[Cite as *State v. Kirk*, 2011-Ohio-1687.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 95260 and 95261

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOSEPH KIRK

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART,
REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-528937 and CR-528938

BEFORE: Rocco, J., Sweeney, P.J., and Cooney, J.

RELEASED AND JOURNALIZED: April 7, 2011

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KENNETH A. ROCCO, J.:

{¶ 1} In two cases that were joined for a jury trial and also have been consolidated in this court, defendant-appellant Joseph Kirk appeals from his convictions for aggravated robbery and kidnapping with firearm specifications, theft, having a weapon while under disability ("HWUD"), and intimidation.

{¶ 2} Kirk presents four assignments of error. He asserts the lower court abused its discretion in joining the two cases for trial, his trial counsel rendered ineffective assistance, his convictions for both aggravated robbery and kidnapping were improper pursuant to R.C.

2941.25(A), and his conviction for intimidation was not supported by sufficient evidence. The state concedes Kirk's assertion with respect to R.C. 2941.25(A).

{¶ 3} Upon a review of the record, moreover, this court finds Kirk's fourth assignment of error also has merit. Kirk's convictions, consequently, are affirmed in part and reversed in part; his conviction for intimidation is vacated, and this case is remanded for further proceedings consistent with this opinion.

{¶ 4} Kirk's convictions resulted from two incidents that took place within a day of each other in East Cleveland, Ohio. The three victims described the incidents by testifying as follows.

{¶ 5} Just after noon on September 14, 2009, Sharon Malone stopped to cash a paycheck at a "money exchange" store located on the corner of Euclid and Superior Avenues. She then drove to her home two blocks away.

{¶ 6} Malone walked to her front porch and began to unlock her door when she looked up to see a gold car stop just up the street. A young man, whom she later identified as Kirk, got out of the car, ran toward her, and yelled to her that he knew she had just cashed a check. Malone saw Kirk holding a gun at his side.

{¶ 7} Although Malone denied that she had any money, Kirk went through her pockets; he took the approximately twenty-four dollars in cash he found there. Malone

estimated it took Kirk several minutes to do so; his hold on the gun made her afraid to move. After taking Malone's money, Kirk left the porch and "traveled towards Euclid."

{¶ 8} Malone went indoors to call the police. East Cleveland police officer Robert Bailey responded to the call with his partner. They obtained a description of the suspect and asked neighbors for information. As a result of their requests, the officers obtained Kirk's name.

{¶ 9} In the late morning of the following day, September 15, 2009, seventy-two-year-old Betty Shaver went to the same "money exchange" store to obtain money orders. Afterward, she sat in her car completing them with her driver's side window partially open.

{¶ 10} Shaver heard something and looked to her side to see a young man at her door; he placed his hand into her car and pushed on the switch that unlocked the car doors. Shaver later identified the young man as Kirk. Kirk quickly opened the driver's side door and demanded her money. When Shaver told him she did not have any, he "pulled a gun" to threaten her.

{¶ 11} The action failed to intimidate Shaver. She tried to wrest the gun from Kirk's hand, and a struggle ensued. After Shaver struck Kirk in the head, he ran around her car and got into the front passenger's seat, whereupon he ransacked her pockets as she continued to

fight him. Kirk obtained only her identification, which he threw to the floor. He then ran from her car, traveling across the street and behind an apartment building.

{¶ 12} Shaver, exhausted from the ordeal, sounded her car's horn repeatedly. The sound attracted the attention of East Cleveland police officer Robert Nicholson. When he stopped, he noticed a distraught Shaver, who told him she had just been robbed. Shaver described her assailant's clothing, and pointed the officers in the direction Kirk fled. Nicholson called for assistance for her and himself, then drove over to the apartment building.

{¶ 13} As he cautiously approached the building with another officer, a female resident, who later identified herself as Rochelle Jones, gestured to him and informed him, "He's back there." She told the officers when they stopped by her that the man was in the "back yard," and that he had a gun.

{¶ 14} Nicholson and his partner proceeded down the side of the apartment building. They spotted a gun on the ground, and, only a short distance away, Kirk. Nicholson observed him attempting to hide behind a tree. The officers recovered the gun and arrested Kirk.

{¶ 15} As Nicholson lead Kirk past Jones to the police car, Kirk said to Jones, "You stupid bitch, why did you say something. * * * . I'm going to kill you." He repeated this threat several times. Shaver was watching from the rear of another police car as Nicholson

escorted him past it; she identified him as her assailant, and heard him call out, "when I get out of this I am going to get you." Shaver was not sure to whom Kirk spoke.

{¶ 16} That same day, Det. Von Harris assembled a photographic array that contained Kirk's picture. He first showed the array to Shaver, who chose Kirk's photo as the man who attempted to rob her at gunpoint. Separately, Harris showed the array to Malone; she also chose Kirk's photo from the array as the man who came up to her on her porch to rob her with a gun in his hand.

