[Cite as *State v. Huber*, 2010-Ohio-5586.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93923

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOSEPH HUBER

DEFENDANT-APPELLANT

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

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-521813

BEFORE: Stewart, J., Rocco, P.J., and Dyke, J.

RELEASED AND JOURNALIZED: November 18, 2010

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MELODY J. STEWART, J.:

{¶ 1} A jury found defendant-appellant, Joseph Huber, guilty of two counts of aggravated robbery and single counts of kidnapping and attempted felonious assault. The crimes resulted from a scheme in which Huber and two others lured a delivery driver to their location, abducted him at knife point, forced him to make an ATM withdrawal from his personal bank

account, and stole the proceeds. Huber's 15 assignments of error can be grouped into three areas: pretrial errors, trial errors, and sentencing errors.

I

{¶ 2} The first four assignments of error complain that (a) the court erred by refusing to allow defense counsel to withdraw, (b) the court erred by examining a prospective juror out of Huber's presence, (c) the court erred by refusing to dismiss the indictment on speedy trial grounds, and (d) the state failed to give complete discovery.

A

{¶ 3} Two weeks before trial, Huber filed a pro se motion to disqualify counsel, complaining that she had been unresponsive to his requests for information about his case. The court did not rule on that motion. On the day before trial, counsel filed a supplemental motion to withdraw as counsel, claiming a conflict of interest: one of Huber's codefendants, Austin Teter, who also happened to be Huber's son, was apparently serving a term of juvenile probation and was represented, like Huber, by the Cuyahoga County Public Defender. Defense counsel told the court that she was basing Huber's defense on his state of mind at the time the crimes were committed and that his state of mind had been influenced by his "knowledge of Mr. Teter from the past." Counsel told the court that she was aware of Teter's juvenile history

but was ethically prohibited from using that information in Huber's defense because she and Teter's attorney were from the same office.

{¶ 4} To establish a Sixth Amendment violation of the right to counsel, Huber had to show an *actual* conflict of interest that adversely affected his attorney's performance. *State v. Getsy* (1998), 84 Ohio St.3d 180, 187, 1998-Ohio-533, 702 N.E.2d 866.

{¶ 5} The court found no conflict of interest existed under Prof.Cond.R. 1.9(c)(2), which prohibits a lawyer who has formerly represented a client from revealing information relating to that representation. We agree. Any information that Huber's attorney learned from another member of the public defender's office would not be subject to disclosure under Prof.Cond.R. 1.9(c)(2). With the state telling the court that it would not call Teter as a witness, all defense counsel could point to was a possible conflict of interest that could only become a full-fledged conflict of interest if defense counsel called Teter as a witness and violated Prof.Cond.R. 1.9(c)(2) by questioning him on his juvenile record. Even if another attorney from outside the pubic defender's office had been appointed to represent Huber, the acts forming the basis of Teter's juvenile court record would be inadmissible to prove Huber's state of mind at the time he committed the charged offenses. See *State v. Cooperider*, 3rd Dist. No. 9-03-11, 2003-Ohio-5133, at ¶16.

{¶ 6} We likewise find no abuse of discretion in the manner in which the court denied Huber's pro se motion to remove counsel. The Sixth Amendment does not guarantee "rapport" or a "meaningful relationship" between client and counsel. *State v. Hennes*, 79 Ohio St.3d 53, 65, 1997-Ohio-405, 679 N.E.2d 686, citing *Morris v. Slappy* (1983), 461 U.S. 1, 13-14, 103 S.Ct. 1610, 75 L.Ed.2d 610. Huber made unsupported claims that counsel had refused to communicate with him and refused to respond to his pro se motion to dismiss on speedy trial grounds. Nothing in the record suggests that there was such a breakdown of communication between attorney and client so as to constitute the denial of counsel.

B

{¶ 7} Huber next complains that the court denied him his right to be present at trial when it examined a prospective juror out of his presence at the sidebar. We reject this argument because defense counsel, in response to a specific question from the court posed at the sidebar, specifically stated that Huber waived his right to participate. *State v. Williams* (1969), 19 Ohio App.2d 234, 250 N.E.2d 907. It is of no consequence that counsel made the waiver after the sidebar concluded. After stating that she waived Huber's presence, the court offered to give her "a second to discuss this with your client." Counsel replied that "we're satisfied" and again noted Huber's decision to waive any error relating to the juror remaining on the panel.

