[Cite as *State v. Walker*, 2011-Ohio-1556.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94875

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

REGINALD WALKER

DEFENDANT-APPELLANT

JUDGMENT:
CONVICTIONS AFFIRMED, REVERSED AND REMANDED FOR RESENTENCING

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-517628-A

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

RELEASED AND JOURNALIZED: March 31, 2011

ATTORNEY FOR APPELLANT

Thomas A. Rein
Leader Building, Suite 940
526 Superior Avenue
Cleveland, Ohio 44114

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: Lauren Bell
Assistant Prosecuting Attorney
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, Reginald Walker, appeals his convictions for aggravated robbery, kidnapping, and having a weapon while under a disability. We affirm the finding of guilt, but reverse and remand for resentencing.

I. Procedural History and Facts

{¶ 2} Walker was charged with the following five counts: Count 1, aggravated robbery

of Eugene Gill; Count 2, aggravated robbery of Herbert Hostetter; Count 3, kidnapping of Eugene Gill; Count 4, kidnapping of Herbert Hostetter; and Count 5, having a weapon while under a disability. Counts 1 through 4 contained one- and three-year firearm specifications. All five counts contained forfeiture specifications.

{¶ 3} The case proceeded to a jury trial. At the conclusion of the state's case, the defense made a Crim.R. 29 motion for acquittal; the motion was denied. Walker testified, the defense rested its case, and renewed its Crim.R. 29 motion. The motion was again denied. The defense requested an instruction on self-defense, but the trial court denied its request.

{¶ 4} The jury returned a guilty verdict as to all counts and specifications. The trial court sentenced Walker to a 16-year prison term and ordered forfeiture of the weapon. The trial court advised Walker that he would be subject to five years of postrelease control.

{¶ 5} The following facts were adduced at trial. The two victims, Eugene Gill and Herbert Hostetter, were at a nightclub celebrating Gill's birthday. Gill's wife had given him $120 for the evening; some of the money was pinned to his shirt. At one point in the evening, Gill and Hostetter left the club to sit in their car and smoke; Gill still had money pinned on his shirt. While sitting in their car, a man, later identified as Walker, approached the car and told Gill and Hostetter that he wanted to purchase marijuana. Hostetter told Walker they were not selling marijuana, and Walker walked away.

{¶ 6} When Walker walked away, another man, later identified as codefendant

Gregory Boey, approached Walker. Walker walked back to the vehicle and asked Gill and Hostetter for a "light"; Hostetter gave Walker a lighter.

{¶ 7} Gill and Hostetter then got out of the car. Walker approached them, grabbed Gill's arm, and stuck a gun into Gill's side. Walker told Gill, "you already know what this is, get against the wall." Walker pushed Gill against the wall, while codefendant Boey pushed Hostetter against the wall. Boey took money from the victims' pockets and the money Gill had pinned on his shirt. The robbery ended when a law enforcement official approached. Boey ran, but was apprehended a short distance away. Walker was apprehended on the scene; he struggled with the police, but was arrested and a gun was retrieved from his pocket. Bills with "pinholes" were also recovered from Walker's person.

{¶ 8} The three law enforcement officials involved with the incident testified at trial. Detective Michael Shay was off-duty at the time of the incident and driving in his car when he saw what he described as a "robbery": two men were "sprawled against the front of the building like they were being searched * * *. One person was going through their pockets, and a second person was standing back with a gun in his hand." Detective Shay then saw a uniformed officer with his gun drawn approach the scene. One of the robbers ran and Shay followed him in his car. Shay eventually apprehended and arrested the suspect, codefendant Boey.

{¶ 9} The officer who approached the robbery was Officer Dwayne Borders. He was

working that night as a security guard in an area parking lot. Officer Borders testified that he saw four males, whom he initially thought were fighting. As he looked more closely, however, Officer Borders saw that two of the males had the other two males "up against the wall," and he realized it was a "robbery." After a struggle with Walker, Officer Borders arrested him.

{¶ 10} The third law enforcement official who testified was Detective Elliot Landrau, who was the lead detective on the case. Landrau testified that the gun recovered from Walker was an operable firearm capable of causing death.

{¶ 11} Walker also testified, albeit against the advice of his attorney. Walker told the jury that he had been "arrested and convicted a few times": in 1995 for aggravated robbery in Chicago when he was 16 or 17 years old; in 2004 for three drug-related offenses; in 2007 for criminal trespass; and "at some point in time," for an assault on a peace officer.

