

[Cite as *State v. Seals*, 2015-Ohio-517.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101081

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

SHELDON SEALS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-12-567510-A

BEFORE: Keough, J., Celebrezze, A.J., and Boyle, P.J.

RELEASED AND JOURNALIZED: February 12, 2015

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KATHLEEN ANN KEOUGH, J.:

{¶1} Defendant-appellant, Sheldon Seals, appeals his convictions. For the reasons that follow, we affirm, but remand the matter to the trial court to correct nunc pro tunc the judgment entry of conviction.

{¶2} In 2012, Seals and his codefendant, Cory Middleton, were charged in a fourteen-count indictment. Thirteen of those charges pertained to Seals, which included four counts each of improperly discharging a firearm into a habitation and felonious assault, two counts of failure to comply, and one count each of having a weapon while under disability, improperly handling a firearm in a motor vehicle, and resisting arrest. Each count contained either attendant one- and three-year firearm specifications or forfeiture specifications. Following discovery, Seals elected to bifurcate and try the disability count to the bench. The remaining counts were tried before a jury and the following evidence was presented.

{¶3} On September 29, 2012 approximately at 4:00 a.m., the occupants of 3372 West 59th Place in Cleveland were awakened by the sounds of gunshots coming into the home. David Steel testified that he was sound asleep upstairs when he thought he heard a car with a flat tire being driven down the street. When he walked downstairs, he saw plaster from the walls and glass all over the place, and holes in the wall, including a hole through a gas line. He then realized that the sounds he heard were gunfire.

{¶4} Asleep downstairs were Teresa Turner, Jacqueline Mack, and Teresa's son, Paul. Both Teresa and Jacqueline testified that they were awakened by gunshots and debris falling on them. After the gunfire ceased, Teresa called the police. David, Teresa, and Jacqueline each testified that they did not see who was shooting into the home and did not hear any screeching tires after the shots were fired.

{¶5} In the early morning hours of September 29, Officer Samuel Ortiz and his partner Officer Higinio Rivera were patrolling in the area of Field and West 50th Street when they heard rapid gunfire from an automatic weapon. Officer Ortiz testified that they drove in direction of where they heard the gunshots. As they approached the intersection of Koch Court and West 52nd Street, Officer Ortiz could hear a vehicle approaching at a high rate of speed, traveling from the direction where he believed the gunshots occurred. A black Chevrolet Impala, with two male occupants inside, stopped at the intersection where the officers were waiting. Officer Ortiz and his partner decided that because the vehicle came from the area where they heard the gunshots, they would stop the vehicle for questioning. According to Officer Ortiz, the two male occupants of the vehicle looked right at them with “deer eyes.” When the vehicle turned the corner and was now facing in the opposite direction, but side-by-side of the zone car, Officer Ortiz yelled through their open car windows to pull over. However, the vehicle sped off, and Officers Ortiz and Rivera pursued with their lights and sirens activated. During the pursuit, and near West 51st or West 50th Streets, the passenger of the vehicle jumped out of car holding what appeared to both Officers Ortiz and Rivera was a piece of wood. The passenger was wearing a brown and cream colored cap, a khaki-colored flannel shirt, white t-shirt, and beige pants. The passenger took off running and the driver of the Impala sped off. Believing that the occupants of the vehicle were now possibly connected with the gunshots heard earlier and that the weapon was still in vehicle, Officers Ortiz and Rivera continued pursuing the vehicle. They also called for assistance due to the nature of the gunfire they heard, believing it was from a high-powered weapon.

{¶6} As the Impala approached West 47th Street, the driver suddenly stopped the car and tried to jump out. However, because of the abrupt stop, Officer Rivera rear-ended his zone car into the Impala, causing the driver to jump back into the Impala and speed off. The pursuit

finally ended on Pretoria Court when the driver jumped out of the moving car, and fled on foot into an open field. Officer Rivera chased the driver and when the driver turned around to see where the officer was, the driver ran into a parked truck and fell to the ground. Officer Rivera, with the help of responding officer, Officer Mark Maguth, was able to apprehend the resisting suspect. The driver of the Impala was identified as Seals. After Seals was detained, Officer Rivera, radioed out a description of the passenger.

