

[Cite as *State v. Stone*, 2010-Ohio-3308.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92949

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

SHELDON STONE

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-516701

BEFORE: Gallagher, A.J., Stewart, J., and Boyle, J.

RELEASED: July 15, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).
SEAN C. GALLAGHER, A.J.:

{¶ 1} Appellant Sheldon Stone appeals his conviction from the Cuyahoga County Court of Common Pleas. For the reasons herein, we affirm in part, reverse in part, and remand.

{¶ 2} Pursuant to an October 16, 2008 judgment entry, Stone was bound over from the juvenile court division to the general felony division.

{¶ 3} On October 24, 2008, Stone was indicted on six counts: three counts of aggravated robbery, one count of attempted murder, and two counts of felonious assault. All counts contained one- and three-year firearm specifications. On February 5, 2009, a jury trial commenced. The state presented three witnesses: the two victims, Anesha Lynn-Coleman (“Coleman”) and Darwin Hill, and Cleveland Metropolitan Housing Authority (“CMHA”) police officer, Maurice Kennedy.

{¶ 4} On July 28, 2008, at approximately 1:00 a.m., Hill and Coleman walked from Coleman’s apartment on E. 30th Street to the Shell gas station located at the corner of Carnegie Avenue and E. 30th Street to purchase juice for Coleman’s child. On the way, they noticed a young man riding a bicycle toward the Shell station. After Coleman and Hill entered the store, the young man entered the store, where they saw him purchase a pack of gum. Coleman testified she was on her cell phone with a girlfriend the entire time she walked to and from the store.

{¶ 5} Coleman and Hill left the store without making a purchase, and while they were returning to Coleman's apartment building, they noticed the man they had just seen in the store with another young man, also on a bicycle. The second man they saw was shorter than the first man. While Hill and Coleman walked, they considered returning to the Shell station because they felt uneasy. Before they could turn around, the two men dropped their bikes and ran toward the couple with guns drawn.

{¶ 6} Coleman testified that the shorter of the two assailants, later identified as Stone, pointed a gun at her and demanded she give him everything she had. Coleman handed him several ID cards, but no cash because she did not have any. Meanwhile the taller of the two assailants pointed his gun at Hill and demanded he give him everything in his pockets. First Hill testified he gave up his wallet with \$20 in it, and then wrestled with his assailant to disarm him. Hill testified the taller assailant yelled to Stone to "Kill him; kill him," referring to Hill. On cross-examination, Hill testified Stone began pistol-whipping him to get Hill to release the other man, and at some point during this attack, Stone reached into Hill's pocket for his wallet. Coleman corroborated Hill's testimony that Stone took his wallet, testifying she witnessed Stone pat him down while he was hitting him with his gun.

{¶ 7} Within a few minutes, the two assailants left on their bikes and rode away. Coleman testified that while Hill was being attacked, she told her friend on the phone to call 9-1-1, and she also ran to her apartment and yelled for her brother to call the police. Hill testified that once the attackers left, he also called 9-1-1. Several CMHA police arrived at the scene of the attack within a few minutes of the 9-1-1 calls. Coleman and Hill described both assailants. Coleman described her attacker as a short, slim black male wearing a white T-shirt, baggy jean shorts, and a white doo-rag. Hill described the same assailant, the one who had pistol-whipped him, as a short, slim black male wearing a white T-shirt, jeans, and a black doo-rag. Both victims testified they told the police the assailants escaped on bicycles and indicated the direction in which they rode off.

{¶ 8} Officer Kennedy testified that once he received the description of the assailants, he drove in the direction the men rode off and circled the block looking for two men on bicycles who matched the description the victims provided. He stated he noticed a number of bikes near where a large group of adults and teenagers were playing cards. Officer Kennedy saw that one teenager in particular, later identified as Stone, attempted to elude detection by hiding behind other people seated there. Officer Kennedy also testified Stone was wearing jean shorts, no shirt, and had fresh lacerations on his back, consistent with a recent altercation or accident.

{¶ 9} Officer Kennedy instructed Stone to accompany him in his zone car to the scene of the attack, where both victims were given the opportunity to identify whether he was their assailant. Both Coleman and Hill immediately identified Stone as the shorter of the two assailants, the person who robbed Coleman and pistol-whipped Hill. Stone was arrested.

