

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

STATE OF OHIO, :
 :
 Plaintiff-Appellee, :
 : No. 108047
 v. :
 :
 DAMON CHRISTOPHER CRIM, :
 :
 Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: September 19, 2019

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-18-629432-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Anna M. Faraglia, Carson Strang, and Brandon A. Piteo, Assistant Prosecuting Attorneys, *for appellee.*

Mark A. Stanton, Cuyahoga County Public Defender, and Jeffrey M. Gamso, Assistant Public Defender, *for appellant.*

MARY J. BOYLE, J.:

{¶ 1} Defendant-appellant, Damon Crim, appeals his convictions and sentence. He raises two assignments of error for our review:

1. Because Mr. Crim did not understand one of the terms of his plea agreement, there was no meeting of the minds, his guilty plea was not knowing, intelligent, and voluntary, and either the plea must be vacated or the sentences made concurrent to [affect] his understanding of the plea he was entering.

2. Mr. Crim was denied his right to effective assistance of counsel when his attorney treated his stated understanding at the plea hearing that his sentences would run concurrently as an agreement that he understood they might be consecutive.

{¶ 2} Finding no merit to his arguments, we affirm.

I. Procedural History and Factual Background

{¶ 3} On June 6, 2018, Crim was indicted on 12 counts, including 2 counts of rape, 4 counts of felonious assault, and 1 count each of kidnapping, domestic violence, contaminating substance for human consumption or use, aggravated menacing, drug possession, and criminal damaging. Several of the counts carried one- and three-year firearm specifications. Crim pleaded not guilty to all charges.

{¶ 4} At a September 27, 2018 hearing, the state placed its plea offer on the record. The state explained that it was willing to offer a plea to an amended indictment of five charges, including Count 4, felonious assault in violation of R.C. 2903.11(A)(2), a second-degree felony with a one-year firearm specification; Count 6, felonious assault in violation of R.C. 2903.11(A)(2), a second-degree felony; Count 7, kidnapping in violation of R.C. 2905.01(A)(3), a first-degree felony with a one-year firearm specification; Count 9, domestic violence in violation of R.C. 2919.25(A), a first-degree misdemeanor; and Count 11, drug possession in violation of R.C. 2925.11(A), a fifth-degree felony. The state further indicated that as part of the plea, Crim would have to agree that there would be no contact with the victim

and no merger of any of the offenses. The state said, “[T]he judge can sentence consecutively.” The state explained that it would ask the court to nolle the remaining counts and specifications.

{¶ 5} Crim stated that he was not interested in that offer or any plea deal where he would have to serve jail time because he “didn’t do anything.”

{¶ 6} The trial court explained to Crim that as he sat there, he was an innocent man and that he had a right to go to trial. But the court stated that it wanted to ensure he understood the amount of time he was facing if he was convicted on all counts. Crim indicated that he would discuss a counteroffer with his attorney. The court adjourned.

{¶ 7} On October 22, 2018, the day of the scheduled trial, the trial court again discussed the possibility of a plea. The state placed the same offer on the record. The state further told the trial court that it was deleting the rape charges from the indictment, which carried a potential lifetime registration as a sex offender. The state explained that if Crim accepted the plea, he would not have to register as a sex offender for the rest of his life.

{¶ 8} The trial court then discussed the possible maximum penalties that Crim was facing if he went to trial versus if he accepted the plea. According to the state, Crim was facing a maximum of 84 years if he went to trial, and all counts were consecutive to one another and a maximum of 29 years if he accepted the plea. The trial court indicated that it was not making any promises with regard to the sentence. Crim told the court that he wished to go to trial.