{¶7} Back on Pretoria Court where the Impala was abandoned, Officer Ortiz approached the vehicle and discovered on the passenger floorboard a magazine containing two rounds of ammunition that fit an AK-47 firearm. He also discovered a rental agreement for the vehicle inside the glove box. Officer Rivera testified that at that point, he realized that when the passenger bailed out of the car, the piece of wood he was carrying could have been the weapon. On cross-examination, Officer Ortiz admitted the weapon was not fired from inside the car because no spent shell casings were discovered inside the Impala.

{¶8} Officer Kelly Smith testified that she and her partner responded to the calls for assistance. They patrolled the area looking for the passenger that fled from the Impala. In the area of West 50th Street and Clark Avenue they observed a male jogging and sweating that somewhat matching the description that Officer Rivera radioed. The male was identified himself as Cory Middleton. They drove Middleton to Officer Rivera for a cold-stand identification. Officer Rivera testified that he positively identified Middleton as the passenger of the Impala that fled from the officers. Officer Smith testified that her supervisor ordered her to release Middleton because no identification was made. Ultimately, Middleton was not arrested but released. Later it was discovered after running a warrant check on Middleton, that a warrant for his arrest existed and he was considered “armed and dangerous.”

{¶9} After Middleton was released, Officer Rivera went back to the location where Middleton fled from the vehicle. Officer Joseph Matt was already there and discovered next to a garage an AK-47 rifle laying in the grass. He testified that he could see one bullet in the chamber of the rifle, but no magazine was in the gun. Officer Matt also discovered a hat nearby. Officer Rivera testified that the rifle and hat were discovered near the garage and in the same pathway that Middleton took when he fled from the Impala. Officer Rivera also positively identified that the hat was the beige and white cap that he saw the passenger wearing.

{¶10} After Officer Maguth assisted in the apprehension of Seals, he and his partner, received a radio broadcast that a house had been shot into on West 59th Place. They responded to the house, interviewed the occupants and observed numerous bullet holes going into the house. The officers searched the area and found several spent shell casings in the driveway-area of a house two up from the house that was shot at. Officer Maguth testified that no other shootings were reported during his shift.

{¶11} Crime scene investigator, Michael E. Gibbs testified that he received a call for a felonious assault shooting with multiple crime scenes. He testified that he processed four crime scenes — (1) the location where the AK-47 and cap were recovered, (2) the location where shell casings were discovered, (3) the home on West 59th Place that was shot into, and (4) the black Chevrolet Impala. At the home on West 59th Place, he observed 14 suspected bullet holes on the exterior of the house. He also recovered 13 spent shell casings from the driveway two houses away from the victimized home that would be tested for DNA and for fingerprints. He swabbed the AK-47 and the cap for DNA analysis.

{¶12} Forensic scientist, Christopher Smith, testified that he analyzed the swabs from the AK-47 and the cap. The DNA testing on the firearm revealed that there was a mixture of two unknown individuals, with one being at least a male, on the pistol grip, trigger, and guard. The

testing on the cap revealed a mixture profile with a major contributor being an unknown male. According to Smith, Seals was not a DNA contributor to either the cap or the firearm.

{¶13} Kristen Koeth, a scientific examiner and firearm examiner, testified in her expert capacity. She testified that the magazine recovered from the Impala was a standard AK-47 magazine, and that it fit the AK-47 that was recovered on September 29th. The AK-47 was test fired by manually loading ammunition and also by using the magazine recovered. In each instance, the firearm was operable. Koeth further testified about the spent shell casings that were recovered. Based on her expertise, she opined that all the shell casings were fired from the same firearm. Based on a reasonable degree of scientific certainty, she opined that the striations and markings on the test fired cartridges matched the striations and markings on the casings found at the West 59th Place crime scene. Regarding the two live rounds discovered in the magazine found in the Impala, Koeth stated that they were of the same manufacturer and caliber as the spent casings that were recovered. The live round of ammunition that was found inside the AK-47 also matched the manufacturer and caliber of the shell casings.

{¶14} Barbara Schultz, fingerprint examiner, testified regarding the two fingerprints lifted from the Impala and were compared with the prints of Seals and Middleton. According to Schultz neither of the prints matched Seals or Middleton, but one of the prints matched Helen Raine.

{¶15} Helen Raine testified that Seals asked her to rent him a vehicle for a weekend in September 2012. She identified the black Chevrolet Impala that was impounded after Seals's arrest as the vehicle she rented for him.