C

{¶ 8} Huber also complains that the court erred by failing to rule on his pro se motion to dismiss on speedy trial grounds.

{¶ 9} When a court fails to rule on a motion, we presume that the motion was denied. *Univ. Mednet v. Blue Cross & Blue Shield of Ohio* (1997), 126 Ohio App.3d 219, 236, 710 N.E.2d 279. Moreover, there is no requirement that a court hold a hearing on a motion to dismiss for want of a speedy trial when the court is able to determine the issue from the record. See *State v. Freeman*, 8th Dist. No. 85137, 2005-Ohio-3480, at ¶62, reversed on other grounds, *In re Ohio Criminal Sentencing Statutes Cases*, 109 Ohio St.3d 313, 2006-Ohio-2109, 847 N.E.2d 1174. Apart from recitations of law relating to speedy trial issues, Huber makes no substantive argument on the merits of the motion to dismiss. In fact, he even fails to set forth relevant dates. We therefore disregard that aspect of this assignment of error. See App.R. 16(A)(7). In any event, we have independently calculated the speedy trial time and find, with tolling events charged to Huber, that his speedy trial rights were not violated.

D

{¶ 10} Huber complains that he was denied due process of law because the state failed to provide complete discovery of statements made by codefendants Teter and Derrick Jones.

{¶ 11} Teter did not make any statements, nor did the state intend to call Teter as a witness, so the state had nothing to give the defense.

{¶ 12} The state provided Jones's oral statement in compliance with Crim.R. 16(B)(1)(a)(ii), along with the handwritten notes of the detective who took the statement. Huber argued that this was insufficient because Jones and Teter must have made statements to the state when negotiating the terms of their plea bargains and those statements were not provided. The state acknowledged interviewing Jones about his testimony (noting that the defense had likewise interviewed Jones) and the assistant prosecuting attorney told the court: "When I spoke with Derrick Jones I put it on the record during the plea. He told me that all three were involved in this case, including defendant Joe Huber, and that all three received profits from the case." The state had no other statements by Jones, so Huber's argument relies purely on speculation of a kind that will not show a violation of Crim.R. 16(B)(1)(a)(ii). See *State v. West*, 8th Dist. No. 83779, 2004-Ohio-5212, at ¶27.

II

{¶ 13} Huber next complains about several trial errors: (a) the court restricted his cross-examination of a witness; (b) the court erred by amending a count to a lesser included offense after the state conceded, in a motion for judgment of acquittal, that there was no evidence to support the higher

degree offense; (c) the court erred in its jury instructions; and (d) the court erred by denying a motion for judgment of acquittal.

A

{¶ 14} Huber complains that the court improperly restricted his cross-examination of a police detective in two ways. The first instance arose when Huber asked the detective whether he had spoken to a police sergeant about a conversation the sergeant had with Huber and whether the sergeant had spoken to Huber about a burglary that occurred in Huber's neighborhood. The court properly refused to allow the detective to answer because the questions were designed to produce inadmissible hearsay. See Evid.R. 802.

{¶ 15} The second instance involved a questioning of Huber by the detective, again about an alleged burglary that occurred in Huber's neighborhood.

{¶ 16} The court did not err by sustaining the state's objections to these questions because the uncharged burglary referred to by Huber had no apparent relevancy to the offenses charged in this case, nor has Huber in this appeal offered any basis in support of relevancy. Evid.R. 611(B) permits cross-examination of all "relevant matters and matters affecting credibility," but the court has discretion to determine what is relevant under the circumstances. *State v. Trimble,* 122 Ohio St.3d 297, 2009-Ohio 2961, 911 N.E.2d 242, at ¶266. While it is true that the detective asked Huber "about

any other robberies in that neighborhood," there was no indication that Huber answered the question. The detective specifically said that he and Huber did not discuss events that occurred on Huber's street because the robbery charged in this case was his only concern. He described his questioning of Huber as "one-sided" and that Huber denied any involvement in the crime, apart from saying, "[w]hat do you have? You don't have shit on me." There being no obvious basis for relevancy, the court did not abuse its discretion by limiting cross-examination.

