[Cite as *State v. Gilcrease*, 2019-Ohio-350.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 107084

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

RUESHAWN GILCREASE

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-17-618277-A

BEFORE: Keough, J., Kilbane, A.J., and Laster Mays, J.

RELEASED AND JOURNALIZED: January 31, 2019

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KATHLEEN ANN KEOUGH, J.:

{¶1} Defendant-appellant, Rueshawn Gilcrease, appeals from the trial court's judgment finding him guilty of aggravated robbery, robbery, and kidnapping, and sentencing him to 12 years in prison. Gilcrease contends that his convictions were not supported by sufficient evidence and were against the manifest weight of the evidence, and that the three offenses should have merged as allied offenses. We affirm, but remand for the trial court to enter a nunc pro tunc entry correcting its sentencing journal entry of March 20, 2018, as explained in paragraphs 29 and 30 of this opinion.

I. Background

{¶2} Gilcrease was indicted on three counts. Count 1 charged aggravated robbery in violation of R.C. 2911.01(A)(1); Count 2 charged robbery in violation of R.C. 2911.02(A)(2); and Count 3 charged kidnapping in violation of R.C. 2905.01(A)(2). All of the counts carried

one- and three-year firearm specifications. Gilcrease pleaded not guilty and the matter proceeded to trial.

{¶3} Billy Coker testified that around 1 a.m. on February 1, 2017, he walked a few blocks from his apartment to a local Sunoco gas station. Upon entering the Sunoco, he observed two males in the station. Coker withdrew $20 from the ATM, and then purchased a pop and a pack of cigarettes. Coker testified that the males were already gone when he left the Sunoco.

{¶4} Coker said that as he left the Sunoco, he observed the same two males standing by a Sav-A-Lot store near the gas station; both males were talking on their cell phones. Coker looked back once as he walked down the street and saw the two men walking behind him. Coker continued walking, but then heard running behind him. He said that when he turned around, one of the two males was "right up on me." The other male, who Coker described as over 6 feet tall and wearing a gray hoodie, pointed a gun at Coker and told him "don't move." Coker said the gun "looked more like a .22 or .38 or something like that." He said that the taller male pointed the gun at him while the shorter male rummaged in his pockets and took his money.

{¶5} Coker testified that after taking his money, the shorter male started running away, but the taller male told him "get his card, get his card," which Coker thought referred to his ATM bank card. Coker said that shorter male, who was running away, said he was not coming back so the taller male then also ran away.

{¶6} Coker went back to his apartment and called 911. The police broadcast a call for officers to respond to the Sunoco station. Cleveland Police Officer Julio DeJesus testified that he heard the dispatch and as he was getting a description of the suspects — a tall male wearing a gray hoodie accompanied by a shorter male — he saw two men who matched the description at East 55th Street and Superior Avenue. DeJesus testified that when he and his partner exited

their vehicle, the two males ran away. DeJesus said that they chased the taller male because he had been reported to have a gun. They eventually apprehended him but did not find the shorter male. The taller male was identified as Elijah Taylor; the police did not find a gun on him.

{¶7} While the police continued to search for the gun, Cleveland Police Officer James Szucs and his partner picked up Coker and brought him to the scene for a cold stand identification. Officer DeJesus testified that Coker positively identified Taylor as the male with the gun who had robbed him.

{¶8} Officer Szucs testified that upon learning from Coker that the two men who robbed him had been in the gas station with him, he and his partner went to the Sunoco to look at surveillance video. Officer Szucs testified that he saw Taylor, the male arrested earlier that evening, in the video. Officer Szucs then took still photographs of the video and emailed them to Officer DeJesus. Officer DeJesus testified that upon viewing the photographs, he recognized the shorter male in the photographs from a prior interaction he had with him in December 2016. DeJesus identified the shorter male as Gilcrease, and testified that Gilcrease was wearing the same clothes and skull cap in the surveillance video photographs that he had been wearing during his December encounter with DeJesus.

{¶9} The photographs were admitted at trial as state exhibit Nos. 1-4. During his testimony, Coker identified Taylor in state exhibit No. 4 as the male who had the gun during the robbery, and Gilcrease as the male who "ran up on him" immediately before the robbery.

{¶10} Cleveland Police Detective Bruce Garner was assigned to investigate. He testified that when he spoke with Coker on February 19, he learned that the taller male had the gun during the robbery, and the shorter male wearing a "funny hat" had taken the money from him. Det. Garner testified that in June 2017, he spoke with Gilcrease after his arrest on an active warrant

for aggravated robbery related to this case. Det. Garner said that he showed Gilcrease the photographs taken from the Sunoco surveillance video, and Gilcrease identified himself as the male wearing the sweatshirt and hat in the photos; Gilcrease also identified Taylor. Det. Garner testified that Gilcrease's identification was significant because it demonstrated that both he and Taylor were at the same gas station as Coker immediately prior to the robbery.

