[Cite as *State v. Burton*, 2011-Ohio-198.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94449

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

WILLIAM D. BURTON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-524032

BEFORE: Gallagher, P.J., Blackmon, J., and Cooney, J.

RELEASED AND JOURNALIZED: January 20, 2011

ATTORNEYS FOR APPELLANT

William L. Summers
Summers & Baker Co., L.P.A.
55 Public Square
Suite 2020
Cleveland, OH 44113

Aaron T. Baker
One Chagrin Highland
2000 Auburn Drive, Suite 200
Cleveland, OH 44122

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: Belinda Kyles-Gest
Assistant Prosecuting Attorney
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

SEAN C. GALLAGHER, P.J.:

{¶ 1} Appellant William Burton appeals his conviction and sentence by the Cuyahoga County Common Pleas Court. For the reasons set forth herein, we affirm.

{¶ 2} On June 5, 2009, the Cuyahoga County grand jury indicted Burton on one count of kidnapping, two counts of aggravated robbery, and two counts of felonious assault. All counts carried one- and three-year firearm specifications. On November 30, 2009, a jury trial commenced.

{¶ 3} The state presented several witnesses, including the victim, Demetrius Matthews, and an eyewitness, Natasha Manning. Matthews testified that on April 30, 2009, at approximately 10:30 or 11:00 p.m., he was walking home when five males in a Buick Skylark drove past him. The driver parked on Delmont Avenue near East 125th Street in Cleveland, Ohio, and all the passengers exited the car. Matthews did not know any of the men. The driver said to Matthews, "You're the n****r that robbed my n****r." The passenger who had been sitting in the front seat pointed a gun at Matthews and said, "You already know what it is. Lay it down." Matthews testified that he understood this to mean that he was being robbed, and he laid down on the sidewalk.

{¶ 4} Matthews testified that one of the backseat passengers went through Matthews's pockets and walked away. All the males, except the male holding the gun, walked back toward the car. The male holding the gun

proceeded to slowly wave the weapon over Matthews's body and then shot him in the back. Matthews rolled over and tried to stand, and the shooter shot him again in the arm. Matthews begged him not to shoot again, and the gunman joined the other males who had already returned to the car, and they drove off. Matthews testified that although it was dark out, the streetlight gave enough light for him to see his assailants' faces.

{¶ 5} When the police and ambulance responded to the scene, Matthews was unable to describe any of the assailants because he was experiencing intense pain. On May 4, a few days after the shooting, while Matthews was still hospitalized, Matthews identified Burton as the shooter from a photo array assembled by the police. The picture in the initial photo array was taken of Burton in 2004 or 2005. On May 11, Matthews identified Burton in two subsequent photo arrays, the last of which was a 2008 photo of Burton. Matthews testified that based on the 2008 photo, he was 100 percent certain it was Burton who shot him. Matthews remains partially paralyzed from the shooting.

{¶ 6} Manning, who is a neighbor and friend of Matthews's, testified that around 9:30 or 10:00 p.m., she saw a Buick Skylark parked on Delmont, she saw four men exit the car, and she heard gunshots. Later, Manning was able to identify the driver from the photo array as Maurice Reynolds, Burton's father, but she was unable to identify the gunman.

{¶ 7} Detective Von Harris testified to the procedure he followed in showing Matthews the photo arrays. He testified that Burton's photo was the only one that was included in all three photo arrays.

{¶ 8} At the close of the state's case, Burton moved for a Crim.R. 29 acquittal, which the court denied. In the defense's case, Burton, Delores Simmons,[1] and Macklin Hines[2] testified. Each witness testified as to Burton's whereabouts on the evening of April 30. According to all three witnesses, Burton was at Hines's house watching a basketball game, and then stopped at Ramone Steel's house before arriving home after midnight.[3] There was some discrepancy in their respective stories as to what game Burton was watching and exactly when he arrived home; however, their stories were consistent that Burton was either with Hines or Simmons at the time Matthews was robbed and shot.

{¶ 9} Burton also testified that he and Reynolds were estranged; that his father drove a Skylark; that he avoided his father because his father was often in trouble; and that he had not seen his father for several months prior to

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[1] Delores Simmons is Burton's fiancee; at the time of Burton's arrest, they lived together with their daughter.

