

[Cite as *State v. Boyd*, 2018-Ohio-4427.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106453

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JAMES D. BOYD, III

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-17-613413-A

BEFORE: Laster Mays, J., Stewart, P.J., and Keough, J.

RELEASED AND JOURNALIZED: November 1, 2018

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ANITA LASTER MAYS, J.

{¶1} Defendant-appellant James D. Boyd, III (“Boyd”) appeals his convictions and sentence and asks this court to reverse his convictions or vacate his sentence and remand to the trial court for resentencing. We affirm his convictions but vacate his sentence and remand to the trial court for resentencing.

{¶2} Boyd was found guilty of aggravated robbery, a first-degree felony with one- and three-year firearm specifications, in violation of R.C. 2911.01(A)(1); kidnapping, a first-degree felony with one- and three-year firearm specifications, in violation of R.C.2904.01(A)(2); and carrying a concealed weapon, a fourth-degree felony, in violation of R.C. 2923.12(A)(2). Boyd was sentenced to 11 years imprisonment for aggravated robbery, four years for kidnapping, and 18 months for carrying a concealed weapon. The sentences were run concurrently. Boyd was

also sentenced to six years for the firearm specifications for kidnapping and aggravated robbery, to be served consecutively. The court ruled that the kidnapping and aggravated robbery convictions did not merge for the purposes of sentencing. Therefore, Boyd was sentenced to a total of 17 years imprisonment.

I. Facts

{¶3} On August 9, 2016, Boyd robbed U.S. Bank in Maple Heights. Witnesses testified that he was wearing blue jeans, work boots, a dark gray sweatshirt, and a greenish-brown army jacket. Boyd's face was covered with a skull cap or ski mask and just his eyes were visible. Boyd entered the bank, and there were two tellers at the counter. Boyd had a firearm and demanded money. Teller Yesteena Taylor ("Taylor") attempted to flee through the back door. However, Taylor turned around, deciding not to leave because the other teller did not have money in her drawer. Taylor came back to the front of the bank to give Boyd the money he demanded. Boyd demanded Taylor give him money. Taylor pulled out three drawers of money, and Boyd put them in a bag. Boyd initially was upset that Taylor was giving him smaller denominations, i.e. one dollar bills, but she eventually put larger denominations in the money bag. After Boyd left the scene, officers responded to the bank.

{¶4} On the day of the robbery, Dawn Watson ("Watson"), an employee at Dollar General, located two blocks from U.S. Bank, was in her parked vehicle during her break. She observed Boyd pacing back and forth in front of Lamplight Assisted Living, which is located across the street from Dollar General. Watson recognized Boyd as a frequent customer of Dollar General. Watson had also exchanged phone numbers with Boyd and had previously given him a ride to his job. Watson noted that Boyd's attire was unusual because of the amount

of clothing he was wearing despite the hot temperature. Watson observed Boyd wearing a skull cap, blue jeans, and an olive or green army jacket.

{¶5} Later that day, Watson heard about the bank robbery from some of the customers at Dollar General. The next day, Watson went to the bank to make a deposit and to ask about the robbery. Watson spoke with Taylor and gave a description of Boyd, asking if he fit the description of the bank robber. Taylor confirmed that the bank robber's description matched Watson's description, and contacted the investigator on the case. Watson later identified Boyd from the surveillance video from the robbery.

{¶6} On August 19, 2016, Boyd came back to U.S. Bank and Taylor recognized him as the man who previously robbed the bank. Maple Heights police were contacted, and they located Boyd walking down the street. The police ordered Boyd to stop, and he did not comply.

Officers physically detained Boyd and found a gun on his person. Boyd was identified by Taylor as the man who robbed the bank.

{¶7} After Boyd was arrested, the police executed a search warrant at his home. While searching Boyd's bedroom, the police found ammunition matching the gun recovered from Boyd, a ski mask, an olive green jacket with camouflage lining, and a money bag with \$2,200 cash, which included \$200 in \$1 bills. Taylor testified that Boyd was upset that she initially was only giving him \$1 bills.

