

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

STATE OF OHIO, :
 :
 Plaintiff-Appellee, :
 : No. 109152
 v. :
 :
 MERLIN T. JOHNSON, :
 :
 Defendant-Appellant. :
 :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: October 22, 2020

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-17-622972-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Maxwell Martin and Lindsay Raskin, Assistant Prosecuting Attorneys, *for appellee*.

Paul W. Flowers Co., L.P.A., and Louis E. Grube, *for appellant*.

FRANK D. CELEBREZZE, JR., P.J.:

{¶ 1} Defendant-appellant Merlin Johnson brings the instant appeal challenging the sentence imposed by the trial court at resentencing. Appellant argues that the trial court committed plain error by ordering him to pay court costs,

he was denied his constitutional right to effective assistance of counsel, and the trial court committed plain error by merging three allied offenses for sentencing purposes and assuming the offense upon which the state wanted to proceed to sentencing. After a thorough review of the record and law, this court affirms.

I. Factual and Procedural History

{¶ 2} In November 2017, appellant was charged for his involvement in the murder of Jonathan Singletary.¹ Following a bench trial in April 2018, appellant was convicted of aggravated murder (Count 1), murder (Count 2), felonious assault (Count 3), aggravated robbery (Count 4), tampering with evidence (Count 5), discharging a firearm near prohibited premises (Count 6), and having a weapon while under disability (Count 7). Appellant was also convicted of the underlying firearm, notice of prior conviction, and repeat violent offender specifications charged in the indictment.

{¶ 3} The trial court held a sentencing hearing on June 21, 2018. The trial court merged the aggravated murder conviction (Count 1) and the murder conviction (Count 2), and the state elected to sentence appellant on Count 1. The trial court imposed an aggregate prison term of 34 years to life. During the sentencing hearing, the trial court ordered appellant to pay \$558.60 in court costs. In its judgment entry of conviction and sentence, the trial court ordered appellant to pay court costs.

¹ For a full recitation of the factual and procedural history in this case, see *State v. Johnson*, 8th Dist. Cuyahoga No. 107427, 2019-Ohio-2913.

{¶ 4} Appellant filed an appeal challenging his convictions and the trial court's sentence. *State v. Johnson*, 8th Dist. Cuyahoga No. 107427, 2019-Ohio-2913. Regarding his sentencing challenge, appellant argued that the trial court committed plain error by failing to merge all convictions at sentencing. Appellant did not challenge the trial court's imposition of court costs on appeal.

{¶ 5} This court affirmed appellant's convictions, but held that appellant's conviction for felonious assault (Count 3) should have merged with his aggravated murder conviction on Count 1. As such, this court reversed the sentences on appellant's aggravated murder and felonious assault convictions and remanded the matter for resentencing "on whichever of those two counts survives the state's election." *Id.* at ¶ 42.

{¶ 6} On remand, the trial court held a resentencing hearing on September 30, 2019. The trial court found, and the parties stipulated, that Counts 1, 2, and 3 merged for sentencing purposes. The state elected to sentence appellant on the aggravated murder conviction on Count 1. The trial court imposed an aggregate prison term of 34 years to life.

{¶ 7} The issue of court costs was not addressed on the record during the resentencing hearing. However, in its judgment entry of conviction and sentence, filed on September 30, 2019, the trial court ordered appellant to pay court costs.

{¶ 8} On October 28, 2019, appellant filed the instant appeal challenging the trial court's judgment. He assigns three errors for review:

I. The trial court plainly erred by failing to consider whether the defendant could afford to pay court costs despite having recognized that he was indigent.

II. The defendant received ineffective assistance of counsel because his attorney failed to request that all costs be waived.

III. The trial court plainly erred by electing on behalf of the state which of the merged counts would proceed upon.

II. Law and Analysis

A. Court Costs

{¶ 9} Appellant's first and second assignments of error pertain to the trial court's imposition of court costs.

