[Cite as *State v. Small*, 2012-Ohio-3409.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-10-1291

Appellee — Trial Court No. CR0201001782

v.

Venice Small — **DECISION AND JUDGMENT**

Appellant — Decided: July 27, 2012

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Brenda J. Majdalani, Assistant Prosecuting Attorney, for appellee.

Sarah K. Skow, for appellant.

* * * * *

SINGER, P.J.

{¶ 1} Appellant appeals his conviction for aggravated robbery and kidnapping, both with firearm specifications, entered after a bench trial to the Lucas County Court of Common Pleas. Because there was sufficient evidence to support appellant's conviction

for kidnapping and aggravated robbery, and the trial court properly concluded these offenses were committed with a separate animus, we affirm.

{¶ 2} On the afternoon of April 27, 2010, two men came in to a family owned jewelry store in Toledo. One of the men, later identified as appellant, Venice Small, approached store co-owner Elias Antypas with a plastic bag containing a watch and some gold chain in need of repair. As appellant discussed repair of these items, his companion, later identified as co-defendant Devon Bryant, roamed the store, browsing in the display cases.

{¶ 3} After a few minutes of discussion with appellant, Elias Antypas consulted his brother, Paul, about the cost of the repair. A price was agreed upon and Elias Antypas began writing the repair order while his brother took a telephone call. According to Elias Antypas, as he began to write, he turned to see appellant with a gun pointed at him. Elias Antypas noted that appellant's gun showed a red mark on the side, indicating that the safety was off.

{¶ 4} Appellant leaped the counter and forced Elias Antypas into an office in the rear of the store, threatening to kill the jeweler if he said anything. Meanwhile, Bryant had forced Paul Antypas into the office, confiscating the cell phone that he had been using, and handcuffing him. Bryant was apparently not aware that the cell phone remained an open line after he took it. According to Paul Antypas' later testimony, the caller heard what was happening and called police.

{¶ 5} Bryant then looted the safe in the office while appellant went into the showroom, opened the showcases and began to take the contents. At some point, Bryant went to a window and announced to appellant "the boys are here," indicating the arrival of the police.

{¶ 6} Bryant exited by a side door and was later taken into custody. Appellant went out the front door, followed closely by Paul Antypas with a shotgun. Paul Antypas advised police of the direction appellant had taken and police began foot pursuit. At one point an officer chasing appellant saw appellant lob something into a trash can. After appellant was apprehended, police searched the area where the officer had seen appellant toss something and found a semi-automatic pistol.

{¶ 7} Appellant and Bryant were both charged with aggravated robbery and kidnapping; a firearm specification was attached to each count. The two were tried separately. Appellant elected a trial to the bench.

{¶ 8} At trial, the Antypas brothers testified to the events on April 27 and identified appellant as one of the men who robbed their store. Surveillance photos of the robbery, the guns alleged to have been used by appellant and Bryant and two guns that had been taken from the store's safe were introduced into evidence. Police testified to the foot pursuit and discovery of the pistol.

{¶ 9} Appellant testified in his own defense. Appellant denied having a gun. He testified that it was his cell phone he had in his hand when he jumped the counter. More importantly, according to appellant, his participation in the robbery was coerced.

{¶ 10} Appellant testified that several years earlier he had been shot multiple times by a man with the street name of Moot-B. On the morning of April 27, appellant reported, Moot-B and Devon Bryant approached him. Moot-B threatened appellant's life and that of his family if he did not accompany Bryant to the jewelry store and aid in the robbery. This was the only reason, appellant insisted, that he was in the jewelry store that day. Appellant could not provide a real name for Moot-B, but gave police the name of a street where he believed Moot-B could be found.

{¶ 11} In rebuttal an investigating officer testified that police had attempted to find Moot-B where appellant had indicated, but could not. Neither were police aware of anyone with that street name.

{¶ 12} The court found appellant guilty of both counts and specifications and sentenced him to an eight-year term of imprisonment for the aggravated robbery and a concurrent seven-year term for the kidnapping. The court additionally imposed mandatory three-year terms for the firearm specifications to be served concurrently with each other, but consecutively to the aggravated robbery and kidnapping sentences. From this judgment of conviction, appellant now brings this appeal.

{¶ 13} Appellant sets forth the following four assignments of error:

> I. The trial court committed plain error when it convicted and sentenced Mr. Small on the kidnapping charge because it is an allied offense of similar import that merged with the aggravated robbery charge under R.C. 2941.25.

