[Cite as *State v. Dennison*, 2016-Ohio-8361.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 15AP-592 (C.P.C. No. 09CR-7310)
v.	:	(REGULAR CALENDAR)
Albert D. Dennison,	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 22, 2016

On brief: *Ron O'Brien*, Prosecuting Attorney, and *Valerie Swanson*, for appellee.

On brief: *Carpenter Lipps & Leland LLP, Kort Gatterdam*, and *Erik P. Henry*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

BROWN, J.

{¶ 1} This is an appeal by defendant-appellant, Albert D. Dennison, from a judgment of the Franklin County Court of Common Pleas resentencing him following this court's remand for further proceedings in compliance with R.C. 2929.14(C)(4).

{¶ 2} On December 8, 2009, appellant was indicted on one count of aggravated burglary, four counts of aggravated robbery, four counts of kidnapping, and one count of rape, each count also carrying a firearm specification. Appellant was also indicted on one count of having a weapon while under disability. The matter came for trial before a jury beginning June 11, 2012.

{¶ 3} In *State v. Dennison*, 10th Dist. No. 12AP-718, 2013-Ohio-5535, ¶ 2-9, ("*Dennison I*"), this court summarized the facts of the underlying case as follows:

> The appellant's crimes arose out of a home invasion on March 15, 2009, on Dering Road in Columbus. Three men entered the home and demanded to know where to find "the stuff," as well as money.
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> Four adults, two men and two women, were present in the home, along with a two-year-old child. The three invaders stayed in the home for a period of over one hour, during which time they struck and injured three of the victims, and ordered them to strip naked. One of the two women was touched in the area of her breasts and genitals. Ultimately, the offenders tied up all four adults in the basement and instructed the victims not to call police. Various pieces of personal property, including a television, purses, a cell phone, car keys, a laptop, and jewelry, were taken from the house. One of the robbers drove away from the home in a car belonging to one of the victims. Shortly after the invaders left, the victims were able to free themselves. They fled to a neighbor's house and then went to the hospital for treatment of their injuries.
>
> In investigating the incident, police attempted to identify the offenders. On March 16, 2009, the day after the robbery, one of the victims, C.[A.]B., called police and suggested that, after reviewing family photo albums and speaking with members of her family, she suspected that appellant was one of the robbers. Police prepared a photo array that included appellant's photo and showed it to all four victims. C.[A.]B. identified appellant as one of the robbers. The other victims could not, however, positively identify appellant's photo as being that of one of the robbers.
>
> C.[A.]B. remained convinced that appellant had participated in the robbery and, thereafter, on multiple occasions, showed his picture to the other victims. On December 3, 2009, police prepared a second photo array in further investigating the Dering Road robbery and other crimes. During the December photo array, the second female victim, S.D., positively identified appellant's photo as that of one of the Dering Road robbers.
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> * * *

> Trial commenced on June 11, 2012, approximately two and one-half years after the indictment. Two other suspects in the crime, Paul Keel and James Moore, had also been indicted and charged with crimes occurring in the Dering Road incident. They both testified that appellant had participated in the robbery; as did the two women who had been victimized in the home during the robbery, C.[A.]B. and S.D.

{¶ 4} A jury returned verdicts finding appellant guilty of one count of burglary, four counts of aggravated robbery, and four counts of kidnapping, "corresponding to the four victims present in the home." *Id.* at ¶ 10. The jury also found appellant guilty of the firearm specifications charged as to each of the nine counts, and the court separately found him guilty of having a weapon while under disability ("WUD"). The jury returned a verdict of not guilty as to the rape count.

{¶ 5} By judgment entry filed July 26, 2012, the trial court sentenced appellant to "nine years on each of the four aggravated robberies (36 years) and eight years on each of the four kidnappings (32 years), but the court merged the aggravated burglary count." *Id.* at ¶ 11. Further, the court sentenced appellant to "three years for the WUD offenses and three years for one of the firearm specifications, of which the jury found appellant guilty," and the court "ordered the sentences to be served consecutively, resulting in a total sentence of 74 years." *Id.*

{¶ 6} Appellant appealed his convictions, raising six assignments of error. Plaintiff-appellee, State of Ohio, filed a cross-appeal, arguing that the trial court erred in merging the aggravated burglary count. In *Dennison I*, this court overruled appellant's six assignments of errors; further, this court sustained the state's two cross-assignments of error, finding that the aggravated burglary conviction did not merge with the aggravated robbery conviction, and that the trial court erred in failing to impose at least two three-year prison terms for the firearm specifications. Accordingly, this court remanded the matter to the trial court for resentencing.

{¶ 7} On June 2, 2014, the trial court held a resentencing hearing and sentenced appellant "to nine years both on the sole count of aggravated burglary and each of the nine counts of aggravated robbery, in addition to eight years on each of the four counts of kidnapping and three years for the sole count of WUD." *State v. Dennison*, 10th Dist. No. 14AP-486, 2015-Ohio-1135, ¶ 5 ("*Dennison II*"). The trial court also sentenced appellant

to "three years each on two of the gun specifications, to be served consecutively, with the remaining specifications to be served concurrently." *Id.* Further, the court "ordered the count of aggravated burglary and the count of WUD to be served concurrently to the other counts, with the remaining counts to be served consecutively for a total sentence of 74 years." *Id.*

{¶ 8} Appellant appealed the judgment of the trial court, raising three assignments of error in which he argued the trial court erred in: (1) imposing a sentence disproportionate to that of his co-defendants and which penalized him for exercising his right to trial, (2) sentencing him to consecutive terms of imprisonment for allied offenses of similar import (by failing to merge each of the kidnapping counts with the aggravated burglary or the aggravated robbery counts), and (3) imposing consecutive sentences without making requisite findings under R.C. 2929.14(C)(4).

