[Cite as *State v. Tukes*, 2010-Ohio-3083.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93224

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

LAMAR TUKES

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No.CR-514763

BEFORE: Blackmon, J., Gallagher, A.J., and Rocco, J.

RELEASED: July 1, 2010

JOURNALIZED:

ATTORNEY FOR APPELLANT

Susan J. Moran
55 Public Square
Suite 1616
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

Nathaniel A. Tosi
Assistant Prosecuting Attorney
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant Lamar Tukes appeals his convictions and assigns the following errors for our review:

> **"I. The trial court erred by denying Appellant's motion for acquittal pursuant to Crim.R. 29 when the evidence was insufficient to sustain Appellant's convictions."**
>
> **"II. Appellant's convictions are against the manifest weight of the evidence."**
>
> **"III. The trial court erred in failing to find that aggravated burglary as charged in count two of the indictment, and felonious assault, as charged in counts three, four and five, are allied offenses of similar import committed with a single animus."**
>
> **"IV. The trial court erred in consecutively sentencing appellant for the crimes of aggravated burglary and felonious assault."**

{¶ 2} Having reviewed the record and pertinent law, we affirm Tukes's convictions. The apposite fact follow.

{¶ 3} On August 26, 2008, a Cuyahoga County Grand Jury indicted Tukes on two counts of aggravated burglary and three counts of felonious assault. Tukes pleaded not guilty at his arraignment, and several pretrials followed. On February 25, 2009, a jury trial commenced.

Jury Trial

{¶ 4} Tracy Bunch testified that on June 20, 2008, he was asleep at his girlfriend's home when the phone rang at 3:30 a.m. Neither answered the phone and twenty minutes later he heard the sound of smashing glass.

{¶ 5} Upon investigating, he was met by an intruder he later identified as Tukes. Tukes struck him in the head with a trowel, and a struggle ensued. While they struggled, his girlfriend, Shirley Woolfolk, ran out of the house onto the porch. Tukes followed her, but later returned and struck Bunch with a pipe wrench, and then fled.

{¶ 6} Woolfolk had a prior relationship with Tukes. In fact, on the date in question, Woolfolk parked her vehicle on another street, prior to entering her home, so as to avoid Tukes. When the phone rang, Bunch and Woolfolk suspected the caller was Tukes and decided not to answer the phone.

{¶ 7} Bunch testified that the police arrived a few minutes after the incident and accompanied him and Woolfolk to the hospital where he received 32 stitches for a wound to his head. Bunch described his injury as a split in his forehead. A short time later, Tukes came to the hospital, threw mail at Woolfolk, and then left.

{¶ 8} Officer Edward Rock of the Cleveland Police Department testified that when he arrived at the scene, he observed the injured Bunch, as well as the broken window and door. The officer observed blood on Bunch, his split

forehead, and blood in the hallway. Officer Rock stated that Bunch identified Tukes as his attacker. Officer Rock accompanied Bunch and Woolfolk to the hospital.

{¶ 9} Tukes presented the testimony of Earl Moultry, an alibi witness. Moultry testified that Tukes had spent the entire night at his house helping to assemble a pool table. Moultry said that Tukes had consumed a lot of alcohol and later fell asleep on his living room couch. Moultry said he stayed up all night watching television and Tukes never left his house.

{¶ 10} Further, Moultry said that there was no way for Tukes to leave, because the door could not be unlocked from the inside without the key. Moultry stated that he had hidden the key to prevent Tukes from driving after consuming so much alcohol. Finally, Moultry stated that Tukes works on houses and had a lot of tools.

{¶ 11} At the close of the case, the trial court dismissed one aggravated burglary charge because it was indicted with the incorrect mens rea; specifically the state had charged recklessness. The jury found Tukes guilty of all remaining counts. The trial court sentenced Tukes to serve three years for aggravated burglary, imposed two-year concurrent sentences for each of the three felonious assault charges. The trial court merged count four of the indictment into counts three and five. The trial court ordered Tukes to serve

the sentences for aggravated burglary and felonious assault consecutively for a total prison term of five years.

Sufficiency

{¶ 12} In the first assigned error, Tukes argues the trial court should have granted his motion for acquittal because the state failed to present sufficient evidence to support his convictions.

{¶ 13} Crim.R. 29(A), which governs motions for acquittal, states:

> **"The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses."**

{¶ 14} The sufficiency of the evidence standard of review is set forth in *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 381 N.E.2d 184, syllabus. *Bridgeman* must be interpreted in light of the sufficiency test outlined in *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus, in which the Ohio Supreme Court held:

> **"An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence submitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable**

> **doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. (*Jackson v. Virginia* [1979], 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, followed.)"**

{¶ 15} At trial, Bunch stated that Tukes broke into the home by smashing the glass of the back door, and then hit him with a trowel and later a pipe wrench. Bunch sustained injuries to his head that required 32 stitches. The record indicates that the state submitted hospital medical records that confirmed that Bunch sustained injuries on June 20, 2008, which required 32 stitches.