{¶ 17} On October 6, 2009, Kirk was indicted in two separate cases. In CR-528937, he was charged on four counts, with Malone named as the victim. Counts 1 and 2 charged him with aggravated robbery and kidnapping, with one-and three-year firearm specifications. Count 3 charged him with theft, and count 4 charged him with HWUD.

{¶ 18} In CR-528938, Kirk was charged on five counts; Shaver was named as the victim in the first three. Counts 1 and 2 charged him with aggravated robbery and kidnapping, with one- and three-year firearm specifications, and a forfeiture specification. Count 3 charged him with intimidation in violation of R.C. 2921.04(B), Count 4 charged him with HWUD, and Count 5 charged him with theft.

{¶ 19} During the pendency of these two cases, the state filed a motion pursuant to Crim.R. 8(A) and 13 to join the cases for trial. The trial court granted the motion over Kirk's objection.

{¶ 20} Although the cases proceeded to a jury trial, Kirk elected to try the HWUD counts to the bench. He stipulated to his prior conviction. The state presented the testimony of Malone, Shaver, the responding police officers, Jones, and Harris. Kirk testified on his own behalf; he denied committing the more serious crimes, but admitted the gun found when the police arrested him was his.

{¶ 21} At the conclusion of trial, the jury found Kirk guilty on all counts. The trial court subsequently found him guilty of both counts of HWUD.

{¶ 22} At the sentencing hearing, the trial court imposed three years for the firearm specifications in each case, to be served prior to and consecutive with concurrent eight-year terms on the most serious charges, for a total of fourteen years.

{¶ 23} Kirk filed a timely appeal of his convictions. He presents the following four assignments of error.

{¶ 24} **"I. The trial court erred by joining the two aggravated robbery cases into one trial thereby prejudicing the defendant and denying him a fair trial.**

{¶ 25} **"II. The Defendant was denied effective assistance of counsel.**

{¶ 26} **"III. The offenses of aggravated robbery and kidnapping are allied offenses of similar import.**

{¶ 27} "IV. The state failed to produce sufficient evidence necessary to sustain a conviction for intimidation."

{¶ 28} In his first assignment of error, Kirk asserts the lower court abused its discretion when it granted the state's motion to join these two cases for trial. This court disagrees.

{¶ 29} The law generally favors joining multiple offenses in a single trial 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, citing *State v. Torres* (1981), 66 Ohio St.2d 340, 421 N.E.2d 1288. Thus, Crim.R. 13 permits a trial court to "order two or more indictments to be tried together, if the offenses could have been joined in a single indictment[.]"

{¶ 30} Joinder is appropriate where the evidence is interlocking and the jury is capable of segregating the proof required for each offense. *State v. Czajka* (1995), 101 Ohio App.3d 564, 577-578, 656 N.E.2d 9. Crim.R. 8(A) provides that two or more offenses may be charged in the same indictment "in a separate count for each offense if the offenses charged * * * are of the same or similar character * * * or are based on two or more acts or transactions * * * constituting parts of a common scheme or plan, or are part of a course of criminal conduct."

{¶ 31} Crim.R. 14 requires separate trials if it appears that a criminal defendant would be prejudiced by such joinder. It is the defendant, however, who bears the burden of

demonstrating both prejudice and that the trial court abused its discretion in denying severance. *State v. Coley*, 93 Ohio St.3d 253, 2001-Ohio-1340, 754 N.E.2d 1129; *State v. LaMar*, 95 Ohio St.3d 181, 191-192, 2002-Ohio-2128, 767 N.E.2d 166; *State v. Saade*, Cuyahoga App. Nos. 80705 and 80706, 2002-Ohio-5564, ¶12.

{¶ 32} Furthermore, "[i]n the event that the trial court denies severance, the defendant must renew his * * * opposition to the joinder of indictments for trial either at the close of the state's case or at the conclusion of all evidence. Failure to do so constitutes a waiver of any previous objection to their joinder." Id.

{¶ 33} In this case, Kirk filed a brief in opposition to the state's motion for joinder. Kirk moved for a Crim.R. 29 acquittal at the conclusion of all of the evidence, but he failed to renew his opposition to the joinder of the indictments. Kirk thus waived all but plain error. Id.

{¶ 34} In reviewing for plain error, the appellate court examines the evidence properly admitted at trial, and determines whether the jury would have convicted the defendant even if the alleged error had not occurred. *State v. Slagle* (1992), 65 Ohio St.3d 597, 604-605, 605 N.E.2d 916. "Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a miscarriage of justice." *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph three of the syllabus.