{¶ 9} In *Dennison II,* this court overruled appellant's second assignment of error in which he asserted the trial court erred by sentencing him to consecutive terms of imprisonment for allied offenses of similar import, holding that appellant "could have presented his claims regarding allied offenses in his original appeal to this court." *Id.* at ¶ 11. Thus, "[b]ecause he did not raise the alleged allied offenses error on direct appeal of the original sentence," this court held that "res judicata bars appellant from raising this issue now." *Id.*

{¶ 10} This court sustained, however, appellant's third assignment of error, finding that the trial court failed to make requisite findings under R.C. 2929.14(C)(4) prior to imposing consecutive sentences, and thus holding that the matter must be remanded "for further proceedings in compliance with R.C. 2929.14(C)(4)." *Id.* at ¶ 24. In light of this court's remand for resentencing, we deemed as moot the issues raised under appellant's first assignment of error (alleging that the trial court erred by imposing a sentence that was disproportionate to that of his co-defendants and which punished him for exercising his right to trial).

{¶ 11} Following this court's remand, the trial court conducted a new sentencing hearing on May 26, 2015. By entry filed June 12, 2015, the trial court sentenced appellant to 9 years each as to Counts 1 (aggravated burglary), 2 (aggravated robbery), 3 (aggravated robbery), 4 (aggravated robbery) and 5 (aggravated robbery), 8 years each as

to Counts 6 (kidnapping), 7 (kidnapping), 8 (kidnapping) and 9 (kidnapping), 36 months as to Count 11 (WUD), and an additional 3 consecutive years for the firearm specifications on Counts 1, 2, 3, 4, 5, 6, 7 and 8. The court ordered Counts 1 and 11, as well as the specifications on Counts 4, 5, 6, 7, 8 and 9, to be served concurrently with each other but consecutive to Counts 2, 3, 4, 5, 6, 7, 8 and 9, as well as the specifications on Counts 2 and 3, for a total sentence of 74 years incarceration.

{¶ 12} On appeal, appellant sets forth the following two assignments of error for this court's review:

> FIRST ASSIGNMENT OF ERROR.
>
> THE TRIAL COURT ERRED AND IMPOSED A SENTENCE CLEARLY AND CONVINCINGLY CONTRARY TO LAW BECAUSE THE SENTENCE WAS DISPROPORTIONATE TO THE CRIME COMMITTED, WAS INCONSISTENT TO THAT OF APPELLANT'S CO-DEFENDANTS, WAS NOT SUPPORTED BY THE RECORD, CONSTITUTED AN ABUSE OF DISCRETION, WAS IMPOSED BECAUSE APPELLANT EXERCISED HIS RIGHT TO TRIAL, AND WAS BASED UPON CONDUCT FOR WHICH APPELLANT WAS FOUND NOT GUILTY, CONTRARY TO R.C. 2929.11(B), ARTICLE I, SECTION 9 OF THE OHIO CONSTITUTION, THE SIXTH AND EIGHTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND THE DUE PROCESS CLAUSES OF THE UNITED STATES AND OHIO CONSTITUTIONS.
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> SECOND ASSIGNMENT OF ERROR.
>
> THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT SENTENCED APPELLANT TO CONSECUTIVE TERMS OF IMPRISONMENT FOR ALLIED OFFENSES OF SIMILAR IMPORT CONTRARY TO THE DOUBLE JEOPARDY PROVISIONS OF THE UNITED STATES AND OHIO CONSTITUTIONS.

{¶ 13} Under his first assignment of error, appellant asserts the trial court's sentence was contrary to law, constituted an abuse of discretion, and violated his due process rights. Specifically, appellant argues that the sentence imposed by the court: (1) was disproportionate to the crime committed and inconsistent to those of his co-defendants, (2) was contrary to the Eighth Amendment, (3) improperly punished him for

exercising his right to trial, and (4) was based on conduct for which he was found not guilty.

{¶ 14} R.C. 2953.08(G)(2) states as follows:

> The court hearing an appeal under division (A), (B), or (C) of this section shall review the record, including the findings underlying the sentence or modification given by the sentencing court.
>
> The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:
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> (a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;
>
> (b) That the sentence is otherwise contrary to law.

{¶ 15} As noted, appellant argues the trial court's sentence was both contrary to law and an abuse of discretion. In support, appellant cites to the plurality decision of the Supreme Court of Ohio in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912.

{¶ 16} However, subsequent to the time for filing briefs in this case, the Supreme Court rendered its decision in *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, ¶ 10, holding that "appellate courts may not apply the abuse-of-discretion standard in sentencing-term challenges" as set forth in *Kalish*. Instead, "appellate courts must adhere to the plain language of R.C. 2953.08(G)(2)." *Marcum* at ¶ 7. Accordingly, "an appellate court may vacate or modify a felony sentence on appeal only if it determines by clear and convincing evidence that the record does not support the trial court's findings under relevant statutes or that the sentence is otherwise contrary to law." *Id.* at ¶ 1.

{¶ 17} Appellant first contends that his sentence was disproportionate to the crime committed and that it was inconsistent with the sentences received by co-defendants Paul Keel and Jimmy Moore, who received shorter total aggregate sentences of 14 years (Keel)

and 9.5 years (Moore), respectively. Appellant maintains he argued against disparate sentences during the first and second resentencing hearings, and that the trial court ignored this issue at the second resentencing hearing.