{¶ 16} Bunch knew Tukes; they frequently met and talked; however, because Bunch was dating his former girlfriend, they were not on friendly terms. Woolfolk and Tukes had argued the day before the incident, and later that evening, Woolfolk picked up Bunch and headed to her home. Before entering the home, Woolfolk parked her vehicle on a street around the corner from the home so that Tukes would not know they were at home.

{¶ 17} Officer Rock testified that when he arrived on the scene, Bunch's head was bloody, the window to the back door was broken out, and the door was broken open. Officer Rock stated that although an ambulance was

summoned, Bunch opted to have Woolfolk drive him to the hospital. Officer Rock waited for Woolfolk to obtain her truck that was parked on another street, and then he accompanied them to Euclid Hospital.

{¶ 18} Therefore, viewing the evidence in a light most favorable to the state, we find that a rational trier of fact could have concluded that Tukes broke into the home and assaulted Bunch. The evidence shows that Tukes was not unknown to Bunch, that the medical records supported the finding that Bunch suffered serious bodily harm on the day in question, that Bunch identified Tukes as his attacker, and that Officer Rock observed that the house had been broken into and observed Bunch's injuries. As such, we conclude sufficient evidence exists to sustain Tukes's convictions; thus the trial court properly overruled Tukes's Crim.R. 29(A) motion for acquittal. Accordingly, we overrule his first assigned error.

Manifest Weight of Evidence

{¶ 19} In the second assigned error, Tukes argues his convictions are against the manifest weight of the evidence.

{¶ 20} In *State v. Wilson,* 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, the Ohio Supreme Court addressed the standard of review for a criminal manifest weight challenge, as follows:

> **"The criminal manifest-weight-of-the-evidence standard was explained in *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541. In *Thompkins*, the court distinguished between sufficiency of the evidence and manifest weight of the evidence, finding that these concepts differ both qualitatively and quantitatively. Id. at 386, 678 N.E.2d 541. The court held that**

> **sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, but weight of the evidence addresses the evidence's effect of inducing belief. Id. at 386-387, 678 N.E.2d 541. In other words, a reviewing court asks whose evidence is more persuasive -- the state's or the defendant's? We went on to hold that although there may be sufficient evidence to support a judgment, it could nevertheless be against the manifest weight of the evidence. Id. at 387, 678 N.E.2d 541. 'When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a "thirteenth juror" and disagrees with the factfinder's resolution of the conflicting testimony.' Id. at 387, 678 N.E.2d 541, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652."**

{¶ 21} As discussed in our resolution of the first assigned error, Tukes's convictions were based on substantial and sufficient evidence. As previously noted, Bunch knew Tukes, but was not friendly with him at the time of the incident because of Bunch's relationship with Tukes's ex-girlfriend.

{¶ 22} Under *Wilson*, when reviewing a manifest weight argument we sit as the "thirteenth juror" to determine whether we disagree with the factfinders' resolution of the conflicting testimony. Here, the conflicting testimony is that Tukes committed the crime versus the alibi witness whose testimony is that he could not have committed the crime because Tukes was with him at his home in the early morning when the crime occurred. The conflict is between ability and inability. Consequently, we agree with the factfinders' resolution of the conflicting testimony. Here, the trier of fact disbelieved the alibi.

{¶ 23} The trier of fact is free to believe or disbelieve all or any of the testimony. *State v. Sheppard* (Oct. 12, 2001), 1st Dist. No. C-000553. The reason for disbelieving Moultry's testimony was timing. Tukes had opportunity, motive, and means. Consequently, the jury could believe that Tukes was at Moultry's home and left at sufficient time to get to Woolfolk's home and commit the crime. None of the evidence disputes the fact that Tukes later arrived at the hospital, threw Woolfolk's mail at her, and left.

{¶ 24} The jury was within their prerogative to believe that the fight between Tukes and Woolfolk the day before the incident spilled over to the next morning, and that Tukes directed his aggression at Bunch, Woolfolk's current boyfriend. Accordingly, we overrule his second assigned error.

Allied Offenses

{¶ 25} In the third assigned error, Tukes argues that the trial court erred when it failed to find that aggravated burglary and felonious assault are allied offenses of similar import.

