[Cite as *State v. Chaffer*, 2010-Ohio-4471.]

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

STATE OF OHIO,	:	APPEAL NO. C-090602 TRIAL NO. B-9805336
Plaintiff-Appellee,	:	*D E C I S I O N.*
vs.	:	
ERIC CHAFFER,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: September 24, 2010

Joseph T. Deters, Prosecuting Attorney, and *Scott M. Heenan*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Michaela M. Stagnaro, for Defendant-Appellant.

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

Per Curiam.

{¶1} Defendant-appellant Eric Chaffer appeals from the judgment of the trial court resentencing him to prison terms for two counts of aggravated robbery and two counts of kidnapping with an accompanying firearm specification. The multiple convictions resulted from a single, 1998 bank robbery. But because these allied offenses of similar import were committed with a separate animus, we affirm the trial court's imposition of an aggregate prison sentence of 19 years.

{¶2} In 1998, Chaffer and four others, armed with sawed-off shotguns, robbed a Fifth Third Bank on Harrison Avenue. While Chaffer acted as a lookout, two of the group accosted teller Tracey Insprucker and bank manager Kevin Murray when they arrived to open the bank. They brandished their weapons and ordered the employees to give them money from the vault. They obtained over $76,000 in cash and fled. Employees of a neighboring business reported the suspicious activity. The five perpetrators were quickly arrested.

{¶3} Chaffer was charged with two counts of kidnapping, four counts of aggravated robbery, and four counts of robbery. One set of kidnapping and aggravated-robbery counts related to the restraint of and theft of personal property from Insprucker, and a separate set involved Murray. Each of the kidnapping and aggravated-robbery counts carried two firearm specifications. Chaffer proceeded to a jury trial, but after the first witness had testified, he entered pleas of no contest to all counts. After accepting Chaffer's pleas, the trial court imposed an aggregate sentence of 19 years' incarceration. This court affirmed the trial court's judgment.[1]

{¶4} In 2009, the trial court ordered Chaffer to be returned from prison for resentencing because he had not received the statutorily mandated postrelease-control warning at his 1998 sentencing.[2] At the conclusion of the resentencing hearing, the trial

[1] See *State v. Chaffer* (July 23, 1999), 1st Dist. No. C-980952.
[2] See, generally, *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, syllabus.

court imposed the same terms of imprisonment as those imposed in 1998. It ordered Chaffer to serve seven years for each kidnapping offense, under R.C. 2905.01(A)(2), as alleged in counts one and two of the indictment. It ordered a nine-year prison term for each aggravated-robbery offense, under R.C. 2911.01(A)(1), as alleged in counts five and seven. The trial court ordered the prison sentence for each kidnapping offense to be consecutive to its related aggravated-robbery sentence. But it ordered that the two sets of 16-year terms be served concurrently at the end of a three-year sentence for a single firearm specification. The trial court merged the other offenses, including those involving the theft of currency from the bank, into these convictions. This appeal ensued.

{¶5} In his first assignment of error, Chaffer argues that the trial court erred by imposing multiple punishments for what he views as the single crime of aggravated robbery of each bank employee, and by imposing an excessive sentence.

{¶6} He first claims that the offenses of aggravated robbery, as defined in R.C. 2911.01(A)(1), and kidnapping, as defined in R.C. 2905.01(A)(2), are allied offenses of similar import. Chaffer did not object at the resentencing hearing to the imposition of multiple sentences on the ground that he had been found guilty of allied offenses of similar import. He has therefore forfeited the issue absent a showing of plain error.[3] To give rise to plain error, there must be an error that constitutes an "obvious" defect in the trial proceedings and that affects "substantial rights."[4] The Ohio Supreme Court has interpreted the second element to mean "that the trial court's error must have affected the outcome of the trial."[5]

{¶7} Under R.C. 2941.25, Ohio's multiple-count statute, if a defendant's conduct results in allied offenses of similar import, the defendant may ordinarily be

