[Cite as *State v. Jackson*, 2009-Ohio-4863.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO	C. A. No. 24650
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
DAVID AL JACKSON	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. CR 08 04 1230

DECISION AND JOURNAL ENTRY

Dated: September 16, 2009

WHITMORE, Judge.

{¶1} Defendant-Appellant, David Al Jackson, appeals from the judgment of the Summit County Court of Common Pleas. This Court affirms.

I

{¶2} On April 13, 2008, Officers Timothy Wypasek and James Donohue ran the license plate of a moving vehicle through their cruiser's computer. While waiting for their computer to return the search results, the officers followed the vehicle. Officer Wypasek saw the vehicle roll through a stop sign and proceeded to initiate a traffic stop. The driver of the vehicle, later identified as Jackson, refused to stop, and a chase ensued. Subsequently, Jackson slowed the vehicle enough to jump from it and continued running from the officers on foot. Officer Wypasek stopped the cruiser and pursued Jackson while Officer Donohue quickly examined Jackson's abandoned vehicle for passengers. Once he determined that the vehicle was empty, Officer Donohue also began to run after Jackson.

{¶3} As Officer Wypasek closed the distance between himself and Jackson to approximately fifteen feet, he shouted at Jackson to stop. Jackson spun, leveled the handgun he was carrying, and fired a shot at Officer Wypasek. Officer Wypasek fell down and remained in place long enough for Jackson to begin running again. Officer Donohue was nearby when Jackson fired his weapon. He saw Jackson and Officer Wypasek running and lost sight of them as they turned a corner, but heard a shot fired shortly thereafter. He then continued to chase Jackson behind Officer Wypasek, who had stood up and begun to chase Jackson again. Once again, when Officer Wypasek got close enough to Jackson to yell for him to stop, Jackson fired his weapon. This time, Jackson discharged the firearm twice in the direction of Officer Donohue.

{¶4} Jackson turned and ran, but other officers had appeared, having responded to Officer Wypasek's two separate radio calls that shots had been fired. One of the other officers managed to tackle Jackson and Officer Donohue joined him. Jackson continued to struggle as officers attempted to subdue him. Finally, the officers arrested Jackson. They found a loaded 9mm Ruger handgun next to Jackson. They also found a .38 caliber revolver and marijuana in Jackson's abandoned vehicle.

{¶5} On April 28, 2008, a grand jury indicted Jackson on the following counts: (1) two counts of attempted aggravated murder, one pertaining to Officer Donahue and the other to Officer Wypasek, in violation of R.C. 2923.02/2903.01(E); (2) two counts of felonious assault, one pertaining to Officer Donahue and the other to Officer Wypasek, in violation of R.C. 2903.11(A)(2); (3) having weapons while under disability, in violation of R.C. 2923.13(A)(3)(1); (4) carrying concealed weapons, in violation of R.C. 2923.12(A)(2); (5) failure to comply with order or signal of police officer, in violation of R.C. 2921.331(B); (6) obstructing official

business, in violation of R.C. 2921.31(B); (7) possession of marijuana, in violation of R.C. 2925.11(A)(C)(3); (8) reckless operation, in violation of R.C. 4511.20; and (9) resisting arrest, in violation of R.C. 2921.33(A). The counts for attempted aggravated murder and felonious assault also contained specifications for discharging a firearm at a peace officer, in violation of R.C. 2941.1412.

{¶6} Before trial, Jackson pleaded guilty to having weapons while under disability, carrying concealed weapons, failure to comply with the order or signal of a police officer, obstructing official business, possession of marijuana, and reckless operation. The matter proceeded to a jury trial on the remaining counts, and the jury found Jackson guilty on each count. The trial court merged Jackson's convictions for attempted aggravated murder and felonious assault with regard to each officer so that only the two convictions for the attempted aggravated murder of each officer remained. The court sentenced Jackson to thirty years in prison.

{¶7} Jackson now appeals from the judgment of the court below and raises three assignments of error for our review.

II

Assignment of Error Number One

"FAILURE TO GRANT OR DISPOSE OF PENDING MOTION FOR EXPERT WITNESS[.]" (Sic.)

