[Cite as *State v. Warren*, 2015-Ohio-604.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101469

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MARVIN D. WARREN

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-580087-A

BEFORE: Boyle, J., Celebrezze, A.J., and Jones, J.

RELEASED AND JOURNALIZED: February 19, 2015

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MARY J. BOYLE, J.:

{¶1} Defendant-appellant, Marvin Warren, appeals from a judgment convicting him of felonious assault and domestic violence. He raises one assignment of error for review, arguing that "[t]he trial court erred in failing to merge [his] convictions of felonious assault and domestic violence." Finding no merit to his appeal, we affirm.

Procedural History and Factual Background

{¶2} In December 2013, Warren was indicted on three counts: felonious assault in violation of R.C. 2903.11(A)(2) (for knowingly causing or attempting to cause physical harm to the victim "by means of deadly weapon or dangerous ordnance, to wit: pipe and/or vase"), kidnapping in violation of R.C. 2905.01(A)(3), and domestic violence in violation of R.C. 2929.25(A) (knowingly causing or attempting to cause physical harm to the victim, a household or family member). The felonious assault and kidnapping counts also had notice of prior conviction and repeat violent offender specifications attached. The notice of prior conviction and repeat violent offender specifications were bifurcated and tried to the bench. The three base charges were tried to a jury.

{¶3} At the close of the trial, the jury found Warren guilty of felonious assault and domestic violence, but not guilty of kidnapping. The trial court found Warren guilty of the specifications.

{¶4} The trial court sentenced Warren to six years for felonious assault, and ordered that it be served concurrent to six months for domestic violence, for a total sentence of six years in prison. It is from this judgment that Warren appeals.

Allied Offenses

{¶5} An appellate court should apply a de novo standard of review in reviewing whether two offenses are allied offenses of similar import. *State v. Williams*, 134 Ohio St.3d 482, 2012-Ohio-5699, 983 N.E.2d 1245, ¶ 28. Warren failed to raise the issue of allied offenses at trial. Nonetheless, the Ohio Supreme Court has held that the imposition of multiple sentences for allied offenses of similar import is plain error. *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶ 31, citing *State v. Yarbrough*, 104 Ohio St.3d 1, 2004-Ohio-6087, 817 N.E.2d 845, ¶ 96-102.

{¶6} R.C. 2941.25, concerning allied offenses of similar import, provides:

> (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.

{¶7} In *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, the Ohio Supreme Court announced a new test for determining when offenses are allied offenses of similar import. Pursuant to *Johnson*, "[w]hen determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25, the conduct of the accused must be considered." *Id*. at ¶ 44. The court further explained the two-part test as follows:

> 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*, 38 Ohio St.3d 116, 119, 526 N.E.2d 816 (1988) (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 ¶ 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 ¶ 48-51.

{¶8} R.C. 2903.11(A)(2) provides that "[n]o person shall knowingly * * * [c]ause or attempt to cause physical harm to another * * * by means of a deadly weapon or dangerous ordnance." R.C. 2919.25(A) provides that "[n]o person shall knowingly cause or attempt to cause physical harm to a family or household member." There is no question that under the first prong of the *Johnson* test, felonious assault and domestic violence can be committed with the same conduct. The harder question is, under the second prong of the *Johnson* test, whether felonious assault and domestic violence were committed separately or with a separate animus. To answer this question, we must review the facts that were presented at trial.

{¶9} The victim in this case, Iris Malone, testified that on December 18, 2012, Warren had gotten angry with her. Malone stated that Warren "flipped out" and hit her "numerous times" with a metal pipe. Malone said that Warren hit her "more than ten times," and "[i]t could have been about 30 or 40 times." Malone explained that Warren first hit her in her arms, and then her legs. She said that he "kept hitting" her in her knees, such that she could not walk.