{¶ 18} In response, the state argues that appellant failed to raise his sentencing consistency argument in his initial direct appeal and, therefore, the principles of res judicata and law-of-the-case bar him from raising it here. According to the state, appellant's argument that his sentence is inconsistent to those imposed on his co-defendants confuses the concepts of consistency with proportionality. With respect to appellant's proportionality argument, the state contends appellant cannot show that the trial court's imposition of consecutive sentences in this case is disproportionate to his conduct and the danger he poses to the public.

{¶ 19} We first consider the state's assertion that appellant's sentencing consistency argument is not properly before this court. As noted under the facts, in *Dennison II,* this court remanded this matter to the trial court to consider whether consecutive sentences were appropriate under R.C. 2929.14(C)(4) and, if so, to make the proper findings on the record at the sentencing hearing and to incorporate those findings into the court's sentencing entry. *Id.* at ¶ 22.

{¶ 20} In addressing appellant's claim that the trial court erred in failing to make requisite findings for the imposition of consecutive sentences, we noted in *Dennison II* that statements by the trial court during the first resentencing hearing reflected that the court had "considered the consistency between appellant's sentence and the sentences imposed upon appellant's co-defendant's who entered guilty pleas." *Id.* at ¶ 20. This court further noted, however, that R.C. 2929.14(C)(4) "does not direct the trial court to compare sentences between similarly situated offenders in making the required proportionality analysis," but instead requires the court to "determine whether consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public." *Id.* In support, this court cited the decision of the Eighth District Court of Appeals in *State v. Moore,* 8th Dist. No. 99788, 2014-Ohio-5135, in which that court found a defendant had incorrectly conflated the concepts of "consistency between sentences imposed on similarly situated offenders and disproportionality analysis under R.C. 2929.14(C)(4)." *Dennison II* at ¶ 20, fn. 1.

{¶ 21} In *Moore,* the defendant received a total sentence of 27 years following his convictions for two counts of kidnapping with firearm specifications and one count of aggravated robbery with firearm specifications. The defendant argued on appeal that the trial court "failed to ensure that his sentence was 'consistent' and 'proportionate' to" that of his co-defendant, who received concurrent nine-year sentences for his convictions. *Id.* at ¶ 17. The reviewing court in *Moore* held that the defendant's argument "treats consistency and proportionality as though they are the same. They are not." *Id.* Rather, the court observed, "[f]or purposes of R.C. 2929.11(B), 'consistency' relates to the sentences in the context of sentences given to other offenders; 'proportionality' relates solely to the punishment in the context of the offender's conduct (does the punishment fit the crime)." *Id.* Further, the court held, when considering "consistency in sentencing for purposes of R.C. 2929.11(B), we do so on the basis of each individual count." *Id.* at ¶ 18.

{¶ 22} In considering the defendant's consistency argument, the court in *Moore* noted that "[t]he disparity between the sentences given to Moore and [his co-defendant] is not the result of Moore receiving more time on each individual count than [his co-defendant] received," as the facts indicated Moore received eight years on each count while his co-defendant received nine years on each count. *Id.* at ¶ 19. For that reason alone, the court held, "Moore cannot argue that his sentences were inconsistent with [his co-defendant's] sentences." *Id.*

{¶ 23} The court in *Moore* further observed that the real difference in the two sentences was "the result of the court running Moore's sentences consecutively." *Id.* at ¶ 1o. While finding that Moore "incorrectly conflated consistency and proportionality when arguing that his sentence was inconsistent with the sentence given to [his co-defendant]," the court noted that Moore's argument raised the issue of whether his consecutive sentences "are *disproportionate* to his conduct and to the danger he poses to the public." (Emphasis sic.) *Id.* at ¶ 20. On that point, the court noted "[t]here are two ways that a defendant can challenge consecutive sentences on appeal. First, the defendant can argue that consecutive sentences are contrary to law because the court failed to make the necessary findings required by R.C. 2929.14(C)(4)." *Id.* at ¶ 21. The second way a defendant can challenge consecutive sentences is to show that "the record does not support the findings made under R.C. 2929.14(C)(4)." *Id.*

{¶ 24} In the instant case, in challenging his sentence as inconsistent with those imposed on his co-defendants, appellant raises a consistency claim under R.C. 2929.11(B), which states in part that "[a] sentence imposed for a felony shall be * * * consistent with sentences imposed for similar crimes committed by similar offenders." We agree with the state, however, that appellant could have raised his consistency claim at the time of his initial direct appeal.

{¶ 25} As previously noted, in that initial appeal, appellant raised six assignments of error; he did not, however, challenge his sentences as inconsistent with those of his co-defendants under R.C. 2929.11(B). This court's remand following the direct appeal, in which we sustained the state's two cross-assignments of error, required the trial court to re-sentence appellant based on our determination that the aggravated burglary conviction did not merge with the aggravated robbery conviction (and we further directed the trial court to sentence appellant to at least two three-year firearm specification sentences).

{¶ 26} In his subsequent appeal from the first re-sentencing hearing, appellant raised three assignments of error including, for the first time, the claim that the trial court's sentence was "inconsistent with or disproportionate to the severity of the crime when compared with similarly situated offenders, namely his co-defendants." *Dennison II* at ¶ 23. In response, the state argued (as it does in the instant appeal) that appellant's claim was barred by principles of res judicata and law-of-the-case (i.e., that this court's remand for resentencing on the aggravated burglary conviction did not grant the trial court authority to vacate the individual sentences previously imposed on the aggravated robbery, kidnapping, and WUD counts).