{¶8} In his first assignment of error, Jackson argues that the trial court erred by not granting his "pending motion for [an] expert witness." Jackson argues that expert testimony on ballistics could have refuted the State's assertion that bullet fragments came from his gun.

{¶9} A trial court has the discretion to determine whether expert testimony is warranted. *Hudkins v. Stratos*, 9th Dist. No. 22188, 2005-Ohio-2155, at ¶10-12; *Harrold v.*

Collier, 9th Dist. No. 02CA0005, 2002-Ohio-3864, at ¶18. It is also within the court's discretion to grant or deny a requested continuance. *Christian v. Johnson*, 9th Dist. No. 24327, 2009-Ohio-3863, at ¶11. As such, this Court reviews a trial court's decision to grant or deny a continuance for an abuse of discretion. *Harrold* at ¶18-19; *Christian* at ¶11-13. An abuse of discretion is not merely an error of law or judgment, but means that the trial court's attitude was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶10} The week before his trial, which commenced on January 12, 2009, Jackson sought a continuance to prepare a ballistics expert and a request for an order granting the payment of the expert's retainer fee. The trial court never issued a written ruling on Jackson's motion, and the matter proceeded to trial. Jackson never referred to his outstanding motions or otherwise raised the issue of expert testimony at trial. This Court presumes that the trial court denied Jackson's motions. *State v. Jackson*, 9th Dist. Nos. 24463 & 24501, 2009-Ohio-4336, at ¶14 ("[W]hen a trial court fails to issue a ruling on a pretrial motion, this Court presumes that the motion was denied.").

{¶11} In addition to the continuance he sought the week before trial, Jackson sought a continuance on November 4, 2008 for the purpose of securing a ballistics expert. The trial court granted that continuance and scheduled Jackson's trial for mid-January. Accordingly, the court had already granted Jackson one continuance for the purpose of securing an expert when he moved for another continuance the week before trial. Moreover, the State only presented limited evidence as to bullet fragments at trial. Both Officers Wypasek and Donohue testified that Jackson fired a total of three shots and Matthew White, a firearm analyst with the Bureau of Criminal Identification and Investigation ("BCI"), testified that the three shell casings officers located in the area matched the 9mm Ruger handgun that Jackson had used. Jackson has not

explained why he needed an additional continuance to secure an expert after the trial court had already granted him one continuance for that purpose. See App.R. 16(A)(7). Nor has he explained how an expert on bullet fragments would have helped him refute the other evidence presented at trial. See *State v. Workman*, 9th Dist. No. 24437, 2009-Ohio-2995, at ¶13 ("An appellate court will not overturn the decision of a trial court regarding the admission or exclusion of evidence absent a clear abuse of discretion that has materially prejudiced the defendant."). Based on the foregoing, we cannot say that the trial court abused its discretion by not granting Jackson's motions. Consequently, Jackson's first assignment of error is overruled.

Assignment of Error Number Two

> "ALLOWING A WITNESS TESTIFY WHO WAS NOT IDENTIFIED PRIOR TO HIS TESTIMONY[.]" (Sic.)

{¶12} In his second assignment of error, Jackson argues that the trial court erred by allowing the State to present the testimony of a witness that the State failed to disclose prior to trial. Specifically, Jackson argues that the State should not have been permitted to examine Robert Codgeill, the landlord of the building that two of the bullets Jackson fired struck.

{¶13} The State must provide a defendant with the name of a rebuttal witness only if the State reasonably should have anticipated calling the witness, either during its case-in-chief or on rebuttal. *State v. Lorraine* (1993), 66 Ohio St.3d 414, 423. See, also, Crim.R. 16(B)(1)(e). Even if the State fails to disclose such a witness, however, the witness' testimony need not be automatically excluded. *State v. Finnerty* (1989), 45 Ohio St.3d 104, 107. The trial court has the discretion to exclude the witness, but also may grant a continuance, permit further discovery, and make other orders "as it deems just under the circumstances." *State v. Evans*, 9th Dist. No. 07CA009274, 2008-Ohio-4295, at ¶6, quoting Crim.R. 16(E)(3). When considering whether the

trial court should have excluded an undisclosed rebuttal witness' testimony, this Court looks to the following factors:

> "[W]hether the defendant requested a continuance; whether the trial court provided a limiting instruction regarding the [] testimony; whether the failure to disclose was willful or inadvertent on the part of the State; and whether defense counsel was surprised by the ultimate disclosure, had the opportunity to voir dire the witness, and engaged in vigorous cross-examination." *Evans* at ¶8.

