[Cite as *State v. Cotton*, 2015-Ohio-5419.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102581

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

SYLVESTER COTTON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART
AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-584941-B

BEFORE: Stewart, J., Jones, P.J., and Kilbane, J.

RELEASED AND JOURNALIZED: December 24, 2015

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MELODY J. STEWART, J.:

{¶1} Defendant-appellant Sylvester Cotton appeals numerous felony convictions stemming from his involvement in an April 2014 robbery and shooting. On appeal, Cotton challenges the sufficiency of the evidence on several counts, asserts that his trial counsel was ineffective for failing to file a motion to suppress, and argues that the court erred by failing to merge certain offenses pursuant to R.C. 2941.25, the allied offenses statute. For the reasons that follow, we affirm in part and reverse in part.

{¶2} In May 2014, the Cuyahoga County Grand Jury returned a 16-count indictment charging Cotton with multiple counts of attempted murder; felonious assault; kidnapping; and aggravated robbery in addition to single counts of aggravated burglary; grand theft auto; theft; petty theft; improperly handling a firearm in a motor vehicle; having weapons while under disability; failure to comply; and tampering with evidence. Numerous counts contained one- and three-year firearm specifications as well as notice of prior conviction and repeat violent offender specifications. All counts were tried to a jury with the exception of the weapons under disability charge that was tried to the court.

{¶3} At trial, the victim testified that on the night of April 25, 2014, he returned home to his apartment in the city of Euclid to find three males hiding in the back entrance to his apartment building. Two of the males were later identified as Cotton and Michael Brooks. The victim testified that all three males were armed with guns and that they demanded the victim's wallet. The victim complied with their request, but the men

forced the victim to his vehicle and ordered him to drive. Shortly thereafter, Cotton took over as the driver. The victim explained to the jury that the third, unknown male put a gun to the victim's chest and told him not to make any moves and that Brooks repeatedly told him he was going to die.

{¶4} Cotton drove to an ATM in Euclid where he used the victim's debit card and PIN to withdraw a total of $560 in three separate transactions. Cotton then drove the victim to a semi-remote location in an alleyway near East 31st Street and Cedar Road in Cleveland. The victim was ordered to exit the vehicle, take off his clothes, and lay naked on the ground. He was then shot multiple times. The victim testified that he did not see who shot at him because he curled up and turned away when the shots were fired. The victim sustained a gunshot wound to his arm causing extensive bone damage that required prompt surgery, and another to his flank stopping just short of his chest wall. Following the shooting, the men drove away, leaving the victim on the ground.

{¶5} Police officers, who were in the vicinity, heard the gunshots and immediately went to the location where they believed the shots originated. Testimony revealed that when they arrived, they found the victim bleeding profusely. Despite his critical condition, the victim was able to tell the officers enough information about his assailants for the police to put out an alert for the three men. The victim was then taken to the hospital where he underwent surgery.

{¶6} Police responding to the call spotted a vehicle that matched the description given by the dispatch at a nearby gas station. When the officers approached the vehicle,

Cotton drove off resulting in a high speed chase. During the chase, a gun was thrown from the passenger side door. Eventually Cotton lost control of the car and crashed into a building. He fled on foot for some distance and discarded $120. He and Brooks were apprehended. Following his arrest, officers found $440 crumpled in the arm of Cotton's sweatshirt. While at the hospital, the victim identified Cotton in a photo array as one of the perpetrators.

{¶7} The jury found Cotton guilty on all counts tried before it, and the judge found him guilty of having a weapon while under disability. At sentencing, the court merged the attempted murder and felonious assault charges, merged the kidnapping charges, merged the aggravated robbery charges, and merged the grand theft auto and theft charges. The state elected to proceed to sentencing on the attempted murder charge in Count 1. On that charge, the court ordered Cotton to an 11-year prison term on the underlying offense, in addition to three years on the gun specification, and ten years on the repeat violent offender specification. The court ordered 11 years on the kidnapping charge in Count 5 plus three years on the gun specification, electing not to impose a sentence on the repeat violent offender specification on that count. The court further imposed an 11-year sentence on the aggravated robbery charge in Count 7, in addition to a three-year prison term for the gun specification.[1] On the aggravated burglary charge, the court sentenced Cotton to 11 years in addition to three years on the gun specification.