[2] Macklin Hines is Burton's cousin, but Burton refers to him as his uncle because Hines is 20 years older than he.

[3] Detective Harris testified that Steel had been a suspect in the case, but that there was not enough evidence against Steel to prove his involvement.

May 1. He also testified that he had been mistaken for his father in the past because they looked alike. Burton stated that on May 1, the day after the shooting, he saw his father being arrested at a nearby gas station, and that the police questioned Burton there and let him go. Burton claimed that he had not come to the gas station that day with his father, but had arrived there on his own. Burton was seen running away from the gas station.

{¶ 10} When the defense rested, Burton renewed his Crim.R. 29 motion, which the court denied. The jury convicted Burton on all counts. The court merged the two counts of aggravated robbery, the two counts of felonious assault, and all the firearm specifications. Burton was sentenced to nine years for kidnapping, nine years for aggravated robbery, eight years for felonious assault, and three years for the firearm specifications. The court ran the sentences consecutively for a total of 29 years.

{¶ 11} Burton filed this appeal, raising five assignments of error for our review.

{¶ 12} "I. The appellant was denied his constitutional right of due process based upon ineffective assistance of counsel."

{¶ 13} In his first assignment of error, Burton argues that his counsel was ineffective for failing to file a motion to suppress the victim's identification through unduly suggestive photo arrays. He acknowledges that his initial attorney filed a motion, but he claims the trial court failed to hold a hearing or

otherwise rule on the motion. Because of his mistake as to the pretrial procedure, we find his argument has no merit.

{¶ 14} In order to substantiate a claim of ineffective assistance of counsel, the appellant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defendant so as to deprive him of a fair trial. *State v. Trimble*, 122 Ohio St.3d 297, 310, 2009-Ohio-2961, 911 N.E.2d 242, citing *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674. Judicial scrutiny of defense counsel's performance must be highly deferential. *Strickland*, 104 S.Ct. at 2065. In Ohio, there is a presumption that a properly licensed attorney is competent. *State v. Calhoun*, 86 Ohio St.3d 279, 1999-Ohio-102, 714 N.E.2d 905. The defendant has the burden of proving his counsel rendered ineffective assistance. *State v. Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, 920 N.E.2d 104, ¶ 223.

{¶ 15} "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. Even if there is a reasonable probability that the motion would have been granted, the failure to pursue it cannot be prejudicial unless there is also a reasonable probability that, without the excluded evidence, the defendant would have been acquitted." (Internal citation omitted.) *State v. Wilson*, Cuyahoga App. No. 94097, 2010-Ohio-5478, ¶ 11.

{¶ 16} The problem with Burton's argument is that the trial court held a hearing and denied his motion. On December 1, after the jury was empaneled and opening statements were made, the trial court recognized that it had not dealt with Burton's motion to suppress. Tr. 160. Outside the presence of the jury, the court heard arguments by both sides. The parties reached an agreement; they stipulated as to the extent of cross-examination the defense could pursue with the detectives who conducted the photo arrays. The court, however, denied Burton's motion, finding that the photo arrays were constitutional. Tr. 176.

{¶ 17} Relying on the record, we cannot say that the trial court erred in denying Burton's motion. Therefore, Burton's claim that his counsel was ineffective fails. Burton's first assignment of error is overruled.

{¶ 18} "II. Appellant's convictions were not supported by sufficient evidence and are against the manifest weight of the evidence."

{¶ 19} In his second assignment of error, Burton argues that the state failed to present sufficient evidence to support all of his convictions. He also argues that the jury lost its way in convicting him on the evidence presented. We disagree.

{¶ 20} When an appellate court reviews a claim of insufficient evidence, "'[t]he 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. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶ 77, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶ 21} In *State v. Thompkins* (1997), 78 Ohio St.3d 380, 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." *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 25.

{¶ 22} Burton was convicted of aggravated robbery in violation of R.C. 2911.01(A),[4] felonious assault in violation of R.C. 2903.11(A)(2),[5] and

[4] R.C. 2911.01(A) states: "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

kidnapping, in violation of R.C. 2905.01(A)(2).[6] He has not specifically argued that the state presented insufficient evidence of any particular element of these statutes. Clearly there was evidence that Matthews was robbed at gunpoint, shot twice, and restrained from moving during the course of the robbery and assault. What Burton argues here is that the testimonies of the state and defense witnesses conflict.

