[Cite as *State v. Wenker*, 2011-Ohio-786.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO	C.A. No. 25185
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
RICHARD T. WENKER	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. CR 08 06 1816

DECISION AND JOURNAL ENTRY

Dated: February 23, 2011

MOORE, Judge.

{¶1} Appellant, Richard T. Wenker, appeals from the judgment of the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} On June 1, 2008, Wenker lived in Akron, Ohio with his fiancé, Traci Billups, and her young daughter. The couple argued frequently and had been arguing loudly all day. Wenker spent most of the day working on his truck in the garage while drinking beer and huffing toluene. Despite the fact that Wenker was still working in the garage, around 9:30 p.m. Billups locked the house in her customary manner. This included wedging a butter knife in the back door to counteract a faulty latching mechanism. Billups then took multiple medications, including a sleeping pill. She testified that she awakened to Wenker attempting to gain entry through the back door. She made her way to the kitchen and as she passed the refrigerator and turned to face the back door she was struck in the face by the wooden door, which Wenker had

forcefully opened. Billups screamed loudly enough to awaken her neighbor, Karen Rohm, who called 911. A second neighbor, Donald Craver, Jr., testified that he also heard the scream and went to check on Billups. Emergency personnel arrived and treated Billups for a broken nose. Billups testified at trial that her injury resulted from an accident.

{¶3} Witnesses testified, however, that Billups first explained that she tripped over the dog and fell on the ground, breaking her nose in the process. She later admitted to a police officer that she was standing right behind the back door looking at Wenker through the glass. He was yelling through the window. He then drove his shoulder into the door, causing it to fly open and strike Billups in the face.

{¶4} The officers placed Wenker under arrest. On June 3, 2008, a judge on the Akron Municipal Court issued a temporary protection order which forbade Wenker from visiting the shared residence.

{¶5} On June 10, 2008, the Summit County Grand Jury indicted Wenker for one count of felonious assault in violation of R.C. 2903.11(A)(1), a felony of the second degree, a repeat violent offender specification to the felonious assault count pursuant to R.C. 2941.149, one count of domestic violence in violation of R.C 2919.25(A), a felony of the fourth degree, one count of abusing harmful intoxicants in violation of R.C 2925.31, a felony of the fifth degree, and one count of endangering children in violation of R.C. 2919.22(A), a misdemeanor of the second degree.

{¶6} On August 1, 2008, police were dispatched to the shared residence, where they found Wenker. The officers determined that Wenker had been huffing in the crawl space above the garage. The fumes in the crawl space were so strong that the officers were unable to enter.

{¶7} On August 8, 2008, the Summit County Grand Jury issued a supplemental indictment charging Wenker with offenses committed on August 1, 2008, including one count of violating a protection order in violation of R.C. 2919.27, a felony of the third degree, and one count of abusing harmful intoxicants in violation of R.C. 2925.31, a felony of the fifth degree.

{¶8} Beginning September 15, 2008, a bench trial commenced in the Summit County Court of Common Pleas. On September 17, 2008, the court found Wenker guilty of felonious assault with the repeat violent offender specification, domestic violence, abusing harmful intoxicants on June 1, 2008, endangering children, violating a protection order and abusing harmful intoxicants on August 1, 2008.

{¶9} On November 26, 2008, the court sentenced Wenker to eight years of incarceration on the felonious assault charge, one year of incarceration on the repeat violent offender specification, 18 months of incarceration on the domestic violence charge, six months of incarceration on each charge of abusing harmful intoxicants, 90 days of incarceration on the endangering children charge and six months of incarceration on the charge of violating a protection order. The court further ordered that the sentences for felonious assault and the repeat violent offender specification run consecutively to each other but concurrently with the sentences for domestic violence, abusing harmful intoxicants, endangering children and violating a protection order, for a total of nine years of incarceration. On December 16, 2009, the trial court resentenced Wenker to the same terms of incarceration but altered its order of post-release control.

{¶10} Wenker timely filed a notice of appeal. He raises three assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

"THE TRIAL COURT ERRED BY OVERRULING THE CRIMINAL RULE 29 MOTION TO DISMISS THE COUNTS OF FELONIOUS ASSAULT AND DOMESTIC VIOLENCE BECAUSE THE STATE FAILED TO PRODUCE EVIDENCE THAT [WENKER] KNOWINGLY CAUSED THE ASSAULT."