{¶10} Malone testified that Warren first hit her in the room with the blinds (which although not entirely clear, appeared to be the dining room). She said that she crawled down a hallway, to the living room, which is the last place that Warren hit her. She said that the violence that took place in these two rooms were about 15 minutes "apart in time" from each other. Malone stated that this whole incident lasted "at least a good 30 minutes, 45 minutes."

{¶11} Malone identified photos of her legs where Warren had hit her with the pipe. The photo shows at least four areas on her left leg that were swollen, bleeding, and bruised. She then identified a photo of her right knee, where it was bruised and swollen from Warren hitting her with the pipe. Malone identified photos of her left arm, where she said Warren "kept hitting [her] arm" with the pipe; her arm was swollen, bruised, and had blood on it. Malone also identified bruises on her back and left side, where Warren had hit her with the pipe. And Malone identified photos of her face that showed two lacerations where she had to get stitches as a result of Malone hitting her — on her forehead and her chin (although she never testified that the lacerations were from the metal pipe).

{¶12} After review, we hold that the evidence presented at trial establishes the felonious assault and domestic violence were committed with a separate animus. Warren beat Malone with a metal pipe "numerous times," all over her body and all throughout the house. If the charges against Warren had only arisen due to him hitting Malone one time with the pipe, then the felonious assault and domestic violence charges would certainly merge. But that is not the case here. As we just stated, the facts established that Warren hit Malone numerous times with a metal pipe, in separate rooms, over a 45-minute period.

{¶13} At oral argument, Warren cited to a recently released case from this court, *State v. Westfall*, 8th Dist. Cuyahoga No. 101256, 2015-Ohio-175, claiming that it supports his argument

that his felonious assault and domestic violence convictions should merge. In *Westfall*, the following facts were presented:

> According to the victim's testimony, on the night of June 13, 2013, appellant came home drunk and the victim asked him to go somewhere else to sleep it off. The appellant pushed his way into the home, locked the door behind him, threw the victim onto the floor, put his hands around her neck, and told her over and over that he was going to kill her, that she was "going to die tonight," and to "say [her] prayers." The victim was able to get her hands between appellant's hands and her neck. The appellant grabbed the victim by the hair, whisked her around the room, and repeatedly punched her. * * * Appellant proceeded to place the victim in another choke hold, causing the victim to temporarily lose consciousness and defecate herself. The victim pled for her life, but appellant told her "you have to die." The victim asked for a last request. Appellant allowed her to roll a cigarette, and she asked him for a washrag. During this time, the victim was able to call 911.

Id. at ¶ 7.

{¶14} This court concluded in *Westfall* that the offenses of domestic violence and attempted murder were committed with a "single course of conduct with a single animus" because "there was no break in the series of events from which the offenses arose[.]" *Id.* at ¶ 21-22.

{¶15} In *Westfall*, we distinguished the facts in the case from the facts in *State v. Harmon*, 9th Dist. Summit No. 26502, 2013-Ohio-1769, where the Ninth District found that felonious assault and domestic violence were not allied offenses of similar import because they were committed separately or with a separate animus. *Id.* at ¶ 29. The facts in *Harmon* established that the victim was abused in multiple rooms of the house over an extended period of time, with intervening periods of no abuse. *See id.* at ¶ 28-29.

{¶16} Here, we find the facts more similar to the facts in *Harmon*, rather than in *Westfall.* Although the duration of abuse in this case lasted approximately 45 minutes, the victim testified that the multiple blows with the metal pipe occurred in separate rooms of her house, and

occurred about 15 minutes "apart in time" from each other. Accordingly, we find that the offenses were committed separately or with a separate animus.

{¶17} Thus, we find no error on the part of the trial court, plain or otherwise, in not merging these offenses because they were not allied offenses of similar import.

{¶18} Judgment affirmed.

It is ordered that appellee recover from appellant 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 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

FRANK D. CELEBREZZE, JR., A.J., and
LARRY A. JONES, SR., J., CONCUR