{¶ 35} A review of the trial court's decision in this case fails to demonstrate error occurred, plain or otherwise. The two separate incidents were joined under Crim.R. 8(A) because the offenses were "based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or [were] part of a course of criminal conduct."

{¶ 36} The crimes were committed a day apart, Kirk robbed Malone and Shaver just after each had utilized the services available at the money exchange store, pointed a gun at both women, and demanded money. When they protested, he went into their pockets to search them for it. These facts reflected either a common scheme or plan, or a course of criminal conduct.

{¶ 37} Kirk contends he was prejudiced by the joining of the two indictments because the cases involved similar conduct, but, "[o]ther than the identity of the perpetrator, there was no evidence that tied these cases together." He asserts the state would not have been able to introduce one of the incidents at a trial on the other under Evid.R. 404(B).

{¶ 38} "A prosecutor can use two methods to negate such claims of prejudice." *Lott*, at 163. Under the first method, the "other acts" test, the prosecutor may argue that he could have introduced evidence of the other crime under the "other acts" portion of Evid.R. 404(B), if the other offense had been severed for trial. Id.

{¶ 39} Under the second method, the " joinder" test, the prosecutor is not required to meet the stricter "other acts" admissibility test, but merely is required to show that evidence of each crime joined at trial is simple and direct. Id. "[W]hen simple and direct evidence exists, an accused is not prejudiced by joinder regardless of the nonadmissibility of evidence of these crimes as 'other acts' under Evid.R. 404(B)." Id.

{¶ 40} In this case, the joinder test is easily established, because evidence of each incident was simple and direct. Each victim provided straightforward testimony. Therefore, the trial court committed no error, plain or otherwise.

{¶ 41} Kirk's first assignment of error, accordingly, is overruled.

{¶ 42} In his second assignment of error, Kirk argues his trial counsel rendered ineffective assistance. He asserts trial counsel should have renewed his objection to joinder at both the close of the state's case-in-chief and the close of evidence, and should have filed a motion to suppress the identification evidence. These assertions cannot be credited.

{¶ 43} In order to successfully assert ineffective assistance of counsel under the Sixth Amendment, a defendant must show not only that the attorney made errors so serious that he was not functioning as "counsel," as guaranteed by the Sixth Amendment, but also that the deficient performance was so serious as to deprive defendant of a fair and reliable trial. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373.

{¶ 44} There are many ways to provide effective assistance in any given case, therefore, scrutiny of counsel's performance must be highly deferential, and there will be a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Id.; see, also, *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 209 N.E.2d 164. Counsel will not be deemed ineffective for failing to make futile motions. *State v. Leonard*, Cuyahoga App. No. 93496, 2010-Ohio-3601, ¶27.

{¶ 45} In these cases, defense counsel filed briefs in opposition to the state's motion for joinder, but the trial court denied them. During trial, the evidence clearly showed, as previously noted, that the test for proper joinder was met. Under these circumstances, defense counsel had no duty to renew an argument that could not be successful.

{¶ 46} Similarly, failure to file a motion to suppress does not necessarily constitute ineffective assistance of counsel. *State v. Madrigal*, 87 Ohio St.3d 378, 389, 2000-Ohio-448, 721 N.E.2d 52. "Failure to file a motion to suppress constitutes ineffective assistance of counsel only if, based upon the record, the motion would have been granted." *State v. Kuhn*, Lorain App. No. 05CA008859, 2006-Ohio-4416, at ¶11, citing *State v. Robinson* (1996), 108 Ohio App.3d 428, 433, 670 N.E.2d 1077.

{¶ 47} The record in these cases demonstrates a motion to suppress identification testimony would have been an exercise in futility. Malone, Shaver, and Jones all observed Kirk at close quarters for a lengthy period of time in broad daylight.

{¶ 48} No identification made under such circumstances could be deemed unreliable. *State v. Rogers*, Cuyahoga App. No. 92380, 2009-Ohio-5490. Consequently, defense counsel did not fall below an acceptable standard of reasonable representation in failing to file a motion to suppress identification evidence. Id.

{¶ 49} Indeed, the record reflects one of defense counsel's trial tactics, possibly the only strategy available to him, was to challenge the reliability of the victims' identifications in front of the jury. Kirk cannot demonstrate his claim of ineffective assistance of counsel on this record, therefore, his second assignment of error also is overruled.

{¶ 50} Kirk argues in his third assignment of error that his convictions in both cases for aggravated robbery and kidnapping were improper pursuant to R.C. 2941.25(A). The state concedes this assignment of error.

{¶ 51} In light of the state's concession and the recent Ohio Supreme Court decision in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, Kirk's second assignment of error is sustained.

{¶ 52} In *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, the Ohio Supreme Court held that if a court of appeals finds reversible error in the imposition of multiple punishments for allied offenses, the court must 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. at ¶25. The determination of the defendant's guilt

for committing allied offenses remains intact, however, both before and after the merger of allied offenses for sentencing. Id. at ¶27.