{¶11} In his first assignment of error, Wenker contends that the trial court erred in overruling his Crim.R. 29 motion to dismiss the counts of felonious assault and domestic violence. We do not agree.

{¶12} "Pursuant to Crim.R. 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt." *State v. Bridgeman* (1978), 55 Ohio St.2d 261, syllabus. "In making this determination, all evidence must be construed in a light most favorable to the prosecution." *State v. Stafford*, 9th Dist. No. 24144, 2009-Ohio-701, at ¶7, citing *State v. Wolfe* (1988), 51 Ohio App.3d 215, 216. "Whether a conviction is supported by sufficient evidence is a question of law that [we] review[] de novo." *State v. Williams*, 9th Dist. No. 24731, 2009-Ohio-6955, at ¶18, citing *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386.

{¶13} In this case, Wenker has limited his challenge to whether the State proved that he acted with the requisite culpable mental state to sustain convictions for domestic violence and felonious assault. To convict a defendant of domestic violence or felonious assault, the State must prove that the defendant acted knowingly. R.C. 2919.25; R.C. 2903.11. "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist." R.C. 2901.22(B).

{¶14} Intent need not be proved by direct evidence. *State v. Elwell*, 9th Dist. No. 06CA008923, 2007-Ohio-3122, at ¶26. This is because, "'[n]ot being ascertainable by the exercise of any or all of the senses, [intent] can never be proved by the direct testimony of a third person, and it need not be. It must be gathered from the surrounding facts and circumstances[.]'" *In re Washington* (1998), 81 Ohio St.3d 337, 340, quoting *State v. Huffman* (1936), 131 Ohio St. 27, paragraph four of the syllabus. "Furthermore, if the State relies on circumstantial evidence to prove any essential element of an offense, it is not necessary for 'such evidence to be irreconcilable with any reasonable theory of innocence in order to support a conviction. (Internal quotations omitted.)'" *State v. Tran*, 9th Dist. No. 22911, 2006-Ohio-4349, at ¶13, quoting *State v. Daniels* (June 3, 1998), 9th Dist. No. 18761, at *2. Circumstantial evidence has the same probative value as direct evidence. See *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph one of the syllabus.

{¶15} Testimony before the trial court indicated that Billups and Wenker had argued earlier in the day. At the time of the incident, Billups was standing directly behind the back door of the house and looking at Wenker, who was yelling at her. He then lowered his shoulder and rammed himself into the door, causing it to fly open and strike her in the face. From these circumstances the trial court could reasonably conclude that Wenker acted knowingly for the purposes of R.C. 2901.22(B). Wenker's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

"IT WAS PLAIN ERROR WHEN [WENKER] WAS CONVICTED OF BOTH FELONIOUS ASSAULT AND DOMESTIC VIOLENCE AS BOTH COUNTS WERE SUPPORTED BY A SINGLE ALLEGATION OF FACT AND THEREFORE THE TWO ALLIED OFFENSES SHOULD HAVE MERGED INTO A SINGLE CONVICTION."

{¶16} In his second assignment of error, Wenker contends that the trial court committed plain error when it failed to merge his convictions for felonious assault and domestic violence. We remand to the trial court for proceedings consistent with this opinion.

{¶17} Wenker observes that both convictions stem from a single act: Wenker pushed open a door, which hit Billups in the face, breaking her nose. Pursuant to Crim.R. 52(B), a plain error or defect that affects a substantial right may be noticed although it was not brought to the attention of the trial court. "A plain error must be obvious on the record, such that it should have been apparent to the trial court without objection." *State v. Kobelka* (Nov. 7, 2001), 9th Dist. No. 01CA007808, at *2, citing *State v. Tichon* (1995), 102 Ohio App.3d 758, 767. As notice of plain error is to be taken with utmost caution and only to prevent a manifest miscarriage of justice, the decision of a trial court will not be reversed due to plain error unless the defendant has "established that the outcome of the trial clearly would have been different but for the alleged error." *Kobelka*, 9th Dist. No. 01CA007808, at *2, citing *State v. Waddell* (1996), 75 Ohio St.3d 163, 166, and *State v. Phillips* (1995), 74 Ohio St.3d 72, 83. The failure to properly merge convictions on allied offenses of similar import constitutes plain error because even when sentences are run concurrently, "a defendant is prejudiced by having more convictions than are authorized by law." *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, at ¶31.