{¶ 27} In *Dennison II*, this court sustained appellant's third assignment of error and remanded the matter to the trial court for resentencing to consider whether consecutive sentences were appropriate pursuant to R.C. 2929.14(C)(4) and, if so, to make the proper statutory findings on the record at the sentencing hearing and to incorporate those findings into its sentencing entry. *Id.* at ¶ 22. In so holding, this court did not address appellant's first assignment of error in which he raised his sentencing consistency argument (nor did we consider the merits of the state's law-of-the-case/res judicata argument); rather, we found the assignment of error to be moot in light of the fact the

trial court "may, at its discretion, choose to impose a different sentence upon remand when making the proper findings." *Id.* at ¶ 23.

{¶ 28} As argued by the state, a remand for compliance with R.C. 2929.14(C)(4) does not involve a consideration as to whether the individual sentences imposed are consistent with those of a co-defendant under R.C. 2929.11(B). Rather, as previously noted, "the trial court must determine whether consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public." *Id.* at ¶ 20. *See also State v. Conn*, 12th Dist. No. CA2015-07-061, 2016-Ohio-1001, ¶ 11 (where reviewing court found error only as to imposition of consecutive sentences and remanded solely to correct the consecutive sentences error, trial court committed error "in conducting a de novo sentencing hearing on remand and modifying several of the individual prison terms"). On review, we agree with the state that appellant could have raised, at the time of his initial direct appeal, a challenge to his individual sentences as inconsistent with the sentences imposed on his co-defendants, and we conclude the trial court did not err in failing to consider appellant's sentencing consistency argument during the resentencing hearing at issue in this appeal.

{¶ 29} Even assuming, however, that appellant had preserved his claim of inconsistent sentences, we would find appellant's argument to be without merit. As cited above, when a court considers consistency in sentencing, for purposes of R.C. 2929.11(B), it does so "on the basis of each individual count." *Moore* at ¶ 18, citing *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, ¶ 8 ("Ohio's felony-sentencing scheme is clearly designed to focus the judge's attention on one offense at a time."). Further, this court has previously noted that "appellate courts have rejected consistency claims where one person involved in an offense is punished more severely than another involved in the same offense." *State v. Hayes*, 10th Dist. No. 08AP-233, 2009-Ohio-1100, ¶ 9. Rather, a defendant challenging a sentence as inconsistent "must show that the trial court failed to properly consider the statutory sentencing factors and guidelines found in R.C. 2929.11 and 2929.12." *Id.* at ¶ 10.

{¶ 30} Here, we agree with the state's observation that the actual basis for appellant's greater sentence than his two co-defendants is the sheer number of his convictions, and the fact the trial court imposed consecutive sentences on various counts.

Specifically, as noted under the facts, the jury returned verdicts finding appellant guilty of one count of aggravated burglary, four counts of aggravated robbery, and four counts of kidnapping, while the trial court separately found him guilty of one count of WUD. By contrast, co-defendant Keel entered a guilty plea to one count of aggravated burglary (with a firearm specification), and one count of aggravated robbery (with a firearm specification), while the other co-defendant, Moore, entered a guilty plea to one count of aggravated burglary and one count of aggravated robbery.

{¶ 31} Based on the record presented, appellant was not "similarly situated" with his co-defendants as he was convicted of additional offenses, and his co-defendants entered into plea agreements with the state, cooperated with the prosecution, and testified at appellant's trial. *See State v. Bailey*, 2d Dist. No. 2011 CA 40, 2012-Ohio-1569, ¶ 19 (rejecting consistency claim and finding defendant not similarly situated to his co-defendants where co-defendants negotiated more beneficial plea agreements and defendant was convicted of other offenses); *State v. Smith*, 8th Dist. No. 95243, 2011-Ohio-3051, ¶ 69 (rejecting claim that defendant's sentence was inconsistent with sentences imposed on co-defendants; difference between sentence defendant received as opposed to co-defendants was "justified by the fact that those individuals pled guilty to fewer offenses, admitted to their involvement, and cooperated with the authorities"); *State v. Pruitt*, 8th Dist. No. 98080, 2012-Ohio-5418, ¶ 27 (defendant's sentence not inconsistent with that of his co-defendant under R.C. 2929.11(B); while both defendant and co-defendant initially were indicted on identical charges, the co-defendant subsequently entered a guilty plea to only one count while the defendant was found guilty of four counts).

{¶ 32} We turn, therefore, to appellant's claim of disproportionality with respect to the trial court's imposition of consecutive sentences. As noted above, a defendant can challenge consecutive sentences on appeal in two ways, i.e., (1) by arguing that consecutive sentences are contrary to law because the court failed to make the requisite findings under R.C. 2929.14(C)(4), and/or (2) by arguing that "the record does not support the findings made under R.C. 2929.14(C)(4)." *Moore* at ¶ 21.

{¶ 33} Appellant does not argue that the trial court failed to make the appropriate statutory findings in imposing consecutive sentences. Rather, he contends the record

does not support the court's finding that consecutive sentences are not disproportionate to the seriousness of his conduct and the danger he poses to the public. In so arguing, appellant maintains the trial court ignored evidence with respect to his alleged role in the home invasion. According to appellant, his role as one of the three intruders boils down to whether he was the first man to enter the house without a mask, or the second man who entered the residence wearing a half-mask, i.e., a mask that exposed his eyes and eyebrows. Appellant argues there was confusion at trial on this issue, and he characterizes his role as secondary to that of co-defendant Keel, who appellant depicts as the ringleader.

