

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 25313

Appellee

v.

SANYALE A. MAPLE

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 09 01 0121

Appellant

DECISION AND JOURNAL ENTRY

Dated: March 16, 2011

WHITMORE, Judge.

{¶1} Defendant-Appellant, Sanyale Maple, appeals from her convictions in the Summit County Court of Common Pleas. This Court affirms in part and reverses in part.

I

{¶2} During the early morning hours of January 3, 2009, Arturo Vazquez Carnero left a bar in Akron, Ohio along with two women he met at the bar. Carnero offered the women a ride in his car and drove them to a parking lot. After one of the women exited the vehicle, the other woman, later identified as Maple, demanded Carnero’s money. When Carnero refused to hand over his wallet, a struggle ensued and Maple stabbed Carnero in the hand approximately four to five times with a small knife. Carnero quickly removed the money from his wallet and threw it to the floor of his car. Maple picked up the money and fled the scene. As a result of the incident, Carnero sustained numerous injuries to his hand and sought emergency treatment. After speaking with Carnero and other witnesses from the bar Carnero had visited the night of

the incident, the police identified Maple as a possible suspect. Carnero later viewed a photo array and identified Maple as his assailant.

{¶3} On January 23, 2009, a grand jury indicted Maple on the following counts: (1) aggravated robbery, in violation of R.C. 2911.01(A)(1); felonious assault, in violation of R.C. 2903.11(A)(1)/(2); and (3) theft, in violation of R.C. 2913.02(A)(1)/(4). A jury trial began on March 26, 2009, at the end of which the jury found Maple guilty of aggravated robbery and felonious assault. The trial court sentenced Maple and she appealed, but this Court dismissed her appeal due to an improper post-release control notification. *State v. Maple* (Nov. 17, 2009), 9th Dist. No. 24748. Subsequently, the trial court resentenced Maple, ordering her to serve two concurrent terms of five years in prison.

{¶4} Maple now appeals from her convictions and raises two assignments of error for our review.

II

Assignment of Error Number One

“APPELLANT’S CONVICTIONS FOR AGGRAVATED ROBBERY AND FELONIOUS ASSAULT WERE ALLIED OFFENSES OF SIMILAR IMPORT AND THE CONVICTIONS MUST MERGE INTO A SINGLE CONVICTION.”

{¶5} In her first assignment of error, Maple argues that the trial court erred by convicting her of both aggravated robbery and felonious assault because the two crimes are allied offenses of similar import. Specifically, she argues that both offenses arose from the same conduct.

{¶6} Recently, the Ohio Supreme Court reevaluated its allied offense jurisprudence and overruled its decision in *State v. Rance* (1999), 85 Ohio St.3d 632. *State v. Johnson*, Slip Opinion No. 2010-Ohio-6314. *Johnson* stemmed from a conflict between the First and Fifth

Districts with regard to the issue of whether the crimes of felony murder and child endangering must merge when child endangering also serves as the predicate offense for the felony murder charge. *Id.* at ¶4-5, citing *State v. Johnson*, 1st Dist. Nos. C-080156 & C-080158, 2009-Ohio-2568 (concluding offenses were not allied because the legislature intended for the offenses to protect distinct societal interests) and *State v. Mills*, 5th Dist. No. 2007-AP-07-0039, 2009-Ohio-1849 (comparing elements in the abstract and concluding offenses were allied). In answering the certified question, the Court recognized the difficulty in applying its allied offense law, abandoned its current approach, and fashioned a new, conduct-based approach. In particular, the Court embraced R.C. 2941.25's plain language and rejected *Rance's* directive that courts examine the statutory elements of offenses in the abstract before considering the conduct of a defendant. *Johnson* at ¶44. Accord *id.* at ¶68 (O'Connor, J., concurring in judgment); *id.* at ¶78 (O'Donnell, J., separately concurring). The 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. Although none of the separate opinions in *Johnson* gained a majority, a majority of the Court clearly agreed that an allied offense determination must depend upon a defendant's conduct and the evidence introduced and arguments made at trial with regard to that conduct. *Id.* at ¶54-57; *id.* at ¶69-70 (O'Connor, J., concurring).

{¶7} Maple was found guilty of aggravated robbery and felonious assault. Her aggravated robbery conviction required the State to prove that she committed a theft offense with a deadly weapon while her felonious assault conviction required the State to prove either that she knowingly caused Carnero serious physical harm or that she caused him physical harm with a

deadly weapon. See R.C. 2911.01(A)(1); R.C. 2903.11(A)(1)/(2). Maple argues that “the two offenses were not committed separately, but [as] part of the same conduct[.]”

