-2026, ¶50. An abuse of discretion in this context occurs when the instruction is not supported by the evidence. *State v. Ponce*, 8<sup>th</sup> Dist. No. 91329, 2010-Ohio-1741, ¶45.

{¶ 29} We find no abuse of discretion in the trial court's instruction because the evidence in this case indicated that Howell changed his appearance to avoid detection. The video recording of the incident showed the robber wearing jeans containing a distinctive rainbow design, a gray

sweatshirt, and dark boots. When Howell reported to the hospital an hour and thirty minutes later, he was still wearing the same jeans, but without the gray sweatshirt, and had on tan boots. This evidence, combined with Howell's unexplained failure to call the police or seek immediate medical attention when he was shot, suggested that Howell changed his appearance to avoid apprehension.

{¶ 30} It has long been recognized that it is not an abuse of discretion for a trial court to provide a jury instruction on flight and consciousness of guilt if there is sufficient evidence presented at trial that the defendant attempted to avoid apprehension. *State v. Kilpatrick*, 8<sup>th</sup> Dist. No. 92137, 2009-Ohio-5555, ¶16; *State v. Benjamin*, 8<sup>th</sup> Dist. No. 80654, 2003-Ohio-281, ¶31. Here, the evidence at trial provided a sufficient evidentiary basis for the jury instruction, and accordingly, appellant's fourth assignment of error is overruled.

## **V. Allied Offenses**

{¶ 31} Howell next contends that the trial court erred in not merging his convictions because they are allied offense of similar import all arising from a "single transaction." Howell did not raise the issue of merger of allied offenses in the trial court and, accordingly, has waived all but plain error. *State v. Yarbrough*, 104 Ohio St.3d 1, 2004-Ohio-6087, 817 N.E.2d

845, ¶96. However, our review of this issue detects no error, plain or preserved.

{¶ 32} This court and others have repeatedly held that aggravated robbery and felonious assault are not allied offenses of similar import. See *State v. Hamilton*, 8<sup>th</sup> Dist. No. 91896, 2009-Ohio-3595, ¶32, citing *State v. Preston* (1986), 23 Ohio St.3d 64, 491 N.E.2d 685; *State v. Allen* (1996), 115 Ohio App.3d 642, 685 N.E.2d 1304; *State v. Collins*, 8<sup>th</sup> Dist. No. 89529, 2008-Ohio-578; *State v. Sowell* (May 27, 1993), 9<sup>th</sup> Dist. No. 62601. Further, the felonious assault convictions do not merge one with the other because they involved two distinct victims. *State v. Garcia*, 8<sup>th</sup> Dist. No. 79917, 2002-Ohio-4179.

{¶ 33} The fifth assignment of error is therefore overruled.

## **VI. Sentencing**

{¶ 34} Howell next argues that his 34-year sentence is contrary to law because it is disproportionate to the crimes he committed and to sentences imposed for other crimes of a similar nature. He argues further that the trial court erred in sentencing him to consecutive sentences without making the necessary findings.

{¶ 35} When reviewing felony sentences, an appellate court must first determine whether the sentencing court complied with all applicable rules and statutes in imposing the sentence, including R.C. 2929.11 (which

specifies the purposes of sentencing) and 2929.12 (which provides guidance in considering factors relating to the seriousness of the offense and the recidivism of the offender), to determine whether the sentence is contrary to law. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 986 N.E.2d 124, ¶4. If the sentence is not contrary to law, we then review the trial court's decision under an abuse-of-discretion standard.

{¶ 36} The trial court's sentencing entry indicates that it "considered all required factors of the law" and, further, that it found prison to be consistent with the purpose of R.C. 2929.11. As the sentences are within the permissible statutory ranges and the court stated it had considered the applicable statutes, we find they are not contrary to law.

{¶ 37} We next consider whether the trial court abused its discretion in imposing maximum, consecutive sentences totaling 34 years. At sentencing, the trial court found that Howell had a juvenile record for an offense of violence, and that he had been incarcerated as an adult. The court further found that Howell's story, which he repeated at sentencing, that he was shot in a drive-by shooting of which he could give no specifics whatsoever was patently untrue. The court further found that Howell "brutally attacked" Sammie and Khalid with a gun which, by law, he was not allowed to have. In light of these factors, we find that Howell's 34-year sentence was "commensurate with the seriousness of [his] conduct and its impact on the



victim[s],” R.C. 2929.11(B), and hence not manifestly disproportionate to the crimes committed. Because the trial court followed the statutory process for felony sentencing, and the sentences imposed were within the statutory range and supported by the record, we find no abuse of discretion.

{¶ 38} Howell contends that the trial court erred by ordering consecutive sentences, however, without making the necessary findings to justify consecutive sentences. He concedes that under *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, such findings are not required, but relies on *Oregon v. Ice* (2009), \_\_\_ U.S. \_\_\_, 129 S.Ct. 711, 172 L.Ed.2d 517, to argue that *Foster* was incorrectly decided and should be overturned.

{¶ 39} In *Oregon v. Ice*, the United States Supreme Court upheld an Oregon statute permitting judicial fact finding in the imposition of consecutive sentences, calling into question the continuing validity of *Foster*.

This court has held that it will apply the holding in *Foster* unless and until directed otherwise.<sup>2</sup>

{¶ 40} Howell’s sentence was not contrary to law and the trial court did not abuse its discretion; hence, the sixth and seventh assignments of error are overruled.

## **VII. The Indictment**

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<sup>2</sup>We anticipate that the Ohio Supreme Court will consider the impact of *Ice* on *Foster* in *State v. Hodge*, Supreme Court Case No. 2009-1997, currently pending before the Ohio Supreme Court.

{¶ 41} In a supplemental assignment of error filed pro se, Howell contends that he was forced to defend against a constitutionally defective indictment because the indictment for aggravated robbery did not include the requisite mens rea of the offense. This argument fails.

{¶ 42} In *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917, the Ohio Supreme Court held that mens rea is an essential element of every offense that must be included in the indictment, except for those offenses that plainly impose strict liability. This court has repeatedly held that the mens rea for aggravated robbery under R.C. 2911.01(A)(1), of which Howell was indicted and convicted, is strict liability to which *Colon* does not apply. See *State v. Ganaway*, 8<sup>th</sup> Dist. No. 89722, 2009-Ohio-2575, ¶7, fn. 8, and cases cited therein. Accordingly, the indictment was not defective and appellant's assignment of error is overruled.

Affirmed.

It is ordered that appellee recover from appellant 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. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

CHRISTINE T. McMONAGLE, JUDGE

MARY EILEEN KILBANE, P.J., and  
LARRY A. JONES, J., CONCUR