{¶ 9} During trial, the emergency room physician, a police officer, and the victim testified. The testimony established that on the evening of May 31, 2018, the victim flagged down a woman driving by her house and asked the woman to take her to the police station. When the victim arrived at the police station, she was “visibly highly upset,” crying, and shaking. She was terrified that Crim was going to find her there. The police officers had to go outside to make sure that Crim was not outside the police station before the victim would talk to them. When the victim began talking to police, she was so upset that “she started to hyperventilate, couldn’t breathe, [and] couldn’t finish a sentence,” so one of the officers called “for EMS.” EMS workers took the victim to the hospital because “she was so inconsolable” and “was having a panic attack.”

{¶ 10} The victim eventually reported that Crim had abused her for five or six days because he accused her of stealing from him. The day that she went to police, he had abused her for approximately five hours that day. She told police she believed that Crim was going to kill her. She said that Crim used a belt to choke the victim until she lost consciousness, broke her nose, kicked her multiple times, hit her, gave her two black eyes, burned her with a butane lighter all over her body, hit her in the head with a gun, and pinched her skin with pliers. He threatened to cut her with a knife. She stated that for most of the time, he held a gun to her head. Crim also made the victim clean the house without any clothes on, cut her hair, urinated on her, and shattered her phone. She said that she had not eaten during that time.

{¶ 11} At the hospital, photos were taken of the victim's injuries. In addition to her nose being broken, the victim had burn marks all over her legs and bruises all over her body, including her neck. Her eyes were bruised and swollen. She had abrasions or cuts all over her body. She had a burn mark between her breasts from the lighter and a small puncture wound below her right breast from pliers. She told medical personnel, "I'm going to die. He's going to kill me." The SWAT team had to be called to remove Crim from his house.

{¶ 12} During the victim's testimony, the state played a number of jailhouse calls between Crim and the victim. Crim called the victim two times per day, once in the morning and once at night. During the first calls, the victim was angry at Crim. Eventually, Crim told the victim that he wanted to marry her. The victim ultimately went to the police station and retracted her statement. At trial, she testified that she inflicted all of her injuries on herself, or that they were the result of "S & M." She said that she was too embarrassed to tell that to the police initially.

{¶ 13} During the middle of the trial, Crim changed his mind and stated that he would like to accept the state's plea offer. The state placed the same plea offer on the record with the exception that it now dropped the one-year firearm specification on the kidnapping charge (in addition to the three-year specification that it had agreed to previously delete). The state made clear again that as part of the plea, "[t]he defendant must agree to the following further conditions: That these are nonallied offenses of similar import and that the judge can sentence consecutively and to an agreed no-contact with the victim."

{¶ 14} Defense counsel told the court that the state's explanation of the plea offer was as he and Crim understood it. The trial court then addressed Crim and asked him a series of questions. In response to the court's questioning, Crim told the court that he was 39 years old; had an associate's degree; understood the charges as filed in the indictment; understood the plea agreement; did not serve any time in the military; was not under the influence of any drugs or alcohol or medication; was not under probation, community control, or postrelease control; no one threatened him to get him to enter into the plea; no one made any promises to him to get him to plead guilty; there was no promise of any particular sentence; he was a citizen of the United States; and that he was satisfied with his defense counsel. The court then informed Crim of the constitutional rights he was waiving and ensured that he understood those rights and understood that he was waiving them.

{¶ 15} The trial court then reviewed the charges with Crim and the maximum penalty that he could face with respect to each charge. The following exchange then occurred:

[THE COURT]: Pursuant to the recitation of the plea agreement, these are not allied offenses, which means that they do not merge for purposes of sentencing, and you may receive — there is a possibility that these sentences will all run consecutive to one another. Do you understand that?

THE DEFENDANT: No, ma'am.

THE COURT: Okay. So sometimes even if you plead guilty to multiple offenses, based on the nature of the offenses, they can merge for purposes of sentencing. So the State would elect which count they would like the Court to proceed to sentencing on. These are all separate

offenses, so you can receive — the sentences can be stacked one upon the other. Do you understand that?

THE DEFENDANT: No.

