[Cite as *State v. Lewis*, 2010-Ohio-4202.]

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

State of Ohio

Appellee

v.

James A. Lewis

Appellant

Court of Appeals Nos. L-09-1224
L-09-1225

Trial Court Nos. CR0200803931
CR0200901606

DECISION AND JUDGMENT

Decided: August 13, 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Timothy F. Braun, Assistant Prosecuting Attorney, for appellee.

Neil S. McElroy, for appellant.

* * * * *

COSME, J.

{¶ 1} In a joint trial of separate indictments, defendant-appellant, James Lewis, was found guilty by a jury of three counts of burglary in violation of R.C. 2911.12(A)(3) and (C) and one count of attempted burglary in violation of R.C. 2923.02 and 2911.12(A)(1) and (C), all felonies of the third degree. The Lucas County Court of Common Pleas sentenced appellant to four years of incarceration on each count to be

served consecutive to each other, for a total of 16 years. Appellant argues in this appeal that he received ineffective assistance of counsel and that the trial court erred in imposing consecutive sentences without making the required factual findings. For the reasons that follow, we affirm the judgment of the trial court.

I. BACKGROUND

{¶ 2} On December 16, 2008, appellant was indicted in case No. CR0200803931 on two counts of burglary and one count of attempted burglary. This indictment covered the following three incidents, all of which occurred in Toledo on December 8, 2008: (1) an attempted burglary at 4735 Vogel Drive, the home of Abdel-Hamid Hasabelnaby; (2) a burglary at 4751 Vogel Drive, the home of Cynthia Corfman; and (3) a burglary at 3230 Gracewood Road, the home of David Siminski, which is located around the corner from the Vogel homes.

{¶ 3} On March 17, 2009, while out on bond and awaiting trial in case No. CR0200803931, appellant was arrested for another burglary that occurred that same day at 2704 Ivy Place, the home of Daniel Estep. Appellant was indicted in case No. CR0200901606 on one count of burglary on March 25, 2009.

{¶ 4} On April 20, 2009, both cases proceeded to trial by jury. At the outset of trial, appellant and his counsel indicated that they had no objection to having both indictments tried together. In regard to the first indictment, the following evidence was adduced. On the morning of December 8, 2008, Mr. Hasabelnaby's younger daughter, Hiba Hasabelnaby, saw a man in her backyard and he appeared to be looking for

something. She went into the kitchen in order to see where the man was going and she saw his hand on the back door, which is connected to her kitchen. Approximately half an hour later, Hiba's parents came home and she told them about the incident. At that time, the Hasabelnabys reported the incident to the police as a non-emergency.

{¶ 5} A short time later, the man, who Mr. Hasabelnaby identified as appellant, returned and entered their backyard shed. Mr. Hasabelnaby testified that appellant was carrying a white sack with items inside and that he placed the sack on the ground when he entered the shed. Mrs. Hasabelnaby called 911and Toledo Police Officers Brian Hollingsworth and Edward Holland arrived within five minutes. As they were investigating the incident, Officer Holland observed appellant exiting the rear of 4751 Vogel, the home of Ms. Corfman. Appellant was wearing a tool belt. Appellant also had a camera around his neck, which was later identified as belonging to Ms. Corfman. Appellant fled while Officer Holland was attempting to question him and a prolonged foot chase ensued. Eventually appellant was physically restrained and arrested. Later that evening, police retrieved the sack that appellant had left in Mr. Hasabelnaby's yard and traced the items to the burglary of Mr. Siminski's home at 3230 Gracewood.

{¶ 6} In regard to the second indictment, Detective Felix Parra testified as to the circumstances that led to appellant's arrest on that charge. Detective Parra stated that he was assisting another detective in attempting to locate appellant on that day and spotted appellant at the corner of Sylvania Avenue and Douglas Road. Detective Parra then testified:

{¶ 7} "There is a parking lot right at the corner of where he was at, and on the edge of the parking lot is a cement ledge and he was sitting on that ledge. Right next to him was a white duffel bag.