{¶ 12} As it related to this case, Walker testified that he and Boey went to the club, and while standing in line to enter, he approached a group of four or five males and asked to buy marijuana from them. One of the men walked to a car and then returned with "a different demeanor." Walker testified that one of the other men in the group stuck out his arm and he and that man got "into it." Boey then entered the fray, and all the men were "tussling." During the tussle, a gun fell to the ground. According to Walker, the gun came from the man "in front of him." Walker testified that he stepped on the gun, in "self-defense," so one

of the men would not get it and shoot him. According to Walker, he was then hit so hard by one of the men that his next memory of the evening was waking up in the hospital, handcuffed to a bed.

{¶ 13} Walker denied robbing or kidnapping Gill and Hostetter. According to Walker, the incident was just a drug deal gone bad with an ensuing struggle.

{¶ 14} Walker raises the following assignments of error for our review:

"[I.] The state failed to present sufficient evidence to sustain a conviction.

"[II.] Appellant's convictions are against the manifest weight of the evidence.

"[III.] Appellant was denied a fair trial due to prosecutorial misconduct by the assistant prosecutor commenting on Appellant's failure to testify.

"[IV.] Appellant was denied a fair trial due to prosecutorial misconduct by the assistant prosecutor's improper questions on cross-examination."

II. Law and Analysis

Sufficiency and Weight of the Evidence

{¶ 15} In his first assignment of error, Walker contends that the state failed to present sufficient evidence to sustain the aggravated robbery and kidnapping convictions. For his second assigned error, Johnson contends that the aggravated robbery and kidnapping convictions were against the manifest weight of the evidence.

{¶ 16} The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different. *State v. Thompkins*, 78 Ohio St.3d 380,

1997-Ohio-52, 678 N.E.2d 541, paragraph two of the syllabus. In *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, the Ohio Supreme Court delineated the role of an appellate court presented with a sufficiency of the evidence argument as follows:

> "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. 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. * * *" Id. at paragraph two of the syllabus.

{¶ 17} A manifest weight of the evidence claim requires a different review. The weight of the evidence concerns the inclination of the greater amount of credible evidence offered to support one side of the issue rather than the other. *State v. Brindley*, Franklin App. No. 01AP-926, 2002-Ohio-2425, ¶16. When presented with a challenge to the manifest weight of the evidence, an appellate court, after "'reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, 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.'" *Thompkins*, supra at 387, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. An appellate court should reserve reversal of a conviction as being against the manifest weight of the evidence for only the most "'exceptional case in which the evidence weighs heavily against the conviction.'" Id.

{¶ 18} Although sufficiency and manifest weight are different legal concepts, manifest weight may subsume sufficiency in conducting the analysis; that is, a finding that a conviction is supported by the manifest weight of the evidence necessarily includes a finding of sufficiency. *State v. Braxton*, Franklin App. No. 04AP-725, 2005-Ohio-2198, ¶15. "[T]hus, a determination that a conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency." Id.

{¶ 19} Walker was charged with aggravated robbery under R.C. 2911.01(A)(1), which provides as follows: "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 or offense, shall * * * [h]ave 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[.]"

{¶ 20} Walker was also charged with kidnapping under R.C. 2905.01(A)(2), which provides that "[n]o person, by force, threat, or deception * * * shall remove another from the place where the other person is found or restrain the liberty of the other person * * * [t]o facilitate the commission of any felony or flight thereafter[.]"

{¶ 21} We disagree with Walker's contention that the state did not present sufficient evidence to sustain the aggravated robbery and kidnapping convictions and that the jury lost its way in convicting him on those charges. In addition to the victims' testimonies that they were

restrained and robbed at gunpoint, both law enforcement officials who actually witnessed the incident described it as a "robbery." First, Shay, the off-duty detective, testified that he saw two men "sprawled against the front of the building like they were being searched * * *. One person was going through their pockets, and a second person was standing back with a gun in his hand."

{¶ 22} Second, Officer Borders, who was working as a security guard at an area parking lot, testified that he saw four males and initially thought that they were fighting. As he looked more closely, however, Borders saw that two of the males had the other two males "up against the wall," and he realized it was a "robbery."

{¶ 23} In light of the above, the state presented sufficient evidence of aggravated robbery and kidnapping and the convictions were not against the manifest weight of the evidence. Accordingly, the first and second assignments of error are overruled.

Questions about Walker's Silence

{¶ 24} For his third assignment of error, Walker contends that he was denied a fair trial because the assistant prosecuting attorney asked Officer Borders, the arresting officer, if Walker made any statement or claim upon arrest that he had been robbed, assaulted, or that the gun was not his. Although not cited by Walker, the assistant prosecuting attorney also questioned Walker on cross-examination as to why he did not tell the police he was the victim.

{¶ 25} There was no objection at trial to any of these questions, and thus, Walker has

waived all but plain error review. Crim.R. 52(B). Crim.R. 52(B) defines plain error as a defect affecting substantial rights that may be noticed although it was not raised at trial.