{¶11} After the trial court denied Gilcrease's Crim.R. 29 motion for acquittal, the jury returned a verdict of guilty on all counts and firearm specifications. At the sentencing hearing, the trial court merged Count 2, robbery, with Count 1, aggravated robbery, and sentenced Gilcrease to nine years incarceration. The court found that Count 3, kidnapping, did not merge with the aggravated robbery and robbery counts, and sentenced Gilcrease to nine years incarceration on the kidnapping conviction, to be served concurrently with Count 1. The court merged all the firearm specifications and ordered that they be served consecutive to the nine years on the base charges, for a total prison term of twelve years.

{¶12} This appeal followed.

II. Law and Analysis

A. Allied Offenses

{¶13} In his first assignment of error, Gilcrease contends that it was plain error for the trial court to not merge all the offenses because there was one victim and "one transaction." In his second assignment of error, Gilcrease contends that the trial court erred in not merging Count 3, kidnapping, with Count 1, aggravated robbery. These assignments of error are related so we consider them together.

{¶14} The allied offenses statute, R.C. 2941.25, codifies Ohio's double jeopardy protections regarding when multiple punishments may be imposed. *State v. Ruff*, 143 Ohio

St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, ¶ 12. Under the statute, where the same conduct by a 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 may be convicted of only one offense. A defendant charged with multiple offenses may be convicted of all the offenses, however, if (1) the defendant's conduct constitutes offenses of dissimilar import, i.e., each offense caused separate identifiable harm; (2) the offenses were committed separately; or (3) the offenses were committed with separate animus or motivation. R.C. 2941.25(B); *Ruff* at ¶ 13. Thus, to determine whether offenses are allied, courts must consider the defendant's conduct, the animus, and the import. *Id*. at paragraph one of the syllabus.

{¶15} Where a defendant fails to raise the issue of allied offenses in the trial court, he forfeits all but plain error review on appeal. *State v. Rogers,* 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 3. Under the plain error standard, an error is not reversible unless it affected the outcome of the proceeding and reversal is necessary to correct a manifest miscarriage of justice. *Id.*, see also Crim.R. 52. Under this standard, the "accused has the burden to demonstrate a reasonable probability that the convictions are allied offenses of similar import committed with the same conduct and without a separate animus." *Id.* The defendant must meet this burden before a reviewing court may reverse for plain error. *Id.*

{¶16} Although Gilcrease argues that the trial court's failure to merge all the offenses was plain error, we need not review only for plain error. The record reflects that at sentencing, after the state had conceded that Count 2 would merge into Count 1, defense counsel argued that the kidnapping conviction on Count 3 should also merge into Count 1. Because counsel raised the issue of merger, we do not review for only plain error. Rather, we consider whether the trial

court properly sentenced Gilcrease on Counts 1 and 3 separately or whether the offenses are allied offenses of similar import that should have merged for sentencing.

{¶17} Many Ohio courts have merged kidnapping and aggravated robbery based on fact patterns where the assailant restrains his victim while robbing him. Indeed, the Ohio Supreme Court has made clear that "implicit within every robbery (and aggravated robbery) is a kidnapping." *State v. Jenkins*, 15 Ohio St.3d 164, 198, 473 N.E.2d 264 (1984), fn. 29. "[W]hen a person commits the crime of robbery, ne must, by the very nature of the crime, restrain the victim for a sufficient amount of time to complete the robbery." *State v. Logan*, 60 Ohio St.2d 126, 131, 397 N.E.2d 1345 (1979).

{¶18} Nevertheless, the facts of this case lead to a different result. Coker testified that during the robbery, Taylor pointed a gun at him and told him not to move, and that Gilcrease then rummaged through his pockets and took his money. Coker testified that Taylor repeatedly told Gilcrease to "get his card," but Gilcrease took off running. Coker testified further that Taylor kept yelling "get his card" but Gilcrease kept running, and shouted at Taylor that "he wasn't going to come back and get no card." Coker said that at that point, Taylor turned and fled the scene.

{¶19} In light of this testimony, we conclude that Count 1, the aggravated robbery, and Count 3, the kidnapping, were committed separately and with separate animus. Coker's testimony clearly established that Taylor continued to hold him at gunpoint after the robbery had been completed. Thus, the two offenses were committed separately and with a separate animus. *See State v. Burton*, 8th Dist. Cuyahoga No. 94449, 2011-Ohio-198, ¶ 30 (the defendant's continued restraint of the victim after the robbery was completed "broke the causal chain and severed the subsequent kidnapping from the aggravated robbery").

