[Cite as *State v. Connelly*, 2023-Ohio-2607.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	
Appellee	:	C.A. No. 29730
	:	
v.	:	Trial Court Case No. 2021 CR 01983
	:	
MATTHEW E. CONNELLY	:	(Criminal Appeal from Common Pleas Court)
	:	
Appellant	:	
	:	

. . . . . .

O P I N I O N

Rendered on July 28, 2023

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MATHIAS H. HECK, JR., by MICHAEL P. ALLEN, Attorney for Appellee

CHRISTOPHER BAZELEY, Attorney for Appellant

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LEWIS, J.

{¶ 1} Defendant-Appellant Matthew E. Connelly appeals from his conviction in the Montgomery County Court of Common Pleas following his guilty plea to one count of felonious assault and one count of illegal use of a minor in nudity-oriented material or performance. Connelly urges reversal of the judgment, because (1) the trial court failed

to conduct an analysis at sentencing as to whether his two offenses should merge; and (2) Connelly was under the influence of marijuana at the plea hearing, which rendered his plea less than knowing, intelligent, and voluntary For the following reasons, we will affirm the judgment of the trial court.

I. Facts and Course of Proceedings

{¶ 2} On June 25, 2021, a Montgomery County grand jury indicted Connelly on two counts of gross sexual imposition (by force), fourth-degree felonies in violation of R.C. 2907.05(A)(1); four counts of unlawful sexual conduct with a minor, third-degree felonies in violation of R.C. 2907.04(A); and one count of illegal use of a minor in nudity-oriented material or performance, a fifth-degree felony in violation of R.C. 2907.323(A)(3). The indictment stated that the offenses occurred between November 22, 2018, and June 16, 2021.

{¶ 3} A jury trial was scheduled for March 6, 2023. On January 12, 2023, the State charged Connelly by way of a bill of information with one count of felonious assault (serious physical harm), a second-degree felony in violation of R.C. 2903.11(A)(1). On that same day, pursuant to a plea deal, Connelly pled guilty to the count of illegal use of a minor in nudity-oriented material or performance and the count of felonious assault. In return, the State agreed to dismiss the other six counts of the grand jury's indictment. The parties agreed to a sentencing cap of five years in prison and probation eligibility.

{¶ 4} Following a plea hearing and a sentencing hearing, the trial court issued its judgment entry convicting Connelly of the two offenses to which he pled guilty and

sentencing him to four years in prison for felonious assault and one year in prison for illegal use of a minor in nudity-oriented material or performance. The court ordered the sentences be served concurrently. The trial court also found that Connelly was a Tier I sex offender. Connelly filed a timely notice of appeal from this judgment.

II. Connelly Forfeited All But Plain Error by Failing to Raise Merger in The Trial Court

{¶ 5} Connelly's first assignment of error states:

THE TRIAL COURT ERRED WHEN IT FAILED TO CONSIDER WHETHER THE OFFENSES MERGED AT SENTENCING.

{¶ 6} Connelly contends that the trial court failed to make a mandatory merger analysis at sentencing. Although Connelly concedes that he did not raise this issue in the trial court, he argues that the trial court's failure constituted plain error requiring reversal and remand for the trial court to consider whether the offenses to which Connelly pled guilty should have merged.

{¶ 7} According to the State, the "Ohio Supreme Court has held that a defendant has the burden of showing that, but for the trial court's omission, there is a reasonably [sic] likelihood that the offenses would have merged." Appellee's Brief, p. 3. The State contends that Connelly failed to argue that the trial court should have merged his offenses and instead is simply arguing that the trial court should have conducted the analysis to determine whether merger was appropriate. The State also argues that, based on the little evidence in the record relating to the two offenses, there are no circumstances under

which the two charges would have merged.

{¶ 8} When a defendant's conduct constitutes a single offense, the defendant may be convicted and punished only for that offense. When the conduct supports more than one offense, however, a court must conduct an analysis of allied offenses of similar import to determine whether the offenses merge or whether the defendant may be convicted of separate offenses. *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, ¶ 24. In particular, R.C. 2941.25 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.