{¶ 10} Initially, we note that appellant's first and second assignments of error are barred by res judicata. The doctrine of res judicata bars a defendant in a criminal case from litigating issues that were or could have been raised previously in a direct appeal. *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraph nine of the syllabus. This court has held that the doctrine of res judicata precludes a defendant from challenging the imposition of court costs if the defendant filed a direct appeal but failed to raise the issue of court costs in that appeal. *See State v. Pettway*, 8th Dist. Cuyahoga No. 98836, 2013-Ohio-1348, ¶ 5; *State v. Hunter*, 8th Dist. Cuyahoga No. 102245, 2015-Ohio-4180, ¶ 8; *State v. Melton*, 8th Dist. Cuyahoga No. 96621, 2011-Ohio-5929, ¶ 21-22; *see also State v. Hawley*, 2d Dist. Montgomery No. 25897, 2014-Ohio-731, ¶ 10 (applying res judicata to defendant's claims that the trial court failed to impose court costs at the sentencing hearing and defense counsel was ineffective for failing to request waiver of court costs at

sentencing because defendant could have, but failed to raise these claims in his direct appeal); *State v. Stapleton*, 3d Dist. Allen No. 1-19-66, 2020-Ohio-852, ¶ 4.

{¶ 11} In the instant matter, appellant could have challenged the trial court's imposition of court costs and the purportedly deficient performance of defense counsel based on counsel's failure to request waiver of court costs in his first appeal. Appellant failed to do so. His attempt to raise these claims in this appeal is barred by res judicata.

{¶ 12} Assuming arguendo that appellant's challenge to the trial court's imposition of court costs and ineffective assistance of counsel claims are not barred by res judicata, for the reasons set forth below, these claims fail on the merits.

1. Ability to Pay

{¶ 13} In his first assignment of error, appellant argues that the trial court committed plain error in imposing court costs without considering appellant's ability to pay court costs.

{¶ 14} The record reflects that appellant or defense counsel did not move to waive the payment of court costs at the resentencing hearing, nor did appellant file a written motion requesting waiver of court costs. “[A]n indigent defendant must move a trial court to waive payment of costs at the time of sentencing. If the defendant makes such a motion, then the issue is preserved for appeal and will be reviewed under an abuse-of-discretion standard. Otherwise, the issue is waived and costs are res judicata.” *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, 843

N.E.2d 164, ¶ 23. Accordingly, appellant has waived all arguments related to the imposition of court costs except for plain error.

{¶ 15} “Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” Crim.R. 52(B). “Plain error exists only if ‘but for the error, the outcome of the trial clearly would have been otherwise,’ and is applied ‘under exceptional circumstances and only to prevent a manifest miscarriage of justice.’” *State v. Harrison*, 122 Ohio St.3d 512, 2009-Ohio-3547, 912 N.E.2d 1106, ¶ 61, quoting *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978).

{¶ 16} Appellant argues that the trial court committed plain error in imposing court costs because the court failed to consider appellant’s “obvious inability to pay court costs.” Appellant’s reply brief at 1. Regarding his “obvious inability to pay court costs,” appellant emphasizes that (1) he had been incarcerated since his arrest on November 9, 2017, (2) he was sentenced to life in prison with parole eligibility after 34 years, (3) he has been in prison a majority of his adult life as a result of this case and Cuyahoga C.P. No. CR-13-570610,² (4) there is no evidence that he has a meaningful work history or ability to work (unlike *State v. Hicks*, 8th Dist. Cuyahoga No. 105083, 2017-Ohio-8312), and (5) he had been declared indigent on three occasions.³ Appellant’s argument is misplaced.

² Appellant was sentenced to a prison term of three years in October 2013. Appellant was 18 years old at the time.

³ The trial court declared appellant indigent (1) at his arraignment on November 21, 2017, (2) on June 22, 2018, when the trial court granted appellant’s oral

{¶ 17} R.C. 2947.23, governing the imposition of court costs, provides, in relevant part, “[i]n all criminal cases * * * the judge * * * shall include in the sentence the costs of prosecution * * * and render a judgment against the defendant for such costs.” Accordingly, a sentencing court must include the costs of prosecution in the sentence and render a judgment against the defendant for costs, even if the defendant is indigent. *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, 817 N.E.2d 393, ¶ 8. “[A] defendant’s financial status is irrelevant to the imposition of court costs.” *State v. Clevenger*, 114 Ohio St.3d 258, 2007-Ohio-4006, 871 N.E.2d 589, ¶ 3 (superseded by statute on other grounds).