[3] See *State v. Sawyer*, 1st Dist. No. C-080433, 2010-Ohio-1990, ¶16, citing *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶31; see, also, Crim.R. 52(B).
[4] *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68, 759 N.E.2d 1240.
[5] Id.

convicted of only one of the offenses.[6] But if the defendant commits each offense separately or with a separate animus, then convictions may be entered for both offenses.[7]

{¶8} The Ohio Supreme Court has held that the forms of kidnapping and aggravated robbery charged in this case are allied offenses of similar import.[8] In comparing the elements of the two offenses, the court concluded that "[i]t is difficult to see how the presence of a weapon that has been shown or used, or whose possession has been made known to the victim during the commission of a theft offense, does not also forcibly restrain the liberty of another. These two offenses are 'so similar that the commission of one offense will necessarily result in commission of the other.' "[9]

{¶9} Though kidnapping and aggravated robbery are allied offenses, our treatment of Chaffer's argument is not over. We must review the conduct of Chaffer and his accomplices to determine whether he committed the charged offenses separately or with a separate animus so as to permit multiple punishments.

{¶10} These offenses were not committed separately. The record does not reflect either a temporal or a spatial separateness in the offenses.[10] The kidnapping and the aggravated robbery of the two bank employees involved one sustained, continuous act under R.C. 2941.25(B).

{¶11} But while the commission of aggravated robbery necessarily entails the restraint of the victim for a brief time,[11] where the restraint is prolonged, the confinement is secretive, or the movement is so substantial as to demonstrate a significance independent of the robbery, there exists a separate animus, a separate "immediate

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[6] See R.C. 2941.25(A); see, also, *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, ¶27.
[7] See R.C. 2941.25(B); see, also, *State v. Harris*, 122 Ohio St.3d 373, 2009-Ohio-3323, 911 N.E.2d 882, ¶10, citing *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117, 526 N.E.2d 816.
[8] See *State v. Winn*, 121 Ohio St.3d 413, 2009-Ohio-1059, 905 N.E.2d 154, syllabus.
[9] Id. at ¶21, quoting *State v. Cabrales* at paragraph one of the syllabus.
[10] See, e.g., *State v. Jackson* (Sept. 15, 2010), 1st Dist. No. C-090414, 2010-Ohio-4312, ¶26.
[11] See *State v. Logan* (1979), 60 Ohio St.2d 126, 131, 397 N.E.2d 1345; see, also, *State v. Winn* at ¶23-24.

motive,"[12] to support the kidnapping conviction.[13] In *State v. Logan*, the Ohio Supreme Court also held that even without prolonged restraint, secret confinement, or substantial movement, where the asportation or restraint exposes the victims to a substantial increase in the risk of harm separate and apart from the underlying crime of robbery, a separate animus exists for kidnapping.[14]

{¶12} Thus, in determining in this case whether the two offenses were committed with a separate animus, we must address two issues: (1) whether the kidnapping was merely incidental to the aggravated robbery or whether the magnitude of the restraint or movement of the victims demonstrated a significance independent of the bank robbery; and (2) whether the restraint or movement subjected the victim to a substantial increase in the risk of harm apart from that involved in the robbery.[15]

{¶13} After a review of the record, including the indictment, the detailed bill of particulars, and the state's summary of the facts surrounding the crimes offered at the plea hearing, we hold that Chaffer committed the kidnapping and aggravated-robbery offenses with a separate animus. The record demonstrates that Chaffer and his fellow perpetrators confronted Insprucker and Murray in the bank parking lot. Wielding shotguns, they forced the two to open the bank and to disable the alarm system. The perpetrators ordered Insprucker to get on the floor while Murray was to fill bags with cash from the bank vault. They ordered the two to surrender their car keys to provide getaway vehicles. And they then "removed [the two] to the vault and ordered them to lie face down on the floor. The two were ordered to remain where they were and not to move."