{¶ 10} The jury convicted Stone of all three counts of aggravated robbery and both counts of felonious assault, as well as all of the firearm specifications. He was acquitted on the attempted murder charge. The court sentenced Stone to a total of six years in prison.¹

{¶ 11} Stone filed this timely notice of appeal, raising two assignments of error for our review.

{¶ 12} “I. The facts of this case seriously lack the quantitative degree of certainty as required by law.”

{¶ 13} In his first assignment of error, Stone argues the state presented insufficient evidence on all elements of the charges against him. Specifically, he argues the state failed to present sufficient evidence of his identity to allow the jury to find him guilty of the charged offenses.

¹ Stone was sentenced to three years on each aggravated robbery conviction but consecutive to the one- and three-year firearm specifications, which merged, and would be served prior to the aggravated robbery terms. He was also sentenced to two years on the one felonious assault conviction and three years on the other felonious assault conviction but consecutive to the one- and three-year firearm specifications, which merged, and would be served prior to the felonious assault terms. All sentences for the underlying offenses ran concurrent.

{¶ 14} When an appellate court reviews a claim of insufficient evidence, “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.” *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶ 77, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus. The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, 847 N.E.2d 386, ¶ 37.

{¶ 15} Stone was convicted of three counts of aggravated robbery, violations of R.C. 2911.01(A)(1) and (A)(3), and two counts of felonious assault, violations of R.C. 2903.11(A)(1) and (A)(2). Stone argues the state failed to present sufficient identity evidence that he was the assailant. He points to Coleman’s and Hill’s conflicting testimony regarding the clothing he was wearing, and the fact that Officer Kennedy chose the first short, slim black male he encountered to present to the victims as a suspect, making the cold stand unnecessarily suggestive.² Despite the conflicting testimony and the cold stand as conducted, we find there was sufficient evidence that Stone

² Stone failed to object to the admission of identity evidence arising from the cold stand. He argues only that the evidence that was presented was insufficient to withstand a Crim.R. 29 motion.

was the individual who committed aggravated robbery and felonious assault against the two victims.

{¶ 16} Coleman testified she identified Stone as her assailant on two separate occasions: first, within approximately 15 minutes of the attack, and second, at the juvenile bindover hearing two and one-half months after the attack. She testified the lighting on July 28 was sufficient for her to see Stone's face as he approached and threatened her, and she saw him as he attacked Hill. Hill testified he identified Stone as his assailant shortly after the attack. Hill was also able to identify Stone at trial. It is true Hill seemed to contradict himself about what Stone was wearing, first saying he was wearing a black shirt, then saying he was not wearing a shirt at all; however, Hill testified to seeing Stone both during the attack and later when he was in the zone car. With respect to the fact that Hill's and Coleman's testimony were inconsistent as to the color of the doo-rag Stone wore, this presents an issue for the jury, not an issue of whether there was sufficient evidence of the assailant's identity to go to the jury.

{¶ 17} Furthermore, Officer Kennedy testified he circled the block looking for suspects. He noticed Stone attempting to hide himself among a larger group of people, and Stone had fresh lacerations on his back, indicating a recent scuffle.³ Officer Kennedy drove Stone to where the victims were

³ When questioned by Office Kennedy about the lacerations, Stone said he got

attacked, and both victims were immediately able to identify Stone as the person who attacked them 15 to 20 minutes earlier. Viewing this evidence in a light most favorable to the prosecution, we find there was sufficient evidence of Stone's identity to send this case to the jury.

{¶ 18} To the extent Stone's assigned error suggests the guilty verdict was against the manifest weight of the evidence, we are equally unpersuaded. There was substantial evidence upon which the jury determined Stone committed the charged offenses against Coleman and Hill.

{¶ 19} Stone's first assignment of error is overruled.

{¶ 20} "II. The trial court erred in not instructing the jury on the allied offenses of similar import as the offenses of aggravated robbery and felonious assault were allied offenses of similar import, and therefore defendant could only be found guilty of one or the other."⁴

{¶ 21} In his second assignment of error, Stone argues that the court erred in not merging the offenses of aggravated robbery and felonious assault.