{¶ 18} A trial court must consider a defendant’s ability to pay a financial sanction pursuant to R.C. 2929.19. This court has held that a trial court need not consider a defendant’s ability to pay court costs. *See State v. Jones*, 8th Dist. Cuyahoga No. 105719, 2018-Ohio-847, ¶ 18, citing *State v. Dawson*, 2017-Ohio-965, 86 N.E.3d 672, ¶ 42 (8th Dist.). Court costs are not financial sanctions requiring consideration of a defendant’s ability to pay. *Dawson at id.*

{¶ 19} A trial court may waive court costs, and such a decision is reviewed on an abuse of discretion standard. *White; Clevenger*. Following the Ohio Supreme Court’s decisions in *White* and *Clevenger*, this court has repeatedly held that a trial court did not abuse its discretion in imposing court costs, *even if the defendant is indigent*. This court has refused to find plain error where the trial court has

motion for court-appointed appellate counsel, and (3) in the trial court’s September 30, 2019 resentencing judgment entry.

exercised its discretion to impose court costs despite a defendant's indigence. *See Hicks*, 8th Dist. Cuyahoga No. 105083, 2017-Ohio-8312, at ¶ 19; *State v. Copeland*, 8th Dist. Cuyahoga No. 107187, 2019-Ohio-987; *Jones*; *Dawson*; and *State v. Graves*, 8th Dist. Cuyahoga No. 103984, 2016-Ohio-7303. *Accord State v. Davenport*, 8th Dist. Cuyahoga No. 106143, 2019-Ohio-4156, ¶ 15.

{¶ 20} In the instant matter, the trial court was not obligated to consider appellant's ability to pay court costs before ordering appellant to pay costs. We find no basis upon which to conclude that the trial court committed plain error in exercising its discretion to impose court costs despite the fact that the court had previously found appellant to be indigent.

{¶ 21} Appellant's first assignment of error is overruled.

2. Resentencing Hearing

{¶ 22} After reviewing the record, we find, *sua sponte*, that the trial court imposed court costs in its September 30, 2019 judgment entry without imposing court costs on the record in open court during the resentencing hearing.

In [*State v. Beasley*, 153 Ohio St.3d 497, 2018-Ohio-493, 108 N.E.3d 1028], the trial court imposed court costs in its sentencing journal entry without mentioning costs during the sentencing hearing. The Ohio Supreme Court recognized that [*State v. Joseph*, 125 Ohio St.3d 76, 2010-Ohio-954, 926 N.E.2d 278]⁴ was no longer good law in light of the General Assembly's enactment of Am.Sub.H.B. No. 247, effective March 22, 2013, which amended R.C. 2947.23. *Beasley* at ¶ 263. The

⁴ In *Joseph*, the Ohio Supreme Court held that when a trial court imposes court costs in a sentencing journal entry without orally imposing costs at the sentencing hearing, the defendant's Crim.R. 43(A) right to be present at all stages of the trial was violated. *Id.* at ¶ 22. The court held that such an error was not harmless, and as a result, the court remanded the case to the trial court "for the limited purpose of allowing [the defendant] to move the court for a waiver of the payment of court costs." *Id.* at ¶ 23.

newly added subdivision (C) to R.C. 2947.23 states, “The court retains jurisdiction to waive, suspend, or modify the payment of the costs of prosecution * * * at the time of sentencing *or at any time thereafter.*” (Emphasis sic.) *Beasley* at ¶ 265, quoting R.C. 2947.23(C). Based on that language, the court concluded that “*Beasley* does not need this court to remand this case in order for him to file a motion to waive costs. Therefore, his request for a remand on this basis has no merit.” *Id.*

