[Cite as *State v. Kontur*, 2015-Ohio-2814.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2014-G-3238**
- vs -	:	
CHASE M. KONTUR,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Geauga County Court of Common Pleas.
Case No. 14 C 000111.

Judgment: Affirmed.

James R. Flaiz, Geauga County Prosecutor, and *Christopher J. Joyce*, Assistant Prosecutor, Courthouse Annex, 231 Main Street, Suite 3A, Chardon, OH 44024 (For Plaintiff-Appellee).

Kenneth J. Lewis, 1220 West 6th Street, Suite 502, Cleveland, OH 44113 (For Defendant-Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Chase M. Kontur, appeals the judgment of the Geauga County Court of Common Pleas sentencing him to eight and one-half years in prison. For the following reasons, we affirm the judgment of the trial court.

{¶2} During the early summer months of 2014, appellant was questioned by deputies from the Geauga County Sheriff's Office and admitted to breaking into the Horizons Christian Assembly and stealing a safe. Appellant was indicted for these

offenses in trial court case number 14C000113 on July 15, 2014, which included two counts. In addition, appellant admitted to participating in the assault and robbery of two Amish victims, as well as the attempted assaults and robberies of two other Amish buggies in the area. Appellant also admitted to deputies that, over the course of several nights, he participated in breaking into businesses in the Amish community in an attempt to steal money from the cash registers. Appellant was indicted for these offenses in trial court case number 14C000111 on July 30, 2014, which included nineteen counts.

{¶3} The cases were consolidated, and appellant entered a guilty plea on September 2, 2014. Ultimately, appellant entered a plea to one count of Breaking and Entering from case 14C000113, a felony of the fifth degree; plus two counts of Felonious Assault, felonies of the second degree; one lesser included offense of Robbery, a felony of the third degree; one count of Safecracking, a felony of the fourth degree; and five counts of Breaking and Entering, felonies of the fifth degree, all from case 14C000111. All of the remaining counts were dismissed, and the state agreed to stand silent at sentencing. Appellant was ultimately sentenced to eight and one-half years in prison.

{¶4} Appellant timely appealed and asserts one assignment of error for our review:

{¶5} "The trial court erred and abused its discretion in sentencing the appellant too harshly; and failed to follow appropriate guidelines when sentencing on multiple counts."

{¶6} Ohio's felony-sentencing scheme allows judges to exercise discretion within established statutory bounds. *State v. Ries*, 11th Dist. Portage No. 2008-P-0064, 2009-Ohio-1316, ¶13, citing *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, paragraph three of the syllabus. Despite having significant latitude, sentencing courts are required to follow statutory direction in choosing a prison term. *State v. Belew*, 140 Ohio St.3d 221, 2014-Ohio-2964, ¶10 (Lanzinger, J., dissenting).

{¶7} This court utilizes R.C. 2953.08(G) as the standard of review in felony sentencing appeals. *State v. Hettmansperger*, 11th Dist. Ashtabula No. 2014-A-0006, 2014-Ohio-4306, ¶14. R.C. 2953.08(G)(2) states:

> 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:
>
> (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.

{¶8} Appellant argues the trial court sentenced him without considering any of the mitigating factors, such as his genuine remorse, absence of prior criminal history, regret for his actions, and acceptance of responsibility for his actions.

{¶9} A felony sentence should be reasonably calculated "to protect the public from future crime by the offender * * * and to punish the offender using the minimum

sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources." R.C. 2929.11(A). A court imposing a felony sentence is required to consider seriousness and recidivism factors found in R.C. 2929.12. However, it is well established that a trial court is "not required to make findings of fact under the seriousness and recidivism factors in R.C. 2929.12." *State v. ONeil*, 11th Dist. Portage No. 2010-P-0041, 2011-Ohio-2202, ¶34.

{¶10} Our review of the trial court record reveals the trial court considered the purposes and factors of felony sentencing in R.C. 2929.11 and R.C. 2929.12 before imposing appellant's sentence within the statutory guidelines. The trial court, both at sentencing and in the judgment of sentence, stated that it had considered the factors in R.C. 2929.11 and R.C. 2929.12. At sentencing, the trial court stated that "in achieving a sentence, [it] considered the overriding principals [sic] of felony sentencing generally set forth in R.C. 2929.11." The trial court further stated it "had considered the factors, both seriousness and recidivism factors, and all relevant factors, balanced those factors in accordance with 2929.12, been guided by the degree and type of felony."