{¶16} Detective John Lally testified that during his investigation, he interviewed both David Steel and Teresa Turner. Although they did not know Seals, they recognized Cory Middleton as "Dutch," a friend of Steel's son. They both stated that they had not seen Dutch

since the shooting. According to Detective Lally, there were no eyewitnesses to the shooting or to whether a black Impala was seen in the area.

{¶17} The jury found Seals guilty of all counts, except the attendant firearm specifications, and the trial court entered a finding of guilt on the weapons under disability count. After merging all relevant counts, the trial court imposed a total prison sentence of 11 years.

{¶18} Seals appeals, raising three assignments of error.

I. Admission of Evidence

{¶19} The state's final witness, Detective Lally, was asked on direct examination whether he had an opportunity to speak with Seals. In response, Lally stated: "Yes. It's funny that my tape recorder, I hit it and it went on and then went off. But the only thing is what was stated was I'm not the guy that — he invoked his rights. He didn't want to talk." (Tr. 663-664.)

{¶20} Seals contends in his first assignment of error that the trial court erred in admitting this evidence of his post-arrest silence and invocation of his *Miranda* rights, which is in derogation of his right against self-incrimination, as protected by the Fifth Amendment of the United States Constitution.

{¶21} Because no objection was made to Detective Lally's testimony, we review this assignment of error under a plain error analysis. Crim.R. 52(B); *State v. Amos*, 140 Ohio St.3d 238, 2014-Ohio-3160, 17 N.E.3d 528, ¶ 21-23 (plain error may be recognized when the error is an obvious defect in the trial that is outcome determinative).

{¶22} Once a criminal defendant receives the warnings required by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), it is improper for the state to impeach the defendant by causing the jury to draw an impermissible inference of guilt from the defendant's post-arrest silence. *Doyle v. Ohio*, 426 U.S. 610, 611, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976).

The rationale behind this rule is that *Miranda* warnings carry the state's "implicit assurance" that an arrestee's invocation of the Fifth Amendment right to remain silent will not later be used against him. *Wainwright v. Greenfield*, 474 U.S. 284, 290-291, 106 S.Ct. 634, 88 L.Ed.2d 623 (1986). Because a defendant's post-*Miranda* warning silence could be nothing more than an invocation of his right to silence, it would be fundamentally unfair to permit a breach of that assurance by allowing impeaching questions as to why the defendant failed to give an exculpatory account to the police after receiving the warnings. *Id.* at 295; *State v. Rogers*, 32 Ohio St.3d 70, 71, 512 N.E.2d 581 (1987).

{¶23} This court has likewise recognized that "admitting evidence of post-arrest silence in a manner that implicitly suggests a defendant's guilt is impermissible." *State v. Gooden*, 8th Dist. Cuyahoga No. 82621, 2004-Ohio-2699, ¶ 54. "The *Miranda* decision precludes the substantive use of a defendant's silence during police interrogation to prove his guilt." *Id.*, citing *State v. Correa*, 8th Dist. Cuyahoga No. 70744, 1997 Ohio App.LEXIS 2076 (May 15, 1997).

{¶24} Seals relies on this court's decision in *State v. Person*, 167 Ohio App.3d 419, 2006-Ohio-2889, 855 N.E.2d 524 (8th Dist.). In *Person*, the state elicited inadmissible testimony from its police witnesses that Person remained silent after the *Miranda* warnings were given. This court found that the testimony was purposefully elicited to support an inference that Person was guilty, which violated his right to due process. The cumulative effect of this error, other inadmissible testimony, and the equivocal evidence warranted a new trial. *Id.* at ¶ 33, 36.

{¶25} However, in *Person* this court recognized that when other overwhelming evidence against the defendant is presented, an isolated reference made regarding a defendant's post-arrest silence does not constitute reversible error; rather it is harmless error. *Id.* at ¶ 31, citing *State v. Ervin*, 8th Dist. Cuyahoga No. 80473, 2002-Ohio-4093. See also *State v. Sims*, 8th Dist.

Cuyahoga No. 84090, 2005-Ohio-1978, ¶ 55 (“There is an independent and substantive basis to support the trial court’s verdict of guilty beyond a reasonable doubt.”); *Gooden*, at ¶ 55 (“The remaining evidence presented comprised overwhelming proof of Gooden’s guilt.”); *State v. Dowdell*, 8th Dist. Cuyahoga No. 83829, 2004-Ohio-5487, ¶ 29 (“There is an independent and substantive basis to support the trial court’s guilty verdict.”); *State v. Thomas*, 8th Dist. Cuyahoga No. 78570, 2002-Ohio-4026 (single reference to the defendant’s post-arrest silence was not reversible error because “had the jury never heard the impermissible reference * * *, it would still have been justified in finding Thomas guilty * * *.”).