{¶ 23} We recognize that Matthews and Manning differed regarding what time the crime occurred. They were not consistent as to how many males exited the car. Manning provided more details about the car than Matthews did. Matthews could not or chose not to describe his assailants immediately after the incident, but he was able to identify Burton in three separate photo arrays in the two weeks afterwards. In court, Matthews was able to provide more details about the shooter than he had given to detectives investigating the crimes. There was

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attempt or offense, shall do any of the following: (1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it; * * * (3) Inflict, or attempt to inflict, serious physical harm on another."

[5] R.C. 2903.11(A) states: "No person shall knowingly do either of the following: * * * (2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance."

[6] R.C. 2905.01(A) states: "No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall remove another from the place where the other person is found or restrain the liberty of the other person, for any of the following purposes: * * * (2) To facilitate the commission of any felony or flight thereafter; * * *."

also testimony from Burton, Hines, and Simmons that provided Burton an alibi on the night the incident occurred.

{¶ 24} Factual inconsistencies as well as the credibility of Burton's alibi are for the fact-finder to weigh and assess. We cannot say that the jury's verdict, despite the obvious conflicts in the various witnesses' testimony, demonstrates a miscarriage of justice. We find there was sufficient evidence presented by the state on all elements of aggravated robbery, felonious assault, and kidnapping. We also find the jury verdict was not against the manifest weight of the evidence.

{¶ 25} Burton's second assignment of error is overruled.

{¶ 26} "III. The trial court abused its discretion and committed plain error by failing to merge the allied offenses of aggravated robbery and kidnapping."

{¶ 27} In his third assignment of error, Burton argues that under R.C. 2941.25, his kidnapping conviction should merge into his conviction for aggravated robbery. While we agree that in certain cases the two offenses would merge, for the following reasons, we decline to sustain Burton's assigned error.

{¶ 28} The Ohio Supreme Court recently decided *State v. Johnson*, ____Ohio St.3d____, 2010-Ohio-6314, 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.' [Emphasis sic]). 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.

{¶ 29} 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, fn. 29, 473 N.E.2d 264, "implicit within every robbery (and aggravated robbery) is a kidnapping." "[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.

{¶ 30} But the facts here lead us to a different result because of the subsequent felonious assault. After the victim was robbed at gunpoint, all of the assailants except Burton returned to the car. This break in the causal chain leads us to conclude that Burton acted with a separate animus to commit kidnapping and felonious assault. Burton did not leave with the other assailants. Instead he kept Matthews pinned face-down on the ground by slowly waving his gun up and down the length of Matthews's body. Burton's continued restraint of the victim broke the causal chain and severed the subsequent kidnapping from the aggravated robbery.

{¶ 31} Burton shot Matthews twice while restraining him, separate and apart from the conduct associated with the aggravated robbery. We therefore conclude that his conviction for kidnapping does not merge with either aggravated robbery or felonious assault.

{¶ 32} In light of *Johnson*, by which we are charged with considering the conduct of the accused, we find that Burton acted with a separate animus when he restrained Matthews after the robbery ended and subsequently shot him. Therefore, the trial court did not err when it failed to merge Burton's kidnapping conviction; it stands alone as a separate offense for which conviction and sentence are proper.

{¶ 33} Burton's third assignment of error is overruled.

{¶ 34} "IV. The trial court abused its discretion in sentencing appellant to the maximum penalty without consideration of the overriding purposes of felony sentencing or the mandatory sentencing factors."

{¶ 35} "V. The trial court abused its discretion in sentencing appellant to the maximum period of incarceration without articulating judicially reviewable reasons for imposition of the sentence."

{¶ 36} In his fourth and fifth assignments of error, Burton challenges his sentence. Specifically, in his fourth assignment of error, Burton contends that the trial court did not consider R.C. 2929.11 and 2929.12, nor did it achieve consistency in light of sentences imposed on similarly situated offenders. We disagree.