{¶ 26} Preliminarily, we note that Tukes is raising this issue for the first time on appeal. Failure to object at the time of trial waives all but plain error. *State v. Sutton*, Cuyahoga App. No. 90172, 2008-Ohio-3677, citing *State v. Childs* (1968), 14 Ohio St.2d 56, 263 N.E.2d 545. Plain errors are obvious defects in trial proceedings that affect "substantial rights," and "although they were not brought to the attention of the court," they may be

raised on appeal. *State v. Fortson*, Cuyahoga App. No. 92337, 2010-Ohio-2337. See, also, Crim.R. 52(B). To affect substantial rights, "the trial court's error must have affected the outcome of the trial." *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68, 759 N.E.2d 1240. Plain error is recognized "only in exceptional circumstances * * * to avoid a miscarriage of justice." *State v. Long* (1978), 53 Ohio St.2d 91, 94-95, 372 N.E.2d 804.

{¶ 27} We also note that Tukes has cited no authority that holds that felonious assault and aggravated burglary are allied offenses of similar import. To the contrary, previous Ohio cases have held that those two offenses are not allied offenses of similar import. *State v. Johnson*, 5th Dist. No. 06CAA070050, 2006-Ohio-4994; *State v. Jackson* (1985), 21 Ohio App.3d 157, 487 N.E.2d 585; *State v. Feathers*, 11th Dist. No. 2005-P-0039, 2007-Ohio-3024.

{¶ 28} In the instant case, the jury found Tukes guilty of aggravated burglary in violation of R.C. 2911.11(A)(2), which provides:

> **"(A) No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if any of the following apply:**
>
> **"* * *

> **"(2) The offender has a deadly weapon or dangerous ordnance on or about the offender's person or under the offender's control."**

{¶ 29} The jury also found Tukes guilty of three counts of felonious assault in violation of R.C. 2903.11(A)(1) and (2), which provides:

> **"(A) No person shall knowingly do either of the following:**
>
> **"(1) Cause serious physical harm to another or to another's unborn."**
>
> **"(2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance."**

{¶ 30} Aggravated burglary per R.C. 2911.11(A)(2) requires a trespass into an occupied structure with a purpose to commit some criminal offense. Felonious assault per R.C. 2903.11(A)(1) and (2) has no such requirement. On the other hand, felonious assault requires the actual infliction of serious physical harm. Aggravated burglary per R.C. 2911.11(A)(2) does not require the infliction of serious physical harm.

{¶ 31} Therefore, the offenses of aggravated burglary, per R.C. 2911.11(A)(2), and felonious assault, per R.C. 2903.11(A)(1) and (2), are not allied offenses of similar import. Rather, they are offenses of dissimilar import, and defendant could be convicted and sentenced for both offenses. R.C. 2941.25(B); *State v. Rance*, 85 Ohio St.3d 632, 1991-Ohio-291, 710 N.E.2d 699.

{¶ 32} Moreover, because we conclude that aggravated burglary and felonious assault are not allied offenses of similar import, the Ohio Supreme Court's pronouncements in *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, is inapplicable to the instant appeal. In *Underwood*, the Ohio Supreme Court concluded that a defendant's plea to multiple counts does not affect the trial court's duty to merge allied offenses at sentencing nor bar appellate review of the sentence. Id. at ¶26-29, 922 N.E.2d 923. Since aggravated burglary and felonious assault are not allied offenses of similar import, the trial court's imposition of a separate sentence for each offense did not amount to plain error. Accordingly, we overrule his third assigned error.

Consecutive Sentences

{¶ 33} In the fourth assigned error, Tukes argues the trial court erred when it imposed consecutive sentences for aggravated burglary and felonious assault. We disagree.

{¶ 34} Under current Ohio law, a trial court "now has the discretion and inherent authority to determine whether a prison sentence within the statutory range shall run consecutively or concurrently." *State v. Sturgill*, Cuyahoga App. No. 93158, 2010-Ohio-2090, quoting *State v. Elmore*, 122 Ohio St.3d 472, 480, 2009-Ohio-3478, 912 N.E.2d 582. See, also, *State v. Bates*, 118 Ohio St.3d 174, 178, 2008-Ohio-1983, 887 N.E.2d 328. Although recognized,

the Ohio Supreme Court has yet "to address fully all ramifications of [*Oregon v. Ice* (2009), ____ U.S. ____, 129 S.Ct. 711, 172 L.Ed.2d 517.]" In *Elmore*, the court followed its *Foster* decision, and reiterated that trial courts "'are no longer required to make findings or give their reasons for maximum, consecutive, or more than the minimum sentences.'" *Elmore*, supra at 482, quoting *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. Until the Ohio Supreme Court states otherwise, this court continues to follow *Foster*. *State v. Pinkney*, Cuyahoga App. No. 91861, 2010-Ohio-237; *State v. Eatmon*, Cuyahoga App. No. 92048, 2009-Ohio-4564. Accordingly, we overrule his fourth assigned error.

Judgment affirmed. It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

PATRICIA ANN BLACKMON, JUDGE

SEAN C. GALLAGHER, A.J., and
KENNETH A. ROCCO, J., CONCUR