{¶ 26} The Fifth Amendment to the Constitution of the United States provides that no person "shall be compelled in any criminal case to be a witness against himself." This Amendment is made applicable to the states through the due process clause of the Fourteenth Amendment. *Malloy v. Hogan* (1964), 378 U.S. 1, 6, 84 S.Ct. 1489, 12 L.Ed.2d 653.

{¶ 27} A defendant's decision to exercise his right to remain silent during police interrogation is generally inadmissible at trial either for the purpose of impeachment or as substantive evidence of guilt. *State v. Leach*, 102 Ohio St.3d 135, 2004-Ohio-2147, 807 N.E.2d 335,¶16-18; see, also, *Doyle v. Ohio* (1976), 426 U.S. 610, 616-618, 96 S.Ct. 2240, 49 L.Ed.2d 91; *Wainwright v. Greenfield* (1986), 474 U.S. 284, 291, 106 S.Ct. 634, 88 L.Ed.2d 623. Furthermore, evidence introduced by the state during its case in chief regarding the defendant's exercise of his right to remain silent during interrogation violates the Due Process Clause of both the state and federal constitutions. *Leach* at ¶18. This rule enforces one of the underlying policies of the Fifth Amendment, which is to avoid having the jury assume that a defendant's silence equates with guilt. Id. at ¶30, citing *Murphy v. Waterfront Comm. of New York Harbor* (1964), 378 U.S. 52, 55, 84 S.Ct. 1594, 12 L.Ed.2d 678.

{¶ 28} In a case somewhat similar to this one, *Fletcher v. Weir* (1982), 455 U.S. 603, 102 S.Ct. 1309, 71 L.Ed.2d 490, a fight had occurred in a nightclub parking lot that resulted in

the death of one of the participants. The defendant fled the scene, but was arrested a short time later. At trial, he admitted the facts of the altercation, but claimed that he acted in self-defense and that the killing was accidental. These in-court statements were the first time the defendant had offered any exculpatory explanation. The prosecution, on cross-examination, inquired into why, after his arrest, the defendant had failed to tell police his self-defense version of the killing.

{¶ 29} On appeal, the United States Supreme Court found *Doyle v. Ohio*, supra, inapplicable because the record was silent as to whether the defendant had received the *Miranda* warnings during the period in which he remained silent immediately after his arrest. Specifically, the United States Supreme Court held that: "In the absence of the sort of affirmative assurances embodied in the *Miranda* warnings, we do not believe that it violates due process of law for a State to permit cross-examination as to postarrest silence when a defendant chooses to take the stand." Id. at 607.

{¶ 30} Here, there is no indication in the record as to whether Walker had been advised of his *Miranda* rights at the time he remained silent. Thus, in light of *Fletcher*, there was no plain error and the third assignment of error is overruled.

Questions to Walker about his Prior Convictions

{¶ 31} In his final assignment of error, Walker contends that he was denied a fair trial because of the assistant prosecuting attorney's questions to him about his prior convictions.

{¶ 32} Evid.R. 609, which governs impeachment by evidence of a criminal conviction, provides as follows:

"For the purpose of attacking the credibility of a witness:

"* * *

"(2) notwithstanding Evid.R. 403(A), but subject to Evid.R. 403(B), evidence that the accused has been convicted of a crime is admissible if the crime was punishable by death or imprisonment in excess of one year pursuant to the law under which the accused was convicted and if the court determines that the probative value of the evidence outweighs the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.

"(3) notwithstanding Evid.R. 403(A), but subject to Evid.R. 403(B), evidence that any witness, including an accused, has been convicted of a crime is admissible if the crime involved dishonesty or false statement, regardless of the punishment and whether based upon state or federal statute or local ordinance."

{¶ 33} Generally, cross-examination of a witness on his prior convictions is limited to establishing the existence of the prior conviction and the name of the crime. *State v. Fricke* (1984), 13 Ohio App.3d 331, 333, 469 N.E.2d 1035. Furthermore, only convictions — not arrests, indictments, or charges — are admissible. *State v. Rodriguez* (1986), 31 Ohio App.3d 174, 176, 509 N.E.2d 952. However, a defendant may "open the door" to more specific inquiry by, for example, misleading the jury. *State v. McKnight* (June 3, 1993), Cuyahoga App. No. 62808.

{¶ 34} Upon Walker taking the stand, defense counsel questioned him as follows: "First thing I want to start off with is, this is not your first time being involved with the

criminal justice system, correct?" Walker agreed and testified to his "few arrests and convictions," which included a 1995 aggravated robbery conviction in Chicago when he was 16- or 17-years old; three drug-related convictions in 2004; a 2007 criminal trespass conviction; and an assault on a peace officer conviction "at some point in time."

