[Cite as *State v. Williams*, 2011-Ohio-316.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 94321, 94322, and 94323

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

SHAWN WILLIAMS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED AND REMANDED
FOR CORRECTION

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-524128, CR-524129, and CR-520764

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

RELEASED AND JOURNALIZED: January 27, 2011

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MARY J. BOYLE, J.:

{¶ 1} In this consolidated appeal, defendant-appellant, Shawn Williams, claims that he was denied a fair trial by the Cuyahoga County Common Pleas Court when it granted the state's motion to join two indictments against him for trial. For the reasons that follow, we affirm. But we remand the case to the trial court with instructions to correct the sentencing entries regarding postrelease control.

Procedural History and Factual Background

{¶ 2} In Case No. CR-524129, Williams was indicted on one count of aggravated robbery, in violation of R.C. 2911.01(A)(1), for events that allegedly took place on January 1, 2009. In Case No. CR-524128, he was indicted for one count of aggravated robbery (same subsection), for events that allegedly took place on March 2, 2009. Each count of aggravated robbery also had one- and three-year firearm specifications attached, as well as notice of prior conviction and repeat violent offender specifications.

{¶ 3} The state moved to join Case Nos. CR-524128 and CR-524129 under Crim.R. 13. Williams opposed the state's motion, but the trial court granted it. Except for the notice of prior conviction and repeat violent offender specifications, which were bifurcated and tried to the bench, the case proceeded to a jury trial where the following evidence was presented.

{¶ 4} Jeffrey Durden, the alleged victim in Case No. CR-524129, testified that on December 31, 2008, he saw an advertisement on Craig's List for a 56-inch television and a Playstation 3 for $1,000. He called the phone number listed in the advertisement and a man (later identified to be Williams) answered the phone. Williams told Durden to meet him at a McDonald's. Durden went to the McDonald's, but Williams never showed. The next day, Durden called Williams again. Williams explained that he had been too busy the previous day but asked Durden "to meet him on 79th and

Cedar," and further told Durden to park on the side of a convenience store located at that corner. Durden took $1,100 ($100 extra to buy games) and his cell phone with him to meet Williams. Durden explained that there were no people around when he arrived. He then saw a blue car pull up with two men inside it. Williams, who was a "big three-hundred pound dude, real sloppy looking, out of shape looking," was the passenger. Durden said that the two men "ran up on my car and pulled guns on me, told me to open the door." When he did, they checked his pockets, took the money, got back in the blue car, and drove away. Durden told police that Williams's nickname was "Re-Run."

{¶ 5} Herbert Hostetter, the alleged victim in Case No. CR-524128, testified that in late February 2009, he went to Rent-a-Center to pay a bill. As he was walking out of the store, a man (later identified to be Williams) walked up to him and asked him if he wanted to buy an X-Box or Playstation 3. Hostetter replied that he did not because his television had been stolen. Williams then asked Hostetter if he wanted to buy a 50-inch television. Hostetter said that he did and asked Williams what he wanted for it. Williams told him $300, but Hostetter did not have that much money on him. Williams gave Hostetter his telephone number and told him to call him when he had enough money. Hostetter borrowed $250 for the television,

which Williams agreed to take. Hostetter met Williams on March 2, 2009, "in the compound of 55th." Williams got into Hostetter's car and told him, "we got to go up the street to give the money to my dude." Although Hostetter thought this was odd, he did it because he wanted the television. Hostetter said, "we drove to 79th and Cedar," and "pulled on the side of this store." Williams told Hostetter, "I got to go in here talk to my dude." Williams then asked Hostetter for the money. Hostetter knew something was wrong at that point, so he told Williams he did not have the money on him because he wanted to see the television first. At that point, Williams pulled "a little gun" out of his pocket and said, "you got the money, my dude." Hostetter then gave him the money.

{¶ 6} Detective Vinson was assigned to both robberies. He was able to find that Williams went by the nickname "Re-Run." Both Durden and Hostetter identified Williams in a photo array as the man who robbed them at gunpoint.

{¶ 7} The jury found Williams guilty of aggravated robbery in both cases with the firearm specifications. Williams stipulated to the prior conviction in both cases, so the trial court found him guilty of the specifications relating to the notice of prior conviction. The trial court then

held a hearing on the repeat violent offender specifications and found Williams guilty of them as well.

{¶ 8} The trial court sentenced Williams to three years for aggravated robbery in Case No. CR-524128 and three years for the firearm specifications, for a total of six years in prison. It then sentenced him to three years for aggravated robbery in Case No. CR-524129 and three years for the firearm specifications, for a total of six years in prison. It then ordered that the two sentences be served consecutively, for a total of 12 years in prison. The trial court chose not to sentence Williams on the repeat violent offender specifications.[1] The trial court then notified Williams that he would be subject to three years of mandatory postrelease control, which although not raised by the state, was incorrect. Since the aggravated robberies were first-degree felonies, it should have been five years of mandatory postrelease control.[2]

Crim.R. 13

[1]Before the sentencing hearing, Williams also pleaded no contest to robbery in a third case, Case No. CR-520764, and was sentenced for it on the same day, to two years in prison, to run concurrently to the 12 years in Case Nos. CR-524128 and CR-524129. It also notified him that he would be subject to three years of mandatory postrelease control, which was incorrect. Although not raised by Williams, it should have been three years of discretionary postrelease control. We will address the issue of postrelease control at the end of this opinion as this case was included in this consolidated appeal (Appeal No. 94323).