{¶8} The issue under the particular facts of this case is whether, under R.C. 2941.25(B), Maple committed the crimes of aggravated robbery and felonious assault separately or with a separate animus. See *Johnson*, supra. See, also, *State v. Bigelow*, 9th Dist. No. 08CA0072-M, 2009-Ohio-4093, at ¶11. Rather than decide this issue in the first instance, we must remand the matter to the trial court for a determination as to whether Maple’s aggravated robbery and felonious assault offenses are, in fact, allied offenses of similar import. *Johnson* at ¶49-50; *Bigelow* at ¶11. Accord *State v. Wenker*, 9th Dist. No. 25185, 2011-Ohio-786, at ¶21-22 (remanding matter to the trial court for consideration of defendant’s conduct and offenses pursuant to *Johnson*). Accordingly, we reverse on this basis and remand to the trial court for the application of *Johnson*.

Assignment of Error Number Two

“THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY IMPROPERLY ADMITTING EVIDENCE THAT WAS BOTH IRRELEVANT AND HEARSAY.”

{¶9} In her second assignment of error, Maple argues that the trial court erred by admitting testimony that was both irrelevant and inadmissible hearsay. Specifically, Maple argues that the court erred by allowing the State to ask her alibi witness an irrelevant question, which was based on hearsay.

{¶10} An appellate court applies an abuse of discretion standard when reviewing a trial court’s decision to admit evidence over an objection that it is irrelevant. *State v. Turner*, 9th Dist. No. 24709, 2009-Ohio-6613, at ¶12-19. An abuse of discretion means that the trial court

was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶11} Maple called her brother to testify as an alibi witness at trial. According to Maple's brother, Maple was with him when Carnero was victimized. On cross-examination, the State asked Maple's brother the following question: "Would it surprise you to learn that your mother told Detective Williams that your sister came home to her house that night?" Maple objected to the State's question on the basis of relevance because neither her mother nor Detective Williams had testified as a witness, but the trial court overruled her objection and allowed the question. On appeal, Maple argues, without any analysis or support, that the trial court erred by allowing the State to ask the foregoing question because it was irrelevant. She also argues that the court erred by allowing the question because it contained inadmissible hearsay.

{¶12} To the extent that Maple challenges the State's question on the basis of hearsay, Maple did not object on that basis in the court below. The specific objection entered on the record reads as follows: "Objection, Your Honor. Relevance. We haven't heard testimony from [Maple's mother] or Detective Williams." Maple did not argue that the State's question contained inadmissible hearsay. The basis for her objection was relevancy. "A defendant forfeits appellate review of an alleged error at trial if she fails to contemporaneously object to that error at trial." *State v. McCallum*, 9th Dist. No. 08CA0037-M, 2009-Ohio-1424, at ¶19, citing *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, at ¶23; Crim.R. 52(B). Moreover, while a litigant who forfeits an objection below may argue plain error on appeal, Maple has not done so. "Because [Maple] forfeited her [hearsay] argument by failing to object on that basis at

trial and does not argue plain error on appeal, we will not address her [hearsay] argument.” *McCallum* at ¶19. Instead, we confine our analysis to her relevancy argument.

{¶13} Relevant evidence is evidence “having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Evid.R. 401. Although poorly-framed, we cannot conclude that the State’s question was irrelevant. Whether Maple was with the victim on the night in question was a fact of consequence. Assuming Maple’s alibi witness was being untruthful about Maple’s whereabouts to protect her, the witness might have reacted in a particular way or panicked at the suggestion that another family member gave the police a different alibi for Maple on the night in question. Maple herself avers that the State’s question threatened her alibi witness’ credibility. The trial court, in its sound discretion, found the question relevant. See *Turner* at ¶13. Absent any authority to the contrary, this Court will not conclude that the trial court abused its discretion by overruling Maple’s relevancy objection. Maple’s second assignment of error is overruled.

III

{¶14} Maple’s second assignment of error is overruled. As to Maple’s first assignment of error, the judgment must be reversed and remanded for the application of *Johnson*. The judgment of the Summit County Court of Common Pleas is affirmed in part, reversed in part, and remanded for further proceedings consistent with the foregoing 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 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 both parties equally.

BETH WHITMORE
FOR THE COURT

CARR, P. J.
MOORE, J.
CONCUR

APPEARANCES:

KIRK A. MIGDAL, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.