[Cite as *State v. Washington*, 2011-Ohio-1149.]

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

STATE OF OHIO Appellee v. DAVID T. WASHINGTON Appellant	C.A. Nos. 10CA009767 10CA009768 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE Nos. 09CA077820 09CA078387

DECISION AND JOURNAL ENTRY

Dated: March 14, 2011

WHITMORE, Judge.

{¶1} Defendant-Appellant, David T. Washington, appeals from his convictions in the Lorain County Court of Common Pleas. This Court affirms in part, reverses in part, and remands this matter for further proceedings.

I

{¶2} On February 26, 2009, Washington and his brother approached a woman as she was getting in her car after exiting the Midway Mall in Elyria. Washington pushed the woman to the ground and demanded the keys to her car. The woman complied and Washington then left the mall in her car, heading to the nearby highway. Once Washington left the mall parking lot, the woman called 911 to report the theft to police, who were immediately dispatched in search of the car, a black Ford Explorer. Elyria police informed other officers in neighboring areas about the theft and shortly thereafter the car was seen heading toward Cleveland on Interstate 90. Area

officers pursued Washington, ordering him to pull over. Instead of stopping, Washington led police on a high-speed chase for several miles on Interstate 90, during which police punctured two of his tires. The chase culminated in Washington exiting the highway by way of an entrance ramp while heading the wrong direction and continuing to flee from police down nearby side streets in Westlake. Washington ultimately pulled off the road into a wooded area where he fled from the stolen Explorer on foot. Police apprehended Washington and his brother hiding in a ditch in the woods close to where they left the car.

{¶3} On April 23, 2009, Washington was indicted on one count of robbery, in violation of R.C. 2911.02(A)(2), a second-degree felony; and two counts of theft, in violation of R.C. 2913.02(A)(1), one of which was a fourth-degree felony and the other a first-degree misdemeanor. On June 4, 2009, Williams was indicted in a separate case on the following counts: felonious assault, in violation of R.C. 2903.11(A)(2), a first-degree felony; failure to comply with the order or signal of a police officer, in violation of R.C. 2921.331(B), a third-degree felony; assault, in violation of R.C. 2903.13(A), a fourth-degree felony; receiving stolen property, in violation of R.C. 2913.51(A), a fourth-degree felony; and obstruction of official business, in violation of R.C. 2921.31(A), a fifth-degree felony. The trial court granted the State's motion to consolidate the cases as they both related to the events of February 26, 2009.

{¶4} Following trial, the jury convicted Washington of two counts of theft, for which he was sentenced to concurrent sentences of imprisonment lasting sixteen months. The jury also found him guilty of failure to comply with the order or signal of a police officer, receipt of stolen property, and obstruction of official business, for which he was sentenced to a total of seven and a half years, which was to be served consecutive to the sentences for his theft convictions. The jury found Washington not guilty of robbery, felonious assault, and assault.

{¶5} Washington appeals and asserts three assignments of error for our review.

II

Assignment of Error Number One

"THE VERDICTS ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶6} In his first assignment of error, Washington alleges that his theft convictions are against the manifest weight of the evidence. Washington admits that he engaged police in a high-speed chase on the highway from Elyria to Westlake while driving in a stolen vehicle. He argues, however, that he did not shove the victim to the ground and steal her car. Instead, he asserts that he was at the Midway Mall earlier that day selling drugs, and that, at the time of the offense, he was waiting at a nearby bus stop to take the bus back to Cleveland. While there, he received a call from someone wanting to buy drugs, in exchange for allowing Washington to use his car for the next several hours. Washington agreed, exchanged the car for drugs, and was heading toward his home in Cleveland when he realized police were following him. He further argues that the evidence does not support his conviction because, at trial, the victim testified she did not see her attacker and was unable to identify him as the person who knocked her to the ground and stole her car and store purchase.