{¶26} Much like in *Ervin* and its progeny, other overwhelming evidence exists against Seals. The jury heard the testimony of Officers Ortiz and Rivera who stated that after hearing rapid gunshots, they proceeded in the direction of where they believed the shots originated. As they were waiting at an intersection, they could hear a car rapidly approaching. When the car stopped at the intersection, the two male occupants, Seals and Middleton, looked at the officers like “deer in headlights.” After being instructed to pull over, Seals sped away. During the pursuit, Middleton jumped out of the vehicle with, what was identified later as an AK-47 firearm.

Seals eventually fled from the vehicle and was apprehended after a brief foot chase. Inside the vehicle was an AK-47 magazine that fit the AK-47 firearm that was recovered near a garage.

{¶27} Spent shell casings that were discovered on West 59th Place matched the manufacturer and caliber of the live ammunition that was found inside the recovered magazine and AK-47. Finally, the striations and markings on the spent casings matched those that were test fired from the AK-47. Based on the evidence and testimony, the jury could logically infer that the shell casings at the scene of the victimized house were shot from the AK-47 recovered, which had a live round of ammunition in the chamber that matched the manufacturer and caliber of the ammunition found in the magazine located on the passenger floor of the vehicle that Seals

was driving. The jury did not need to hear that Seals invoked his right to remain silent to find Seals guilty; Detective Lally's isolated reference to Seals's post-arrest silence does not rise to the level of plain error.

{¶28} Furthermore, the record supports that Detective Lally's statement was not elicited to support an inference of guilt. Detective Lally stated that when he questioned Seals, Seals told him that he was "not the guy." (Tr. 663-664.) The jury heard this statement again during cross-examination and on redirect. (Tr. 703-704.) This denial supported Seals's theory of the case that he was not guilty of the crime charged.

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

II. Sufficiency of the Evidence

{¶30} In his second assignment, Seals contends that the trial court erred in entering a conviction based upon insufficient evidence, in derogation of his right to due process of law, as protected by the Fourteenth Amendment to the United States Constitution. The issue Seals raises on appeal is whether a defendant can be convicted of aiding and abetting in the shooting based on his actions which he committed after the criminal act. Specifically, Seals contends that his conduct after a crime, without more, is insufficient to establish complicity in the commission of the crime. We disagree.

{¶31} The test for sufficiency requires a determination of whether the prosecution met its burden of production at trial. *State v. Bowden*, 8th Dist. Cuyahoga No. 92266, 2009-Ohio-3598, ¶ 12. 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. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). Additionally, when reviewing the sufficiency of the evidence, an appellate court is to consider all of the evidence admitted at trial, even if the evidence was improperly admitted. *State v. Brewer*, 121 Ohio St.3d 202, 2009-Ohio-593, 903 N.E.2d 284, ¶ 19.

{¶32} It is well established that “‘circumstantial evidence is sufficient to sustain a conviction if the evidence would convince the average mind of the defendant’s guilt beyond a reasonable doubt.’” *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, 837 N.E.2d 315, ¶ 75, quoting *State v. Heinish*, 50 Ohio St.3d 231, 238, 553 N.E.2d 1026 (1990). Circumstantial evidence carries the same weight as direct evidence. *State v. Jenks*, 61 Ohio St.3d 259, 272 N.E.2d 492 (1991). Circumstantial evidence is proof of facts or circumstances by direct evidence from which the trier of fact may reasonably infer other related or connected facts that naturally or logically follow. *State v. Beynum*, 8th Dist. Cuyahoga No. 69206, 1996 Ohio App. LEXIS 2143 (May 23, 1996).

{¶33} In this case, Seals was charged with four counts each of improperly discharging a firearm into a habitation and felonious assault, two counts of failure to comply, and one count each of having a weapon while under disability, improperly handling a firearm in a motor vehicle, and resisting arrest. The state proceeded under a theory of aiding and abetting.