{¶ 34} While appellant contends he was not the ringleader, and seeks to diminish his role in the events, there was contrary evidence presented by the state which, if believed, indicated that appellant set in motion the events leading to the home invasion. Specifically, co-defendant Moore testified that he was at his grandmother's house on the date of the events when appellant phoned him and told him to "be out back and he would be there to get me." (Tr. Vol. IV at 541.) Appellant picked up Moore and they drove to a location where they smoked "[w]eed" and talked about "doing the home invasion * * * over at Pug's house."[1] (Tr. Vol. IV at 543.) This particular house was chosen "[b]ecause [Pug] had cocaine. He was selling coke, and we needed money." (Tr. Vol. IV at 550.) Later that day, appellant and Moore sought out another individual, Cliff Harbour, to assist with the home invasion; the three men drove around and "picked up some cocaine." (Tr. Vol. IV at 545.) According to Moore, Harbour was "smoking crack and taking pills," and he "ended up getting too messed up that night to do it, so we ended up calling [Keel]." (Tr. Vol. IV at 545.) Moore testified that, during the invasion, he wore a mask that covered his whole face, while appellant wore a "toboggan" type mask "with the eyes cut out." (Tr. Vol. IV at 551.)

{¶ 35} Co-defendant Keel testified that he became involved in the home invasion after receiving a call from appellant at approximately 10:00 p.m. on the date of the incident; appellant "wanted to know if I wanted to be a part of it." (Tr. Vol. III at 455.) Appellant meant "[b]e part of a robbery." (Tr. Vol. III at 456.) Prior to the robbery, appellant informed Keel that there was "[s]upposed to be * * * money and * * * jewelry" in

[1] "Pug" is the nickname of one of the male victims (C.B.) of the home invasion.

the house. (Tr. Vol. III at 459-60.) All three men were carrying weapons when they entered the residence; Keel stated he did not wear a mask during the invasion because nobody in the house knew him.

{¶ 36} Keel testified that, upon entering the residence, he hit a male occupant in the head when the man stood up. During the incident, appellant took a female to a back bedroom. At one point, the intruders ordered three of the occupants, including one of the females, to remove their clothing. The intruders later took the occupants to the basement, where they were "tied up with a phone cord." (Tr. Vol. III at 465.) Keel observed appellant and Moore hit the occupants during the incident. After leaving the residence, Keel and Moore rode together in a vehicle to appellant's residence where they met up with appellant, who drove there in a separate vehicle. The three men split up the stolen items in the dining room of appellant's residence.

{¶ 37} Keel's wife, Maria Keel, testified that she drove to appellant's residence on the date of the incident. Upon entering the house, she observed appellant, Moore, and Keel sitting around appellant's dining room table "doing cocaine." (Tr. Vol. III at 520.) The men were "talking about how they had robbed people that evening." There was cash and jewelry on the table, and "they were splitting [it] up between the three of them." (Tr. Vol. III at 521.)

{¶ 38} The state also presented the testimony of the two male victims (C.B. and A.M.) and the two female victims (S.D. and C.A.B.) to the home invasion. C.B. testified that all of the intruders were carrying weapons. During the incident, one of the intruders struck C.B. with a gun, knocking out some of his teeth. C.B. testified that the man with the half-mask struck one of the women, S.D. The man without the mask struck C.B. and A.M. with a dog collar. C.B. identified Keel as the individual without the mask.

{¶ 39} S.D. testified that the man with the half-mask "told me to get up and took me back in the back room and told me to strip naked, and then he made me lay across the bed, and he * * * laid on the back of me." (Tr. Vol. II at 286.) The man was "grazing across, like, my breast area, and * * * at one point * * * tried to spread * * * my butt and everything to look in there. He was * * * feeling and stuff." (Tr. Vol. II at 307.) He touched her breasts with his hand, and also touched her "vaginal area and the butt area." (Tr. Vol. II at 308.) At one point, S.D. was "bent over, and he was * * * trying to shove the

gun up in there and was fondling and touching, and then the other guy came again and was, like, 'We're not here for this. Let's go.' " (Tr. Vol. II at 287.)

{¶ 40} Later, the man with the half-mask demanded that S.D. reveal where money was located. S.D. told him that she had received income tax money and had purchased a car and paid off some loans. The man then "smacked [her] in [the] face." S.D. had "clear braces on at the time," and her "lip got busted." She looked up at him and he told her: " 'Quit looking at me in my face,' and smacked [her] again." (Tr. Vol. II at 289.) At trial, S.D. identified appellant as the individual with the half-mask.

{¶ 41} The man with the half-mask and the man without a mask later took the individuals downstairs and tied them to poles. They placed a cord around S.D.'s neck. S.D. testified that the assailants were "spitting on us and yelling at us." S.D. "started to panic" because the cord "was too tight on [her] throat, and [she] couldn't breathe, so [she] started crying and freaking out." The intruders made the other female, C.A.B., "sit Indian style" with her young daughter placed on her lap; they then tied C.A.B.'s arms to a pole. Before leaving, the men warned the occupants not to call the police because "we are going to have people watching your house." They threatened to "come back and kill [us] and all [our] family." (Tr. Vol. II at 290.)

{¶ 42} A.M. testified that he was struck in the back of the head as the intruders entered the house. According to A.M., the incident "went on for * * * probably an hour, hour and a half." A.M. was hit with a dog collar "a couple times." The intruders "ransacked the place and stripped us down naked." (Tr. Vol. II at 237.) A.M. was unsure which assailant struck him. A.M.'s head was "split * * * open," and he eventually received staples to close the wound. (Tr. Vol. II at 240.)