{¶7} When considering a manifest weight argument, this Court:

> "[M]ust review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Otten* (1986), 33 Ohio App.3d 339, 340.A weight of the evidence challenge indicates that a greater amount of credible evidence supports one side of the issue than supports the other. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. Further, when reversing a conviction on the basis that the conviction was against the manifest weight of the evidence, the appellate court sits as the "thirteenth juror" and disagrees with the factfinder's resolution of the conflicting testimony. Id. Therefore, this Court's "discretionary power to grant a

> new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Martin* (1983), 20 Ohio App.3d 172, 175; see, also, *Otten*, 33 Ohio App.3d at 340.

{¶8} Washington was convicted of two counts of theft based on the stolen vehicle and the recent purchase that the victim had made at Macy's. One count was a misdemeanor and the other a felony-level offense. R.C. 2913.02(A)(1) provides that "[n]o person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services *** [w]ithout the consent of the owner[.]" To do so constitutes misdemeanor theft. R.C. 2913.02(B)(2). When "the value of the property or services stolen is five thousand dollars or more and is less than one hundred thousand dollars," however, the theft is a fourth-degree felony. R.C. 2913.02(B)(2). "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist." R.C. 2901.22(B).

{¶9} At trial, Judith Mayo-Silvey testified that she went to Macy's at approximately 4:00 p.m. on the date in question to return an item to the store and make a small purchase. Upon exiting the store at approximately 4:25 p.m., Mayo-Silvey placed her Macy's purchase in the back of her car, at which point a man threw her to the ground, placed her in a choke hold, and lay on top of her, repeatedly ordering her to give him the keys to her car. Mayo-Silvey complied, and the man got into her car and drove out of the mall parking lot, heading northbound in the same direction as the highway. She called 911 while she was still on the ground, watching her car leave the mall. She reported the attack and provided police with a description of her stolen car. According to Mayo-Silvey, police arrived at the scene within three to four minutes. Mayo-

Silvey admitted she did not see where the car headed once it exited the mall parking lot, nor did she see it enter the highway.

{¶10} Macy's security camera operator, Erin Hickok, testified that she had seen Washington and another man sitting at the west entrance to Macy's department store at approximately 2:30 p.m. on the day of the theft. Hickok monitored the men on closed circuit television for nearly thirty minutes before they left the store. She saw Washington in the parking lot shortly thereafter and noticed him again, sitting in the chairs near the store's west entrance at approximately 4:30 p.m.

{¶11} Several area police officers testified at the trial with respect to locating and pursuing Washington in the stolen Explorer from Elyria to Westlake. Specific to the theft offense, Officer William Witt from the Elyria Police Department testified that he had just finished up on another call when he received an alert from dispatch that there had been a carjacking at the Midway Mall in Elyria. Officer Witt received the alert at approximately 4:30 p.m. and arrived at the mall at approximately 4:33 p.m. to find Mayo-Silvey in the parking lot, upset and still talking on her cell phone. While Officer Witt was obtaining additional information from Mayo-Silvey about her vehicle and the potential suspects involved, he received information that the stolen vehicle had been located by Avon police. Officer Witt explained that when there are serious or violent crimes like robbery, theft, or rape committed in the vicinity of the mall, dispatch alerts neighboring police departments to be on the lookout for the suspects or vehicles because many suspects flee the Elyria mall area given its close proximity to the highway. Given the nature of the offense here, Officer Witt confirmed that area police were notified of the theft and given a description of the stolen vehicle.

{¶12} Officer Larry Miller from the Avon Police Department testified that at 4:30 p.m. he received a call informing him to be on the lookout for a black Ford Explorer that was recently stolen from the Midway Mall and could be traveling on Interstate 90. Officer Miller positioned himself with three other Avon officers on the entrance ramp to Interstate 90, which was located one exit eastward of the Midway Mall. Officer Miller's dash camera recorded the vehicle passing him at that exit at approximately 4:32 p.m. Officer Miller proceeded onto the highway and joined the other three cars that were already following the Explorer, at speeds of nearly 100 m.p.h.

{¶13} Officer Joe Novosielski from the Avon Police Department testified that upon receiving the call about the car theft at approximately 4:30 p.m., he headed toward the overpass one exit eastward of the Midway Mall to position himself with the other Avon officers that had responded. As he passed over the highway, he saw a black Ford Explorer travelling eastbound just before he entered the highway. Once on the highway, he closed in on the vehicle and confirmed that the license plate number on the Explorer matched the one reported as stolen. He then waited for backup to join him and initiated a traffic stop by activating his lights and sirens. At that point, the car sped up from 65-70 m.p.h. to speeds of nearly 100 m.p.h. for the next several miles before exiting the highway.