{¶14} It is beyond cavil that the bank-robbery scheme was the immediate motive for the kidnapping. Kidnapping the bank employees was merely incidental to the bank

[12] Id.; see, also, *State v. Barnes* (Oct. 22, 1980), 1st Dist. Nos. C-790595, C-790622, and C-790636.
[13] See *State v. Logan*, syllabus.
[14] See id.
[15] See id.

robbery. Indeed the indictment stated that the kidnappings were committed "for the purpose of facilitating the commission" of the aggravated robberies. And here the restraint and asportation of the victims were limited. Their detention was brief, the movement was slight.[16]

{¶15} But we hold, under the second prong of our separate-animus analysis, that by their actions the perpetrators subjected Insprucker and Murray to a substantial increase in the risk of harm apart from that involved in the robbery. They moved Insprucker and Murray, at gunpoint, from the parking lot into the bank building, and they forced Insprucker to lie on the floor where passersby could not see her. And to aid their escape, they moved the two to the bank vault and ordered them to remain there, significantly increasing the risk of harm to the victims.[17]

{¶16} Accordingly, we conclude, under subsection (b) of the syllabus of *State v. Logan*, that there existed a separate animus for each offense sufficient to support separate convictions. And the trial court properly convicted Chaffer for each of the allied offenses of kidnapping and aggravated robbery.[18] Since the trial court did not err, much less commit an obvious and outcome-determinative error, in entering multiple convictions,[19] this portion of Chaffer's argument must fail.

{¶17} Chaffer also argues that the trial court erred in imposing "near" maximum, consecutive sentences without considering the purposes and principles of felony sentencing.[20] We conduct a two-part review of his sentences of imprisonment.[21] First we must determine whether the sentences were contrary to law.[22] Then, if the sentences were not contrary to law, we must review each to determine whether the trial court abused its discretion in imposing them.[23]

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[16] See id. at 135, 397 N.E.2d 1345.
[17] See id.
[18] See R.C. 2941.25(B); see, also, *State v. Bickerstaff* (1984), 10 Ohio St.3d 62, 65-66, 461 N.E.2d 892.
[19] See Crim.R. 52(B).
[20] See R.C. 2929.11 and 2929.12.
[21] See *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124.
[22] See id. at ¶14.
[23] See id. at ¶17.

{¶18} First, the sentences imposed were not contrary to law. Chaffer concedes that the sentences were within the range provided by statute.[24] And although the trial court did not specifically state that it had considered R.C. 2929.11 and 2929.12, we may presume that it did.[25] Moreover, the trial court did not err in imposing consecutive sentences.[26] Finally, on the state of this record, we cannot say that the trial court acted unreasonably, arbitrarily, or unconscionably in imposing these sentences.[27] The first assignment of error is overruled.

{¶19} Chaffer's second assignment of error, in which he claims that his trial counsel's performance at the resentencing hearing was deficient, is overruled. In light of our resolution of the first assignment of error and our review of the transcript of the resentencing hearing, we hold that there were no acts or omissions by Chaffer's trial counsel that deprived him of a substantive or procedural right, or that rendered the trial fundamentally unfair.[28]

{¶20} Therefore, the judgment of the trial court is affirmed.

Judgment affirmed.

CUNNINGHAM, P.J., SUNDERMANN and **HENDON, JJ.**

Please Note:

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

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[24] See *State v. Boggs*, 1st Dist. No. C-050946, 2006-Ohio-5899, ¶6; see, also, *State v. Hairston*, 118 Ohio St.3d 289, 2008-Ohio-2338, 888 N.E.2d 1073, syllabus.
[25] See *State v. Kalish* at fn. 4.
[26] See *State v. Long*, 1st Dist. Nos. C-090248 and C-090249, 2010-Ohio-1062, ¶36 (holding that, even after the Supreme Court's decision in *Oregon v. Ice* (2009), __ U.S. __ , 129 S.Ct. 711, Ohio courts have the authority to impose consecutive sentences).
[27] See *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.
[28] See *Lockhart v. Fretwell* (1993), 506 U.S. 364, 113 S.Ct. 838; see, also, *Strickland v. Washington* (1984), 466 U.S. 668, 689, 104 S.Ct. 2052; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraphs two and three of the syllabus.