{¶ 43} During the second resentencing hearing, the trial court, in addressing the issue of consecutive sentences, noted that the facts of the case "involved a very intensified and directed assault on a residence for the purpose of committing a robbery." (May 26, 2015 Tr. at 11.) The court described the events as "a brutal home invasion. They came in with the sole purpose to be sadistic. * * * They tied people up. * * * There's a plethora of behavior here. They make them undress and walk around the house to gather their goods. There's a child there screaming. There was no resistance, but there were still people that got hit. It was just a horrible set of events." (May 26, 2015 Tr. at 14.) The court further

noted that each of the victims "suffered a different, distinct event * * *, whether it's the beating of the men, * * * the sexual assault of the lady." The court observed that the conduct at issue was directed "not only to rob, but to humiliate, and they were very sadistic in nature." (May 26, 2015 Tr. at 12.)

{¶ 44} A review of the record in this case supports the trial court's findings that the home invasion, which lasted more than one hour, involved brutal behavior inflicted on victims who offered no resistance. This evidence included testimony by S.D., one of the female victims, that the man with the half-mask forced her to strip naked and subjected her to repeated touching of her breast and vaginal area with his hands and a weapon. S.D., who identified appellant as the individual with the half-mask, also testified that he struck her twice in the face during the events. The assailants later forced the victims to the basement where they were spit upon and tied to poles. A two-year old child was placed on her mother's lap, and the mother (C.A.B.) was tied to a pole. As also noted, there was testimony indicating that appellant was the individual who enlisted the aid of both co-defendants to carry out these events. Following the home invasion, all the intruders met at appellant's residence to divide the items taken. At the time of the initial sentencing hearing, the prosecutor noted that appellant "has been involved in criminal activity for his entire adult life. * * * [H]e has prior [b]urglary convictions. He's been on probation to this Court. Mr. Dennison has been involved in this behavior for a number of years." (Tr. Vol. X at 1324.)

{¶ 45} A review of the second resentencing hearing reflects that the trial court made the requisite statutory findings under R.C. 2929.14(C). Further, we cannot clearly and convincingly find that the record does not support the court's findings that consecutive sentences are not disproportionate to the seriousness of the conduct or the danger he posed to the public.

{¶ 46} Appellant also contends that his sentence was in violation of the Eighth Amendment's protection against cruel and unusual punishment. Specifically, appellant argues that the sentences received by his co-defendants for the same incident are evidence that his sentence was disproportionate to the crime committed and to his role in the offense.

{¶ 47} In general, "[t]he Eighth Amendment's prohibition on cruel and unusual punishments 'imposes two separate limitations': (1) 'a requirement of proportionality' and (2) 'prohibition against specific torturous methods of punishment.' " *State v. Vinson,* 8th Dist. No. 103329, 2016-Ohio-7604, ¶ 47, quoting *State v. Broom*, 146 Ohio St.3d 60, 2016-Ohio-1028, ¶ 36. With respect to the issue of proportionality, "[a] punishment does not violate the constitutional prohibition against cruel and unusual punishments, if it be not so greatly disproportionate to the offense as to shock the sense of justice of the community." *State v. Chaffin,* 30 Ohio St.2d 13 (1972), paragraph three of the syllabus.

{¶ 48} The Supreme Court has held that, "for purposes of the Eighth Amendment and Section 9, Article I of the Ohio Constitution, proportionality review should focus on individual sentences rather than on the cumulative impact of multiple sentences imposed consecutively." *State v. Hairston,* 118 Ohio St.3d 289, 2008-Ohio-2338, ¶ 20. Thus, "[w]here none of the individual sentences imposed on an offender are grossly disproportionate to their respective offenses, an aggregate prison term resulting from consecutive imposition of those sentences does not constitute cruel and unusual punishment." *Id.* Under the facts of *Hairston,* the Supreme Court held that the defendant's "aggregate prison term of 134 years, which resulted from the consecutive imposition of the individual sentences," did not violate the Eighth Amendment's prohibition against cruel and unusual punishment. *Id.* at ¶ 23.

{¶ 49} As noted, appellant contends that the sentences received by his co-defendants "for the same incident" constitutes "direct evidence" that the sentence he received was disproportionate to the crime. At the outset, we agree with the state that appellant could have raised this argument at the time of his initial direct appeal. We also find, however, no merit to appellant's claim that his sentence violates the Eighth Amendment's prohibition against cruel and unusual punishment on the basis that it is disproportionate to the sentences his co-defendants received.

{¶ 50} Under Ohio law, a trial court is not required to sentence co-defendants equally. *State v. Boone*, 7th Dist. No. 96-CA-9 (Sept. 22, 1999). As such, Ohio courts have rejected arguments that a defendant's sentence is cruel and unusual because it is disproportionate with the sentence imposed on a co-defendant. *See State v. Mery,* 5th Dist. No. 2010-CA-00218, 2011-Ohio-1883, ¶ 42 (rejecting claim that appellant's sentence

constituted cruel and unusual punishment because it was disproportionate to sentences imposed on his co-defendants; "[a]ppellant cites no precedent, or any other authority, for reversal of an otherwise valid sentence on the basis that more culpable co-defendants were not punished more severely"); *State v. Roy*, 12th Dist. No. CA97-11-216 (Sept. 28, 1998) (rejecting claim that appellant's sentence was disproportionate to that imposed on co-defendant in violation of his right to be free from cruel and unusual punishment).

{¶ 51} Federal courts have similarly held that the Eighth Amendment's prohibition against cruel and unusual punishment does not require a comparison of sentences between a defendant and co-defendant. *See United States v. Layne*, 324 F.3d 464, 474 (6th Cir.2003) (rejecting defendant's argument that her sentence "runs afoul of the Eighth Amendment merely because it is disproportionate to the sentences received by others who committed the same or similar crimes"); *Witmer v. Houston*, D.Neb. No. 4:03cv3315 (Dec. 14, 2006) ("The proportionality principle does not compare sentences among co-defendants but instead considers only whether a sentence is grossly disproportionate to the crime."); *Workman v. Burt*, E.D.Mich. No. 2:06-CV-11129 (Feb. 29, 2008) ("The critical factor for a court in determining whether a sentence is so disproportionate as to constitute cruel and unusual punishment is whether the sentence is grossly disproportionate to the crimes, not whether the sentence is grossly disproportionate to that received by co-defendants.").

