[Cite as *State v. Carroll*, 2010-Ohio-6013.]

[Please see original opinion at 2010-Ohio-4672.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93938

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

TYRONE CARROLL

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-506568

BEFORE: Celebrezze, J., Kilbane, P.J., and Sweeney, J.

RELEASED AND JOURNALIZED: December 9, 2010

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ON RECONSIDERATION[1]

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Defendant-appellant, Tyrone Carroll, appeals his conviction and sentence for robbery and kidnapping. Based on our review of the record and pertinent case law, we reverse and remand. The following facts were adduced from the testimony of various witnesses, including appellant himself.

[1]The original announcement of decision, *State v. Carroll*, Cuyahoga App. No. 93938, 2010-Ohio-4672, released September 30, 2010, is hereby vacated. This opinion, issued upon reconsideration, is the court's journalized decision in this appeal. See App.R. 22(C); see, also, S.Ct.Prac.R. 2.2(A).

{¶ 2} On November 15, 2007, appellant entered Vanity, a store located in the Great Northern Mall, surveyed the area, and then left. He returned moments later, chose a piece of merchandise, and indicated to the clerk, Courtney Horn, that he was ready to purchase the item and would return in a moment. Horn began ringing up the merchandise when appellant returned. Instead of standing in front of the sales counter, appellant stood beside Horn and demanded that she give him all of the money from the store's cash register. Before she could respond to appellant's demands, Horn's district manager arrived at the store for a surprise visit. After the district manager entered, appellant told Horn he would also like to purchase a sweater and that he would need her to retrieve it for him. Horn asked if he was serious and then asked him to leave. Appellant fled the store without obtaining any money.

{¶ 3} The same day, appellant went into Malley's Chocolates, which is located in a plaza near the Great Northern Mall. Appellant approached Andrene Gaddis, the manager of the store, and indicated that he needed assistance. When Gaddis approached the sales counter, appellant demanded that she give him all of the money in the cash register. As Gaddis was looking for her keys to open the cash register, appellant noticed the store's assistant manager, Mary Reznik, who was attempting to enter the store's back room to call the police. Appellant ran after Reznik, grabbed her by the

arm, and told Gaddis that he would hurt Reznik if he did not get the money. Gaddis opened the cash register, gave appellant the money, and appellant fled the scene.

{¶ 4} The following day, November 16, 2007, appellant entered Famous Footwear, which is also located near the Great Northern Mall. Appellant selected a pair of shoes and approached the sales counter. When the store's manager, Amanda Lesner, arrived to ring up the shoes, appellant told her to open the cash register and give him all the money. After Lesner complied with appellant's demands, he told her to walk slowly toward the back of the store with her back toward him or he would hurt her. As Lesner was complying, appellant fled. When Lesner finally reached the store's back room, she found both her district manager and the manager of another store branch. She informed them what had happened, and they contacted the police.

{¶ 5} All witnesses testified that appellant kept at least one of his hands in his pocket while perpetrating these robberies. According to appellant, he did this to give the impression that he was carrying a weapon, but never affirmatively stated that he had a weapon, nor did he threaten to shoot anyone. Some of the witnesses testified, however, that appellant indicated he had a gun and did threaten to shoot them if they did not comply with his demands.

{¶ 6} Appellant was initially interviewed by Sergeant Robert Buza with the Fairlawn Police Department. Sergeant Buza suspected appellant in a separate crime when he learned about the robberies in and around the Great Northern Mall. Believing that appellant matched the description of the suspect in those robberies, Sergeant Buza asked appellant if he had any involvement. At that time, appellant confessed to perpetrating the robberies at Malley's and Vanity, but denied any involvement in the robbery at Famous Footwear.

{¶ 7} Detective Victor Branscum with the city of North Olmstead was assigned to investigate the series of robberies around the Great Northern Mall. According to Detective Branscum, he interviewed all of the witnesses, and each witness identified appellant out of a photo array.

{¶ 8} Appellant was indicted in a six-count indictment on three counts of aggravated robbery and three counts of kidnapping. Each count carried one- and three-year firearm specifications. After a trial by jury, where appellant waived his right to counsel and chose to represent himself, he was acquitted of the aggravated robbery counts. He was found guilty of three counts of robbery[2] as lesser included offenses and was also found guilty of the three kidnapping counts.[3] He was acquitted of all firearm specifications.