{¶ 22} R.C. 2941.25(A) provides that where the same conduct by a defendant can be construed to constitute two or more allied offenses of similar

them playing basketball earlier that day.

⁴ Appealing whether two or more offenses are allied and should have been merged does not raise an issue of whether the court failed to give the proper jury instruction, as Stone sets forth in his second assignment of error. It is a legal determination for the court to make.

import, the defendant may be convicted of only one of the offenses. R.C. 2941.25(B) provides that where the conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the defendant may be convicted of all the offenses.

{¶ 23} Ohio courts have repeatedly held that aggravated robbery and felonious assault are not allied offenses of similar import. See *State v. Preston* (1986), 23 Ohio St.3d 64, 491 N.E.2d 685; *State v. Allen* (1996), 115 Ohio App.3d 642, 685 N.E.2d 1304; *State v. Collins*, Cuyahoga App. No. 89529, 2008-Ohio-578; *State v. Sowell* (May 27, 1993), Cuyahoga App. No. 62601. Likewise, we agree that commission of aggravated robbery does not necessarily result in the commission of felonious assault, and further that commission of felonious assault does not necessarily result in the commission of aggravated robbery. It is not unheard of for a crime to evolve in its commission, and what starts as intent to commit one particular crime results in the commission of additional crimes. The circumstances in this case provide a perfect example.

{¶ 24} Stone argues that his convictions for felonious assault should merge with his convictions for aggravated robbery. We disagree. The facts in this case suggest Stone planned to rob Coleman and Hill by holding them up at gunpoint. Because of Hill's attempt to disarm the other assailant, Stone chose to pistol-whip Hill. At this point, what had begun as aggravated

robbery evolved into felonious assault. And while we agree that Stone's pistol-whipping of Hill constitutes an element of R.C. 2911.01(A)(3), we nonetheless find that it began as the separate crime of felonious assault, and therefore Stone can be convicted of both. We find that Stone's convictions for felonious assault and aggravated robbery were not allied offenses because Hill's testimony supports separate convictions where Stone engaged in a separate animus to commit each crime. Stone's second assignment of error is overruled.

{¶ 25} However, we sua sponte find that the trial court erred by not merging the two felonious assault convictions with each other and the two aggravated robbery convictions (as they relate to Hill) with each other. See *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923. Felonious assault in violation of R.C. 2903.11(A)(1) (cause serious physical harm) and felonious assault in violation of R.C. 2903.11(A)(2) (cause physical harm by means of a deadly weapon) are allied offenses of similar import under R.C. 2941.25. On the facts before us, the two crimes against the same victim should have merged. See *State v. White*, Cuyahoga App. No. 92972, 2010-Ohio-2342; *State v. Cotton*, 120 Ohio St.3d 321, 2008-Ohio-6249, 898 N.E.2d 959.

{¶ 26} Likewise, we find Stone’s two convictions for aggravated robbery against Hill in violation of R.C. 2911.01(A)(1)⁵ and in violation of R.C. 2911.01(A)(3)⁶ should merge. Based on this court’s holding in *White*, we find the two counts of aggravated robbery against Hill should merge where Stone both brandished a weapon and used it to pistol-whip one victim, thus committing allied offenses with the same animus.⁷

{¶ 27} Therefore, we remand this case with instructions to the trial court to merge Stone’s convictions on Counts 5 and 6. The trial court is also instructed to merge Stone’s convictions on Counts 1 and 2.

Judgment affirmed in part, reversed in part, and cause remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant and appellee share costs herein taxed.

The court finds there were reasonable grounds for this appeal.

⁵R.C. 2911.01(A)(1) states: “No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, 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; * * *.”

⁶R.C. 2911.01(A)(3) states: “(A) No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following: * * * (3) Inflict, or attempt to inflict, serious physical harm on another.”

⁷We note that there may well be factual scenarios where defendants are convicted of an additional count of the same crime against one victim. We do not hold that in every case where similar offenses are committed against one victim that the convictions automatically merge, especially when an intervening act serves to break the causal chain of events.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

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

SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

MELODY J. STEWART, J., and
MARY J. BOYLE, J., CONCUR