{¶11} Next, appellant argues the trial court erred in imposing a consecutive sentence, in violation of R.C. 2941.25, as his crimes were allied offenses. Initially, we note that appellant pled guilty to all of these offenses. He did not assert that any of the crimes were allied offenses below; therefore, we review this argument under a plain error analysis.

{¶12} In *State v. Rogers*, ___ Ohio St.3d ___, 2015-Ohio-2459, ¶3, the Ohio Supreme Court held:

> An accused's failure to raise the issue of allied offenses of similar import in the trial court forfeits all but plain error, and a forfeited

> error is not reversible error unless it affected the outcome of the proceeding and reversal is necessary to correct a manifest miscarriage of justice. Accordingly, an accused has the burden to demonstrate a reasonable probability that the convictions are for allied offenses of similar import committed with the same conduct and without a separate animus; and, absent that showing, the accused cannot demonstrate that the trial court's failure to inquire whether the convictions merge for purposes of sentencing was plain error.

{¶13} Further, although appellant argues allied offenses, he fails in his appellate brief to state what offenses he believes are allied offenses. There is a bald assertion that the offenses occurred over a two day period of time, but there is nothing in the record to allow us to review whether any of the offenses should have been merged.

{¶14} When the defendant's conduct constitutes a single offense, the defendant may be convicted and punished only for that offense. When the conduct supports more than one offense, however, a court must conduct an analysis of allied offenses of similar import to determine whether the offenses merge or whether the defendant may be convicted of separate offenses. R.C. 2941.25(B).

{¶15} In *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, the Ohio Supreme Court set forth the standard for determining whether merger is apposite, holding that, "[w]hen determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25, the conduct of the accused must be considered." *Id*. at syllabus. In making such a determination, a court must consider whether it is possible to commit the offenses by the same conduct and, if so, whether the offenses were, in fact, committed by the same conduct: i.e., "'a single act, committed with a single state of mind.'" *Id*. at ¶49, quoting *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, ¶50 (Lanzinger, J., concurring in judgment only). If both

questions are answered affirmatively, merger is appropriate. The results of the analysis will vary by case, as the examination of the defendant's conduct is necessarily non-formulaic and inherently subjective. *Johnson*, *supra*, at ¶52.

{¶16} Recently, in *State v. Ruff,* ___ Ohio St.3d ___, 2015-Ohio-995, the Ohio Supreme Court clarified and supplemented *Johnson*. In *Ruff*, the Court stated two or more offenses may result in multiple convictions if any of the following are true: "(1) the offenses are dissimilar in import or significance—in other words, each offense caused separate, identifiable harm, (2) the offenses were committed separately, and (3) the offenses were committed with separate animus or motivation." *Id.* at ¶25. "The conduct, the animus, and the import must all be considered." *Id.* at ¶31. "At its heart, the allied-offense analysis is dependent upon the facts of a case because R.C. 2941.25 focuses on the defendant's conduct." *Id.* at ¶26.

{¶17} We cannot say the trial court committed plain error in failing to merge any of the counts. Appellant has not sustained his burden as set forth in *Rogers, supra*, to establish any manifest miscarriage of justice. Here, appellant pled guilty to two counts of felonious assault, one count of robbery, one count of safecracking, and five counts of breaking and entering. The safecracking offense was committed when appellant forced entry into the church's safe, while the breaking and entering offenses stemmed from appellant's conduct of breaking into Amish stores with the purpose to commit theft offenses. The two felonious assault offenses stemmed from appellant's conduct on June 23, 2014, when he caused physical harm to two different Amish men using a baseball bat. Appellant's robbery offense stemmed from an incident that occurred on June 22, 2014, involving another Amish buggy. There is no evidence that appellant's

crimes arose out of anything other than separate conduct. And, assuming arguendo, appellant's crimes arose from the same conduct, the record indicates each crime was committed with a separate animus. Thus, these offenses were committed separately for purposes of R.C. 2941.25, and the trial court did not err by sentencing appellant to consecutive sentences.

{¶18} We further note the trial court found that "at least two of those offenses were committed as one or more courses of conduct, and the harm caused by two or more of the offenses was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct." At sentencing, the trial court found that consecutive sentences totaling eight and one-half years was not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public. Moreover, the trial court imposed sentences well within its permissible range. *See* R.C. 2929.14.

{¶19} Appellant's sole assignment of error on appeal is without merit.

{¶20} The judgment of the Geauga County Court of Common Pleas is hereby affirmed.

CYNTHIA WESTCOTT RICE, J., concurs,

COLLEEN MARY O'TOOLE, J., concurs in judgment only.