[1] The court also merged the petty theft charge contained in Count 12 (this count represented the stolen $560) with Count 7, aggravated robbery.

The court ordered Cotton to respective18-month prison terms on the grand theft auto and improper handling of a firearm in a motor vehicle charges. Lastly, the court ordered Cotton to serve respective three-year terms on the weapons while under disability, failure to comply, and tampering with evidence counts. The court made the necessary findings under R.C. 2929.14(C)(4) and ran all counts consecutive for a total 78-year prison term.

{¶8} In this appeal, Cotton first contends that there was insufficient evidence to find him guilty of attempted murder when the state failed to show that he had the requisite intent to murder the victim. Cotton asserts that the only intent shown was a desire to rob the victim at gunpoint, but not to kill him. Therefore, according to Cotton, the facts of the case at most establish a felonious assault or an aggravated robbery, but not an attempted murder.

{¶9} When reviewing the record on sufficiency grounds "'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. Dean*, Slip Opinion No. 2015-Ohio-4347, ¶ 150, quoting *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991). Thus, sufficiency is a question of law which tests the adequacy of the evidence by requiring that the state produce legally sufficient evidence on every element of the crime charged. *See State v. Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541 (1997) (overruled on other grounds). "'On review for sufficiency, courts are to assess not whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a

conviction.'" *State v. Williams*, 8th Dist. Cuyahoga No. 94261, 2011-Ohio-591, ¶ 12, quoting *Thompkins* at 390.

{¶10} R.C. 2923.02, the attempt statute, states:

> (A) No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense.

{¶11} The Ohio Supreme Court has stated that an "obvious requisite of the statute is that a person cannot commit an attempt offense unless he or she has acted purposely or knowingly." *State v. Nolan*, 141 Ohio St.3d 454, 2014-Ohio-4800, 25 N.E.3d 1016, ¶ 7. This requires that the defendant have acted with the "'specific intention to cause a certain result' or the 'specific intention to engage in conduct' of a certain nature, R.C. 2901.22(A), or to have acted when 'aware that his conduct will probably cause a certain result or will probably be of a certain nature,' R.C. 2901.22(B)." *Id.*

{¶12} In this case, Counts 1 and 2 of the indictment charged Cotton with attempted murder. Count 1 charged attempted murder in violation of R.C. 2923.02 and 2903.02(A) and stated that Cotton "did attempt to purposely cause the death of [the victim]." Count 2 charged Cotton with the offense of attempted murder under R.C. 2923.02 and 2903.02(B) and stated that:

> [Cotton] did attempt to cause the death of [the victim] as a proximate result of the offender committing or attempting to commit an offense of violence

that is a felony of the first or second degree, to wit: Aggravated Robbery and/or Felonious Assault.

Attempted Murder in Violation of R.C. 2903.02(A)

{¶13} The Ohio Supreme Court has stated that "to commit the offense of attempted murder as defined in R.C. 2903.02(A), one must engage in conduct that, if successful, would result in purposely causing the death of another." *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147, 922 N.E.2d 937, ¶ 25.

{¶14} Here, we find the evidence presented sufficient to sustain a finding of guilt on Count 1, attempted murder in violation of R.C. 2903.02(A) and 2923.02. In this case, the victim testified that Cotton had a gun on his person during the commission of the offenses and used the gun to hold the victim captive. The victim further testified that following Cotton's withdrawal of funds from the ATM, Cotton drove him to a semi-remote location on Cleveland's near east side. It was there that all three men exited the vehicle, ordered the victim out of the car, made him undress and lie down on the ground. Although the victim testified that he did not know which of the three men fired shots at him, there was enough circumstantial evidence for the jury to conclude that Cotton fired one or more shots at the victim. That evidence includes the fact that Cotton had a gun and that his hands tested positive for gunshot residue. Additionally, the victim's doctor testified that one of the bullets that hit the victim stopped short of piercing his chest wall and would have been a "devastating" injury had it gone any further.