[2]Again, we will address the issue of postrelease control at the end of this opinion.

{¶ 9} In general, the law 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. Crim.R. 13 provides as much and permits a court to "order two or more indictments *** to be tried together, if the offenses *** could have been joined in a single indictment[.]" Consequently, 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.

{¶ 10} Crim.R. 8(A), regarding joining offenses, provides, "[t]wo or more offenses may be charged in the same indictment, information or complaint in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character, or are based on the same act or transaction, or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct."

{¶ 11} Nonetheless, if it appears that a criminal defendant would be prejudiced by such joinder, then the trial court is required to order separate trials. Crim.R. 14. "It is the defendant, however, who bears the burden of demonstrating prejudice and that the trial court abused its discretion in

denying severance." *State v. Saade*, 8th Dist. Nos. 80705 and 80706, 2002-Ohio-5564, ¶12, citing *State v. Coley*, 93 Ohio St.3d 253, 2001-Ohio-1340, 754 N.E.2d 1129, and *State v. LaMar*, 95 Ohio St.3d 181, 191-192, 2002-Ohio-2128, 767 N.E.2d 166. "In the event that the trial court denies severance, the defendant must renew his or her 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." *Saade* at ¶12, citing *State v. Owens* (1975), 51 Ohio App.2d 132, 146, 366 N.E.2d 1367, and *State v. Fortson* (Aug. 2, 2001), 8th Dist. No. 78240.

{¶ 12} Before trial, Williams did move for severance of the indictments, and opposed the state's motion for joinder. At the close of the state's case (which was also the conclusion of all of the evidence), Williams moved for a Crim.R. 29 acquittal, which was denied by the trial court, but he failed to renew his opposition to the joinder of the indictments. Williams has, therefore, waived all but plain error. See Crim.R. 52(B); *Saade* at ¶12; *Owens* at 146.

{¶ 13} An appellate court reviewing a proceeding for plain error must examine the evidence properly admitted at trial and determine 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. Further, "[n]otice 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.

{¶ 14} The trial court in the instant case granted the state's motion to join the two indictments charging separate acts of aggravated robbery as it was permitted to do 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 are part of a course of criminal conduct." The aggravated robberies were only two months apart, Williams used the lure of a 50-some inch television and a Playstation 3 in both robberies, and proceeded to rob both victims at gunpoint outside the same convenience store. These facts were sufficient to establish that both aggravated robberies constituted a common scheme or plan or were part of a course of criminal conduct.

{¶ 15} Williams contends that he was prejudiced by the joining of the two aggravated robbery indictments because "the cases involved the same conduct, different victims, and separate dates." He argues that "[a]s a result, it was undoubtedly difficult for the jury to not keep the evidence of each offense segregated and as a result convicted the Defendant because the

crimes allegedly occurred on multiple occasions." He further maintains that "[t]he fact the scene of the occurrence and the circumstances leading to the robbery were very similar likely aroused the passions and prejudices of the jury before any evidence was admitted at trial."

{¶ 16} "A prosecutor can use two methods to negate such claims of prejudice." *Lott*, supra, at 163. Under the first method, the "other acts" test, the state may argue that it 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., citing *Bradley v. United States* (C.A.D.C.1969), 433 F.2d 1113, 1118-1119. "Under the second method, the 'joinder' test, the state is not required to meet the stricter 'other acts' admissibility test, but is merely required to show that evidence of each crime joined at trial is simple and direct." *Lott*, citing *State v. Roberts* (1980), 62 Ohio St.2d 170, 175, 405 N.E.2d 247; *Torres*, supra, at 344. The Ohio Supreme Court made it clear that "when 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)." *Lott*, citing *Roberts*; *Torres*; and *United States v. Catena* (C.A.3, 1974), 500 F.2d 1319, 1325-1326, certiorari denied, *Catena v. U.S.* (1974), 419 U.S. 1047, 95 S.Ct. 621, 42 L.Ed.2d 641.

{¶ 17} Here, the state counters Williams's arguments with both tests, the other acts test and the joinder test. But without considering whether the stricter "other acts" test is met under Evid.R. 404(B), we find that the joinder test is easily established in the instant case. Evidence of each aggravated robbery was simple and distinct. Although undoubtedly terrifying to each victim, the robberies were simple holdups, nothing more. The testimony of each victim was straightforward and brief. In addition, the trial court instructed the jury to consider each count and the evidence applicable to each count separately. It is presumed that the jury will obey the trial court's instructions. *State v. Dunkins* (1983), 10 Ohio App.3d 72, 73, 460 N.E.2d 688.