{¶18} R.C. 2941.25 provides as follows:

> "(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."

{¶19} The Ohio Supreme Court recently decided *State v. Johnson*, Slip Opinion No. 2010-Ohio-6314[1]. *Johnson* involved a defendant who was charged with child endangering as well as felony murder with respect to the death of a seven year old boy. On direct appeal, the First District Court of Appeals ruled that the trial court should have merged the felony murder conviction and the child-endangering conviction under R.C. 2941.25 as allied offenses. The Fifth District in *State v. Mills*, 5th Dist. No. 2007 AP 07 0039, 2009-Ohio-1849, reached the opposite result in a similar case. The Ohio Supreme Court acknowledged a conflict, accepted the appeal and concluded that, in 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. In reaching this conclusion, the court overruled its previous precedent in *State v. Rance* (1999), 85 Ohio St.3d 632, to the extent that *Rance* required a comparison of the offenses in the abstract. *Johnson* at ¶44.

{¶20} Although no four-justice majority supported any one test, the Court held that a defendant's conduct must be examined. Id. at the syllabus. Examining the defendant's conduct allows a court to determine whether it is possible to commit both offenses by the same conduct. Id. at ¶48. If both offenses can be committed with the same conduct, then a court must determine "whether the offenses were committed by the same conduct, i.e., 'a single act, committed with a single state of mind.'" Id. at ¶49, quoting *Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, at ¶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." Id. at ¶50. We believe this

[1] *Johnson* was released December 29, 2010. In response, we ordered the parties to submit supplemental briefs addressing what effect, if any, *Johnson* has on the outcome of this case.

approach is consistent with Chief Justice Brown's opinion, joined by Justices Pfeiffer and Lundberg Stratton, and Justice O'Donnell's concurrence in which Justice Lundberg Stratton also joined.

{¶21} Applying *Johnson* to the facts of this case, Wenker contends that the felonious assault and domestic violence charges stem from his single act of driving the door into Billups' nose. As a result, *Johnson* dictates that the charges are allied offenses of similar import and must be merged for sentencing purposes. In response to our request for briefing, however, the State changed its approach. In its initial brief, the State argued without citing to any authority, that domestic violence and felonious assault are not allied offenses of similar import based on a comparison of the elements of each charge. The State further contended that because one offense could be committed without the other, this "Court need not determine whether the offenses were committed with separate animus." In its supplemental brief addressing *Johnson*, the State, apparently unable to argue that Wenker's single act could support two convictions, looked elsewhere in the transcript and cited an event that occurred earlier in the evening in which Wenker allegedly argued with Billups, pushed her and then went to the garage. The State now contends that the earlier act of pushing Billups constitutes a separate instance of domestic violence under R.C. 2941.25(B). We remand the matter to the trial court for a determination as to whether Wenker committed the offenses separately or with a separate animus. *Johnson* at ¶49-50; *State v. Bigelow*, 9th Dist. No. 08CA0072-M, 2009-Ohio-4093, at ¶11 (because the offenses committed are allied offenses the trial court must hold a hearing to determine if they were committed separately or with a separate animus).

{¶22} Accordingly, in light of *Johnson*, we must remand this matter to the trial court for a determination as to whether Wenker committed the offenses separately or with a separate

animus. If the trial court finds that he committed the offenses with the same animus the State must elect which charge will be merged into the other for the purposes of sentencing. *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569 at ¶43.

ASSIGNMENT OF ERROR III

> "[WENKER] SUFFERED FROM INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS ATTORNEY FAILED TO INFORM HIM THAT HE FACED A MANDATORY EIGHT-YEAR PRISON TERM BEFORE REJECTING A PLEA DEAL AND PROCEEDING TO TRIAL."

{¶23} In his third assignment of error, Wenker contends that his trial counsel was ineffective because counsel failed to inform him that he faced a mandatory eight-year prison term before rejecting a plea deal and proceeding to trial. We do not agree.