In *State v. West*, 8th Dist. Cuyahoga No. 105568, 2018-Ohio-956, this court applied the *Beasley* rationale. The defendant-appellant challenged the trial court’s imposition of court costs, arguing that the trial court imposed costs in its sentencing journal entry without imposing costs in open court at sentencing. *Id.* at ¶ 27. Furthermore, the appellant argued that the appropriate remedy was to remand the case to the trial court with instructions to waive court costs based on appellant’s indigence. *Id.* This court recognized that “*Beasley* effectively overrules this court’s en banc decision in [*State v. Taylor*, 2017-Ohio-9270, 102 N.E.3d 1101 (8th Dist.)].”⁵ *West* at ¶ 30. Accordingly, this court held that the trial court did not err in imposing court costs and found no merit to appellant’s request for a remand. *Id.*; see *State v. Cruz*, 8th Dist. Cuyahoga No. 106098, 2018-Ohio-2052, ¶ 32, citing *Beasley* at ¶ 265 (because trial courts retain continuing jurisdiction to waive, suspend, or modify the payment of court costs, appellate courts need not remand the case to the trial court to allow a defendant to file a motion to waive costs).

State v. Reed, 8th Dist. Cuyahoga No. 106796, 2018-Ohio-3187, ¶ 10-11.

{¶ 23} In the instant matter, the trial court did not impose court costs in open court during the resentencing hearing. Court costs were imposed, however, in the trial court’s September 30, 2019 judgment entry. Following the resentencing hearing, the trial court assessed court costs upon appellant in the amount of \$747.64

⁵ In *Taylor*, this court, sitting en banc, applied the Ohio Supreme Court’s *Joseph* rationale and held that a “trial court’s failure to impose court costs at the sentencing hearing, but ordering the defendant to pay court costs in the judgment entry of conviction, constitutes reversible error.” *Taylor* at ¶ 13

on October 18, 2019, and a statement of court costs were “sent to correctional institution for collection.”

{¶ 24} Initially, we find that the trial court was not obligated to consider the issue of court costs or impose court costs on the record during the resentencing hearing. The scope of the remand from this court in *Johnson*, 8th Dist. Cuyahoga No. 107427, 2019-Ohio-2913, was limited. Specifically, this court concluded that appellant’s “conviction for felonious assault must merge with his conviction for aggravated murder.” *Id.* at ¶ 2. Accordingly, this court reversed the trial court’s sentences on the aggravated murder and felonious assault counts and remanded the matter to the trial court “for resentencing, *solely as to these offenses* after the state elects upon which count to proceed.” (Emphasis added.) *Id.* Because the matter was remanded for the limited purpose of merging the aggravated murder and felonious assault convictions and resentencing on the count elected by the state, rather than remanded for a de novo resentencing hearing, the trial court was not obligated to reconsider and reimpose court costs.

{¶ 25} The trial court imposed court costs at the original sentencing hearing. Appellant did not challenge the trial court’s imposition of court costs in his first appeal. This court did not disturb this aspect of the trial court’s original sentence. Therefore, the issue of court costs was outside of the scope of the limited resentencing hearing.

{¶ 26} Assuming, arguendo, that the trial court erred by failing to impose court costs during the resentencing hearing, we would not need to remand the

matter to the trial court for correction of the imposition of court costs. Pursuant to the 2013 amendment to R.C. 2947.23(C), the trial court retains jurisdiction to waive, suspend, or modify the payment of court costs at any time after sentencing. Accordingly, appellant can file a motion to waive court costs in the trial court at any time, and we need not remand the matter to the trial court to provide appellant an opportunity to do so.

3. Ineffective Assistance of Counsel

{¶ 27} In his second assignment of error, appellant argue that he was denied his constitutional right to effective assistance of counsel.

{¶ 28} In order to prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate: (1) deficient performance by counsel, i.e., performance falling below an objective standard of reasonable representation, and (2) counsel's errors prejudiced the defendant, i.e., a reasonable probability that but for counsel's errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraphs two and three of the syllabus.

{¶ 29} Here, regarding the first *Strickland* prong, appellant argues that counsel's failure to move for waiver of court costs at resentencing constituted deficient performance.