II. The trial court erred when it failed to specify either of the reasons in R.C. 2929.14(b) [sic] as supporting its reasons for deviating from the minimum sentence for Mr. Small's first felony facing imprisonment.

III. Mr. Small's trial counsel was ineffective in violation of the Sixth Amendment to the United States constitution [sic].

IV. Mr. Small's convictions are against the manifest weight of the evidence.

I. Allied Offenses

{¶ 14} In his first assignment of error, appellant maintains that because kidnapping and aggravated robbery are allied offenses of similar import, the charges should have merged and he should not be convicted of both. The trial court committed plain error when it failed to merge these counts, appellant insists.

{¶ 15} R.C. 2941.25(A) provides that "[w]here 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." Alternatively, when the offenses are of dissimilar import or the criminal conduct results in two or more offenses committed separately or with a separate animus, the offender may be charged with and convicted of all such offenses. R.C. 2941.25(B).

{¶ 16} The test for allied offenses of similar import is to first determine whether it is possible to commit both offenses by the same conduct. "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." *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, ¶ 48. Once it is determined that dual offenses can be committed by the same conduct, the next question is "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 *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, ¶ 50 (Lanzinger, J., dissenting).

{¶ 17} As appellant properly points out kidnapping and aggravated robbery have been held to be allied offenses of similar import. *State v. Winn*, 121 Ohio St.3d 413, 2009-Ohio-1059, 905 N.E.2d 154, syllabus; *State v. Logan*, 60 Ohio St.2d 126, 130, 397 N.E.2d 1345 (1979); *State v. Jenkins*, 15 Ohio St.3d 164, 198, 473 N.E.2d 264 (1984); *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, ¶ 204. The question then becomes whether in this instance the offenses were the result of the same conduct.

{¶ 18} Certain guidelines have been established to determine whether kidnapping and an allied offense are considered to have been committed with a separate animus:

> (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. *Logan, supra,* syllabus.

A kidnapping is inherent in any robbery or aggravated robbery. The victim's movement must be restrained for the amount of time sufficient to complete the theft. *State v. McCullough*, 12th Dist. Nos. CA2010-04-006, CA2010-04-008, 2011-Ohio-992, ¶ 17.

{¶ 19} Here the Antypas brothers were not only restrained, but moved to the store's office, out of sight of anyone who might try to come in. One of the brothers was restrained by handcuffs. It is reasonable to infer that the purpose of this movement and restraint was to prevent detection and facilitate an escape, thus providing a separate animus for the kidnapping. The offenses of aggravated robbery and kidnapping were not then "a single act, committed with a single state of mind." These offenses, therefore, may be separately charged and separate convictions may be had pursuant to R.C. 2941.25(B). Accordingly, appellant's first assignment of error is not well-taken.

II. Ineffective Assistance of Counsel

{¶ 20} Appellant requested a plain error analysis on the allied offenses question because trial counsel failed to object at trial to the imposition of separate convictions. This would ordinarily waive the issue on appeal absent plain error. In his third assignment of error, appellant insists that his trial counsel provided ineffective assistance because he failed to object to the separate convictions for aggravated robbery and

kidnapping. In view of our discussion of appellant's first assignment of error, we conclude that trial counsel was not ineffective for failing to interpose an objection on this issue. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Accordingly, appellant's third assignment of error is not well-taken.

III. Minimum Sentence

{¶ 21} In his second assignment of error, appellant maintains that the trial court failed to comply with R.C. 2929.14(B) when sentencing appellant to more than the minimum sentence for his offenses. Sentences exceeding the minimum may not be imposed, appellant argues, without the sentencing court finding that such a sentence would demean the seriousness of the offender's conduct.

{¶ 22} Former R.C. 2929.14(B), the sentencing statute that would have been in effect at the time of appellant's sentencing, contained a directive to a sentencing court to impose the shortest prison term authorized unless the offender had previously served a prison term or the court made a finding that the shortest sentence would demean the seriousness of the offense or would not adequately protect the public from future crime.[1] Appellant had not previously served a prison term and the trial court entered no findings.