{¶ 8} "I passed him, went down to the Northwest [District Police] Station, turned around, and watched him from down the street. At this time he was standing right next to a bus stop sign which is about 20 or 25 feet from where he was sitting and the white bag was next to him right there."

{¶ 9} Parra then called for back-up and approached appellant after several officers responded to his call. He further testified:

{¶ 10} "Q. What did you say to him [appellant]?

{¶ 11} "A. Basically, I just said that we had been looking for him. Told him why we were looking for him. Asked him what he was doing there. He told me that he was there to meet somebody, and the person that he was meeting didn't show up so he was going to get the bus and go back in the area which he came from.

{¶ 12} "At this time Detective Jones started to do a pat down search.

{¶ 13} "Q. Now, was he being patted down because he was under arrest, sir?

{¶ 14} "A. At this time, no. It was for our own safety looking for weapons making sure he didn't have any kind of weapons.

{¶ 15} "Q. Okay

{¶ 16} "A. So he [Detective Jones] patted him [appellant] down. He pulled a glove out of his back pocket, threw it down on the ground and kept patting him down.

He pulled a phone charger out of another pocket, put it back in the pocket. He pulled a cell phone out of another pocket, put it back in the pocket and continued to pat him down."

{¶ 17} Parra then asked appellant about the duffel bag. Appellant denied that it was his and claimed that it belonged to a black male who had asked him to watch the bag while that man went across the street. Detectives searched for the man, but were unable to locate any such person. The detectives opened the bag and found it to contain a small flat screen television, a Play Station, loose change, and a receipt for Detroit Tigers baseball tickets. Using the address on the ticket receipt, the detectives were directed to Mr. Estep's residence on Ivy Place. When they arrived at Mr. Estep's residence, the detectives discovered that the house had been burglarized.

{¶ 18} Meanwhile, appellant had been detained at the corner of Sylvania and Douglas. When the detectives determined that a burglary had been committed at 2704 Ivy Place, appellant was taken into custody and transported to the Safety Building in downtown Toledo, where he was eventually arrested. Appellant was not handcuffed during transport and when he arrived at the Safety Building, the officers could not find the cell phone or the charger that were previously observed during the pat down search. Subsequently, the cell phone was found in a briefcase belonging to one of the officers and the charger was found the next day on the side panel in one of the rear doors of the vehicle in which appellant had been transported. Mr. Estep identified the duffel bag, several items in the duffel bag, and the cell phone and charger as having been stolen from

his home. During questioning, appellant offered of his own volition to help the police in setting up two people that he knew dealt in stolen property.

{¶ 19} On April 24, 2009, the jury returned guilty verdicts on all counts. On April 29, 2009, the trial court filed its entry of conviction and ordered the preparation of a presentence investigation report. On May 8, 2009, appellant filed a motion for new trial on grounds that the jury may have been influenced by prejudicial news coverage that aired during the trial. The court conducted individual voir dire of each juror and determined that no juror had been exposed to the media coverage.

{¶ 20} On July 28, 2009, the trial court sentenced appellant to four years on each of the four counts and ran all of the sentences consecutive to each other for a cumulative prison term of 16 years. On July 30, 2009, the trial court journalized its sentencing order. It is from that judgment that appellant appeals.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

{¶ 21} In his first assignment of error, appellant asserts:

{¶ 22} "Mr. Lewis was denied the effective assistance of counsel guaranteed by the 6th Amendment to the United States Constitution and Article I § 10 of the Ohio Constitution.

{¶ 23} "A. Mr. Lewis was charged in 2 indictments; the indictment in CR 08 3931 included three offenses, and the indictment in CR 09 1606 included only one offense. His trial counsel did not file *a Motion for Relief from Prejudicial Joinder*. Failure to do so constituted deficient performance and resulted in prejudice to the defendant.

{¶ 24} "B. Trial counsel failed to file a *Motion to Suppress the Fruits of an Illegal Search* in CR 09 1606. That failure constituted deficient performance and resulted in prejudice to the defendant where the motion was meritorious. And the prejudice to Mr. Lewis was only exacerbated by the joinder of offenses for trial." (Emphasis sic.)

{¶ 25} Since appellant's first assignment of error is bifurcated into what he refers to as "separate, but related, claims" of ineffective assistance of counsel, each presenting "different issues for review," we will consider each claim separately.

A. Relief from Prejudicial Joinder

{¶ 26} Appellant argues that joinder in this case was prejudicial because the "admission of strong evidence of the 2008 burglaries led to an easy conviction on the relatively weak 2009 burglary." According to appellant, "the evidence of the 2008 burglaries would not have been admissible in a fair trial on the 2009 burglary" and "a review of the full complement of testimony reveals that the evidence in this matter was neither simple nor distinct."

{¶ 27} We disagree.

{¶ 28} "To obtain a reversal of a conviction on the basis of ineffective assistance of counsel, the defendant must prove (1) that counsel's performance fell below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome of the proceeding." *State v. Madrigal* (2000), 87 Ohio St.3d 378, 388-389. See, also, *Strickland v. Washington* (1984), 466 U.S.668, 687.

{¶ 29} Crim.R. 13 authorizes the joinder of two or more indictments for a single trial. Crim.R. 14 provides, however, that separate trials shall be ordered if it appears that a defendant is prejudiced by joinder for trial of indictments. The burden of demonstrating prejudice under Crim.R. 14 is on the defendant. *State v. Torres* (1981), 66 Ohio St.2d 340, syllabus.

{¶ 30} A claim of prejudice depends on whether the salient advantages of joinder and avoidance of multiple trials are outweighed by the right of a defendant to be tried fairly on each charge. Id. at 343. Accordingly, the state can use two methods to defeat a claim of prejudice under Crim.R. 14. Under the first method, the so-called "other acts" test, the state must show that pursuant to Evid.R. 404(B), evidence of the other charged offenses would be admissible even if the counts or indictments had been severed for trial. Under the second method, often referred to as the "joinder" test, the state is merely required to show that evidence of each crime joined at trial is simple and direct. When the state shows that the evidence of each crime is simple and direct, it is not required to meet the stricter "other acts" admissibility test. See *State v. Lott* (1990), 51 Ohio St.3d 160, 163-164; *State v. Hicks*, 6th Dist. Nos. L-04-1021, L-04-1022, 2005-Ohio-6848, ¶ 30, 41.

{¶ 31} In *State v. Mills* (1992), 62 Ohio St.3d 357, 362, the Ohio Supreme Court explained:

{¶ 32} "The joinder test requires that the evidence of the joined offenses be simple and direct, so that a jury is capable of segregating the proof required for each offense.

The rule seeks to prevent juries from combining the evidence to convict of both crimes, instead of carefully considering the proof offered for each separate offense."

{¶ 33} Ohio appellate courts routinely find no prejudicial joinder where the evidence is presented in an orderly fashion as to the separate offenses or victims without significant overlap or conflation of proof. See *State v. Johnson* (2000), 88 Ohio St.3d 95, 110 (finding joinder test met where testimony was presented separately as to offenses and victims); *State v. Moshos*, 12th Dist. No. CA2009-06-008, 2010-Ohio-735, ¶ 82 (finding no prejudice where the state's witnesses were "all 'victim-specific' in their testimony"); *State v. Schandel*, 7th Dist. No. 07-CA-848, 2008-Ohio-6359, ¶ 24, 25 (finding no prejudice where witnesses testified separately as to joined drug and theft offenses); *State v. Stoutamire*, 11th Dist. No. 2007-T-0089, 2008-Ohio-2916, ¶ 55 (no prejudice where "the state presented witnesses and evidence chronologically according to the dates of the incidents"); *State v. Fitts*, 5th Dist. No. 2005CA00092, 2006-Ohio-678, ¶ 94 (finding no prejudice because "each crime involved separate witnesses and separate evidence"); *State v. Castile*, 6th Dist. No. E-02-012, 2005-Ohio-41, ¶ 64 (finding no prejudice from joint trial of drug-trafficking charges where evidence was "clearly divided by the dates of the controlled buys and is relatively simple in nature"); *State v. Norman* (1999), 137 Ohio App.3d 184, 197 (no prejudice where "evidence was presented in such a manner that it was separated and not improperly intertwined").

{¶ 34} We find the evidence in this case to be straightforward and easily separable. On November 8, 2008, appellant attempted to break into one house on Vogel, he was

caught by police coming out of another house on Vogel, and he was carrying items that were taken from a third house on Gracewood, all around the corner from each other. On March 17, 2009, appellant was spotted on a street corner with a sack of items that were traced to a burglary on Ivy Place. A review of the present record reveals no significant overlap of evidence or commingling of offenses. Appellee presented witnesses and evidence primarily in chronological order according to the dates of the incidents and offenses charged in the respective indictments. Eight of the first nine witnesses testified as to the burglaries that occurred on December 8, 2008, as charged in case No. CR0200803931. Only Officer Melvin Woods was called during this time to testify as to his involvement in the incident of March 17, 2009, but appellee carefully informed the jury that his testimony concerned only that incident and was being elicited "out of order." The remaining block of witnesses testified in regard to the burglary that occurred on March 17, 2009, as charged in case No. CR0200901606. While two of the officers called to testify were involved in both cases, their testimony was carefully divided into separate segments as to each indictment.

{¶ 35} In fact, appellant is able to muster only a single instance in which a witness sought clarification as to the particular offense about which he was being asked to testify. However, the confusion on the part of this witness, Detective Parra, did not result from the nature or order of presentation of the state's evidence. Rather, it was brought about by the nature of the questioning by appellant's trial counsel during cross-examination. Indeed, just prior to the witness's request for clarification, defense counsel was compelled

to apologize for "going back and forth" between the incidents of December 8, 2008 and March 17, 2009.

{¶ 36} Since the evidence in this case is simple and direct, a motion for relief from prejudicial joinder of the indictments for trial would have been properly denied. Thus, the failure of appellant's trial counsel to object to a joint trial of the two indictments does not constitute ineffective assistance of counsel.

{¶ 37} Accordingly, Part A of appellant's first assignment of error is not well-taken.

B. Motion to Suppress

{¶ 38} Appellant argues that his trial counsel's performance was deficient because he failed to file a suppression motion in regard to the cell phone and charger that were observed during the March 17, 2009 pat down search for weapons in case No. CR0200901606. According to appellant, those items would probably have been suppressed because "[n]one of the exceptions to the warrant requirement permitted police to search Mr. Lewis." Specifically, appellant contends that "there is no suggestion that the police had a reasonable, articulable suspicion that Mr. Lewis was armed" in order to justify a weapons search pursuant to *Terry v. Ohio* (1968), 392 U.S. 1. Finally, appellant maintains, "The 2009 case was weak but for the items discovered in the illegal search of Mr. Lewis. As such, there was a reasonable probability that this evidence contributed to the verdict."

{¶ 39} We disagree.

{¶ 40} To establish ineffective assistance of counsel for failure to file a suppression motion based on a violation of the Fourth Amendment, a defendant must prove that the motion would have been granted and that there is a reasonable probability that the verdict would have been different without the excluded evidence. See *Kimmelman v. Morrison* (1986), 477 U.S. 365, 375; *State v. Madrigal*, supra, 87 Ohio St.3d at 389; *State v. Rucker*, 9th Dist. No. 25081, 2010-Ohio-3005, ¶ 46.

{¶ 41} Appellant fails to meet this test, for the following three reasons:

{¶ 42} (1) *Appellant is seeking the wrong relief in the wrong court.*

{¶ 43} Appellant is asking this court to determine whether the police officers had a reasonable suspicion that he was armed when they patted him down for weapons on March 17, 2009, without the benefit of testimony on this issue. As explained by the Ninth District Court of Appeals:

{¶ 44} "In this case, 'this Court has no way of knowing what testimony might [have been] elicited' on these issues at a suppression hearing. *State v. Mitchell*, 9th Dist. No. 24730, 2009-Ohio-6950, at ¶ 20. The record developed at trial is generally inadequate to determine the validity of a suppression argument on appeal. *State v. Siders*, 4th Dist. No. 07CA10, 2008-Ohio-2712, at ¶ 11 (quoting *State v. Culbertson*, 5th Dist. No. 2000CA00129, 2000 WL 1701230 at *4 (Nov. 13, 2000)). '[If] the record is not clear or lacks sufficient evidence to determine whether [there is a reasonable probability that] a suppression motion would have been successful, a claim for ineffective assistance

of counsel cannot be established.' *State v. Parkinson*, 5th Dist. No. 1995CA00208, 1996 WL 363435 at *3 (May 20, 1996)).

{¶ 45} "In this case, the record lacks sufficient evidence to permit this Court to determine the validity of [appellant's] suppression argument. Therefore, this 'claim is more suitable to postconviction relief, where * * * additional evidence could be presented.' *Mitchell*, 2009-Ohio-6950, at ¶ 20 (quoting *State v. Usury*, 1st Dist. No. C-050740, 2006-Ohio-6287, at ¶ 43)." *State v. Rucker*, 2010-Ohio-3005, ¶ 50-51.

{¶ 46} As further explained by the Eighth Appellate District, "It is impossible for this court to determine on a direct appeal from a conviction whether an attorney was ineffective in his representation of a criminal defendant, where the allegation of ineffectiveness is based on facts dehors the record. There is no procedure whereby this court can obtain [such] evidence * * *." *State v. Gibson* (1980), 69 Ohio App.2d 91, 95.

{¶ 47} (2) *The cell phone and charger would have been inevitably discovered apart from any unlawful search.*

{¶ 48} Although we cannot determine from the present record whether the weapons search of appellant was lawful under the Fourth Amendment at the time it was conducted, we can say that the evidence of the cell phone and charger would be properly admitted even if that search was unlawful. Under the ultimate or inevitable discovery exception to the Exclusionary Rule, "illegally obtained evidence is properly admitted in a trial court proceeding once it is established that the evidence would have been ultimately or inevitably discovered during the course of a lawful investigation." *State v. Perkins*

(1985), 18 Ohio St.3d 193, syllabus, citing *Nix v. Williams* (1984), 467 U.S. 431. For the exception to apply, the state must show that there is a high degree of probability that police would have discovered the derivative evidence apart from the unlawful conduct. Id., 18 Ohio St.3d at 196. See, also, *State v. Sevrence* (Feb. 28, 1997), 6th Dist. No. F-96-001. Ohio appellate courts will "find evidence saved from suppression by operation of the inevitable discovery rule even where it had apparently not been raised at the trial level." *State v. Flippin* (Dec. 16, 1994), 2d Dist. No. 93-CA-65.

{¶ 49} We find it eminently manifest from the record that there is a very high degree of probability the police would have inevitably discovered the cell phone and charger apart from their purportedly unlawful pat down search of appellant. The cell phone and charger is not what led police to investigate the premises at 2704 Ivy Place and take appellant into custody on suspicion of his involvement in a burglary at that residence. It was the evidence in the duffel bag, particularly the receipt for the Detroit Tigers baseball tickets. Once the officers traced the items in the duffel bag to the burglary on Ivy, they could have lawfully conducted a weapons search of appellant and discovered the disputed items at that point in their investigation.[1] See *State v. Brown*, 8th Dist. No. 80725, 2002-Ohio-5468, ¶ 14 (reasonable suspicion of an offense of burglary will usually justify a weapons search); *State v. Warren* (1998), 129 Ohio App.3d 598, 605

[1]Appellant challenges only the lawfulness of the search for weapons, not the initial stop for questioning or the subsequent detention.

(nature of some suspected offenses such as burglary may give rise to reasonable suspicion that individual is armed).

{¶ 50} At a minimum, the police would certainly have discovered the items after they took appellant into custody and transported him to the Safety Building, either as part of their search incident to arrest or as part of the inventory and booking process. See *State v. Woodard*, 11th Dist. No. 2009-A-0047, 2010-Ohio-2949, ¶ 22; *State v. Winters*, 11th Dist. No. 2009-G-2919, 2010-Ohio-2678, ¶ 54; *State v. Ewing*, 10th Dist. No. 09AP-776, 2010-Ohio-1385, ¶ 36; *State v. Miller*, 2d Dist. No. 20513, 2005-Ohio-4203, ¶ 2; *State v. Sincell* (Apr. 12, 2002), 2d Dist. No. 19073. The fact that appellant attempted to conceal the items en route to the station does not vitiate the inevitability of their discovery. *State v. Ford* (1989), 64 Ohio App.3d 105, 112. Besides, it clearly appears from the record that the hidden items would eventually have been discovered even if they were never observed before transport, since the cell phone was found in a briefcase belonging to one of the officers and the charger was found in the squad car pursuant to a routine pre-shift inspection of the vehicle.

{¶ 51} (3) *Appellant has not shown the reasonable probability of a different result in the absence of the disputed evidence.*

{¶ 52} Based on the totality of the evidence presented in this case, we cannot conclude that the verdict on the March 17, 2009 burglary charge would probably have been different if the evidence of the cell phone and charger was excluded. Appellant was observed on a street corner in close proximity to a burglarized home about to board a bus

in possession of a duffel bag containing stolen items from the burglarized residence. Detective Parra saw appellant sitting next to the duffel bag at the parking lot near the corner of Sylvania and Douglas and again standing next to the duffel bag 25 feet away at the bus stop. Appellant denied that the bag was his, but his story about how he came to posses it did not check out. There is nothing in the record to suggest that the jury would have found appellant's story about the duffel bag to be credible in the absence of the cell phone and charger, which is the gravamen of appellant's claim. Considering this evidence, we cannot conclude that the jury would probably have reached a different verdict if a motion to suppress the cell phone and charger had been successfully pursued.

{¶ 53} Consequently, appellant has failed to demonstrate the ineffectiveness of his trial counsel. Accordingly, Part B of appellant's first assignment of error is not well-taken.

III. JUDICIAL FACT-FINDING AS A PREREQUISITE TO IMPOSING CONSECUTIVE SENTENCES

{¶ 54} In his second assignment of error, appellant asserts:

{¶ 55} "The trial court erred when it ordered sentences to be served consecutively without making the findings required by *State v. Comer* which are required again in light of the recent United States Supreme Court ruling in *Oregon v. Ice*."

{¶ 56} In *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165, paragraph one of the syllabus, the Supreme Court of Ohio held, "Pursuant to R.C. 2929.14(E) (4) and 2929.19(B)(2)(c), when imposing consecutive sentences, a trial court is required to make

its statutorily enumerated findings and give reasons supporting those findings at the sentencing hearing." In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, paragraph seven of the syllabus, the Ohio Supreme Court struck down and severed parts of Ohio's sentencing statute, holding in particular that "[t]rial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." In *Oregon v. Ice* (2009), ___ U.S. ___, 129 S.Ct. 711, 172 L.Ed.2d 517, the United States Supreme Court upheld an Oregon sentencing statute that required judicial fact-finding as a predicate to the imposition of consecutive sentences for multiple offenses.

{¶ 57} Based on the United States Supreme Court's decision in *Ice*, appellant urges this court to disregard the Ohio Supreme Court's decision in *Foster* and revive its decision in *Comer*. However, this court has repeatedly declined to take such action, finding that "such a re-examination can only be taken by the Supreme Court of Ohio. As it stands now, we are bound to follow the law and decisions of the Supreme Court of Ohio, unless or until they are reversed or overruled." See *State v. Allen*, 6th Dist. No. S-09-033, 2010-Ohio-2381, ¶ 13; *State v. Brown*, 6th Dist. No. WD-09-058, 2010-Ohio-1698, ¶ 53-54; *State v. Winters*, 6th Dist. Nos. L-08-1195, L-08-1263, L-08-1264, 2009-Ohio-5992, ¶ 7; *State v. Miller*, 6th Dist. No. L-08-1314, 2009-Ohio-3908, ¶ 18.

{¶ 58} Accordingly, appellant's second assignment of error is not well-taken.

IV. CONCLUSION

The judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the 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

Thomas J. Osowik, P.J. _____
JUDGE

Keila D. Cosme, J. _____
CONCUR. JUDGE