B

{¶ 17} At the close of evidence, Huber requested a Crim.R. 29(A) judgment of acquittal on the felonious assault count, arguing that there had been no proof of serious physical harm as charged under R.C. 2903.11(A)(1). The state conceded that "[a]s far as the felonious assault, there is no testimony of actual serious physical harm." It asked the court to "allow the lower offense of attempted felonious assault in Count 4." The court denied Huber's motion for judgment of acquittal and granted the state's motion to amend the indictment to charge attempted felonious assault.

{¶ 18} Crim.R. 7(D) permits the court to amend a charge to reflect an attempt to commit that same charge. See *State v. Russell* (Oct. 20, 2000), 2d Dist. No. 18155 (holding that the "trial court was allowed to permit amendment of the indictment to charge [the defendant] with an attempt to

commit the specific offense with which he was originally indicted without violating Crim.R. 7(D)."); *State v. Burnside*, 7th Dist. No. 08 MA 172, 2009-Ohio-2653, at ¶8. It makes no difference that the court allowed the state to amend the indictment after Huber made his motion for judgment of acquittal because the court had no obligation to rule on the motion for judgment of acquittal before ruling on the state's motion to amend the indictment. See *State v. Bess* (Nov. 4, 1981), 1st Dist. No. C-810042.

C

1

{¶ 19} Huber asked the court to instruct the jury on robbery as a lesser included offense of aggravated robbery, but the court denied that request. There was no abuse of discretion in doing so. The court need only instruct on a lesser included offense if, under any reasonable view of the evidence, it is possible for the trier of fact to find the defendant not guilty of the greater offense and guilty of the lesser offense. *State v. Wilkins* (1980), 64 Ohio St.2d 382, 389, 415 N.E.2d 303. The evidence showed that Huber and his codefendants abducted the victim at knife point, with Jones holding the knife against the victim's throat. Even though the victim suffered no serious physical harm as a result, evidence that the knife had been held against the victim's throat was sufficient to prove the brandishing element of aggravated robbery as charged under R.C. 2911.01(A)(1). Under a reasonable view of

the evidence, the jury could not find Huber not guilty of aggravated robbery and guilty of robbery, since robbery under R.C. 2911.02(A) would have nonetheless been based on the presence of the knife as a deadly weapon.

2

{¶ 20} Huber also complains that the court erred by incompletely instructing the jury on aiding and abetting because it omitted telling the jury that an aider and abettor had to possess the same culpable mental state as that required for the crime. Huber did not object to the court's jury instruction, so he waived all but plain error. See Crim.R. 30(A); *State v. Underwood* (1983), 3 Ohio St.3d 12, 444 N.E.2d 1332, syllabus. Plain error did not occur because the court defined the mental elements for each charged offense and further instructed the jury that a charge of aiding and abetting required Huber to knowingly aid or assist in the commission of the crime. See *State v. Wagner*, 8th Dist. No. 93432, 2010-Ohio-2221, at ¶44; *State v. Keeton*, 5th Dist. No. 03 CA 43, 2004-Ohio-3676.

3

{¶ 21} We likewise find no plain error in the court's failure to instruct the jury on the consent element of theft. Huber has not shown that the court's failure to separately charge the jury on every element of theft resulted in a manifest injustice or that he was prejudiced by the omission. See *State v. Price*, 8th Dist. No. 90308, 2008-Ohio-3454, reopening disallowed,

2009-Ohio-3503, at ¶10. Indeed, evidence that the theft occurred at knife point could only cause the jury to conclude that the victim's property had been taken without his consent.

4

{¶ 22} Finally, we find no plain error resulting from the court's failure to instruct the jury that it could not consider codefendant Jones's guilty plea as evidence against Huber because the court instructed the jury that the testimony of an accomplice "should be viewed with grave suspicion and weighed with great caution." See *State v. Cochran*, 11th Dist. No. 2006-G-2697, 2007-Ohio-345, at ¶38-39.

D

{¶ 23} Huber next argues that the court erred by denying his motion for judgment of acquittal on the attempted felonious assault and aggravated robbery charges. He maintains that he was merely present on the scene when the offenses occurred and did not actively assist or participate in their commission.