{¶8} At the end of the trial, Boyd was found guilty of aggravated robbery, kidnapping, and carrying a concealed weapon. He was sentenced to 17 years imprisonment and assigns three errors for our review:

- I. Defense counsel was ineffective in allowing inadmissible hearsay into the trial, resulting in defendant's conviction;

- II. Boyd’s convictions are against the manifest weight of the evidence; and
- III. The trial court erred at sentencing when it concluded that the aggravated robbery charge and the kidnapping charge did not merge for purposes of sentencing.

II. Ineffective Assistance of Counsel and Hearsay Testimony

A. Standard of Review

{¶9} In order to substantiate a claim of ineffective assistance of counsel

[a] defendant must establish that counsel’s performance was deficient and that the defendant was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Counsel will only be considered deficient if his or her conduct fell below an objective standard of reasonableness. *Id.* at 688.

When reviewing counsel’s performance, this court must be highly deferential and “must indulge a strong presumption that counsel’s conduct [fell] within the wide range of reasonable professional assistance.” *Id.* at 689. To establish resulting prejudice, a defendant must show that the outcome of the proceedings would have been different but for counsel’s deficient performance. *Id.*

State v. Jackson, 8th Dist. Cuyahoga No. 104132, 2017-Ohio-2651, ¶ 39-40.

B. Law and Argument

{¶10} In Boyd’s first assignment of error, Boyd argues that his trial counsel was ineffective because counsel allowed inadmissible hearsay testimony at trial.

Hearsay is defined as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Evid.R. 801(C). Pursuant to Evid.R. 802, hearsay is inadmissible unless it falls within an exception provided by the rules of evidence. Should hearsay statements be admitted improperly, however, such error does not necessarily require reversal of the outcome of the trial if it was harmless. *See Arizona v. Fulminante*, 499 U.S. 279, 306-309, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991).

State v. Thomas, 8th Dist. Cuyahoga No. 101797, 2015-Ohio-3226, ¶ 39.

{¶11} Boyd specifically argues that his trial counsel did not object to Watson testifying about her conversation with Taylor. Boyd claims that this testimony is impermissible hearsay.

However,

“[t]he main premise behind the hearsay rule is that the adverse party is not afforded the opportunity to cross-examine the declarant.” *State v. Primeau*, 8th Dist. Cuyahoga No. 97901, 2012-Ohio-5172, ¶ 69. For this reason, we have found hearsay errors to be harmless where the defense had the opportunity to cross-examine the declarant. *Id.* See also *State v. Thompson*, 8th Dist. Cuyahoga No. 99846, 2014-Ohio-1056, ¶ 31.

State v. Campbell, 8th Dist. Cuyahoga Nos. 100246 and 100247, 2014-Ohio-2181, ¶ 14. In this case, Boyd’s attorney cross-examined Watson and Taylor, and specifically asked both witnesses about the conversation at issue. Thus, Taylor’s and Watson’s testimony was harmless beyond a reasonable doubt. *State v. Simmons*, 8th Dist. Cuyahoga No. 98613, 2013-Ohio-1789, ¶ 29, citing *State v. Greer*, 8th Dist. Cuyahoga No. 91983, 2009-Ohio-4228, ¶ 59.

{¶12} In addition, Boyd does not demonstrate how his counsel’s decision to cross-examine the witnesses rather than objecting to their testimony prejudiced him and changed the outcome of the trial. “It is axiomatic that, for an appellant to succeed on a claim of ineffective assistance of counsel, he must be able to prove that there is a reasonable probability that he would have been found not guilty had it not been for trial counsel’s actions or failure to act.” *State v. Milton*, 8th Dist. Cuyahoga No. 92914, 2009-Ohio-6312, ¶ 24. We find that Boyd has not shown that there was a reasonable probability that he would have been found not guilty but for counsel’s actions.

{¶13} Therefore, Boyd’s first assignment of error is overruled.