Because a trial court has the discretion to admit or exclude an undisclosed rebuttal witness' testimony and to impose or forego sanctions as a result of the State's failure to disclose, this Court reviews such decisions for an abuse of discretion. Id. See, also, *State v. Sage* (1987), 31 Ohio St.3d 173, paragraph two of the syllabus ("The admission or exclusion of relevant evidence rests within the sound discretion of the trial court."). An abuse of discretion is more than an error of judgment; it means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore*, 5 Ohio St.3d at 219.

{¶14} In his interview with the police, Jackson only admitted to firing one shot on the night in question and claimed to have fired that shot to scare Officer Wypasek away so that he could escape. Jackson denied firing his weapon twice more, as the State charged. Officers were never able to recover the first bullet fired, but found evidence of damage from the second and third bullets to the building in front of which Officer Donohue had been standing. At trial, the defense theorized that the building was situated in a high crime area and that the bullet damage could have been caused at some other time. Near the end of its case-in-chief, the State informed the trial court of its intention to call an undisclosed witness: Codgeill, the landlord of the building. The prosecutor told the trial court that he had contacted Codgeill for the first time during the lunch break in light of the defense's theory that the damage to Codgeill's building had occurred at some other time. Jackson objected, arguing that the court should prohibit the State

from calling Codgeill. Although the trial court expressed concern that the State should have anticipated the potential need for Codgeill's testimony during discovery, the court agreed to give the parties additional time to speak with Codgeill before the next day of trial. Codgeill testified the following day without any further objection from Jackson. Codgeill indicated that he had spoken with both the State and defense counsel for the first time the night before. He was able to testify as to the exact weekend that his building incurred bullet damage. The weekend Codgeill identified included April 13, 2008, the day that Jackson fired his gun while running from the police.

{¶15} Even if Codgeill should not have been permitted to testify, Jackson cannot demonstrate prejudice as a result of his testimony. See *Workman* at ¶13. As previously noted, both Officers Wypasek and Donohue testified that Jackson fired his weapon a total of three times, and the three casings recovered from the scene matched Jackson's gun. This evidence, in conjunction with Jackson's admission that he did fire one shot (from which a casing was recovered), made Codgeill's testimony merely corroborative in nature. Because Jackson was not prejudiced as a result of the admission of Codgeill's testimony, his second assignment of error lacks merit.

Assignment of Error Number Three

> "SENTENCING SHOULD HAVE BEEN CONCURRENT IN COUNT 1, 2 AND 7[.]" (Sic.)

{¶16} In his third assignment of error, Jackson argues that the trial court erred by issuing him consecutive sentences for his two attempted aggravated murder convictions and his conviction for failure to comply with an order or signal of a police officer. Specifically, Jackson argues that a defendant cannot be issued consecutive sentences for allied offenses of similar

import. Jackson admits that he did not raise the allied offenses issue below, but argues that plain error exists.

{¶17} The Double Jeopardy Clause of the United States Constitution, as applied through Section 10, Article I of the Ohio Constitution, prohibits the allocation of multiple punishments for the same offense. *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, at ¶10. If two offenses are found to be allied offenses of similar import, such that the same conduct supports each offense, then the sentencing court may not impose a separate punishment for each offense. Id. at ¶11-12. To determine whether two offenses are allied offenses of similar import, a reviewing court must first look to the statutory language of the offenses to determine whether the Generally Assembly plainly and unambiguously intended for the statute(s) to set forth separately punishable offenses. Id. at ¶37-40. If no plain and unambiguous intent emerges from the statutory language, then the court must employ the two-part test set forth in R.C. 2941.25 to determine whether two offenses are allied offenses of similar import. Id. at ¶12.

