[Cite as *State v. Peelman*, 2010-Ohio-4472.]

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

STATE OF OHIO,	:	APPEAL NO. C-090686 TRIAL NO. B-0809512
Plaintiff-Appellee,	:	*D E C I S I O N.*
vs.	:	
AARON PEELMAN,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Common Pleas Court

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: September 24, 2010

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Ron Springman*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Timothy J. McKenna, for Defendant-Appellant.

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

WILLIAM L. MALLORY, JR., Judge.

{¶1} After committing a robbery at a convenience store, defendant-appellant Aaron Peelman was indicted for aggravated robbery[1] and felonious assault.[2] Peelman waived his right to a jury trial, and following a bench trial in the common pleas court, Peelman was found guilty on both counts and sentenced to an aggregate term of ten years' incarceration. In this appeal, Peelman alleges that the trial court erred in denying his acquittal motion, that the convictions were against the weight and sufficiency of the evidence, that his trial counsel was ineffective, and that his sentence was unlawful. Peelman's assignments of error are overruled, and the trial court's judgment is affirmed.

{¶2} Around noon on November 14, 2008, Juma Akel was working at Price Hill Mart when Peelman came in and asked about batteries. Akel knew Peelman because he had come to the store often. As Akel was walking into a rear storage room, he was hit in the back of the head repeatedly, and he fell to the floor. As he lay on his back on the floor, Akel recognized Peelman as the assailant. While Akel was on the ground, Peelman continued to choke and beat him. Peelman then took about $2,000 from Akel's right pocket and fled. During the robbery, Peelman broke Akel's eye socket and cheek bone as well as several of his teeth.

{¶3} Officer Michael Roth received a tip that Peelman had committed the robbery, and he then assembled a photographic lineup for Akel to review. Akel identified Peelman as the robber. Roth then interrogated Peelman, and after signing a *Miranda*[3] waiver, Peelman confessed that he had acted as a lookout for a person

[1] R.C. 2911.01(A)(3).
[2] R.C. 2903.11(A)(1).
[3] *Miranda v. Arizona* (1966), 384 U.S. 436, 444, 86 S.Ct. 1602.

named "Real" who, according to Peelman, had actually committed the robbery and assaulted Akel. Peelman then recounted several facets of the robbery that no one else would have known unless they had been at the scene of the crime. For example, Peelman told Roth about the batteries and that the money had been stolen from Akel's right pants pocket.

{¶4} On cross-examination, Officer Roth testified that handprints taken from the scene did not match Peelman's, and that the security videos of the store robbery did not show Peelman. But Roth also testified that the store's video system was very poor, produced black and white images, and was fuzzy, that the tape used was very old, and that because of the inadequate system, the images from the tape were not useful.

{¶5} Despite Peelman's confession, his alibi at trial was that he had been at Good Samaritan Hospital when the robbery had taken place. The security manager at the hospital testified that video cameras had showed Peelman in the maternity unit at 11:30 a.m., and again at 1:01 p.m. Peelman also testified that he had been high on drugs and scared when he confessed. At the close of the state's case, Peelman moved for an acquittal, and the trial court denied his motion.

{¶6} In his first two assignments of error, Peelman contends that the trial court erred in denying his motion for an acquittal and that his convictions were against the weight and sufficiency of the evidence. We consider these assignments of error together.

{¶7} The standard of review for a sufficiency claim and for the denial of a Crim.R. 29 motion for an acquittal is identical. When reviewing the sufficiency of the evidence to support a criminal conviction, we must examine the evidence admitted at trial in the light most favorable to the state. We must then determine whether that evidence could have convinced a rational trier of fact that the essential elements of

the crime had been proved beyond a reasonable doubt.[4] On the other hand, a review of the weight of the evidence puts the appellate court in the role of a "thirteenth juror."[5] We must review the entire record, weigh the evidence, consider the credibility of the witnesses, and determine whether the trier of fact clearly lost its way and created a manifest miscarriage of justice in finding the defendant guilty.[6] A new trial should be granted only in exceptional cases where the evidence weighs heavily against the conviction.[7]