{¶ 30} Regarding the second *Strickland* prong, appellant must show that a reasonable probability exists that the trial court would have waived payment of court

costs if such motion had been filed. *State v. Graves*, 8th Dist. Cuyahoga No. 103984, 2016-Ohio-7303, ¶ 13, citing *State v. Vanderhorst*, 8th Dist. Cuyahoga No. 97242, 2012-Ohio-2762, ¶ 78; *State v. Bonton*, 8th Dist. Cuyahoga No. 102918, 2016-Ohio-700, ¶ 20. Based on the 2013 amendment to R.C. 2947.23(C) under which trial courts retain jurisdiction to waive, suspend, or modify the payment of court costs at any time, this court has held that “it is nearly impossible to establish prejudice as a result of counsel’s failure to move for a waiver of costs at sentencing.” *State v. Mihalis*, 8th Dist. Cuyahoga No. 104308, 2016-Ohio-8056, ¶ 33; *State v. Brown*, 8th Dist. Cuyahoga No. 103427, 2016-Ohio-1546, ¶ 15.

{¶ 31} As noted above, pursuant to the 2013 amendment to R.C. 2947.23(C), the trial court retains jurisdiction to waive, suspend, or modify the payment of court costs at any time after sentencing, and appellant can file a motion to waive court costs in the trial court at any time. Accordingly, appellant’s ineffective assistance claim fails under the second *Strickland* prong because he cannot demonstrate prejudice. *Davenport*, 8th Dist. Cuyahoga No. 106143, 2019-Ohio-4156, at ¶ 16, citing *Beasley*, 153 Ohio St.3d 497, 2018-Ohio-493, 108 N.E.3d 1028; see *Copeland*, 8th Dist. Cuyahoga No. 107187, 2019-Ohio-987, at ¶ 10 (appellant could pursue waiver of court costs after sentencing and as a result, the appellant was not prejudiced by counsel’s failure to seek waiver of court costs and failure to file an affidavit of indigency).

{¶ 32} This court has recognized a narrow exception to the “near impossibility” to establish prejudice in this context. In *State v. Gibson*, 8th Dist.

Cuyahoga No. 104363, 2017-Ohio-102, this court held that the trial court’s prior finding that a defendant was indigent demonstrated a reasonable probability that the trial court would have waived costs had defense counsel made a timely motion to waive. *Id.* at ¶ 16. This court explained that under these circumstances, including the trial court’s prior finding of indigency, counsel’s failure to file a motion to waive court costs constituted deficient performance that prejudiced the defendant.

{¶ 33} In *State v. Springer*, 8th Dist. Cuyahoga No. 104649, 2017-Ohio-8861, the trial court made a prior finding that the defendant was indigent, but ordered the defendant to pay court costs at sentencing. Despite the trial court’s prior finding of indigency, defense counsel failed to move for a waiver of court costs. This court applied the *Gibson* exception, and remanded the matter for a hearing “regarding the imposition of costs.” *Springer* at ¶ 46.

{¶ 34} In *State v. Davis*, 159 Ohio St.3d 31, 2020-Ohio-309, 146 N.E.3d 560, the Ohio Supreme Court considered the following issue: “whether trial counsel’s failure to file a motion to waive court costs at a defendant’s sentencing hearing constitutes ineffective assistance of counsel when the defendant has previously been found indigent.” *Id.* at ¶ 1. The court declined to answer the question affirmatively or negatively. Rather, the court concluded that

when trial counsel fails to request that the trial court waive court costs on behalf of a defendant who has previously been found to be indigent, a determination of prejudice for purposes of an ineffective-assistance-of-counsel analysis depends upon whether the facts and circumstances presented by the defendant establish that there is a reasonable probability that the trial court would have granted the request to waive costs had one been made.