{¶34} Ohio’s complicity statute, R.C. 2923.03(A), provides: “[n]o person, acting with the kind of culpability required for the commission of an offense, shall do any of the following: * * * (2) Aid or abet another in committing the offense.” A person aids or abets another when he supports, assists, encourages, cooperates with, advises, or incites the principal in the commission of the crime and shares the criminal intent of the principal. *State v. Johnson*, 93 Ohio St.3d 240, 245-246, 2001-Ohio-1336, 754 N.E.2d 796. “Such intent may be inferred from the circumstances surrounding the crime.” *Id.* at 246.

{¶35} Aiding and abetting may be shown by both direct and circumstantial evidence, and participation may be inferred from presence, companionship, and conduct before *and after* the offense is committed. *State v. Cartellone*, 3 Ohio App.3d 145, 150, 444 N.E.2d 68 (8th Dist.1981), citing *State v. Pruett*, 28 Ohio App.2d 29, 34, 273 N.E.2d 884 (4th Dist.1971); *see also State v. Harmon*, 8th Dist. Cuyahoga No. 53221, 1988 Ohio App. LEXIS 629 (Feb. 18, 1988). Aiding and abetting may also be established by overt acts of assistance such as driving a getaway car or serving as a lookout. *Cartellone*; *see also State v. Trocodaro*, 36 Ohio App.2d 1, 301 N.E.2d 898 (10th Dist.1973).

{¶36} In *State v. Widner*, 69 Ohio St.2d 267, 431 N.E.2d 1025 (1982), the Supreme Court found sufficient evidence to support the felonious assault conviction of the driver whose passenger shot at police as the pair fled from an investigative stop. As evidence of the driver's intent, the court cited to the defendant-driver's knowledge that the passenger possessed a gun and his intentionally evasive conduct that aided in the shooting. *Id.* at 269.

{¶37} Similarly, in *Harmon*, the defendant's evasive driving after a seemingly random shooting by his passenger was deemed sufficient to sustain a conviction for felonious assault. In *State v. Allmond*, 8th Dist. Cuyahoga No. 89020, 2007-Ohio-6191, the evidence established that defendant was more than merely in the presence of the principal offenders; rather, he aided and participated in the crime by driving the principal offenders to the victim's house, blocking the victim's car, waiting for his friends to shoot at the victim, then driving evasively in an attempt to get away. These cases demonstrate the degree of an accomplice's participation necessary to constitute aiding or abetting.

{¶38} In this case, and viewing the evidence in the light most favorable to the state, the evidence sufficiently established that Seals's actions were far more than a mere presence at the scene or that he was an accessory after the fact. The evidence supports that Seals's acted, in the

very least, as the getaway driver after the shooting. Much like in *Widner*, Seals's criminal intent can be inferred from the circumstances surrounding the crime. The direct and circumstantial evidence demonstrates that Seals knew there was a weapon in the vehicle and that it was used in the commission of a crime. Additionally, Seals, as the driver, acted intentionally to evade police, which further aided in the criminal enterprise.

{¶39} Accordingly, the evidence was sufficient to support Seals's convictions under the state's complicity theory. The second assignment of error is overruled.

III. Sentence

{¶40} In his third assignment of error, Seals contends that the trial court's sentence is contrary to law because the court (1) failed to make necessary findings pursuant to R.C. 2929.14(C), (2) failed to merge Counts 11 and 12 because they are allied offenses, and (3) imposed a six-month sentence on Count 14, a second-degree misdemeanor.

A. R.C. 2929.14(C)(4)

{¶41} The presumption in Ohio is that sentencing is to run concurrent, unless the trial court makes the required findings for consecutive sentences set forth in R.C. 2929.14(C)(4). *State v. Wells*, 8th Dist. Cuyahoga No. 98428, 2013-Ohio-1179, ¶ 11; R.C. 2929.14(A).

{¶42} Under current R.C. 2929.14(C)(4), when imposing consecutive sentences, the trial court must first find the sentence is "necessary to protect the public from future crime or to punish the offender." Next, the court must find that consecutive sentences are "not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public." Finally, the trial court must find that one of the following factors applies:

(a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction * * *, or was under postrelease control for a prior offense.

(b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses

so committed was so great or unusual that no single prison term * * * adequately reflects the seriousness of the offender's conduct.

(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

R.C. 2929.14(C).