{¶ 23} R.C. 2929.14 was one of the sentencing provisions found unconstitutional and severed from the law by the Supreme Court of Ohio in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. Although the legal basis for *Foster* was

[1] This provision was deleted when the legislature repealed and revived the statute in 2011 Am.Sub.H.B. No 86 (effective September 30, 2011).

undermined when the United States Supreme Court declared constitutional a nearly identical sentencing scheme in another state, *Oregon v. Ice*, 555 U.S. 160, 129 S.Ct. 711, 172 L.Ed.2d 517 (2009), the sentencing provisions of the Ohio statute could not be revived without legislative reenactment. *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, 941 N.E.2d 768, ¶ 36. Prior to legislative revival, sentencing courts had no obligation to make findings, *id.* at paragraph three of the syllabus, and had discretion to impose a sentence within the statutory range. *Id.* at ¶ 11.

{¶ 24} Since the version of R.C. 2929.14(B) appellant seeks to apply was severed from the law prior to his offense or his sentencing, it is inapplicable to him. Sentencing for appellant rested in the sound discretion of the court and will not be reversed absent an abuse of that discretion. An abuse of discretion is more than an error in judgment or a mistake of law, the term connotes that the court's attitude is arbitrary, unreasonable or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). The sentence imposed here was within the parameters of the sentencing statute and we can find nothing in the record to suggest that the sentence imposed is unreasonable. Accordingly, appellant's second assignment of error is not well-taken.

IV. Manifest Weight

{¶ 25} In his remaining assignment of error, appellant suggests that his conviction was against the manifest weight of the evidence.

{¶ 26} A verdict or finding may be overturned on appeal if it is either against the manifest weight of the evidence or because there is an insufficiency of evidence. In the

former, the appeals court acts as a "thirteenth juror" to determine whether the trier of fact lost its way and created such a manifest miscarriage of justice that the conviction must be overturned and a new trial ordered. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). In the latter, the court must determine whether the evidence submitted is legally sufficient to support all of the elements of the offense charged. *Id*. at 386-387. Specifically, we must determine whether the state has presented evidence which, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The test is, viewing the evidence in a light most favorable to the prosecution, could any rational trier of fact have found the essential elements of the crime proven beyond a reasonable doubt. *Id*. at 390 (Cook, J., concurring); *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. *See also State v. Eley*, 56 Ohio St.2d 169, 383 N.E.2d 169 (1978); *State v. Barnes*, 25 Ohio St.3d 203, 495 N.E.2d 922 (1986).

{¶ 27} Appellant was found guilty of aggravated robbery in violation of R.C. 2911.01(A) and kidnapping, in violation of R.C. 2905.01(A)(2), (C). Both offenses came with a firearm specification. R.C. 2911.01, in material part provides:

> (A) No person, in attempting or committing a theft offense * * * or in fleeing immediately after the attempt or offense, shall do any of the following:

(1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it[.]

R.C. 2905.01 provides:

(A) No person, by force, threat, or deception * * * shall remove another from the place where the other person is found or restrain the liberty of the other person, for any of the following purposes:

* * *

(2) To facilitate the commission of any felony or flight thereafter[.]

{¶ 28} Both Antypas brothers testified that appellant and Bryant came into their store under the pretext of having jewelry repaired. After a time, both appellant and Bryant pulled guns, ordered the brothers into the office and held them there. Bryant looted the safe. Appellant took goods from the display cases. This testimony alone, if believed, is sufficient to establish the elements of the two offenses and specifications with which appellant was charged.

{¶ 29} Nonetheless, appellant insists that the weight of the evidence is in his favor. It is uncontested that he was shot previously. The brothers were unable to identify the gun appellant was alleged to have carried. In any event, he argues, it was not a gun, it was a cell phone in his hand when he leaped the counter.

{¶ 30} The trier of fact is certainly permitted to disbelieve appellant's unsubstantiated account of being coerced into crime by a street hood. The only part of appellant's story that could be substantiated was that he had previously been shot.

{¶ 31} With respect to the rest, the jewelry store these men chose to rob was equipped with an exceptionally good digital surveillance system. The recording from the store clearly reveals appellant and Bryant entering the store. The pictures also clearly reveal appellant pull a firearm from his jacket and brandish it gangster style before leaping over the counter. Earlier in the recording, appellant did use a cell phone that he clearly put into his left pocket. Appellant also clearly pulled the gun from his right pocket. Moreover, from appellant's demeanor in the recordings, a trier of fact could certainly find that appellant was the principal actor in the robbery. Consequently, we find nothing in the record to suggest that the trier of fact lost its way or that any miscarriage of justice occurred. Accordingly, appellant's fourth assignment of error is not well-taken.

{¶ 32} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. It is ordered that appellant pay the court costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE