[Cite as *State v. Beatty*, 2008-Ohio-5063.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 08AP-52
v.	:	(C.P.C. No. 06CR-12-9272)
Aaron L. Beatty,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

O P I N I O N

Rendered on September 30, 2008

Ron O'Brien, Prosecuting Attorney, and *Richard A. Termuhlen,* for appellee.

Eric J. Allen, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Defendant-appellant, Aaron L. Beatty, appeals from a judgment of the Franklin County Court of Common Pleas finding him guilty on 11 counts: one count of aggravated burglary, one count of aggravated robbery, and one count of kidnapping, each with a gun specification, two counts each of felonious assault and failure to comply with an order or signal of a police officer, and one count each of tampering with evidence, carrying a concealed weapon, improper handling of a firearm with a gun specification,

and having a weapon under disability. Because sufficient evidence supports defendant's convictions, his trial counsel was not ineffective, and the trial court did not err in sentencing him to consecutive sentences, we affirm.

{¶2} Defendant's convictions arose from a December 4, 2006 incident at Lewis Ruffin's residence at 1095 Fairwood Avenue in Columbus. Ruffin was unloading groceries when four men pulled up; one had a gun with a laser sight. Forcing Ruffin into his residence, the men bound Ruffin's hands and feet with duct tape. The men were not disguised, and Ruffin recognized defendant because Ruffin knew defendant's older brother.

{¶3} Once inside the house, the four men took money from the residence, demanded Ruffin's gold chain, and insisted Ruffin had additional money at a second home he shared with his girlfriend, Jamie Broom. To prevent the men from going to the second home, Ruffin called Broom and instructed her to bring a gold chain belonging to him, along with $3,000 in cash, to a nearby Sunoco gas station at Livingston Avenue and Hampton Road where some men Ruffin knew would meet her. After arriving at the Sunoco station, Broom was surprised to see two men whom she did not know driving Ruffin's new car. Broom handed over the money and the gold chain to the driver of the car, later identified as defendant.

{¶4} While defendant and one of the other men met Broom, the two men who remained with Ruffin continued to rummage through Ruffin's residence and his belongings. About 45 minutes after leaving, defendant and his companion returned to the Fairwood Avenue address where the four men divided the stolen money in Ruffin's presence. The men then bound Ruffin with a sheet and, before Ruffin could untie himself

and telephone the authorities, they left the house in Ruffin's vehicle, easily identified due to its license plate "GO HARD."

{¶5} A police officer arrived at Ruffin's residence and radioed a description of Ruffin's stolen car; Ruffin did not give the officer the names of any of the four men. Sergeant Richard Ketcham heard the radio dispatch about the home invasion, as well as a description of the stolen car. Believing he had spotted the stolen vehicle, Ketcham pursued it in his police cruiser. Although he could not read the license plate, he observed a vehicle matching the radioed description at a Sunoco station at East 23rd and Cleveland Avenues, and he called for backup.

{¶6} After the suspect vehicle left the gas station, Ketcham verified its license plate and followed it. When the stolen car stopped at a red light, Ketcham pulled up behind it. At the same time, in an attempt to box in the vehicle, Officer Robert Vass, one of the responding officers, stopped his cruiser approximately four or five feet directly in front of the stolen car. Vass turned on his cruiser spotlight to light up the passenger compartment and activated his beacons. When Vass opened the door to exit his vehicle, defendant drove the stolen vehicle forward and hit Vass' cruiser; Vass instructed the occupants of the vehicle to "show me your hands, stop the vehicle." (Tr. 98.)

{¶7} As Vass was reaching for his weapon, Ketcham saw defendant, the driver, turn and look at him through the rear window of the stolen vehicle. Defendant then put the vehicle in reverse and drove into and onto Ketcham's police cruiser. Ketcham retreated to the back of his cruiser to avoid injury. From Vass' perspective, however, the vehicle appeared to run over Ketcham, so Vass fired two shots toward the stolen vehicle. In response, defendant drove forward, hitting Vass' cruiser on the passenger side front

quarter panel as Vass stood at the front of the driver's side. Defendant then drove off at an accelerated speed, leading police on a high speed chase through Columbus.

{¶8} Vass, Ketcham, another police cruiser, and a police helicopter pursued defendant, who drove 70 to 80 m.p.h. in 35 to 40 m.p.h. zones, running red lights through residential areas. The chase progressed onto the interstate where speeds reached 110 to 120 m.p.h., causing at least one motorist who witnessed the chase in his rearview mirror to move to the shoulder. As the stolen vehicle passed, the motorist saw an object thrown from the passenger side of the window. Police later identified the item as an operable 9 mm Taurus firearm with laser sight. The chase lasted eight to nine minutes and spanned 15 to 16 miles before 12 to 15 police apprehended defendant.

{¶9} Ruffin and Broom separately were taken to the area where defendant was arrested. Ruffin identified defendant without hesitation and recognized the vehicle's passenger as one of the men who stayed at the Fairwood Avenue address while the other two men met Broom at the gas station. Broom testified she was 98 percent sure defendant was one of the men to whom she gave the jewelry and money at the Sunoco station at Livingston and Hampton; she could not identify the other man with defendant at the station. On his arrest, defendant possessed Ruffin's gold necklace and $1,670.

{¶10} By indictment filed December 13, 2006, defendant was charged with 11 counts arising out of the December 4, 2006 incident. Defendant chose that all charges, including the weapon under disability charge, be tried to a jury; the jury found defendant guilty of all charges, including the firearm specifications. Merging some of the counts, the trial court sentenced defendant to a total of 20 years. Defendant appeals, assigning three errors:

I. THE TRIAL COURT ERRED IN OVERRULING DEFENDANT[']S RULE 29 MOTION AS THERE WAS NOT SUFFICIENT EVIDENCE TO CONVICT THE DEFENDANT OF FELONIOUS ASSAULT OF THE TWO POLICE OFFICERS.

II. TRIAL COUNSEL WAS INEFFECTIVE UNDER THE SIXTH AMENDMENT TO THE FEDERAL CONSTITUTION FOR FAILING TO CHALLENGE THE OUT OF COURT IDENTIFICATION BY LEWIS RUFFIN AND JULIA B[R]OOM AS UNDULY SUGGESTIVE.

III. THE TRIAL COURT ERRED WHEN IT SENTENCED THE APPELLANT TO CONSECUTIVE SENTENCES.

I. First Assignment of Error

{¶11} In his first assignment of error, defendant asserts the evidence presented at trial was legally insufficient to support his convictions for felonious assault that arose from defendant's driving the stolen vehicle into the cruisers of the two officers involved. Whether the evidence is legally sufficient to sustain a verdict is a question of law. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. Sufficiency is a test of adequacy. Id. We construe the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found the essential elements of the offense proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus; *State v. Conley* (Dec. 16, 1993), Franklin App. No. 93AP-387.

{¶12} As relevant here, R.C. 2903.11 defines felonious assault as knowingly causing serious physical harm to another by means of a deadly weapon. R.C. 2901.22 provides that a person acts knowingly when, regardless of his purpose, "he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances

probably exist." "A deadly weapon is 'any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon.' " *State v. Whalen*, Lorain App. No. 08CA009313, 2008-Ohio-4152, at ¶6, quoting R.C. 2923.11(A). Within the meaning of R.C. 2923.11(A), " 'a car, used as a weapon, can be considered a deadly weapon[.]' " Id., quoting *State v. Millender,* Summit App. No. 21349, 2003-Ohio-4384, at ¶15, citing *State v. Jaynes,* Summit App. No. 20937, 2002-Ohio-4527, at ¶12.

{¶13} Defendant does not contend the vehicle he operated is not a deadly weapon; nor does he contend serious physical harm could not result from his driving the stolen vehicle into the officers' cruisers. Instead, he argues that the evidence fails to show he acted knowingly. Defendant asserts he simply was attempting to escape from the police officers, not to harm them. Contrary to defendant's contentions, the state presented sufficient evidence, if believed, to enable a rational trier of fact to find beyond a reasonable doubt that defendant knowingly attempted to cause serious physical harm to the officers when he drove the stolen vehicle into the police cruisers.

{¶14} The record undisputedly demonstrates that before defendant drove into Vass' cruiser, Vass turned on his cruiser spotlight, activated his beacons, and began to exit his car. Defendant nonetheless rammed the car with the officer still in it. A jury reasonably could conclude defendant was aware that the probable consequence of putting his vehicle in drive and striking Vass' cruiser would be to place Vass in danger and to cause him harm, especially when Vass was attempting to exit the vehicle. The state need not prove defendant intended to harm the officer; the evidence is sufficient if

the probable result of defendant's action is to cause or attempt to cause the prohibited result. *Whalen*, supra; *State v. Robinson*, Cuyahoga App. No. 88382, 2007-Ohio-3646.

{¶15} After placing the car in forward and driving into Vass' cruiser, defendant turned and deliberately looked into his rear window where he saw Ketcham's cruiser. Aware of the cruiser's location, defendant placed his vehicle in reverse and drove it into and so far onto Ketcham's cruiser that the rear wheels of the stolen vehicle were off the ground. Indeed, defendant's actions appeared so dangerous that Vass believed Ketcham had been run over, causing Vass to fire two shots at the vehicle defendant used to ram the cruiser. If the jury believed it, the evidence was sufficient to prove beyond a reasonable doubt defendant was aware that he engaged in acts, the probable consequence of which was to harm Ketcham, even if that was not defendant's intent. *Whalen*, supra; *Robinson*, supra.

{¶16} Because the state's evidence, if believed, was sufficient to prove defendant acted knowingly in attempting to cause serious physical harm, his first assignment of error is overruled.

II. Second Assignment of Error

{¶17} Relying on *Neil v. Biggers* (1972), 409 U.S. 188, 93 S.Ct. 375, defendant's second assignment of error asserts he was deprived of his Sixth Amendment right to the effective assistance of counsel when his trial counsel failed to move to suppress as unreliable Ruffin's and Broom's "show up" out-of-court identification of defendant.

{¶18} To prove ineffective assistance of counsel, defendant must show that counsel's performance was deficient. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052. Defendant thus must show counsel made errors so serious that counsel

was not functioning as the "counsel" the Sixth Amendment guarantees. Id. Defendant then must show that the deficient performance prejudiced the defense, demonstrating that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Id. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable. Id.

{¶19} Some suggestiveness is inherent in show-up identifications, where the victims of a crime are brought to the place of the suspect's apprehension to determine whether the detained person can be identified as the perpetrator. *State v. Parrish,* Montgomery App. No. 21206, 2006-Ohio-4161, at ¶15, citing *State v. Sherls,* Montgomery App. No. 18599, 2002-Ohio-939. Nonetheless, such identification is admissible so long as it is reliable. *State v. Moody* (1978), 55 Ohio St.2d 64. According to *Neil*, the reliability factors "to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." Id. at 199-200.

{¶20} Here, the facts do not support defendant's contention that the show-up identification presented "a very substantial likelihood of misidentification." *State v. Madison* (1980), 64 Ohio St.2d 322, 331, quoting *Neil,* supra. Ruffin, in particular, was with the four men for a considerable period of time while they were in his residence, and he had every opportunity to see them, as none was disguised. Perhaps as significant, Ruffin knew defendant because he had associated with defendant's older brother. While

Ruffin's description of defendant was not entirely accurate, all the other factors favor the reliability of Broom's identification. Similarly, the *Neil* factors do not support suppression of Broom's show-up identification of defendant. While Broom was with the two men at the Sunoco station for a shorter period of time, she testified the area was lighted and she had the opportunity to talk directly to defendant who was "still right in [her] face when he took the money and he took the chain. * * * He stood right there in [her] face." (Tr. 72.) When asked in cross-examination whether she was tentative or hesitant in her identification, she testified she was not, explaining that she was 98 percent sure of her identification.

{¶21} Because the identification properly was admitted, a motion to suppress properly would have been denied. Counsel was not ineffective in failing to file a motion that lacks merit. Similarly, because the motion would not have been granted, defendant suffered no prejudice as a result of his attorney's failure to file it. Trial counsel was not ineffective; defendant's second assignment of error is overruled.

III. Third Assignment of Error

{¶22} In his third assignment of error, defendant contends the trial court abused its discretion in sentencing him to an aggregate sentence of 20 years.

{¶23} Preliminarily, we settle the standard of review for resolving defendant's third assignment of error. In *State v. Burton*, Franklin App. No. 06AP-690, 2007-Ohio-1941, this court concluded that R.C. 2953.08(G) requires a clear and convincing standard of review for felony sentences. Accordingly, we examine whether clear and convincing evidence establishes that defendant's felony sentence is contrary to law pursuant to R.C. 2953.08(G)(2)(b). In applying such standard, we would "look to the record to determine whether the sentencing court considered and properly applied the statutory guidelines

and whether the sentence is otherwise contrary to law." *State v. Vickroy*, Hocking App. No. 06CA4, 2006-Ohio-5461, at ¶16.

{¶24} Here, the trial court's judgment entry states "[t]he Court has considered the purposes and principles of sentencing set forth in R.C. 2929.11 and the facts [sic] set forth in R.C. 2929.12." The court's language is sufficient to overcome a claim that the court did not consider the statutory guidelines. *State v. Moore*, Franklin App. No. 07AP-309, 2007-Ohio-5797, at ¶7.

{¶25} Moreover, given the facts of the case, the trial court's sentence was reasonably calculated to achieve the dual felony sentencing purposes of protecting the public and punishing the offender. Initially, the trial court's sentence was not excessive. Had the trial court imposed the maximum sentence on each of defendant's offenses and ordered defendant to serve them consecutively, defendant could have been incarcerated for approximately 50 years. Instead, the trial court sentenced defendant to 20 years, a sentence we cannot find to be clearly and convincingly contrary to law in light of the seriousness of the defendant's conduct and the risk of harm not just to the police officers involved in the incident, but to the public involuntarily involved as a result of defendant's high speed chase through residential areas. That defendant had the opportunity to accept the prosecution's plea bargain for a sentence of 12 years and rejected the offer does not mean the trial court's sentence is aberrant, as nothing in the record indicates the trial court was involved in the plea or suggested such a sentence was appropriate to conviction on all the offenses charged in the indictment.

{¶26} Because defendant failed to establish by clear and convincing evidence that his sentence was contrary to law, his third assignment of error is overruled.

{¶27} Having overruled defendant's three assignments of error, we affirm the judgment of the trial court.

Judgment affirmed.

McGRATH, P.J., and KLATT, J., concur.

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