{¶14} Officer Brian Tackett of the Avon Police Department headed to the Avon overpass in response to the call as well. He testified that he identified the black Explorer within approximately five to seven minutes of receiving the call informing area police of the theft while he was searching traffic from the overpass.

{¶15} Officer Andrew Kehl was also positioned with the other Avon officers on the overpass and pursued Washington with the other officers until he was eventually arrested. While

transporting Washington from Westlake to Elyria after the chase, Washington told Officer Kehl that "nobody saw [him] take that car" and suggested that the car theft would "get dropped to an RSP," that is, Washington suspected he would get charged with receipt of stolen property, not theft, because there were no eyewitnesses that saw him outside Macy's taking the Explorer.

{¶16} Washington testified in his own defense. According to Washington, he was at the Midway Mall earlier in the day selling crack cocaine that he had purchased from a dealer he knew. He had approximately six drug sales throughout the afternoon, but then left the mall "because he made enough money for [him] and [his] brother to get on the bus and go back to Cleveland." Washington headed to Life Skills Center on River Road to take the bus and while waiting, received a call from someone that he had sold crack to earlier in the day who asked him if he had any more drugs to sell, which he did. In exchange, the caller, whose name Washington did not know, came to Life Skills Center, gave Washington the keys to his car, and told him to "bring the car back in a matter of hours." Washington testified the entire exchange took "maybe ten seconds," and then he and his brother got in the car and headed toward Cleveland on Interstate 90. Washington sped up when he realized police were behind him on the highway because he had a warrant out for his arrest in Cleveland based on a probation violation.

{¶17} Upon cross examination, Washington was unsure how much it cost to purchase a bus ticket, and admitted that he had misidentified the location of Life Skills Center on the map. He indicated there were one or two buses there while he was waiting around 4:30 p.m. that day. He further indicated that he had made $60 on the crack that he had sold earlier that day, but that he no longer had that money with him when police arrested him because it had fallen out of his pocket when he fled and hid from police. Further, Washington did not recall making a statement to Office Kehl about the stolen car while being transferred to jail.

{¶18} In response to Washington's testimony, the State called Detective Larry Barbee as a rebuttal witness. Detective Barbee had retraced the path the stolen Explorer was alleged to have taken based on Washington's testimony that he obtained the car from an unknown person while he was waiting for the bus at Life Skills Center. Detective Barbee testified that it took him fifteen minutes to reach the point on the highway where Avon police first spotted Washington on Interstate 90 after leaving from the same point in Macy's parking lot where the theft occurred, and heading to the highway by way of the bus stop at the Life Skills Center. Detective Barbee performed this exercise at 4:30 p.m. on a weekday and incorporated a two-minute wait at the bus stop into his route based on the drug transaction that is alleged to have occurred there. He testified that, at that point in the afternoon, there were several buses at the Life Skills Center and that traffic in the area surrounding the mall was generally congested. Detective Barbee also timed several routes heading from Macy's parking lot directly to the highway, and in each instance it took him seven to eight minutes to reach the point on the highway at which Avon police spotted the stolen vehicle from the overpass.

{¶19} Based on the foregoing, we cannot say that the jury lost its way in concluding that Washington was person who knocked Mayo-Silvey to the ground and fled from Macy's parking lot in her black Explorer, which contained her recent Macy's purchase. Though Washington argues his conviction is against the manifest weight of the evidence because there were no witnesses who saw him steal the car, this Court has previously held that "[t]he identity of a perpetrator may be established using direct or circumstantial evidence," as both types of evidence are accorded equal probative value. *State v. Liggins*, 9th Dist. No. 24220, 2009-Ohio-1764, at ¶11, quoting *State v. Flynn*, 9th Dist. No. 06CA0096-M, 2007-Ohio-6210, at ¶12. See, also, *State v. Park*, 9th Dist. No. 09CA009568, 2010-Ohio-3943, at ¶7-13 (determining that