{¶ 52} In the present case, appellant does not dispute that the individual sentences imposed by the trial court were within the statutory range for the offenses of which he was convicted, and while appellant again diminishes his role in the events, we have noted contrary evidence on this issue as well as testimony regarding the heinous nature of the crimes. Appellant's argument also fails to take into consideration the fact that his co-defendants cooperated and testified at his trial. In this respect, "[p]rosecutors are not required to plea bargain co-defendants on the same charges and offer them identical deals." *Boone*. Further, Ohio courts "may, in their discretion, impose consecutive terms of incarceration," and "the Constitution does not require" a reviewing court to compare a criminal defendant's sentence "with that imposed on other defendants for similar crimes in considering whether his sentence violates the Eighth Amendment." *Hairston v. Warden, S. Ohio Corr. Facility*, E.D.Ohio No. 2:09-978 (Mar. 1, 2011) (noting that court

was "not aware of, any decision of the United States Supreme Court suggesting that a sentence of life incarceration for multiple convictions on aggravated robbery, aggravated burglary, kidnapping, and having a weapon while under disability, with firearm specifications, resulting from a spree of armed home robberies by a defendant who had previously been convicted of similar offenses, violates the Eighth Amendment"). Based on the record presented, appellant has not shown that his sentence was disproportionate to the crime committed, nor does the fact that he received a greater sentence than his co-defendants demonstrate that his sentence is disproportionate so as to constitute cruel and unusual punishment.

{¶ 53} Appellant next contends the trial court improperly punished him for his decision to go to trial. Appellant cites to language by the trial court at the first resentencing hearing, in which the court stated in part: "It is not disproportionate. I know Mr. Moore makes the argument, but the other gentlemen had come forward and admitted it. If they were placed in the same circumstance, they would have received a similar sentence from me on this case." (June 2, 2014 Tr. at 8.) Appellant interprets the trial court's statement to mean it would have sentenced the co-defendants to the same sentence if they had exercised their right to trial. Appellant argues the trial court made the same error at the second resentencing hearing, stating in part: "We had joint recommendations on the other two * * *. I did not know all of the accusations until we got to the trial. So there is a slight difference here." (May 26, 2015 Tr. at 13.)

{¶ 54} In response, the state argues that the record belies appellant's contention the trial court punished him for going to trial. According to the state, the trial court's statements reflect the sentiment that, if the co-defendants "were placed in the same circumstance" as appellant, the court would have considered the heinous nature of the crimes, and the co-defendants would have faced sentencing on ten serious felony counts, as well as multiple firearm specifications; further, under the "same circumstance," the co-defendants would not have been entitled to any benefit from cooperating with the state.

{¶ 55} The Supreme Court has noted that "a defendant is guaranteed the right to a trial and should never be punished for exercising that right or for refusing to enter a plea agreement." *State v. O'Dell,* 45 Ohio St.3d 140 (1989), paragraph two of the syllabus. Further, "[a]ny increase in the sentence based upon the defendant's decision to stand on

his right to put the government to its proof rather than plead guilty is improper." *State v. Morris*, 159 Ohio App.3d 775, 2005-Ohio-962, ¶ 12 (4th Dist.), citing *State v. Scalf*, 126 Ohio App.3d 614, 621 (8th Dist.1998).

{¶ 56} As noted, appellant relies on comments made by the trial court during the first resentencing hearing in support of his claim that the court punished him for his decision to go to trial. As also noted, appellant and the state offer differing interpretations with respect to the court's references during that hearing to the "same circumstance" and "similar sentence."

{¶ 57} Upon consideration, we do not find that the comments at issue suggest the trial court sought to punish appellant for exercising his right to trial. As noted by the state, the trial court made no reference to appellant declining a plea deal. Further, while appellant offers an interpretation of the trial court's statement that he claims evinces intent to punish him for going to trial, the trial court made clarifying statements at the second resentencing hearing that do not support such an inference. During that subsequent hearing, the trial court, in addition to noting the fact there had been "joint recommendations" with respect to both co-defendants, further observed: "I may not have been as willing to go for the numbers that were offered before once I knew all the facts." (May 26, 2015 Tr. at 13.)

{¶ 58} We view the above comments by the trial court as essentially reflecting the reality that, at the time of the joint recommendation concerning the co-defendants, the court could not have been aware of the totality of the facts and circumstances regarding the nature of the home invasion crime involving the four victims. Rather, "a trial court knows more details about the facts of the case, the flavor of the event, and its impact upon the victim after a trial on the merits than it would after a guilty plea." *State v. Mayle*, 7th Dist. No. 04 CA 808, 2005-Ohio-1346, ¶ 46. As observed by one court, while a defendant who chooses to go to trial "must in no way be penalized for that election[,] * * * it is a reality that oftentimes an election to trial brings to the attention of the sentencing court certain facts of an egregious nature, facts which may not be brought to the attention of the sentencing court of the defendant who accepts the plea bargain and avoids the ardors of trial." *State v. Miranda*, Super.Ct.Conn. No. CR93151905 (Oct. 28, 2003). On review, we

find unpersuasive appellant's contention that the trial court based its sentence on his decision to go to trial.