{¶43} In imposing consecutive sentences, the trial court stated:

I'm also imposing those sentences consecutive one to the other. Under 2929.14, multiple prison terms are appropriate. These offenses were committed as part of a course of conduct. Obviously, it's clear that the harm caused was great and unusual and that sentences for each of these victims, who fortunately weren't injured, but came very close to being injured or killed, deserve a separate sentence for each.

I think that reflects the seriousness of this conduct, but I don't think more than the minimum is warranted, given that they were not injured. Although, they will bear the psychological and emotional scars, I suppose, for the rest of their lives.

I also think that because of Mr. Seals'[s] criminal history, and the fact that he served prior prison sentences, that multiple sentences are appropriate. And I should point out, because of the fact that just three weeks prior he already engaged in another crime or crimes involving drugs.

For all those reasons, I think these are appropriate. I think this will serve to protect the public from future crime.

{¶44} Although the trial court did not use the exact language in R.C. 2929.14(C)(4), the Ohio Supreme Court has recently held that a court is not "required to give a talismanic incantation of the words in the statute" to satisfy its obligation to make its findings. *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 37; *see also State v. Gibson*, 8th Dist. Cuyahoga No. 98725, 2013-Ohio-4372. "[A] word-for-word recitation of the language of the statute is not required, as long as the reviewing court can discern that the trial court engaged in the correct analysis and can determine that the record contains evidence to support the findings, consecutive sentencing should be upheld." *Id.* at ¶ 29. A trial court satisfies this statutory requirement when the record reflects that the court has engaged in the required analysis

and has selected the appropriate statutory criteria. *See State v. Edmonson*, 86 Ohio St.3d 324, 326, 715 N.E.2d 131 (1999).

{¶45} In this case, we can discern from the record that the trial court's findings were sufficient to satisfy the requirements of R.C. 2929.14(C)(4). Accordingly, Seals's sentence is not contrary to law based on consecutive sentence findings.

B. Allied Offenses

{¶46} Seals contends that his sentence is also contrary to law because the trial court failed to merge Counts 11 and 12 because they are allied offenses. As the state correctly points out, the trial court stated on the record at sentencing that Counts 11 and 12 were allied; thus, merging those counts and ordering a one-year sentence. The court did not specify which count survived merger. (Tr. 853.) However, the court's recitation was not accurately reflected in the trial court's judgment entry of conviction. Rather, the journal entry provides that a concurrent one-year sentence was imposed on each count.

{¶47} Typically, this court would reverse the sentence in its entirety and remand the matter for resentencing for the state to elect which count would survive merger and receive the sentence. However, we can glean from the state's sentencing memorandum filed January 23, 2014 and the sentencing transcript (tr. 845), that the state elected to proceed with sentencing under Court 11.

{¶48} Accordingly, while it is clear that the judgment entry of conviction does not accurately reflect what transpired at sentencing, this error does not invalidate Seals's sentence, which can be corrected nunc pro tunc.

C. Misdemeanor Sentencing

{¶49} Seals contends that his sentence is contrary to law because the trial court imposed a six-month sentence on Count 14, a second-degree misdemeanor.

{¶50} The state concedes that 90 days is the maximum jail sentence for a second-degree misdemeanor. However, the state maintains that the sentence is not contrary to law because according to the sentencing transcript, the trial court imposed a 90-day sentence and gave him credit for time served. (Tr. 853.)

{¶51} While the sentencing transcript does reflect that the trial court imposed a 90-day sentence, the court's sentencing journal entry does not — it reflects that a six-month sentence was imposed for Count 14. Again, it is clear that the judgment entry of conviction does not accurately reflect what transpired at sentencing. This error does not invalidate Seals's sentence because it can be corrected nunc pro tunc.

{¶52} Accordingly, Seals's assignment of error is overruled.

IV. Conclusion

{¶53} Judgment affirmed; case remanded to the trial court to correct nunc pro tunc the judgment entry of conviction to accurately reflect the sentence imposed in open court. Specifically, the court is ordered to merge Counts 11 and 12 (tr. 853), with the state electing to proceed with sentencing on Count 11. (Tr. 845 and the State's sentencing memorandum, page 6-7.) Further, the court is ordered to accurately reflect in the judgment entry of conviction that a sentence of 90 days on Count 14 was imposed. (Tr. 853.)

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.

KATHLEEN ANN KEOUGH, JUDGE

FRANK D. CELEBREZZE, JR., A.J., and
MARY J. BOYLE, P.J., CONCUR