appellant's convictions for robbery and theft were not against the manifest weight of the evidence given the circumstantial evidence that he was missing from a party at the time the offense occurred and the conflicting testimony of his whereabouts during that time span). To the extent that Washington testified that he was not at the mall at the time of the offense and only received the stolen car in exchange for drugs, the jury was free to discredit his testimony, and instead credit the State's version of events. *State v. Peasley*, 9th Dist. No. 25062, 2010-Ohio-4333, at ¶18 (noting that "[w]hen presented with conflicting evidence, the jury was free to believe or disbelieve any, or all, of [the defendant's] testimony" that he was not present or involved in the events that led to his convictions for felonious assault and robbery). Accordingly, Washington's argument that his convictions for theft are against the manifest weight of the evidence lacks merit. Washington's first assignment of error is overruled.

Assignment of Error Number Two

> "THE TRIAL COURT ERRED IN IMPOSING SENTENCES FOR BOTH THEFT AND RECEIVING STOLEN PROPERTY, WHICH ARE ALLIED OFFENSES OF SIMILAR IMPORT."

{¶20} In his second assignment of error, Washington argues that his convictions for theft and receiving stolen property are allied offenses of similar import. Consequently, he asserts that the trial court erred in sentencing him on both offenses because the court should have merged the offenses and sentenced him on only one. He argues, consistent with his objection on the matter at sentencing, that the commission of the theft necessarily resulted in the commission of receiving stolen property, as they both concerned the same vehicle. He further argues that both offenses arose out of the same course of conduct, so while he was found guilty of both, Washington argues he should have only been sentenced on one.

{¶21} Pursuant to R.C. 2941.25(A), "[w]here the same conduct by defendant can be construed to constitute two or more allied offenses of similar import *** the defendant may be convicted of only one." Since the parties in this matter submitted their briefs, the Supreme Court decided *State v. Johnson*, Slip No. 2010-Ohio-6314, in which it addressed the approach courts should employ with respect to determining whether two offenses are allied under R.C. 2941.25. In *Johnson*, the Supreme Court held 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." *Johnson* at syllabus, overruling *State v. Rance* (1999), 85 Ohio St.3d 632. Though the Court failed to set forth in a majority opinion any precise methodology for a court to apply in such circumstances, the separate opinions of the Court unanimously concluded that a court should no longer begin its analysis by focusing on the elements of the offense in abstract, as required by *Rance*, but should instead, first focus on the conduct of the defendant in the case. *Johnson* at ¶44. See, also, id. at ¶68 (O'Connor, J., concurring in judgment); id. at ¶78 (O'Donnell, J., separately concurring). A majority of the justices also endorsed an approach that looks to the defendant's conduct in light of the evidence introduced and the arguments made by the parties at trial, in order to determine if two offenses are allied. *Johnson* at ¶54-56; id at ¶69-70 (O'Connor, J., concurring in judgment).

{¶22} Based on this fundamental change to the manner in which courts are to address allied offense challenges, this Court requested the parties in this matter submit supplemental briefs to address *Johnson's* effect, if any, on Washington's second and third assignments of error. In response, the State conceded that under *Johnson*, Washington's convictions for receiving stolen property and theft are allied offenses and should merge for the purposes of sentencing, because both offenses were committed by the same conduct. Our review of the

record supports this conclusion, as it is apparent from the testimony adduced at trial that the State relied on the same occurrence and the same conduct to convict Washington of both offenses. Accordingly, Washington's second assignment of error is sustained, and the matter is remanded for resentencing, at which point the State can elect which allied offense it will pursue against Washington, consistent with the Supreme Court's directive in *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2.

Assignment of Error Number Three

> "THE TRIAL COURT COMMITTED PLAIN ERROR IN IMPOSING SENTENCES FOR BOTH FAILURE TO COMPLY AND OBSTRUCTING OFFICIAL BUSINESS, WHICH ARE ALLIED OFFENSES OF SIMILAR IMPORT."