{¶ 24} We determine whether the evidence is sufficient to sustain a verdict by examining the evidence in the light most favorable to the prosecution and determining whether any rational trier of fact could have

found that the prosecution proved the essential elements of the crime beyond a reasonable doubt. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, 767 N.E.2d 216, at ¶78, quoting *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560.

{¶ 25} Viewed in the state's favor, the evidence showed that Huber, Teter, and Jones were neighbors. They were "chilling" when Teter said, "let's hit a lick." They went walking and Teter telephoned a pizza parlor and ordered a pizza for delivery. When the victim, a pizza delivery driver, arrived, he exited his car and went to take the pizza out of an insulated bag. Teter came up behind the victim and put him in a neck-lock. He then held a knife against the victim's neck and ordered him to drop to his knees. He told the victim to "give me all your money." At that point, both Jones and Huber approached the victim. They took what little money the victim had and ordered him into the back seat of his car, telling him "you're going to go for the ride of your life." The victim said he sat between Huber and Teter, and that Teter still held him in a neck-lock with the knife pressed against this throat. As they drove, Jones asked "where is your money at?" The victim told them his money was in the bank. At this point, Teter told the victim to undress. As the victim did so, Teter handed the clothing to Huber, who searched them for anything of value. Huber then climbed into the front seat of the car. Huber refused to allow the victim to use a walk-up automated

teller machine, saying that "we can't let him out of the vehicle right now, he'll run away." They pulled up to a drive-through, automated teller machine and told the victim to put his clothes on. He then withdrew $260 in increments of $200, $40, and $20. The bank would not allow any further withdrawals, despite the defendants suggesting that the victim try withdrawing other amounts of cash. The defendants then split the money and drove off. Huber told the victim to undress again. They pushed him out of the car, naked, near a sports bar.

{¶ 26} We reject Huber's assertion that there was insufficient evidence to convict him of attempted felonious assault because he did not hold the knife to the victim's throat. The jury found Huber guilty of attempted felonious assault as an aider and abettor on substantial proof that he supported, assisted, encouraged, cooperated with, advised, or incited Teter in the commission of the crime, and that he shared the criminal intent of the principal. R.C. 2923.03(A)(2); *In re T.K.*, 109 Ohio St.3d 512, 2006-Ohio-3056, 849 N.E.2d 286, at ¶13. We can find no fault with that conclusion given the compelling evidence of Huber's role in causing the commission of the offense. *State v. Jordan*, 168 Ohio App.3d 202, 2006-Ohio-538, 859 N.E.2d 563. The victim testified that Huber was "the decision-maker" out of the three defendants. Huber may not have held the

knife, but his failure to stop Teter (his son) from using the knife could only suggest his cooperation in the scheme to rob the victim.

{¶ 27} For the same reasons, we reject Huber's argument that he did nothing to attempt to inflict physical harm for purposes of aggravated robbery as charged under R.C. 2911.01(A)(3). In analogous circumstances, holding a knife to another's throat is sufficient to prove the cause or attempt to cause serious physical harm element of felonious assault under R.C. 2903.11(A)(2). See *State v. Ryan*, 10th Dist. No. 08AP-481, 2009-Ohio-3235, at ¶33 (citing cases). Putting the knife against the victim's neck and ordering him to drop to his knees constituted a sufficient threat that Teter would use the knife. Huber helped rob the victim as Teter held the victim at knife point, so the evidence showed that he assisted Teter in the crime.

{¶ 28} Finally, there was sufficient evidence to show that Huber restrained the victim's liberty to prove kidnapping under R.C. 2905.01(A)(2). Apart from his joint participation in forcing the victim into the car, Huber was the one the victim quoted as saying, "No, lets [sic] not let him out here because we can't let him go, he'll run."

III

{¶ 29} The remaining assignments of error relate to sentencing issues.

A

{¶ 30} We first address Huber's claim that the court erred by failing to inform him of the consequences of violating the terms of his postrelease control. In addition to informing the defendant of the length of postrelease control, the court must also inform the defendant that a violation of postrelease control can result in the imposition of one-half the stated prison term. *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, 909 N.E.2d 1254, at ¶2. The state concedes, and our review of the record confirms, that the court did not advise Huber that a violation of postrelease control could result in an additional prison term. We therefore sustain this assignment of error and, because Huber was sentenced after July 11, 2006, order the court to apply the procedures set forth in R.C. 2929.191 to properly impose postrelease control. See *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958, paragraph two of the syllabus.