{¶ 35} On cross-examination, the assistant prosecuting attorney questioned Walker in detail about his prior convictions. For example, in regard to the 1995 aggravated robbery conviction, which Walker claimed happened when he was a juvenile, the assistant prosecutor sought to establish that Walker was an adult (18 years old) when he was convicted. Walker maintained that the crime was processed through juvenile court and testified that the conviction was his cousin's fault. The assistant prosecuting attorney then questioned Walker about other prior convictions and arrests and whose fault they were. In addition to the prior convictions Walker testified about on direct examination, the assistant prosecutor questioned Walker about others, all over the objections of the defense.

{¶ 36} In regard to the questioning about the 1995 aggravated robbery conviction, that was proper because the assistant prosecuting attorney was attempting to demonstrate that Walker was convicted when he was an adult, not a juvenile as Walker earlier testified. In regard to questioning about arrests, Walker opened the door to that line of questioning when he testified on direct examination that he had been "arrested and convicted a few times."

{¶ 37} We do agree, however, that the assistant prosecuting attorney overstepped his

boundaries in some of his questioning on Walker's prior convictions. For example, the assistant prosecutor asked Walker about an assault on a police officer, and whose fault it was. Walker answered, "[t]hat was my fault." The assistant prosecutor then pressed Walker about why he assaulted a police officer. Questions such as those about the details of Walker's convictions were improper.

{¶ 38} Notwithstanding the above, we find the improper questioning was harmless error. The court gave a limiting instruction to the jury on the prior convictions testimony. And the overwhelming evidence, which included the victims' testimonies and corroborating testimonies from two witnesses, supported the convictions.

{¶ 39} Accordingly, the fourth assignment of error is overruled.

Merger of Aggravated Robbery and Kidnapping Convictions

{¶ 40} Finally, sua sponte, we consider Walker's sentence. The trial court did not merge the aggravated robbery and kidnapping convictions at sentencing. The Ohio Supreme Court recently decided *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, in which it overruled *State v. Rance* (1999), 85 Ohio St.3d 632, 710 N.E.2d 699. In light of the decision in *Johnson*, we apply the law on allied offenses as follows:

> "Under R.C. 2941.25, the court must determine prior to sentencing whether the offenses were committed by the same conduct. Thus, the court need not perform any hypothetical or abstract comparison of the offenses at issue in order to conclude that the offenses are subject to merger.

"In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), the question is whether it is possible to commit one offense and commit the other with the same conduct, not whether it is possible to commit one without committing the other. *State v. Blankenship* (1988), 38 Ohio St.3d 116, 526 N.E.2d 816 (Whiteside, J., concurring) ('It is not necessary that both crimes are always committed by the same conduct but, rather, it is sufficient if both offenses can be committed by the same conduct. It is a matter of possibility, rather than certainty, that the same conduct will constitute commission of both offenses.'). If the offenses correspond to such a degree that the conduct of the defendant constituting commission of one offense constitutes commission of the other, then the offenses are of similar import.

"If the multiple offenses can be committed by the same conduct, then the court must determine whether the offenses were committed by the same conduct, i.e., 'a single act, committed with a single state of mind.' [*State v.*] *Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, at ¶50 (Lanzinger, J., dissenting).

"If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged.

"Conversely, if the court determines that the commission of one offense will never result in the commission of the other, or if the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge." *Johnson* at ¶47-51.

{¶ 41} Many Ohio courts have merged kidnapping and aggravated robbery based on fact patterns where the assailant restrains his victim while robbing him. As the Ohio Supreme Court made clear in *State v. Jenkins* (1984), 15 Ohio St.3d 164, 198, 473 N.E.2d 264, "implicit within every robbery (and aggravated robbery) is a kidnapping." Id. at fn. 29. "[W]hen 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." *State v. Logan* (1979), 60

Ohio St.2d 126, 131, 397 N.E.2d 1345.

{¶ 42} Here, the kidnapping was part and parcel of the robbery. Although the court imposed concurrent sentences for the aggravated robbery and kidnapping convictions, it is plain error to impose multiple sentences for allied offenses of similar import, even if the sentences are run concurrently. *State v. Crowley*, 151 Ohio App.3d 249, 255, 2002-Ohio-7366, 783 N.E.2d 970. Accordingly, the trial court should have merged the kidnapping and aggravated robbery convictions for the purpose of sentencing.

Judgment affirmed in part and reversed and remanded in part for resentencing.

It is ordered that appellee recover of 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.

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

LARRY A. JONES, JUDGE

PATRICIA A. BLACKMON, P.J., and
KATHLEEN ANN KEOUGH, J., CONCUR