{¶20} The trial court did not err in not merging Counts 1 and 3. The first and second assignments of error are therefore overruled.

B. Sufficiency and Manifest Weight of the Evidence

{¶21} In his third assignment of error, Gilcrease contends that his convictions were not supported by sufficient evidence and were against the manifest weight of the evidence.

{¶22} The test for sufficiency requires a determination of whether the prosecution met its burden of production at trial. *State v. Bowden*, 8th Dist. Cuyahoga No. 92266, 2009-Ohio-3598. ¶ 12. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997).

{¶23} A manifest weight challenge, on the other hand, questions whether the state met its burden of persuasion. *State v. Hill*, 8th Dist. Cuyahoga No. 98366, 2013-Ohio-578, ¶ 32. To determine whether a conviction is against the manifest weight of the evidence, the reviewing court must look at the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *Thompkins* at 388.

{¶24} Although we review credibility when considering the manifest weight of the evidence, we are cognizant that determinations regarding the credibility of witnesses and the weight given to the evidence are primarily matters for the trier of fact to decide. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967). The trier of fact is best able "to view the witnesses and observe their demeanor, gestures, and voice inflections, and use these observations

in weighing the credibility of the proffered testimony." *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 24. Thus, an appellate court will overturn a conviction due to the manifest weight of the evidence only in extraordinary circumstances where the evidence presented at trial weighs heavily against the conviction. *Thompkins* at 388.

{¶25} Gilcrease argues that his convictions were not supported by sufficient evidence and were against the manifest weight of the evidence because Coker never specifically identified him as one of the robbers and, in fact, picked someone else out of the photo lineup. He argues further that "there are millions of short people around," so he should not be convicted merely because he is short and Coker testified that "the short one" robbed him. He contends that there is "not one scintilla of evidence" demonstrating that he committed any of the crimes he was convicted of. We disagree.

{¶26} Coker testified that he noticed two males, one tall and one short, in the Sunoco gas station when he was there. He testified further that the men left before he did, but he saw them by the Sav-A-Lot store near the Sunoco when he exited the Sunoco. He testified that as he was walking down the street, two males ran up behind him, held him at gunpoint, and robbed him. Coker specifically testified that he knew that the two men he had seen in the Sunoco were the two men who robbed him.

{¶27} Officer DeJesus testified that the police apprehended Taylor, the taller of the two males, after the two males fled when he and his partner exited their car. Officer DeJesus testified that although they were unable to find the shorter male, he recognized the shorter male in the surveillance video from the Sunoco as Gilcrease because in a previous encounter with him, Gilcrease had been wearing the same clothing and hat. Although Coker did not identify Gilcrease in the photo array, Gilcrease identified himself and Taylor as the two men in the

surveillance video photographs. In fact, Det. Garner testified that Gilcrease specifically identified himself as the shorter male in the surveillance photographs.

{¶28} In light of this evidence, it is apparent that Gilcrease's convictions are supported by sufficient evidence and not against the manifest weight of the evidence. The evidence established beyond a reasonable doubt that Gilcrease was indeed the shorter male that robbed Coker at gunpoint around 1 a.m. on February 1, 2017. The third assignment of error is therefore overruled.

{¶29} Although we affirm Gilcrease's convictions, we remand for the trial court to issue a nunc pro tunc sentencing entry. At sentencing, the trial court specifically found that Counts 1 and 3 did not merge (tr. 415). Further, it sentenced Gilcrease to nine years incarceration on Count 1 and nine years on Count 3, to be served concurrently with Count 1 (tr. 417). The sentencing entry, however, states that "[t]he bodies of Counts 1 and three merge for a total of 9 years on the bodies." The trial court's nunc pro tunc entry should correct this statement to reflect that Counts 1 and 3 did not merge and will be served concurrently.

{¶30} The sentencing entry also states that "[t]he 3 years on the gun specs is to be served prior to and consecutive to the 9 *months* on the bodies for a total sentence of 12 years." The nunc pro tunc entry should reflect that the three-year sentence for the firearm specifications will be served prior to and consecutive to nine *years* on the base convictions.

{¶31} Judgment affirmed and remanded.

It is ordered that appellee recover from appellant 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. The defendant's conviction having been affirmed,

any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence and for the trial court to enter a nunc pro tunc entry correcting its sentencing journal entry of March 20, 2018, as explained in paragraphs 29 and 30 of this opinion.

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

KATHLEEN ANN KEOUGH, JUDGE

MARY EILEEN KILBANE, A.J., and
ANITA LASTER MAYS, J., CONCUR