B

{¶ 31} The court sentenced Huber to six years on each count of aggravated robbery and merged them into one, six-year sentence. The court ordered a six-year sentence on the kidnapping count and a three-year sentence on the attempted felonious assault count. Those sentences were all ordered to be served consecutively for a total prison term of 15 years.

{¶ 32} Huber first complains that the court should not have sentenced him to six-years on each of the aggravated robbery counts and merged them,

but instead should have merged the counts and only issued one sentence. The state concedes this argument and we agree. "[A]llied offenses must be merged for purposes of sentencing following the state's election of which offense should survive." *State v. Jackson*, 1st Dist. No. C-090414, 2010-Ohio-4312, at ¶20, citing *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182. In other words, it is offenses, not sentences, that must merge. The court purported to merge two sentences, so Huber must be resentenced.

{¶ 33} Huber next complains that the kidnapping and attempted felonious assault counts should have each merged into the single aggravated robbery conviction, leaving just a single sentence for aggravated robbery under R.C. 2941.25.

{¶ 34} In *State v. Winn*, 121 Ohio St.3d 413, 2009-Ohio-1059, 905 N.E.2d 154, the syllabus states: "The crime of kidnapping, defined by R.C. 2905.01(A)(2), and the crime of aggravated robbery, defined by R.C. 2911.01(A)(1), are allied offenses of similar import pursuant to R.C. 2941.25." However, even though allied offenses, they must be committed together or with the same animus such that the commission of one will necessarily result in the commission of the other. *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, at ¶14.

{¶ 35} We agree that the kidnapping and aggravated robbery convictions were committed with the same animus. The defendants restrained the victim for the sole purpose of forcing him to withdraw money from his bank account. By refusing to let the victim use a walk-up automated teller machine lest he run away, Huber contributed to the victim's further confinement, all in the name of committing the aggravated robbery. The court erred by not merging the kidnapping and aggravated robbery offenses.

{¶ 36} Felonious assault and aggravated robbery are not allied offenses. See *State v. Howell*, 8th Dist. No. 92827, 2010-Ohio-3403, at ¶32; *State v. Stone*, 8th Dist. No. 92949, 2010-Ohio-3308, at ¶23 (collecting cases). It follows that an attempt to commit felonious assault would likewise not be an allied offense with aggravated robbery.

C

{¶ 37} Huber next complains that the court erred by ordering him to serve all of his sentences consecutively, apparently arguing that the United States Supreme Court decision in *Oregon v. Ice* (2009), 555 U.S. ___, 129 S.Ct. 711, 714, 172 L.Ed.2d 517, reimposed the judicial fact-finding that had been struck down in paragraph four of the syllabus to *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. We reject this argument on authority of *State v. Bates*, 118 Ohio St.3d 174, 2008-Ohio-1983, 887 N.E.2d 328, at ¶18, in which the Ohio Supreme Court stated that: "The severance *

* * of former R.C. 2929.14(E)(4) and former R.C. 2929.41(A) in their entirety by *Foster* * * * leaves no statute to establish in the circumstances before us presumptions for concurrent and consecutive sentencing or to limit trial court discretion beyond the basic 'purposes and principles of sentencing' provision articulated and set forth in R.C. 2929.11 and 2929.12." We have no authority to rejoin that which the Ohio Supreme Court has severed. *State v. Reed*, Cuyahoga App. No. 91767, 2009-Ohio-2264.

{¶ 38} We also conclude that the court did not abuse its discretion by imposing consecutive sentences. Among the purposes and principles of sentencing stated in R.C. 2929.11 are to protect the public from future crime and to punish the offender. The court noted Huber's prior criminal history included convictions for kidnapping and felonious assault. Those convictions were an adequate basis for the court to conclude that consecutive sentences would punish Huber and protect the public from any future offenses that Huber might commit.

Judgment affirmed in part, reversed in part, and remanded for resentencing for proceedings consistent with this opinion.

It is ordered that the parties bear their own costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas 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.

_____
MELODY J. STEWART, JUDGE

KENNETH A. ROCCO, P.J., CONCURS;
ANN DYKE, J., CONCURS IN JUDGMENT ONLY