{¶ 9} "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, or (3) the offenses were committed with separate animus or motivation." *Ruff* at ¶ 25.

{¶ 10} "An accused's failure to raise the issue of allied offenses of similar import in the trial court forfeits all but plain error, and a forfeited error is not reversible error unless it affected the outcome of the proceeding and reversal is necessary to correct a manifest miscarriage of justice." *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 3. "Accordingly, an accused has the burden to demonstrate a reasonable probability that the convictions are for allied offenses of similar import committed with the same conduct and without a separate animus; absent that showing, the accused cannot demonstrate that the trial court's failure to inquire whether the convictions merge for purposes of sentencing was plain error." *Id.*

{¶ 11} Connelly failed to point to anything in the record that supported merger of the two offenses to which he pled guilty. Rather, he argues only that the trial court failed to perform a merger analysis, and we should reverse the judgment and remand the matter for the trial court to conduct such an analysis. Connelly readily concedes that he did not raise the issue before the trial court despite having opportunities to do so in his written sentencing memorandum and at the sentencing hearing. The record contains very little information about the facts underlying the charges brought against Connelly, let alone the type of straightforward evidence that would be necessary to establish plain error in failing to merge the offenses. Consequently, Connelly failed to meet his burden to demonstrate a reasonable probability that his convictions were for allied offenses of similar import committed with the same conduct and without a separate animus.

{¶ 12} The first assignment of error is overruled.

III. The Record Does Not Demonstrate That Connelly's Guilty Plea Was Less Than Knowing, Intelligent, and Voluntary

{¶ 13} Connelly's second assignment of error states:

> CONNELLY'S USE OF MEDICAL MARIJUANA THE MORNING OF THE PLEA HEARING MADE HIS PLEA UNKNOWINGLY, INVOLUNTARY, AND UNINTELLIGENTLY GIVEN.

{¶ 14} Connelly contends that his plea was not knowing, voluntary, and intelligent, because he was under the influence of medical marijuana at the time of the plea hearing. According to Connelly, "[w]hile he stated that he felt that using medical marijuana did not affect his judgment, his subsequent conduct to the court suggest[ed] otherwise." Appellant's Brief, p. 3. "For example, he failed to give audible answers to the court when asked if he consented to proceeding on a prior PSI, whether he understood his registration obligations, and whether he understood that a guilty plea is a complete admission of guilt." *Id.* at 3-4.

{¶ 15} The State responds that "[s]imply because the transcript did not pick up Connelly's voice, or if he nodded rather than spoke, nothing in the record supports any assertion that Connelly did not understand the colloquy." Appellee's Brief, p. 6. Further, the State argues that "[t]here is no evidence in the record that he did not understand the plea colloquy, and an admission of using marijuana is not enough by itself to invalidate the plea." *Id.*, citing *State v. Lauharn*, 2d Dist. Miami No. 2012-CA-9, 2012-Ohio-6185.

{¶ 16} "To comport with due process and be constitutionally valid, a guilty plea must be entered knowingly, intelligently, and voluntarily." (Citations omitted.) *State v. Ashley*, 2d Dist. Montgomery No. 28377, 2019-Ohio-5007, ¶ 8. "In order for a plea to be knowing, intelligent, and voluntary, the trial court must comply with Crim.R. 11(C)." (Citation omitted.) *State v. Russell*, 2d Dist. Clark No. 2010-CA-54, 2011-Ohio-1738, ¶ 6. "Crim.R. 11(C) governs the process that a trial court must use before accepting a felony plea of guilty or no contest." *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶ 8. "By following this rule, a court ensures that the plea is knowing, intelligent, and voluntary." *State v. Cole*, 2d Dist. Montgomery No. 26122, 2015-Ohio-3793, ¶ 12, citing *State v. Redavide*, 2d Dist. Montgomery No. 26070, 2015-Ohio-3056, ¶ 12.

{¶ 17} "The trial court must strictly comply with Crim.R. 11(C)(2)(c), as it pertains to the waiver of constitutional rights." *Russell* at ¶ 7, citing *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, ¶ 31. However, the trial court need only substantially comply with the non-constitutional notifications required by Crim.R. 11(C)(2)(a) and (b). *Cole* at ¶ 12, citing *State v. Nero*, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990). "Substantial compliance means that under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving." (Citations omitted.) *Nero* at 108.