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[2]Second-degree felonies.

[3]First-degree felonies.

{¶ 9} The trial court sentenced appellant to three, four, and five years for the kidnapping counts. The court then sentenced appellant to three, four, and five years for the robbery counts. Each three-, four-, and five-year sentence was to run concurrently to the corresponding sentence of the same duration. These sentences were then ordered to be run consecutively to one another for an aggregate sentence of 12 years. This appeal followed wherein appellant argues 1) that kidnapping and robbery are allied offenses, and thus his convictions should have merged for sentencing; 2) that the trial court erred in failing to instruct the jury that kidnapping is a second-degree felony if the victims were left in a safe place unharmed; and 3) that the trial court erred in issuing consecutive sentences without making factual findings.

Law and Analysis

Allied Offenses

{¶ 10} In his first assignment of error, appellant argues that he was convicted and sentenced for allied offenses. R.C. 2941.25(A) provides that, "[w]here the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant can be convicted of only one." It is well-established that a two-step analysis is required to determine if two offenses are allied offenses of similar import. *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, ¶14. "'In the first step, the elements of the

two crimes are compared. If the elements of the offenses correspond to such a degree that the commission of one crime will result in the commission of the other, the crimes are allied offenses of similar import, and the court must then proceed to the second step. In the second step, the defendant's *conduct* is reviewed to determine whether the defendant can be convicted of both offenses. If the court finds either that the crimes were committed separately or that there was a separate animus for each crime, the defendant may be convicted of both offenses.' (Emphasis sic.)" Id. at ¶14, quoting *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117, 526 N.E.2d 816.

{¶ 11} Appellant argues that kidnapping and robbery are allied offenses and should have merged for sentencing. When committed with a single animus, robbery and kidnapping are allied offenses. *State v. Taylor*, Montgomery App. No. 22564, 2009-Ohio-806, ¶42, citing *State v. Logan* (1979), 60 Ohio St.2d 126, 130-131, 135, 397 N.E.2d 1345. In the present case, it is indisputable that the restraint of the victims was purely incidental to the robberies. As such, appellant committed these offenses with a single animus, and the offenses should have merged for sentencing. This matter must be remanded to the trial court for a new sentencing hearing where the state shall choose which charge it wishes to proceed under. Appellant's first assignment of error is sustained.

Jury Instructions

{¶ 12} In his second assignment of error, appellant argues that the trial court committed plain error in failing to instruct the jury that kidnapping is a second-degree felony if they find that the victims were left in a safe place unharmed. In the event we find that the trial court did not commit plain error in this respect, appellant urges us to follow this court's holding in *State v. Banks*, Cuyahoga App. No. 91992, 2009-Ohio-4229, where we held that a defendant's conviction was against the manifest weight of the evidence where the evidence established that the kidnapping victim had been left in a safe place unharmed.

{¶ 13} Kidnapping is ordinarily a felony of the first degree. R.C. 2905.01(C)(1). If, however, the offender leaves the victim in a safe place unharmed, kidnapping will be a second-degree felony. Id. Although this provision mitigates an offender's criminal culpability, Ohio courts have consistently held that it is not an element of kidnapping and must be treated the same as an affirmative defense. *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, 837 N.E.2d 315, ¶233.

{¶ 14} Appellant concedes that he never requested a jury instruction with regard to whether he left the victims in a safe place unharmed, but argues that the court's failure to provide the jury with such an instruction constitutes plain error. We agree. Although we are unaware of any cases from this district that provide such an omission constitutes plain error, other

Ohio courts have, in fact, held that failure to instruct the jury on this mitigating factor constitutes plain error when such an instruction is warranted by the evidence presented. See *State v. Carson* (Apr. 22, 1999), Franklin App. No. 98AP-784; *State v. Steverson* (Sept. 15, 1998), Franklin App. No. 97APA11-1466; *State v. Chubb* (Apr. 18, 1985), Franklin App. Nos. 84AP-614 and 84AP-625.