{¶15} Although Cotton contends that the facts of this case show that he only intended to use his weapon to effectuate the robbery or to commit a felonious assault, and not to kill the victim, it is a well recognized principle of Ohio law that a "'person is presumed to intend the natural, reasonable and probable consequences of his voluntary acts.'" *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, 842 N.E.2d 996, ¶ 143, quoting *State v. Johnson*, 56 Ohio St.2d 35, 39, 381 N.E.2d 637 (1978). A natural and probable consequence of shooting a person at nearly point-blank range is that the victim will suffer life-threatening injury. Therefore, the state met its burden of presenting sufficient evidence to sustain a guilty verdict on attempted murder.

Attempted Murder in Violation of R.C. 2903.02(B)

{¶16} Notwithstanding our conclusions above, we find that the jury's guilty verdict on Count 2, attempted murder in violation of R.C. 2923.02 and 2903.02(B), was in error because the court should have dismissed this count as being in contravention of law.

{¶17} R.C. 2903.02(B) states:

> No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree and that is not a violation of section 2903.03 or 2903.04 of the Revised Code.

{¶18} This offense — more colloquially referred to as the crime of felony murder — is not recognized in Ohio in the inchoate "attempt" form. *See Nolan,* 141 Ohio St.3d

454, 2014-Ohio-4800, 25 N.E.3d 1016, at ¶ 9. In *Nolan*, a unanimous Supreme Court explained that felony-murder is in essence a strict liability offense that punishes an unintentional killing committed during the course of a felony. Therefore, because attempt requires a mental state of purposely or knowingly, *see* R.C. 2923.02, it would be inherently contradictory to attempt an unintentional killing because it is impossible to purposely or knowingly cause an unintended death. *Nolan* at ¶ 9. Accordingly, the court erred in failing to dismiss this count.[2]

{¶19} In his second assigned error, Cotton argues that there was insufficient evidence to convict him of felonious assault.

{¶20} Cotton was indicted on Counts 3 and 4 with felonious assault in violation of R.C.2903.11(A)(1) and (A)(2), respectively. This section of the code states that:

(A) No person shall knowingly do either of the following:

(1) Cause serious physical harm to another or to another's unborn;

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[2] We note that the trial court, in a discussion regarding the applicability of *Nolan* to this case, indicated that it was its position that *Nolan* did not apply because "[this] is technically not a felony murder case[,] [instead] this is an attempted murder case during the commission of a felony." The court's reasoning is circular. There is no provision in Ohio that punishes the combined criminal actions of attempting to kill another person while committing a felony. Rather, Ohio law simply allows for the offender to be punished separately for each offense (the attempted murder (under R.C. 2923.02 and 2903.02(A)) and the felony (under the appropriate felony statute). In this case, Cotton was indicted and found guilty of the separate offenses and should not have been convicted under R.C. 2903.02(B) that requires the actual killing of another during the commission of a felony.

We further note, that the state argues in its brief that even if the court should have dismissed Count 2 of the indictment, the court nevertheless negated its error when it merged Count 2 into Count 1 for sentencing purposes. We disagree that the error was negated by the merger. Due process of law does not allow a person to be found guilty of a nonexistent offense, even if the offender does not receive a sentence for that offense.

(2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance.

{¶21} There was sufficient circumstantial evidence contained in the victim's testimony to sustain the guilty verdicts. The victim testified that Cotton took him by gunpoint to a remote location where he was ordered out of the car and forced to lay down on the ground naked before he was shot. Although the victim testified that he did not know which of the men fired shots, police officers testified at trial that more than one gun may have been used in the shooting. This together with the forensic evidence establishing that Cotton had gunshot residue on his hands was enough evidence to show that Cotton shot, and/or shot at, the victim. Lastly, the serious physical harm/physical harm aspect of the felonious assault is not in question because the victim was critically injured with two gunshot wounds. We therefore overrule this assignment of error.

{¶22} Cotton next contends that his trial counsel was ineffective for failing to file a motion to suppress the $440 found in his sweatshirt sleeve. We disagree.