{¶23} In his third assignment of error, Washington argues that his convictions for failure to comply and obstructing official business are also allied offenses and were committed without a separate animus. He acknowledges that he did not object on this basis at sentencing, and consequently asserts on appeal that it was plain error for the trial court to sentence him on both offenses.

{¶24} Given the nature of this alleged error, we incorporate the standard of review with respect to the allied offenses argument from Washington's second assignment of error into our review here, as well. Under R.C. 2921.331(B), a person is guilty of failure to comply if he "operates 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." A person is guilty of obstruction of official business under R.C. 2921.31(A) when he "hampers or impedes a public official in the performance of the public official's lawful duties" and does so "without privilege *** and with purpose to prevent, obstruct, or delay the performance by a public official of any authorized act within the public official's official capacity." If in doing so the person

creates a risk of physical harm to any person, the offense is a felony of the fifth degree. R.C. 2921.31(B).

{¶25} In his supplemental brief, Washington argues that the same conduct led to both his obstruction and his failure to comply convictions. He asserts that when he failed to stop after being signaled by officers on the highway to do so, and instead, engaged police in a high-speed chase for several miles, he simultaneously obstructed police in performance of their duties and willfully eluded police in his motor vehicle. Though he acknowledges in his brief that he did not object at sentencing on this basis, he maintains that the same conduct served as the basis for both of his convictions. Therefore, he argues there was no evidence that these offenses were committed separately, or were separate criminal wrongdoings that resulted in separate harm. See *Johnson* at ¶49; id at ¶70 (O'Connor, J., concurring in judgment).

{¶26} The State, however, argues that it is not possible to commit both offenses with the same conduct, nor did the same conduct serve as the basis for both convictions. That is, the State maintains that fleeing from police in a vehicle after being signaled to stop cannot serve as the basis for an obstruction conviction, as the State would be obligated to charge a defendant under the more specific offense of failure to comply, in such an instance. Additionally, the State points to the underlying conduct, arguing that Washington's refusal to stop in response to police lights and sirens while on the highway served as the basis for his failure to comply conviction, and involved conduct which created a risk of harm to both the police engaged in that pursuit, as well as the surrounding motorists. Washington's later decision to stop the vehicle, flee from police on foot, and hide in a ditch in the nearby woods served as the basis for his obstruction conviction, which created a risk to the officers who pursued him at that juncture. Additionally, the State asserts that Washington's intent, as demonstrated by his conduct, was to escape police initially,

by leading them on a high-speed chase in a stolen vehicle, but once his tires were punctured, he then intended to escape police capture on foot.

{¶27} As stated, the issue of allied offenses with respect to obstruction of official business and failure to comply was not raised at the time of sentencing, so the trial court did not consider any of the arguments related to the whether the offenses were committed separately or with separate animus. The absence of any record in that regard, in conjunction with the sweeping effect of *Johnson* on the issue of allied offenses, requires we remand this matter to the trial court to consider this issues in the first instance. Accord *State v. Wenker*, 9th Dist. No. 25185, 2011-Ohio-786, at ¶21-22 (applying *Johnson* and remanding the matter to the trial court for consideration of defendant's conduct and whether there was evidence of a separate animus for his domestic violence and felonious assault convictions).

{¶28} Accordingly, the matter is remanded to the trial court for consideration of the foregoing arguments of the parties and a determination as to whether the offenses are allied under the auspices of *State v. Johnson*. Id. at ¶22.

III

{¶29} Washington's first assignment of error is overruled. Washington's second assignment of error is sustained. The sentences challenged in Washington's third assignment of error are reversed and that matter is remanded to the trial court for application of *State v. Johnson*. The judgment of the Lorain County Court of Common Pleas is affirmed in part, reversed in part, and the matter is remanded for further proceedings consistent with this opinion.

Judgment affirmed in part,
reversed in part,
and cause remanded.

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 Lorain, 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 both parties equally.

BETH WHITMORE
FOR THE COURT

CARR, P. J.
MOORE, J.
CONCURS

APPEARANCES:

PAUL A. GRIFFIN, Attorney at Law, for Appellant.

DENNIS P. WILL, Prosecuting Attorney, and AMY IOANNIDIS BARNES, Assistant Prosecuting Attorney.