{¶ 15} The state does not concede that such an instruction was warranted. In fact, the state argues that "[a]ppellant did not introduce evidence in mitigation nor did [he] seek an instruction from the trial court." This argument is misguided. The state ignores the testimony of its own witnesses. Each of the witnesses testified that appellant threatened to hurt them, but none testified that he actually inflicted any harm upon them. They also testified that once the events were over, appellant fled. Appellant also testified that he had no intention of hurting the victims and was simply looking for money to buy drugs. He testified that once he got what he demanded, he left the stores and did not return.

{¶ 16} The evidence presented unequivocally showed that appellant left the victims in safe places unharmed, and thus his kidnapping convictions could only be felonies of the second degree. The trial court committed plain error in failing to instruct the jury in this regard. The absence of a proper jury instruction should have been cured by sentencing appellant on the

kidnapping charge as a second-degree felony. Appellant's second assignment of error is sustained.

Consecutive Sentences

{¶ 17} In his third assignment of error, appellant argues that the trial court erred when it failed to make findings with regard to why the terms imposed should run consecutively. Appellant admits that *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, specifically held that such findings were not required, but relies on *Oregon v. Ice* (2009), 555 U.S. ___, 129 S.Ct. 711, 172 L.Ed.2d 517, to argue that *Foster* was incorrect and should be overturned.

{¶ 18} In *Ice*, the United States Supreme Court resolved whether the holdings of *Apprendi v. New Jersey* (2000), 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435, and *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403, govern consecutive sentencing decisions. *Ice* at 716. The *Apprendi* and *Blakely* decisions essentially stand for the proposition that "it is within the jury's province to determine any fact (other than the existence of a prior conviction) that increases the maximum punishment authorized for a particular offense." *Ice* at 714.

{¶ 19} In *Foster*, the Ohio Supreme Court held that consecutive sentences increase an offender's ultimate punishment, and thus Ohio's requirement that judges find certain facts before imposing consecutive

sentences violated the principles set forth in *Blakely*. *Foster* at ¶67. In *Ice*, the United States Supreme Court held otherwise. Specifically, the Court stated: "These twin considerations — historical practice and respect for state sovereignty — counsel against extending *Apprendi*'s rule to the imposition of sentences for discrete crimes. The decision to impose sentences consecutively is not within the jury function that 'extends down centuries into the common law.' Instead, specification of the regime for administering multiple sentences has long been considered the prerogative of the legislature." (Internal citations omitted.) *Ice* at 717.

{¶ 20} This court has repeatedly chosen to apply the holding in *Foster* rather than *Ice* and reserve any reconsideration for the Ohio Supreme Court. Specifically, in *State v. Woodson*, Cuyahoga App. No. 92315, 2009-Ohio-5558, this court stated: "We have responded to *Oregon v. Ice* in several recent decisions and concluded that we decline to depart from the pronouncements in *Foster* until the Ohio Supreme Court orders otherwise." Id. at ¶33, citing *State v. Reed*, Cuyahoga App. No. 91767, 2009-Ohio-2264, *State v. Robinson*, Cuyahoga App. No. 92050, 2009-Ohio-3379, and *State v. Eatmon*, Cuyahoga App. No. 92048, 2009-Ohio-4564. As the high court in this state, the Ohio Supreme Court's decision in *Foster* is binding on lower courts. Accordingly, it is not within our purview to step into the Supreme Court's shoes and

reconsider *Foster* in light of the decision in *Ice*. Appellant's third assignment of error is overruled.

Conclusion

{¶ 21} The evidence presented at trial supports the conclusion that appellant left the kidnapping victims in safe places unharmed. Although he did not request a jury instruction on this mitigating factor, the trial court's failure to include such an instruction in the jury charge constitutes plain error. The trial court also erred when it sentenced appellant for multiple allied offenses. This matter must be remanded to the trial court for a new sentencing hearing wherein the state shall elect under which count it wishes to proceed. The court did not err, however, when it did not make findings when imposing consecutive sentences.

{¶ 22} This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant recover of said appellee costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

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

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

FRANK D. CELEBREZZE, JR., JUDGE

MARY EILEEN KILBANE, P.J., and
JAMES J. SWEENEY, J., CONCUR