{¶23} In order to prevail on a claim of ineffective assistance of counsel, the defendant must show two things: 1) that counsel's performance was deficient and 2) that the deficient performance prejudiced him at trial. *Dean*, Slip Opinion No. 2015-Ohio-4347, at ¶ 74, citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This court has previously held that when asserting a claim of ineffective assistance of counsel for failure to file a motion to suppress, a "'defendant must prove that there was [first] a basis to suppress the evidence in question.'" *State v.*

Weatherspoon, 8th Dist. Cuyahoga No. 89996, 2008-Ohio-2345, ¶ 15, quoting *State v. Brown*, 115 Ohio St.3d 55, 68, 69, 2007-Ohio-4837, 873 N.E.2d 858.

{¶24} The Fourth Amendment to the United States and Ohio Constitutions protect against unreasonable governmental searches and seizures. *State v. Callan*, 8th Dist. Cuyahoga No. 95310, 2011-Ohio-2279, ¶ 15. In general, warrantless searches and seizures are considered per se unreasonable, unless an exception to the warrant requirement applies. *Katz v. United States*, 389 U.S 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). One exception to the warrant requirement is a routine inventory search conducted concurrent to the booking and confinement of an arrestee. *See Illinois v. Lafayette*, 462 U.S. 640, 103 S.Ct. 2605, 77 L.Ed.2d 35 (1983) (holding that, "consistent with the Fourth Amendment, it is reasonable for police to search the personal effects of a person under lawful arrest as part of the routine administrative procedure at a police station incident to booking and jailing the suspect").

{¶25} In this case, searching the sweatshirt occurred immediately after Cotton had been arrested and taken into custody at the police department. At the time, the officer felt an unusual object in his sweatshirt and reached into it to discover the $440 in cash; the sweatshirt had moments before been worn by Cotton. Cotton removed it and gave it to the officer to give to his friend in the waiting area. Accordingly, the search was in effect a routine booking inventory search. As a valid search, there would have been no basis for trial counsel to file a motion to suppress. Accordingly, trial counsel's performance was not deficient.

{¶26} In his final assignment of error, Cotton asserts that the court erred when it failed to merge the kidnapping offense in Count 5, with the aggravated robbery and aggravated burglary charges contained in Counts 7 and 9.

{¶27} R.C. 2941.25 states:

> (A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
>
> (B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

{¶28} The Ohio General Assembly provided R.C. 2941.25 as a guide for courts to determine whether particular offenses merge as the same offense. *State v. Rance*, 85 Ohio St.3d 632, 635–636, 710 N.E.2d 699 (1999). Pursuant to the statute, the court must first examine the defendant's conduct at the time he committed the offenses. *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, ¶ 9. If, while examining the conduct, the court finds that the offenses caused separate and identifiable harm (i.e., the offenses are of dissimilar import), were committed separately, or were committed with a separate animus, the offenses do no merge under the statute. *Id.*

{¶29} Ohio courts have long held that where captivity is prolonged, or the movement of the victim is so substantial that it becomes significantly independent of any other criminal act, there exists a separate animus to support the kidnapping conviction. *See State v. Houston,* 1st Dist. Hamilton No. C-130429, 2014-Ohio-3111, ¶ 22. In such

cases, the kidnapping offense ceases to be incidental to the underlying felony from which it might have originated. *See id.* at ¶ 23.

{¶30} Here, Cotton continued to drive the victim, who was held at gunpoint, for at least 30 minutes to an alleyway. Cotton committed this act after the completion of all the necessary acts to commit the crimes of aggravated burglary and aggravated robbery. Although the kidnapping may have originated as a means of effectuating the aggravated robbery at the ATM, the kidnapping is not incidental to the aggravated robbery because the length of captivity long outlasted the duration of time necessary to commit the underlying offenses. We therefore find no error in the trial court's conclusion that the kidnapping offense should not merge under the allied offenses statute.

{¶31} Judgment affirmed in part, reversed in part, and remanded.

It is ordered that appellant and appellee 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.

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

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MELODY J. STEWART, JUDGE

LARRY A. JONES, SR., P.J., and
MARY EILEEN KILBANE, J., CONCUR