[DEFENSE COUNSEL]: It is a sentencing option for the Court. It is what her potential sentence is. She's explaining under the law these do not have to be run concurrently. They —

THE DEFENDANT: They all start off with the same time?

[DEFENSE COUNSEL]: Yes.

THE COURT: Do you understand that?

THE DEFENDANT: Yes.

{¶ 16} The trial court then made sure that Crim understood that he could not have any contact with the victim. The court also asked Crim if he understood that the maximum penalty he could face was 29 years. Crim replied that he did. The court then advised Crim that he would face five years of postrelease control upon his release from prison. The court asked the state and defense counsel if it had complied with Crim.R. 11. They both replied that they did. The court then accepted Crim's guilty pleas to each offense, found that Crim entered into his guilty pleas voluntarily, knowingly, and intelligently, and found him guilty of each offense. The court nolleed the remaining charges and specifications.

{¶ 17} At the sentencing hearing, the trial court astutely noted that if Crim had done to a stranger what he did to the victim, placing a belt around her neck until she lost consciousness, he would have been facing attempted murder; but “unfortunately, society and our judicial system takes those cases more seriously than

when you impose this kind of torture, and I will call it torture, sadistic torture, on the person you purport to love.”

{¶ 18} The trial court sentenced Crim to 6 years in prison on Count 4 plus 1 year on the firearm specification and ordered that the 1 year be served consecutive to and prior to the base charge; 6 years in prison on Count 6; 8 years in prison on Count 7; and 12 months in prison on Count 11. The trial court also sentenced Crim to 6 months in jail on Count 9. The trial court ordered that Counts 4, 6, and 7 run consecutive to each other and Counts 9 and 11 run concurrent to those and to each other, for a total of 21 years in prison. The trial court also notified Crim that he would be subject to three years of postrelease control for his “second-degree felonies.” It is from this judgment that Crim now appeals.

II. Crim.R. 11

{¶ 19} In his first assignment of error, Crim argues that his plea was not voluntary, knowing, or intelligent because the trial court failed to inform him of the maximum penalty involved.

{¶ 20} The standard for reviewing whether the trial court accepted a plea in compliance with Crim.R. 11(C) is *de novo*. *State v. Tutt*, 2015-Ohio-5145, 54 N.E.3d 619, ¶ 13 (8th Dist.), citing *State v. Spock*, 8th Dist. Cuyahoga No. 99950, 2014-Ohio-606. It requires an appellate court to review the totality of the circumstances and determine whether the plea hearing was in compliance with Crim.R. 11(C). *State v. Cardwell*, 8th Dist. Cuyahoga No. 92796, 2009-Ohio-6827, ¶ 26, citing *State v. Stewart*, 51 Ohio St.2d 86, 364 N.E.2d 1163 (1977).

{¶ 21} Crim.R. 11(C)(2)(a) provides in pertinent part that the court

shall not accept a plea of guilty or no contest without first addressing the defendant personally and * * * [d]etermining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved[.]

{¶ 22} The requirements of Crim.R. 11(C)(2)(a) are nonconstitutional, and thus, this court reviews “to ensure substantial compliance” with this rule. *State v. Esner*, 8th Dist. Cuyahoga No. 90740, 2008-Ohio-6654, ¶ 4. “Under this standard, a slight deviation from the text of the rule is permissible; so long as the totality of the circumstances indicates that ‘the defendant subjectively understands the implications of his plea and the rights he is waiving.’” *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, ¶ 31, quoting *State v. Nero*, 56 Ohio St.3d 106, 564 N.E.2d 474 (1990). “If it appears from the record that the defendant appreciated the effect of his plea and his waiver of rights in spite of the trial court’s error, there is still substantial compliance.” *Id.*, quoting *State v. Caplinger*, 105 Ohio App.3d 567, 664 N.E.2d 959 (4th Dist.1995).