Id. at ¶ 16. The Ohio Supreme Court explained that

a determination of indigency alone does not rise to the level of creating a reasonable probability that the trial court would have waived costs had defense counsel moved the court to do so, contrary to the Eighth District's holding in *Gibson*, 2017-Ohio-102, and in *Springer*, 2017-Ohio-8861. See *State v. Dean*, 146 Ohio St.3d 106, 2015-Ohio-4347, 54 N.E.3d 80, ¶ 233; *State v. Smith*, 12th Dist. Warren No. CA2010-06-057, 2011-Ohio-1188, ¶ 63-64, *rev'd in part on other grounds*, 131 Ohio St.3d 297, 2012-Ohio-781, 964 N.E.2d 423 (an indigent defendant fails to show that there is a reasonable probability that the trial court would have waived costs when the trial court made a finding that the defendant had the ability to work and therefore had the ability to pay the costs in the future). The court of appeals, instead, must look at all the circumstances that the defendant sets forth in attempting to demonstrate prejudice and determine whether there is a reasonable probability that the trial court would have granted a motion to waive costs had one been made.

(Emphasis added.) *Davis* at ¶ 15.

{¶ 35} In the instant matter, the trial court, on three occasions, found appellant to be indigent. As noted above, these findings of indigency alone do not constitute a reasonable probability that the trial court would have waived court costs if counsel filed a motion to waive.

{¶ 36} In addition to these findings of indigency, appellant attempts to demonstrate prejudice by emphasizing that (1) he had been incarcerated since his arrest on November 9, 2017, (2) he was sentenced to life in prison with parole eligibility after 34 years, (3) he has been in prison a majority of his adult life, and (4) there is no evidence that he has a meaningful work history or ability to work.

{¶ 37} After reviewing the record, we find that appellant has failed to demonstrate a reasonable probability that had counsel moved to waive court costs, the trial court would have granted the motion. The evidence in the record regarding

appellant's ability to pay costs, educational history, physical and mental health, and assets is limited.

{¶ 38} During the original sentencing hearing,⁶ the trial court explained,

I did avail myself of the opportunity to review a presentence investigation report prepared sometime around August 5, 2013, in connection with Case Numbers [CR-13-570610] and [CR-13-570713]. Part of the reason being I wanted to, at a minimum, acquaint myself with whatever prior criminal history [appellant] had and, of course, I've read the whole thing so there is a little but about social and education history and so on.

(Tr. 464.) Defense counsel confirmed that he reviewed the presentence investigation report from appellant's prior case during the original sentencing hearing. (Tr. 476.)

{¶ 39} Accordingly, when the trial court ordered appellant to pay court costs in June 2018, the trial court was aware of the amount of time that appellant had previously been incarcerated in CR-13-570610 and CR-13-570713, and the trial court was also aware of the amount of time that appellant would be incarcerated for his convictions in CR-17-622972. The trial court had also considered the information pertaining to appellant's educational and employment history, and appellant's financial status. *See State v. Redden*, 5th Dist. Ashland No. 19-COA-026, 2020-Ohio-878, ¶ 49 (presentence investigation report contains information about defendant's employment history and assets); *State v. Dehner*, 12th Dist. Clermont No. CA2012-12-090, 2013-Ohio-3576, ¶ 47, citing *State v. Dandridge*, 12th Dist.

⁶ The trial court did not reference appellant's presentence investigation report during the resentencing hearing.

Butler No. CA2003-12-330, 2005-Ohio-1077, ¶ 6 (presentence investigation report details defendant’s personal and financial information).

{¶ 40} Appellant was born on November 19, 1994. At the time of the September 30, 2019 resentencing hearing, he was 24 years old. There is no evidence in the record that appellant has any physical, mental, or medical conditions that will render him incapable of working. Therefore, there is no reason appellant cannot pay court costs while serving his prison sentence. *See Hicks*, 8th Dist. Cuyahoga No. 105083, 2017-Ohio-8312, at ¶ 18; *State v. McWay*, 3d Dist. Allen No. 1-19-65, 2020-Ohio-719, ¶ 8 (pursuant to Ohio Administrative Code Chapter 5120, a defendant can earn money by working while in prison). If appellant does not pay his court costs while in prison, he will be 58 years old when he becomes eligible for parole.

{¶ 41} For all of the foregoing reasons, appellant has failed to demonstrate a reasonable probability that if defense counsel requested waiver of court costs, the trial court would have granted counsel’s request. Appellant’s second assignment of error is overruled.