{¶24} In order to show ineffective assistance of counsel, Wenker must satisfy a two-prong test. *Strickland v. Washington* (1984), 466 U.S. 668, 669. First, he must show that his trial counsel engaged in a "'substantial violation of any * * * essential duties to his client.'" *State v. Bradley* (1989), 42 Ohio St.3d 136, 141, quoting *State v. Lytle* (1976), 48 Ohio St.2d 391, 396. Second, he must show that his trial counsel's ineffectiveness resulted in prejudice. *Bradley*, 42 Ohio St.3d at 141-142, quoting *Lytle*, 48 Ohio St.2d at 396-397. "Prejudice exists where there is a reasonable probability that the trial result would have been different but for the alleged deficiencies of counsel." *State v. Velez*, 9th Dist. No. 06CA008997, 2007-Ohio-5122, at ¶37, citing *Bradley*, 42 Ohio St.3d at paragraph three of the syllabus. This Court need not address both *Strickland* prongs if Wenker fails to prove either one. *State v. Ray*, 9th Dist. No. 22459, 2005-Ohio-4941, at ¶10.

{¶25} The State contends that Wenker failed to request a transcript of the sentencing hearing or notify the State that he had failed to do so. The State further contends that as a result of this failure, this Court should presume regularity in the proceedings below and overrule this

assignment of error. A review of the record, however, demonstrates that Wenker requested that the sentencing hearing be included in the transcript. The sentencing transcript was made part of the record. Accordingly, we will address the merits of this assignment of error.

{¶26} In his argument, Wenker quoted the trial judge at sentencing. The trial judge stated: "Having said all that, you still would have been sent to prison, Mr. Wenker, even without the mandatory sentence. I would have sent you to prison, I wouldn't have sent you to prison for 8 years." Additionally, the trial judge, prosecutor and defense counsel all acknowledged that until sentencing, they were unaware of a mandatory sentence in this case. Wenker also cites *State v. Hicks*, 12th Dist. No. CA2002-08-198, 2003-Ohio-7210, for the proposition that an attorney's failure to communicate a prosecutor's plea offer to her client constitutes ineffective assistance of counsel. Id. at ¶14.

{¶27} Wenker did not, however, point this Court to any location in the transcript or record that demonstrates the contents of the prosecutor's plea offer. Moreover, *Hicks* does not stand for the proposition that the failure to communicate a mandatory sentence to a client who may be convicted after trial constitutes ineffective assistance of counsel. In fact, in *State v. Lawson* (Dec. 12, 1996), 8th Dist. No. 69899, the court held "that a defense counsel's failure to inform his client of the range of sentencing possibilities does not require reversing the conviction." Id. at *2. As in *Lawson*, Wenker has not directed this Court to any authority to support his claim for ineffective assistance of counsel. App.R. 16(A)(7). Additionally, Wenker interprets the court's statement to mean that if a plea had been accepted, the trial court would have sentenced him to a shorter prison term. That inference is fair, given the context of the statement; however, it also presumes that the plea bargain would involve the dismissal of the specification that carries the mandatory maximum sentence. We emphasize that the record does

not contain the terms of any plea offer. We are, therefore, unable to evaluate the effect of any purported plea bargain and the trial judge's after-the-fact statement does not render trial counsel's representation ineffective. Moreover, because the attorneys and judge were unaware of the mandatory nature of the sentence attendant to the specification, it is equally reasonable to assume that any plea bargain would not have involved dismissal of the specification. Additionally, there is no evidence that the trial judge would have accepted whatever plea agreement the prosecutor may have offered. Wenker has failed to demonstrate that he was prejudiced by ineffective assistance of counsel. *Velez*, at ¶37. His third assignment of error is overruled.

III.

{¶28} Wenker's first and third assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed in part, and the cause remanded for further proceedings consistent with this opinion.

Judgment affirmed in part,
and cause remanded for further proceedings.

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.

CARLA MOORE
FOR THE COURT

CARR, P. J.
CONCURS

WHITMORE, J.
CONCURS, SAYING:

{¶29} I concur, but write separately to note that a remand also would be warranted under Justice O'Connor's separate opinion in *Johnson*, which Justices Pfeifer and Cupp joined. See *State v. Johnson*, Slip Opinion No. 2010-Ohio-6314, at ¶59-71 (focusing on the evidence and arguments raised at trial in assessing a defendant's conduct and instructing courts to ask whether the commission of one offense will probably result in the commission of the other and whether the offenses involved similar criminal wrongs and similar resulting harm).

APPEARANCES:

DONALD GALLICK, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN DIMARTINO, Assistant Prosecuting Attorney, for Appellee.