{¶8} We conclude that Peelman's convictions were against neither the weight nor the sufficiency of the evidence, and that the trial court did not err in denying his motion for an acquittal. Peelman's alibi and his claim of mistaken identity were rebutted by Akel's testimony that he had known Peelman for years, and that he was on a first-name basis with him. Akel identified Peelman as the robber, and he picked him out of a photographic lineup. In fact, as Akel reviewed the photographic lineup, he noted that in Peelman's photograph he had not been wearing a hat, but that he had been wearing a hat on the day of the robbery and assault. Also, Peelman's alibi that he had been at Good Samaritan Hospital proved nothing because there had been ample time for Peelman to commit the robbery—security photographs showed Peelman at the hospital around 11:30 a.m. and 1:01 p.m., but the robbery occurred around noon. We are convinced that Akel's recollection of the robbery and assault was sound, and that his identification of Peelman as the perpetrator was damning to Peelman's defense. In fact, Akel's testimony was sufficient to convict Peelman apart from his confession, and the first two assignments of error are overruled.

[4] See *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.
[5] See *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.
[6] Id., citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211.
[7] Id.

{¶9} Peelman next argues that his trial counsel was ineffective in failing to renew the motion for an acquittal at the close of his case. As we have noted, Akel's testimony was damning to Peelman's case, and a renewed motion for an acquittal would have been denied in light of the overwhelming evidence against him. The failure to renew an acquittal motion does not constitute ineffective assistance of counsel when the motion would have been futile.[8] This assignment of error is overruled.

{¶10} Peelman's next assignment of error contends that his sentences were excessive and unlawful. Not so. We review claims of excessive sentencing under a two-part analysis: we first must decide whether the sentences were contrary to law; and if they were not, we must then decide whether the trial court abused its discretion in imposing the sentences.[9] Peelman's sentences were not contrary to law, as they were within the applicable statutory ranges.

{¶11} We now decide whether the trial court abused its discretion in sentencing Peelman. The court noted that it had considered the sentencing guidelines, and our review of the record convinces us that the gravity of Peelman's offenses warranted the sentences that he received. Peelman bludgeoned and assaulted Akel far beyond what was necessary to commit the robbery. We overrule this assignment of error.

{¶12} Finally, Peelman argues that the trial court erred in failing to merge his convictions for robbery and felonious assault because the two offenses were allied offenses of similar import.

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[8] *State v. Wallace*, 10th Dist. No. 08AP-2, 2008-Ohio-5260, citing *Defiance v. Cannon* (1990), 70 Ohio App.3d 821, 592 N.E.2d 884.
[9] *State v. Williams*, 1st Dist. No. C-081148, 2010-Ohio-1879, ¶18, citing *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124.

{¶13} In *State v. Cabrales*,[10] the Ohio Supreme Court clarified the law of allied offenses. It began by stating that "[t]his court has recognized that R.C. 2941.25 requires a two-step analysis."[11] The first step requires a comparison of the elements of the offenses. If the elements of the offenses correspond to such a degree that the commission of one crime will result in the commission of the other, the crimes are allied offenses of similar import.[12] In the second step, a court reviews the defendant's conduct to determine whether the offenses were committed separately or with a separate animus as to each.[13] We have recently held that, in enacting the aggravated-robbery and felonious-assault statutes, the legislature intended to protect separate societal interests, and that it therefore intended to consider the offenses as having different imports.[14] Thus Peelman's argument lacks merit. And in any event, Peelman went far beyond what was necessary to commit the robbery. Aggravated robbery and felonious assault are not allied offenses of similar import; and even if this were not so, in this case the excessive nature of the beating involved separate conduct and a separate animus that supported multiple convictions. Peelman's final assignment of error is, accordingly, overruled.

{¶14} The judgment of the trial court is affirmed.

Judgment affirmed.

CUNNINGHAM, P.J., and **HENDON, J.,** concur.

Please Note:

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

[10] 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181.
[11] Id. at ¶14.
[12] Id., quoting *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117, 526 N.E.2d 816.
[13] *State v. Mitchell* (1983), 6 Ohio St.3d 416, 418, 453 N.E.2d 593.
[14] *State v. Canyon*, 1st Dist. Nos. C-070729, C-070730, and C-070731, 2009-Ohio-1263.