[Cite as *State v. Smith*, 2009-Ohio-3258.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-080607 TRIAL NO. B-0802749
Plaintiff-Appellee,	:	*D E C I S I O N.*
vs.	:	
LARRY SMITH,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed in Part, Sentences Vacated, and Cause Remanded

Date of Judgment Entry on Appeal: July 2, 2009

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Tanner B. McFall*, Assistant Prosecuting Attorney, for Appellee,

Christine Y. Jones, for Appellant.

Please note: This case has been removed from the accelerated calendar.

SYLVIA S. HENDON, Presiding Judge.

{¶1} Following a bench trial, defendant-appellant Larry Smith was convicted of robbery and theft, in violation of R.C. 2911.02(A)(3) and 2913.02(A)(1), respectively. The trial court sentenced him on both counts and ordered the sentences to run consecutively, for a total of five years' incarceration. Smith now raises four assignments of error through counsel. By entry, this court has permitted Smith to file an appellate brief, pro se, asserting two assignments of error. We find that Smith's fourth assignment of error challenging his crimes as allied offenses of similar import has merit. But we find no other error in the trial court's proceedings.

Smith's Crimes

{¶2} Eighty-year-old victim Sam Hutchinson testified that Smith had entered his home posing as an insurance agent and then robbed him of $500. Eyewitness David Carter, an acquaintance of Smith's, testified that he and Smith had gone to Hutchinson's house together because they knew that Smith had just sold a car, and therefore that he probably had money in his home. According to Carter, Smith had tricked Hutchinson into taking his wallet out of his pocket by asking him for identification. Carter testified that Smith then grabbed Hutchinson's wallet, took the money from it, threw Hutchinson against a wall, and "took off running."

{¶3} Hutchinson and Carter were both state's witnesses. Their testimony was somewhat conflicting. Most significantly, Hutchinson did not state that Smith had shoved him—but Hutchinson was not specifically asked that question.

{¶4} Smith testified in his own defense. He claimed that he had not robbed Smith, but that Carter had.

Smith Claims that the State did not Prove its Case

{¶5} In his first, second, and third assignments of error, Smith asserts (1) that there was insufficient evidence to support his conviction, (2) that his conviction was against the manifest weight of the evidence, and (3) that the trial court erred when it denied his Crim.R. 29(A) motion for an acquittal.

{¶6} We find no error. Carter's and Hutchinson's testimony provided sufficient evidence for the court to find Smith guilty beyond a reasonable doubt.[1] And while there were conflicts in the evidence presented, there is no indication that the trial court so "lost its way" in resolving these conflicts as to warrant a new trial.[2] These assignments of error are overruled.

Allied Offenses

{¶7} In his fourth assignment of error, Smith asserts that his crimes were allied offenses of similar import, and that the trial court erred by sentencing him for both. He is correct.

{¶8} According to *State v. Cabrales*, allied offenses of similar import exist if, with the elements of the offenses compared in the abstract, the offenses are so similar that the commission of one will necessarily result in commission of the other.[3] A defendant can not be separately convicted of allied offenses if the crimes were committed at the same time and with the same animus.[4]

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[1]See *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus; *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 381 N.E.2d 184, syllabus.

[2] See *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541; *State v. Martin* (1983), 20 Ohio App.3d 172, 485 N.E.2d 717.

[3]118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, paragraph one of the syllabus; see, also, R.C. 2941.25(A).

[4] *Cabrales* at ¶14; R.C. 2941.25(B).

{¶9} Here, the trial court convicted Smith of both robbery and theft, in violation of R.C. 2911.02(A)(3) and 2913.02(A)(1), respectively. R.C. 2911.02(A)(3) provides that "[n]o person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following: * * * (3) Use or threaten the immediate use of force against another." A "theft offense" includes a violation of R.C. 2913.02.[5]

{¶10} Since theft is an element of robbery, it is impossible to commit a robbery without also committing a theft. These crimes are therefore allied offenses of similar import. And we conclude that Smith committed the offenses at the same time with the same animus. The "same animus" means the same "purpose, intent, or motive."[6] Here, Smith pushed Hutchinson against the wall immediately after grabbing the money from his wallet. These acts were motivated by Smith's intent to steal money from Hutchinson. The trial court therefore erred by convicting Smith of two separate crimes. We sustain Smith's fourth assignment of error.

Smith's Pro Se Assignments of Error

{¶11} Because this court granted Smith leave to file a supplemental brief, we will address his pro se assignments of error.

{¶12} In his first pro se assignment of error, Smith contends that trial counsel was ineffective for failing to request an in camera review of Carter's grand jury testimony and for failing to obtain a copy of a police report.

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[5] R.C 2913.01(K).
[6] *State v. Blankenship* (1988), 38 Ohio St.3d 116, 119, 526 N.E.2d 816.

{¶13} Because these claims are based on matters outside the record, we can not consider them on direct appeal.[7] We overrule this assignment of error.

{¶14} In his second assignment of error, Smith essentially argues that his conviction was against the manifest weight of the evidence, asserting that the trial court should have convicted him of theft, only. We have already determined that this argument has no merit. This assignment of error is overruled.

{¶15} The trial court's judgment is, therefore, affirmed with respect to the findings of guilt. But the sentences are vacated, and this case is remanded for the imposition of a sentence on the robbery charge, only.

Judgment affirmed in part, sentence vacated, and cause remanded.

HILDEBRANDT and **CUNNINGHAM, JJ.,** concur.

Please Note:

The court has recorded its own entry on the date of the release of this decision.

[7] *State v. Madrigal*, 87 Ohio St.3d 378, 390, 2000-Ohio-448, 721 N.E2d 52.