{¶ 53} The determinations of appellant's guilt of aggravated robbery and kidnapping, with firearm specifications, remain intact, but this matter must be remanded to the trial court for a new sentencing hearing consistent with *Whitfield.*

{¶ 54} In his fourth assignment of error, Kirk argues that the trial court erred in denying his motion for acquittal as to the charge of intimidation. He contends that the evidence in the record established neither the victim nor the predicate offense as required by R.C. 2921.04(B). In light of the Ohio Supreme Court's decision in *State v. Malone*, 121 Ohio St.3d 244, 2009-Ohio-310, 903 N.E.2d 614, this court must agree.

{¶ 55} In *Malone*, the supreme court held as follows at ¶19-21:

{¶ 56} " * * * A key to our analysis is the clear-cut difference between the protections afforded victims and witnesses under the statute. As far as a victim is concerned, R.C. 2921.04(B) makes clear that it applies immediately upon the commission of the underlying crime, prior to the involvement of legal authorities; under R.C. 2921.04(B), it is illegal for anyone to 'attempt to influence, intimidate, or hinder the victim of a crime in the filing or prosecution of criminal charges.' That portion of the statute protects victims from intimidation prior to their filing of a criminal complaint and during any subsequent prosecution.

{¶ 57} " Protection of a witness in R.C. 2921.04(B), on the other hand, is separate and is not so temporally broad-the statute applies only if the witness is already 'involved in a criminal action or proceeding.' The General Assembly in R.C. 2921.04(B) could have protected witnesses from intimidation immediately upon their witnessing a criminal act, but it did not.

{¶ 58} "The statute requires a witness's involvement in a criminal action or proceeding, not his or her potential involvement."

{¶ 59} The indictment in CR-528938 charged Kirk with intimidation in violation of R.C. 2921.04. It did not contain a named victim. Furthermore, the charge was phrased in terms of the entire subsection, i.e., to cover both a victim and a witness.

{¶ 60} The state argues that this court's decision in *State v. Gooden*, Cuyahoga App. No. 82621, 2004-Ohio-2699, compels a rejection of Kirk's assignment of error. However, *Malone* specifically considered *Gooden*, and determined *Gooden* was decided improperly.

{¶ 61} In *State v. Muniz*, Cuyahoga App. No. 93528, 2010-Ohio-3720, this court pointed out that a defendant is entitled to notice of the elements of the crime charged, and the state may not rely on suggestion to prove an offense. Like the indictment in *Muniz*, the charge of intimidation in Kirk's indictment was "defective from the outset." This is demonstrated by the simple fact that, at the close of the evidence, neither the prosecutor, the

trial court, nor defense counsel could say who the victim of the intimidation charge was supposed to be.

{¶ 62} Therefore, the trial court should have granted Kirk's motion for acquittal on that charge. His fourth assignment of error, accordingly, is sustained.

{¶ 63} Kirk's convictions are affirmed in part and reversed in part. This case is remanded for the state to elect which of Counts 1 and 2 in each case that it wishes to pursue, for the trial court to vacate Kirk's conviction for intimidation, and for appropriate resentencing.

It is ordered that appellee and appellant share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. Case remanded to the trial court for further proceedings.

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

KENNETH A. ROCCO, JUDGE

JAMES J. SWEENEY, P.J., CONCURS;
COLLEEN CONWAY COONEY, J.,
CONCURS IN PART AND DISSENTS IN PART
SEE ATTACHED OPINION

COLLEEN CONWAY COONEY, J., CONCURRING IN PART, DISSENTING IN PART:

{¶ 64} I concur in all but the majority's disposition of the fourth assignment of error. I would affirm the conviction for intimidation because that charge arose from the predicate offense of the robbery of Ms. Shaver. As the victim in that case, Ms. Shaver testified regarding Kirk's threat. Shaver heard Kirk say, "When I get out of this, I'm getting you." Jones testified that Kirk said, "Bitch, I'm going to kill you, bitch, bitch. You's a dead bitch. I'm going to kill you. I better not catch you. I'm going to kill you, bitch."

{¶ 65} Therefore, I would sustain the conviction for one count of intimidation related to the robbery of Ms. Shaver. I find *State v. Muniz*, Cuyahoga App. No. 93528, 2010-Ohio-3720, totally distinguishable from the instant case. In *Muniz*, there was no indictment for a predicate offense involving a victim. Therefore, this court found "the state's failure to give notice of the underlying predicate acts in the indictment render it defective from

the outset, and therefore fatal to her conviction." Id. at ¶23. Kirk, on the other hand, was charged in a five-count indictment, with the predicate offenses of aggravated robbery and kidnapping involving Shaver. The evidence supports his intimidation conviction.