{¶ 59} Appellant further argues that the trial court appeared to have based its sentence on conduct (i.e., allegations of rape) for which the jury returned a verdict of not guilty. Specifically, appellant points to comments by the trial court regarding the testimony of S.D., in which the court stated: "I can't ignore that." (May 26, 2015 Tr. at 12.) According to appellant, the trial court accepted S.D.'s testimony as to her allegations of rape, and then used such testimony to enhance his sentence. We disagree.

{¶ 60} A review of the second resentencing hearing indicates that the trial court, in discussing the facts of the case, noted that "[e]ach one of [the victims] suffered a different, distinct event that occurred, whether it's the beating of the men, whether it is the sexual assault on the lady -- and I realize there was a not guilty. She didn't testify about that aspect of it during the trial, but she did testify about it during the motion hearing, and I can't ignore that." The court further noted that the conduct of the intruders was "directed, not only to rob, but to humiliate, and they were very sadistic in nature." (May 26, 2015 Tr. at 12.)

{¶ 61} We note that Ohio courts, in the context of R.C. 2929.14(C)(4), "have broadly construed the word 'conduct' under [the statute], noting that it has significance apart from whether the defendant's acts established the elements of a particular crime." *State v. Diaz,* 8th Dist. No. 102582, 2015-Ohio-4382, ¶ 9, quoting *Moore* at ¶ 33. As such, the word "conduct" is understood "to encompass more than just the facts supporting conviction on a particular offense," and "[f]or purposes of determining whether consecutive sentences are disproportionate to an offender's conduct, a sentencing judge can consider the entirety of a defendant's actions in a particular case, not just the defendant's behavior or actions when committing any one offense." *Id.* Furthermore, under Ohio law, " 'a sentencing judge may take into account facts introduced at trial relating to other charges, even ones of which the defendant has been acquitted.' " *State v. Wiles,* 59 Ohio St.3d 71, 78 (1991), quoting *United States v. Donelson,* 695 F.2d 583, 590 (C.A.D.C.1982).

{¶ 62} In the present case, considered in context, the trial court's reference to a "sexual assault" appears to involve recognition that the conduct at issue involved more

than just a home invasion robbery, i.e., that the intruders engaged in cruel acts intended to humiliate the victims beyond the crime of robbery itself. We do not find it a fair reading, however, to conclude the trial court sentenced appellant for a rape offense for which he was acquitted. In fact, the trial court noted that the jury "found him not guilty; the State failed to prove beyond a reasonable doubt that the offense occurred. I agree with that." (May 26, 2015 Tr. at 15.) While the trial court recognized that the state failed to prove the elements of rape (i.e., that appellant engaged in vaginal penetration), the court also noted that, as part of the conduct to humiliate the victims, the state presented evidence indicating that one of the intruders fondled one of the female victims with his hand and with a weapon. The fact the jury did not find evidence of vaginal penetration does not negate S.D.'s testimony that appellant touched her inappropriately, nor does it negate the trial court's assessment that appellant acted in a sadistic manner by humiliating this female victim. Accordingly, we find the record does not support appellant's contention that the trial court sentenced him for an offense he did not commit.

{¶ 63} Based on the foregoing, appellant's first assignment of error is not well-taken and is overruled.

{¶ 64} Under his second assignment of error, appellant asserts the trial court erred in sentencing him to consecutive terms of imprisonment for allied offenses of similar import. More specifically, appellant contends the trial court should have merged the kidnapping counts with the aggravated robbery counts with respect to each one of the victims. While appellant acknowledges this court's determination in *Dennison II* that the merger issue was barred by the doctrine of res judicata, he contends that this court can consider the issue in the present appeal because of the Supreme Court's decision in *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, which constitutes the Supreme Court's most recent interpretation of Ohio's merger statute (R.C. 2941.25).

{¶ 65} In response, the state argues that appellant's merger issue is barred by res judicata. The state further argues that appellant had a prior opportunity to argue the applicability of *Ruff*, as the Supreme Court issued its decision in *Ruff* on March 25, 2015, and this court issued our decision in *Dennison II* on March 26, 2015; the state notes that appellant did not seek reconsideration of this court's decision. The state also challenges

appellant's assertion that application of the decision in *Ruff* would alter the outcome in this case.

{¶ 66} Upon review, we agree with the state that appellant's merger argument is barred by the doctrine of res judicata. Under Ohio law, "[m]erger claims are non-jurisdictional and barred by res judicata." *State v. Monroe*, 10th Dist. No. 13AP-598, 2015-Ohio-844, ¶ 38. Further, merger analysis "constitutes a review of underlying convictions." *State v. Dillard*, 7th Dist. No. 12 JE 29, 2014-Ohio-439, ¶ 10.

{¶ 67} In the present case, appellant failed to raise the issue of merger in his initial direct appeal, and this court affirmed appellant's underlying convictions in *Dennison I*. In *Dennison II*, appellant raised for the first time his merger argument. This court addressed the merits of that argument, finding that appellant "could have presented his claims regarding allied offenses in his original appeal to this court," and therefore the doctrine of res judicata "bars appellant from raising this issue now." *Dennison II* at ¶ 11. As noted by the state, appellant did not seek reconsideration of this court's decision in *Dennison II*, nor did he seek an appeal to the Supreme Court from our decision. Here, we agree with the state that appellant cannot defeat the res judicata bar at this time by relying on *Ruff*. We further note that, while appellant sought to raise the issue of merger at the second resentencing hearing, the trial court properly recognized that the scope of this court's remand was limited to consideration of whether consecutive sentences were appropriate.

{¶ 68} Accordingly, appellant's second assignment of error is without merit and is overruled.

{¶ 69} Based on the foregoing, appellant's two assignments of error are overruled, and we hereby affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

TYACK and SADLER, JJ., concur.

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