III. Manifest Weight of the Evidence

A. Standard of Review

{¶14} “A manifest weight inquiry looks at whether the evidence was substantial enough for a jury to reasonably conclude that all of the elements of the alleged crime have been proved beyond a reasonable doubt. We sit “as a thirteenth juror.”” *State v. Newett*, 8th Dist. Cuyahoga No. 103518, 2016-Ohio-7605, ¶ 39, quoting *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997), quoting *Tibbs v. Florida*, 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982).

B. Law and Analysis

{¶15} In Boyd’s second assignment of error, he argues that his convictions are against the manifest weight of the evidence.

We review the entire record, consider the credibility of the witnesses, weigh the evidence and all reasonable inferences, and determine whether the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983); *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶ 81. “Weight is not a question of mathematics, but depends on its effect in inducing belief.” *Black’s Law Dictionary* 1594 (6th Ed.1990). *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. *Martin* at 175.

Id. at ¶ 40.

{¶16} Boyd argues that Watson was incorrect in her belief that the bank robber was Boyd. He contends that her testimony caused the jury to lose their way and created a manifest miscarriage of justice. We disagree. The jury was presented with more evidence than just Watson’s testimony. In addition to matching the physical description of the robber, the police confiscated a firearm from Boyd’s person. Additionally, while searching Boyd’s bedroom, ammunition matching the firearm confiscated from Boyd was found; a ski mask; a jacket fitting the witnesses’ description; and a money bag with about \$2,200 in cash, which included \$200 in

\$1 bills was found. This was significant because Taylor testified that she gave the robber \$200 in \$1 bills. Taylor also recognized Boyd as the man who robbed the bank. Given the evidence and testimony of the witnesses, we determine that Boyd's convictions were not against the manifest weight of the evidence.

{¶17} Therefore, Boyd's second assignment of error is overruled.

IV. Merger

A. Standard of Review

{¶18} "When determining whether two offenses are allied offenses of similar import, we apply a de novo standard of review. *State v. Williams*, 134 Ohio St.3d 482, 2012-Ohio-5699, 983 N.E.2d 1245, ¶ 28." *State v. McDonall*, 8th Dist. Cuyahoga No. 105787, 2018-Ohio-2065, ¶ 61.

B. Law and Analysis

{¶19} In Boyd's third assignment of error, he argues that the trial court erred at sentencing when it concluded that the aggravated robbery charge and the kidnapping charge did not merge for purposes of sentencing. In *State v. Logan*, 60 Ohio St.2d 126, 397 N.E.2d 1345 (1979), the Supreme Court held the following:

In establishing whether kidnapping and another offense of the same or similar kind are committed with a separate animus as to each pursuant to R.C. 2941.25(B), this court adopts the following guidelines:

- (a) Where the restraint or movement of the victim is merely incidental to a separate underlying crime, there exists no separate animus sufficient to sustain separate convictions; however, where the restraint is prolonged, the confinement is secretive, or the movement is substantial so as to demonstrate a significance independent of the other offense, there exists a separate animus as to each offense sufficient to support separate convictions;
- (b) Where the asportation or restraint of the victim subjects the victim to a substantial increase in risk of harm separate and apart from that involved in the

underlying crime, there exists a separate animus as to each offense sufficient to support separate convictions.

Id. at the syllabus.

{¶20} This court in *State v. Echols*, 8th Dist. Cuyahoga No. 102504, 2015-Ohio-5138, ¶ 38, stated:

The Ohio Supreme Court has previously addressed whether kidnapping and rape are allied offenses that should merge prior to sentencing. *State v. Logan*, 60 Ohio St.2d 126, 397 N.E.2d 1345 (1979). While this case deals with a since rejected standard applied to allied offenses, it is instructive. That court held:

“We adopt the standard which would require an answer to the further question of whether the victim, by such limited asportation or restraint, was subjected to a substantial increase in the risk of harm separate from that involved in the underlying crime. If such increased risk of harm is found, then the separate offense of kidnapping could well be found. For example, prolonged restraint in a bank vault to facilitate commission of a robbery could constitute kidnapping. In that case, the victim would be placed in substantial danger.”

