

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C. A. No. 24622

Appellee

v.

DIAMOND M. FISK

Appellant

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 02 04 0986(A)

DECISION AND JOURNAL ENTRY

Dated: September 9, 2009

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} In 2002, a jury convicted Diamond Fisk of two counts of aggravated robbery, carrying a concealed weapon, and having weapons while under disability. This Court affirmed his convictions, but remanded for resentencing. He was resentenced in 2004. In January 2009, the trial court again resentenced Mr. Fisk because it determined that his sentence was void under *State v. Bezak*, 114 Ohio St. 3d 94, 2007-Ohio-3250. It sentenced him to seven years on each of the aggravated robbery counts, which it identified as felonies of the first degree, one year for carrying a concealed weapon, which it identified as a felony of the fourth degree, and one year for having weapons while under disability, which it identified as a felony of the fifth degree. Mr. Fisk has appealed, assigning as error that the court incorrectly applied Section 2945.75(A)(2) of the Ohio Revised Code. Because the court correctly applied that section to Mr. Fisk's convictions, this Court affirms.

OHIO REVISED CODE SECTION 2945.75

{¶2} Section 2945.75(A)(2) provides that, “[if] the presence of one or more additional elements makes an offense one of more serious degree . . . [a] guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional element or elements are present. Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged.” Construing that provision, the Ohio Supreme Court has held that, “[under] the clear language of [Section] 2945.75, a verdict form signed by a jury must include either the degree of the offense of which the defendant is convicted or a statement that an aggravating element has been found to justify convicting a defendant of a greater degree of a criminal offense.” *State v. Pelfrey*, 112 Ohio St. 3d 422, 2007-Ohio-256, at syllabus. *Pelfrey* involved a single section of the Ohio Revised Code, namely, tampering with records. *Id.* at ¶3. *Pelfrey* was charged with and sentenced for felony tampering with records. *Id.* The verdict form in *Pelfrey*, however, did not mention the degree of the offense or that the records were government records. *Id.* at ¶13. “*Pelfrey*’s offense of tampering with records would have constituted a misdemeanor under R.C. 2913.42(B)(2)(a) but for the additional element that the records at issue were government records, a circumstance that elevates the crime to a third-degree felony under R.C. 2913.42(B)(4).” *Id.* The Supreme Court concluded that, because the verdict form did not contain the degree of the offense or the fact that the records were government records, Section 2945.75(A)(2) required that *Pelfrey* only be convicted of the misdemeanor offense. *Id.*

{¶3} Mr. Fisk has argued that the trial court incorrectly applied Section 2945.75(A)(2) to his aggravated robbery convictions. He has argued that, because the verdict forms do not state the level of the felonies he allegedly committed or all of the elements of those offenses, he must

be sentenced as though he was convicted of the lowest form of robbery, a felony of the third degree. The offenses of robbery and aggravated robbery, however, are contained in separate sections of the code. Robbery is codified at Section 2911.02 and aggravated robbery is codified at Section 2911.01.

{¶4} The jury found Mr. Fisk “guilty of the offense of aggravated robbery.” At the time of the offenses, the aggravated robbery statute, Section 2911.01, provided that, “[w]hoever violates this section is guilty of aggravated robbery, a felony of the first degree.” R.C. 2911.01(C). It did not describe any additional elements that could make an offense “one of more serious degree.” R.C. 2945.75(A)(2). *Pelfrey* stands for the proposition that, if a single offense contains an aggravating element that could result in a conviction of a greater degree of a criminal offense under Section 2945.75(A)(2), the verdict form must include either the degree of the offense of which the defendant is convicted or a statement regarding the aggravating element. *State v. Pelfrey*, 112 Ohio St. 3d 422, 2007-Ohio-256, at syllabus. As stated above, there is only one degree of aggravated robbery, that being first degree. R.C. 2911.01. Thus, the subsections of Section 2911.01(A) are not aggravating factors, but merely examples of conduct that qualifies as aggravated robbery. Mr. Fisk, therefore, has not established that Section 2945.75(A)(2) applies to his convictions under Section 2911.01(A)(1).

{¶5} Mr. Fisk has also argued that the trial court incorrectly applied Section 2945.75(A)(2) to his carrying a concealed weapon conviction. At the time of the offense, Section 2923.12(D) provided that, “[w]hoever violates this section is guilty of carrying concealed weapons, a misdemeanor of the first degree. If the offender previously has been convicted of a violation of this section or of any offense of violence, if the weapon involved is a firearm that is either loaded or for which the offender has ammunition ready at hand, or if the

weapon involved is dangerous ordnance, carrying concealed weapons is a felony of the fourth degree.”

{¶6} While the State has attempted to concede that the trial court should have sentenced Mr. Fisk to a first degree misdemeanor instead of a fourth degree felony, this Court has not identified any error. The jury found that Mr. Fisk was “guilty of the offense of carrying [a] concealed weapon.” It also found that “the firearm was loaded or for which ammunition was ready at hand.” The jury, therefore, specifically found “an aggravating element . . . to justify convicting [Mr. Fisk] of a greater degree of a criminal offense.” *State v. Pelfrey*, 112 Ohio St. 3d 422, 2007-Ohio-256, at syllabus. Accordingly, the court properly described the carrying a concealed weapon conviction as a felony of the fourth degree. Mr. Fisk’s assignment of error is overruled.

CONCLUSION

{¶7} The trial court correctly applied Section 2945.75(A)(2) when it sentenced Mr. Fisk. The judgment of the Summit County Common Pleas Court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the

period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellant.

CLAIR E. DICKINSON
FOR THE COURT

WHITMORE, J.
BELFANCE, J.
CONCUR

APPEARANCES:

THOMAS C. LOEPP, attorney at law, for appellant.

SHERRI BEVAN WALSH, prosecuting attorney, and RICHARD S. KASAY, assistant prosecuting attorney, for appellee.