{¶ 18} The trial court strictly complied with Crim.R. 11. The court asked the requisite questions of Connelly and provided the requisite information to him. During the plea colloquy, the court was alerted by Connelly that he had smoked marijuana earlier

that day:

THE COURT: How far did you go in school?

THE DEFENDANT: I have a GED.

THE COURT: Okay. Have you had an opportunity to go over the plea forms with your attorney?

THE DEFENDANT: Yes.

THE COURT: And were you able to read and understand everything on the plea forms?

THE DEFENDANT: Yes.

THE COURT: Are you currently under the influence of any drug, alcohol, or medication?

THE DEFENDANT: I have a medical marijuana card and I did smoke earlier today.

THE COURT: Okay. Okay.

THE DEFENDANT: It does not affect my judgment.

THE COURT: So the effect of your marijuana, will it prevent you from being able to understand what's happening today?

THE DEFENDANT: (Indiscernible)

THE COURT: Will it prevent you from being able to make decisions on your own behalf?

THE DEFENDANT: No.

THE COURT: Is - - with the medical marijuana card, is that something that

you do on a regular basis?

[THE DEFENDANT]: Yes.

THE COURT: So your body is accustomed to the - -

THE DEFENDANT: Yes.

THE COURT: - - effects of medical marijuana.

THE DEFENDANT: Very much so.

THE COURT: Okay. Are you under the influence of anything else?

THE DEFENDANT: No.

THE COURT: Okay. Do you have any physical or mental issues which make it difficult for you to hear or understand what's happening today?

THE DEFENDANT: No.

Plea Hearing Tr. 8-10.

{¶ 19} The trial court then went on to review with Connelly the potential sentence he could face and asked Connelly several questions about whether he understood the effect of his guilty plea and what rights he was giving up. After the State read the charges, the court asked Connelly if he understood what the State had presented and the charges. Connelly affirmatively responded that he understood the charges to which he was pleading guilty and that he was entering his plea voluntarily. Connelly then signed the plea forms and pled guilty.

{¶ 20} Connelly's entire argument under this assignment of error relies on three instances in which the plea hearing transcript reflected "(No audible response)" rather than an affirmative or negative response from Connelly. His argument, however, ignores

the affirmative responses Connelly made to the trial court when he was asked questions relevant to whether his plea was being made knowingly, intelligently, and voluntarily. Further, "(No audible response)" in a transcript simply means the person did not make a vocal response to the question. It does not mean Connelly was acting impaired or did not understand the question. Overall, the record does not demonstrate that Connelly was incapable of fully understanding the proceedings or the consequences of his pleas.

{¶ 21} Finally, we note that the fact that a defendant was on psychotropic medication or had smoked marijuana the day of the plea hearing is not alone an indication that his plea was not knowing, voluntary, or intelligent. *Ashley,* 2d Dist. Montgomery No. 28377, 2019-Ohio-5007, at ¶ 14-15; *State v. Senich*, 8th Dist. Cuyahoga No. 82581, 2003-Ohio-5082, ¶ 25. Rather, Connelly needed to point to evidence in the record that his ability to understand was sufficiently impaired to render his plea less than knowing, voluntary, and intelligent. *See, e.g., State v. Nickell*, 6th Dist. Wood No. WD-07-015, 2008-Ohio-1571, ¶ 19-103 (reversing a judgment where a defendant with mental health and medication issues often failed to answer the significant questions asked, stated that she did not understand what was being asked, and continued to claim innocence during the plea hearing). He failed to do so, and we have not discovered any such evidence in our review of the record before us. Therefore, we cannot conclude that Connelly's guilty pleas were less than knowing, voluntary, and intelligent.

{¶ 22} The second assignment of error is overruled.

IV. Conclusion

{¶ 23} Having overruled both assignments of error, the judgment of the trial court will be affirmed.

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TUCKER, J. and HUFFMAN, J., concur.