Id. at 135. This test for an increase in the risk of harm attributed to the actions of the accused was also incorporated into the current analysis used in the allied offense context. *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892. There, the court set forth the factors to consider in determining whether offenses should merge:

“A trial court and the reviewing court on appeal when considering whether there are allied offenses that merge into a single conviction under R.C. 2941.25(A) must first take into account the conduct of the defendant. In other words, how were the offenses committed? If any of the following is true, the offenses cannot merge and the defendant may be convicted and sentenced for multiple offenses: (1) the offenses are dissimilar in import or significance — in other words, *each offense caused separate, identifiable harm*, (2) the offenses were committed separately, and (3) the offenses were committed with separate animus or motivation.” (Emphasis added.) *Id.* at ¶ 25.

{¶21} Although the sentences Boyd received for kidnapping and aggravated robbery were to be served concurrently, the firearm specifications have to be served consecutively. Boyd was sentenced to three years imprisonment for each specification. The trial court determined that the two offenses do not merge for the purpose of sentencing. We disagree. The kidnapping

and aggravated robbery were not committed with a separate animus. When Boyd entered the bank and demanded money, Taylor testified that she was on her computer. She attempted to run out the back door, but decided to come back to the front of the bank to give Boyd the money because the other teller did not have money. (Tr. 352.) There was another teller up front with Taylor, but she previously had cleared out her drawer of extra cash and did not have the money to give to Boyd. So Taylor came back to give Boyd the cash in her drawer.

Many courts have merged kidnapping and aggravated robbery convictions where the defendant restrained the victim while robbing him. *State v. Walker*, 8th Dist. Cuyahoga No. 94878, 2011-Ohio-1556, ¶ 41. In *State v. Logan*, 60 Ohio St.2d 126, 397 N.E.2d 1345 (1979), the Supreme Court explained: “[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.” *Id.* at 131. In a later case, the Ohio Supreme Court stated that “implicit within every robbery (and aggravated robbery) is kidnapping.” *State v. Jenkins*, 15 Ohio St.3d 164, 198, 473 N.E. 2d 264 (1984), fn. 29.

State v. Johnson, 8th Dist. Cuyahoga No. 99656, 2013-Ohio-5430, ¶ 29.

{¶22} Boyd’s restraint of Taylor was merely incidental to a separate underlying crime where Taylor decided on her own to return to the counter. The restraint was not prolonged, the confinement was not secretive, nor was the movement substantial so as to demonstrate a significance independent of the other offense.

Under R.C. 2941.25, Ohio’s multicount statute, where the defendant’s conduct constitutes two or more allied offenses of similar import, the defendant may be convicted of only one offense. R.C. 2941.25(A). A defendant charged with multiple offenses may be convicted of all the offenses, however, if (1) the defendant’s conduct constitutes offenses of dissimilar import, i.e., each offense caused separate identifiable harm; (2) the offenses were committed separately; or (3) the offenses were committed with separate animus or motivation. R.C. 2941.25(B); *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, ¶ 13. Thus, to determine whether offenses are allied, courts must consider the defendant’s conduct, the animus, and the import. *Id.* at paragraph one of the syllabus.

State v. Brisbon, 8th Dist. Cuyahoga No. 105591, 2018-Ohio-2303, ¶ 35.

{¶23} Applying these guidelines, we find that the aggravated robbery and kidnapping should be merged for the purposes of sentencing. Boyd's conduct did not cause a separate, identifiable harm. Restraining Taylor's liberty and robbing the bank were committed with the same motivation. Therefore, Boyd's convictions for kidnapping and aggravated robbery should merge for the purpose of sentencing.

{¶24} Boyd's third assignment of error is sustained.

{¶25} Judgment of Boyd's convictions are affirmed, Boyd's sentence is reversed, and this matter is remanded to the trial court for resentencing.

It is ordered that the appellee and appellant split 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.

ANITA LASTER MAYS, JUDGE

MELODY J. STEWART, P.J., and
KATHLEEN ANN KEOUGH, J., CONCUR