B. Allied Offenses

{¶ 42} In his third assignment of error, appellant argues that the trial court committed plain error by electing on the state’s behalf which allied offense upon which to sentence appellant.

{¶ 43} Appellant acknowledges that “[t]he state did ratify the trial court’s decision” regarding whether the state wished to proceed to sentencing on Count 1 or Count 3. Appellant’s brief at 20. Nevertheless, appellant contends that “it was the

trial court's decision in the first instance to 'sentence [appellant] on count 1, aggravated murder.'" Appellant's brief at 20, citing tr. 4-5.

{¶ 44} In *Johnson*, 8th Dist. Cuyahoga No. 107427, 2019-Ohio-2913, this court remanded the matter for resentencing and merger of Counts 1, 2, and 3. *Id.* at

¶ 42. During the resentencing hearing, the trial court stated,

So the State of Ohio was invited to be present today and has declined the invitation. But at the original sentencing the state did elect [to sentence appellant on Count 1 rather than Count 2]. So I'll assume that that same election applies; therefore, it's necessary today to sentence [appellant] on count 1, aggravated robbery; 5 tampering with evidence; 6, discharge of a firearm; 7, weapons under disability.

(Tr. 4.) Before imposing its sentence, the trial court stated,

I want to note for the oral record that Assistant County Prosecutor Lindsay Raskin appeared nearing the end of [defense counsel's] presentation there.

Miss Raskin, * * * When you had not arrived by the time of the hearing started I assumed that if you were here you would elect among counts 1, 2 and 3 to sentence on count 1. Am I correct?

(Tr. 5.) The prosecutor confirmed that the state was electing to sentence appellant on Count 1. Only after the state made this election did the trial court impose its sentence.

{¶ 45} After reviewing the record, we find that appellant has failed to demonstrate reversible error or prejudice from the trial court's initial "assumption" that the state would elect to sentence appellant on Count 1, consistent with the state's election at the original sentencing hearing. To the extent that appellant argues that the trial court's statement in this regard influenced the state's decision on which count to sentence appellant, appellant's argument is unsupported by the record.

From what we can discern from the transcript, the prosecutor was not present in the courtroom at the time the trial court verbalized its assumption that the state would again elect to sentence appellant on Count 1.

{¶ 46} Furthermore, contrary to appellant’s assertion that the trial court “deci[ded] in the first instance to ‘sentence [appellant] on count 1,’” the trial court did not impose a sentence on Count 1 based on its assumption during the hearing, nor journalize a sentence based on its assumption that the state would elect to sentence appellant on Count 1. A sentence announced in open court is not final until it is journalized. *See State v. Goines*, 8th Dist. Cuyahoga No. 105436, 2017-Ohio-8172, ¶ 22, citing *State v. Houston*, 8th Dist. Cuyahoga Nos. 103252 and 103254, 2016-Ohio-3319, ¶ 11, and *State v. Lee*, 8th Dist. Cuyahoga No. 104190, 2016-Ohio-8317, ¶ 25.

{¶ 47} The trial court sentenced appellant on Count 1, aggravated murder, during the resentencing hearing *after* the state elected to proceed to sentencing on Count 1. The sentence journalized by the trial court was based on the state’s election, not the trial court’s assumption that the state would elect to sentence appellant on Count 1.

{¶ 48} For all of the foregoing reasons, appellant’s third assignment of error is overruled.

III. Conclusion

{¶ 49} After thoroughly reviewing the record, we affirm the trial court’s judgment. The trial court did not commit plain error in ordering appellant to pay

court costs. Appellant was not denied his constitutional right to effective assistance of counsel. The trial court did not commit plain error in sentencing appellant on Count 1 at resentencing.

{¶ 50} 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 out of this court directing the common pleas court to carry this judgment into execution. The defendant's convictions 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.

FRANK D. CELEBREZZE, JR., PRESIDING JUDGE

LARRY A. JONES, SR., J., and
RAYMOND C. HEADEN, J., CONCUR