{¶ 23} As repeatedly recognized by the Ohio Supreme Court, “a defendant must show prejudice before a plea will be vacated for a trial court’s error involving Crim.R. 11(C) procedure when nonconstitutional aspects of the colloquy are at issue.” *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶ 17; *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51, ¶ 12; *Nero* at 108. “The test for prejudicial effect is ‘whether the plea would have otherwise been made.’” *Clark* at ¶ 32, quoting *Nero*.

{¶ 24} Specifically, Crim contends that he did not understand the maximum penalty he was facing because neither the trial court nor his attorney properly explained the meaning of merger or consecutive sentences to him. Crim maintains that not only did they not properly explain it to him, “the record reveals that [he] affirmatively misunderst[ood] a key term of the agreement.” Crim therefore claims that there was no “meeting of the minds” with respect to his plea and, as a result, his plea was invalid and should be vacated.

{¶ 25} When the trial court was discussing the plea offer with Crim, it asked him if he understood that the five offenses that he was pleading guilty to “are not allied offenses” and that “there is a possibility that these sentences will all run consecutive to one another.” Crim indicated that he did not understand. The trial court stated, “These are all separate offenses, so you can receive — the sentences can be stacked one upon the other.” Crim still did not understand. At that point, his counsel explained, that “[i]t is a sentencing option for the Court. It is what her potential sentence is. She’s explaining under the law these do not have to be run concurrently. They — [.]” Crim then interrupted his counsel and asked, “They all start off with the same time?” Defense counsel responded, “Yes.” Crim stated that he now understood.

{¶ 26} While we agree with Crim that this exchange between the trial court, Crim’s defense counsel, and Crim was somewhat confusing, we find that the trial court substantially complied with Crim.R. 11 by informing Crim of the maximum penalties he could receive. Despite the confusing exchange at Crim’s plea hearing

regarding merger and consecutive versus concurrent sentences, the trial court and the state informed Crim — multiple times — that the maximum sentence he was facing if he entered into the plea was 29 years. Before trial began on October 22, 2018, when discussing the state’s plea offer, the state informed Crim that if he accepted the plea, he was facing a maximum of 29 years in prison if the trial court ran the counts consecutively. At that time, the trial court also said that it was not making any promises with respect to the sentence. Then, during the actual plea hearing after the confusing exchange quoted previously, the trial court asked Crim if he understood that the maximum penalty he could face was 29 years in prison. Crim indicated that he understood the maximum penalty.

{¶ 27} Thus, after reviewing the totality of the circumstances, we conclude that Crim subjectively understood the maximum sentence he was facing, as well as the implications of his plea and the rights he was waiving by entering into the plea. *See Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, at ¶ 31, quoting *Nero*, 56 Ohio St.3d 106, 564 N.E.2d 474.

{¶ 28} Moreover, even if we had found that the trial court failed to substantially comply, we would find no prejudice to Crim. Crim maintains that there was “no meeting of the minds” because he did not understand that his sentence could be served consecutively, which was a requirement of his plea deal. Incredulously, Crim argues this despite the fact that the trial court reviewed the maximum sentence of each offense with Crim as well as made sure that Crim understood that he was facing a maximum of 29 years if it ran all of the offenses

consecutively to one another. There is simply no prejudice to Crim on the record before us.

{¶ 29} Crim's first assignment of error is overruled.

{¶ 30} In his second assignment of error, Crim argues that his trial counsel was ineffective for failing to properly explain the concepts of merger and consecutive sentences to him. To sustain a claim of ineffective assistance of counsel, there must be prejudice to a defendant. As we stated above, Crim was not prejudiced by his counsel's purported failure to properly explain the concepts to him. Accordingly, Crim's second assignment of error has no merit and is overruled.

{¶ 31} Judgment affirmed.

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 of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending is terminated. Case remanded to the trial court for execution of sentence.

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

MARY J. BOYLE, JUDGE

**MARY EILEEN KILBANE, A.J., and
MICHELLE J. SHEEHAN, J., CONCUR**