{¶18} R.C. 2941.25 provides as follows:

> "(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
>
> "(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them."

Thus, a defendant may be convicted of two offenses if the offenses are either: "(1) offenses of dissimilar import [or] (2) offenses of similar import committed separately or with a separate animus." *Brown* at ¶17, citing *State v. Rance* (1999), 85 Ohio St.3d 632, 636.

{¶19} The Supreme Court has explained the first part of R.C. 2941.25's test as follows:

> "In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), courts are required to compare the elements of offenses in the abstract without considering the evidence in the case, but are not required to find an exact alignment of the elements. Instead, if, in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in commission of the other, then the offenses are allied offenses of similar import." *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, paragraph one of the syllabus.

The second part of R.C. 2941.25's test then requires the court to consider the defendant's conduct. Id. at ¶14, quoting *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117. "If the court finds either that the crimes were committed separately or that there was a separate animus for each crime, the defendant may be convicted of both offenses." *Blankenship*, 38 Ohio St.3d at 117. The term "animus" refers to a person's "purpose or, more properly, immediate motive." *State v. Logan* (1979), 60 Ohio St.2d 126, 131.

{¶20} The attempt statute provides that "[n]o person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense." R.C. 2923.02(A). The aggravated murder statute provides, in relevant part, as follows:

> "No person shall purposely cause the death of a law enforcement officer whom the offender knows or has reasonable cause to know is a law enforcement officer when *** [t]he victim, at the time of the commission of the offense, is engaged in the victim's duties[, or] *** [i]t is the offender's specific purpose to kill a law enforcement officer." R.C. 2903.01(E)(1)-(2).

Consequently, one who purposely engages in conduct that, if successful, would result in aggravated murder, as defined by R.C. 2903.01(E), commits the crime of attempted aggravated murder. R.C. 2923.02(A).

{¶21} R.C. 2921.331(B) provides that "[n]o person shall operate a motor vehicle so as willfully to elude or flee a police officer after receiving a visible or audible signal from a police

officer to bring the person's motor vehicle to a stop." Whoever commits the foregoing offense is guilty of failing to comply with an order or signal of a police officer. R.C. 2921.331(C)(1).

{¶22} First, Jackson argues that the trial court erred by not merging his two convictions for attempted aggravated murder because "here there is only one officer" who "was shot at two different times within seconds apart." Contrary to Jackson's argument, Jackson was indicted for and the jury convicted him of the attempted aggravated murder of two different officers: Officer Wypasek and Officer Donohue. Both officers pursued Jackson, and the trial testimony and evidence revealed that Jackson first shot at Officer Wypasek and then later at Officer Donohue. Jackson's argument that his convictions should be merged because only one victim was involved lacks merit.

{¶23} Second, Jackson argues that his convictions for failure to comply with an order or signal of a police officer and for attempted aggravated murder should have merged because his flight from the officers and his later firing at the officers amounted to a continuous course of conduct. Yet, an examination of a defendant's conduct only becomes relevant after a court reviews the elements of two offenses in the abstract and determines that the commission of one offense will necessarily result in commission of the other. *Cabrales* at paragraph one of the syllabus. The crimes of attempted aggravated murder and failure to comply with an order or signal of a police officer each contain numerous elements that differ from one another. Compare R.C. 2923.02/2903.01(E); R.C. 2921.331(B). Jackson has not engaged in any abstract comparison of the offenses or otherwise explained how the offenses constitute allied offenses under the first part of the two-part test set forth in *Cabrales*. It is not this Court's duty to formulate such an argument. App.R. 16(A)(7). Jackson's third assignment of error is overruled.

III

{¶24} Jackson's assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

BETH WHITMORE
FOR THE COURT

MOORE, P. J.
DICKINSON, J.
CONCUR

APPEARANCES:

THOMAS W. WATKINS, Attorney at Law, for Appellant.

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