{¶ 37} R.C. 2929.11(B) reads as follows: "(B) A sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing set forth in division (A) of this section, commensurate with

and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders." R.C. 2929.11(A) provides that the "overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender."

{¶ 38} While R.C. 2929.11 does not require a trial court to make findings on the record, a record must nevertheless adequately demonstrate that the trial court considered the objectives of R.C. 2929.11(B). *State v. Turner*, Cuyahoga App. No. 81449, 2003-Ohio-4933. As we recognized in *State v. Georgakopoulos*, Cuyahoga App. No. 81934, 2003-Ohio-4341, "trial courts are given broad but guarded discretion in applying these objectives to their respective evaluations of individual conduct at sentencing."

{¶ 39} Under R.C. 2929.12, a court imposing a sentence upon a felony offender has the discretion to determine the most effective way to comply with the purposes and principles of sentencing. See R.C. 2929.12(A). The court must, therefore, consider the factors set forth in divisions (B) and (C) relating to the seriousness of the offender's conduct, as well as the factors set forth in divisions (D) and (E) relating to the likelihood of recidivism, along with any other relevant factors. R.C. 2929.12(A).

{¶ 40} At Burton's sentencing, the trial court explained its reasons for proceeding directly to sentencing after the verdict was read. The court noted

that, while it was not suggesting Burton was directly involved, several threats had been made to the victim and his family throughout the pendency of the case. Additionally, the victim's house was firebombed, leading the court to conclude that for the protection of the witnesses and the public, Burton should be sentenced immediately.

{¶ 41} The trial court discussed at length that it considered Burton's deliberate assault on Matthews, shooting him twice after the robbery had been committed and essentially forcing Matthews to beg for his life, made his conduct even more egregious. In light of the fact that Burton had violated his parole on two earlier drug-related cases by committing the instant offenses, the court reasoned that it should impose consecutive sentences for Burton's crimes.

{¶ 42} Furthermore, the goal of felony sentencing pursuant to R.C. 2929.11(B) is to achieve "consistency" not "uniformity." *State v. Klepatzki*, Cuyahoga App. No. 81676, 2003-Ohio-1529. The court is not required to make express findings that the sentence is consistent with other similarly situated offenders. *State v. Richards*, Cuyahoga App. No. 83696, 2004-Ohio-4633; *State v. Harris*, Cuyahoga App. No. 83288, 2004-Ohio-2854. This court has also determined that in order to support a contention that his or her sentence is disproportionate to sentences imposed upon other offenders, a defendant must raise this issue before the trial court and present some

evidence, however minimal, in order to provide a starting point for analysis and to preserve the issue for appeal. *State v. Woods*, Cuyahoga App. No. 82789, 2004-Ohio-2700.

{¶ 43} Burton failed to present any evidence of, or reference to, other similarly situated offenders who received lesser sentences. Without a starting point for the trial court to begin analysis, the issue has not been preserved for appeal, and we decline to address it.

{¶ 44} In his fifth assignment of error, Burton is essentially arguing that *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, is no longer good law, in light of the United States Supreme Court's decision in *Oregon v. Ice* (2009), 555 U.S. 160, 129 S.Ct. 711, 172 L.Ed.2d 517. The Ohio Supreme Court recently decided *State v. Hodge*, ___ Ohio St.3d ___, 2010-Ohio-6320, in which it held "The United States Supreme Court's decision in *Oregon v. Ice* (2009), 555 U.S. 160, 129 S.Ct. 711, 172 L.Ed.2d 517, does not revive Ohio's former consecutive-sentencing statutory provisions, R.C. 2929.14(E)(4) and 2929.41(A), which were held unconstitutional in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.[7] Id. at paragraph two of the syllabus. Therefore, we find that the trial court's imposition of maximum sentences was not error.

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[7] Burton's appeal and brief were filed prior to the Ohio Supreme Court's ruling in *State v. Hodge* on December 29, 2010.

{¶ 45} Thus, Burton's fourth and fifth assignments of error are overruled.

Judgment 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.

SEAN C. GALLAGHER, PRESIDING JUDGE

PATRICIA A. BLACKMON, J., and
COLLEEN CONWAY COONEY, J., CONCUR