{¶ 18} Under the plain error standard, we find that the outcome of the trial would not have been different even if Williams's cases were tried separately. See *Saade*, supra. We note, however, that we find no error on the part of the trial court, plain or otherwise.

Postrelease Control

{¶ 19} As we stated in the procedural and factual section of this opinion, the trial court imposed an incorrect period of postrelease control for all three cases on appeal. It imposed three years of mandatory postrelease control for Williams's first-degree aggravated robbery convictions in Case Nos. CR-524128 and

CR-524129. But for first-degree felonies, postrelease control is mandatory for five years. R.C. 2967.28(B)(1).

{¶ 20} The trial court further imposed three years of mandatory postrelease control for Williams's robbery conviction in Case No. CR-520764. In this case, Williams pleaded no contest to robbery under R.C. 2911.02(A)(3), which is a third-degree felony. Under R.C. 2967.28(B)(3), three years of mandatory postrelease control is required "[f]or a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened *physical harm* to a person[.]" (Emphasis added.)

{¶ 21} But R.C. 2967.28(C) states that for a felony of the "third, fourth, or fifth degree that is not subject to division (B)(1) or (3) of this section shall include a requirement that the offender be subject to a period of post-release control of *up to three years* after the offender's release from imprisonment, if the parole board, in accordance with division (D) of this section, determines that a period of post-release control is necessary for that offender[.]" Thus, when a person commits a third-degree felony offense that does not include physical harm to a person or threatened physical harm, postrelease control is a discretionary three-year period. R.C. 2967.28(B)(3) and (C).

{¶ 22} Here, in Case No. CR-520764, Williams pleaded no contest to robbery under R.C. 2911.02(A)(3), which provides that "[n]o person, in attempting or committing a theft offense or in fleeing immediately after the attempt or

offense, shall *** [u]se or threaten the immediate use of force against another." "Force" is defined in R.C. 2901.01(A) as "any violence, compulsion, or constraint, physically exerted by any means upon or against a person or thing." But force does not necessarily mean that there was physical harm to persons. R.C. 2901.01(A)(3) defines "physical harm to persons" as "any injury, illness, or other physiological impairment, regardless of its gravity or duration."

{¶ 23} The prosecutor read the underlying facts of Williams's robbery conviction into the record at the plea hearing: "On the date in question in the area of 4908 Central Avenue, Cleveland, Ohio, the defendant did in fact use force to remove — against Bernadette Morris, that he went up to her and forcibly took $2,250 out of her hands and fled the area." There is nothing in the record to indicate that Williams threatened Morris with physical harm, or caused her physical harm. If there would have been, he would have likely been charged with R.C. 2911.02(A)(2), a second-degree felony ("[n]o person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall *** [i]nflict, attempt to inflict, or threaten to inflict physical harm on another.").

{¶ 24} Thus, in Case No. CR-520764, Williams should have received three years of *discretionary* postrelease control for his robbery conviction.

{¶ 25} As this court has repeatedly done in the past and as we are permitted to do under R.C. 2953.08(G)(2), we modify Williams's postrelease

control in all three cases on appeal, Case Nos. CR-520764, CR-524128, and CR-524129, as follows:

{¶ 26} 1. In Case No. CR-520764, we modify and correct Williams's postrelease from three years mandatory postrelease control to three years of discretionary postrelease control.

{¶ 27} 2. In Case Nos. CR-524128 and CR-524129, we modify and correct Williams's postrelease control from three years of mandatory postrelease control to five years of mandatory postrelease control.

{¶ 28} In *State v. Fischer*, __ Ohio St.3d __, 2010-Ohio-6238, __N.E.2d___, the Ohio Supreme Court recently recognized that appellate courts do not have to remand a sentence that includes an improper period of postrelease control, calling remand "just one arrow in the quiver." Id. at ¶29. Instead, it acknowledged that an appellate court's discretion to correct "a defect in a sentence without a remand is an option that has been used in Ohio and elsewhere for years in cases in which the original sentencing court, as here, had no sentencing discretion." Id. Indeed, the Supreme Court explained, "[c]orrecting the defect without remanding for resentencing can provide an equitable, economical, and efficient remedy for a void sentence[,]" in cases where "a trial judge does not impose postrelease control in accordance with statutorily mandated terms." Id. at ¶30.

{¶ 29} Judgments affirmed, but the sentences are modified. Case remanded. Upon remand, trial court is instructed to correct the sentencing entries to reflect the proper period of postrelease control.

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. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for correction of sentencing entries and execution of sentence.

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

MARY J. BOYLE, JUDGE

PATRICIA ANN BLACKMON, P.J., and
LARRY A. JONES, J., CONCUR