

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23817
v.	:	T.C. NO. 09 CR 2298
	:	
MOSES MATTHEW STEVENS	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	

OPINION

Rendered on the 1st day of October, 2010.

MICHELE D. PHIPPS, Atty. Reg. No. 0069829, Assistant Prosecuting Attorney, 301 W. Third Street, 5th Floor, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

DANIEL J. O'BRIEN, Atty. Reg. No. 0031461, 1210 Talbott Tower, 131 N. Ludlow Street, Dayton, Ohio 45402
Attorney for Defendant-Appellant

FROELICH, J.

{¶ 1} Defendant-Appellant Moses Stevens appeals from his convictions and sentence for Aggravated Robbery with a Firearm Specification, Kidnapping with a Firearm Specification, Having Weapons Under Disability, and Possession of Criminal Tools. Stevens was indicted on August 18, 2009, for crimes that occurred

the previous month. He filed a motion to dismiss the Aggravated Robbery and Kidnapping charges for failure to set forth a mens rea in the indictment. The trial court overruled his motion. Stevens pled no contest to, and the trial court found him guilty of, all four charges, including their attendant specifications. The trial court sentenced him to an aggregate term of ten years in prison. Stevens appeals.

I

{¶ 2} Stevens's first assignment of error:

{¶ 3} "THE TRIAL COURT COMMITTED PREJUDICIAL AND REVERSIBLE ERROR IN FAILING TO MERGE ALLIED OFFENSES OF SIMILAR IMPORT AND SENTENCING FOR ALL COUNTS."

{¶ 4} In his first assignment of error, Stevens insists that the trial court erred in ordering at the sentencing hearing that he serve seven years for both Aggravated Robbery and Kidnapping because the two charges are allied offenses of similar import. However, Stevens has failed to cause a transcript of the sentencing hearing to be filed with this court, in violation of App.R. 9. Nevertheless, even assuming, arguendo, that the trial court did fail, orally, to merge the convictions during the sentencing hearing, Stevens acknowledges that the court specifically stated in its judgment of conviction that "the charge in count #2 [Kidnapping] merges with count #1[Aggravated Robbery]." Because the trial court speaks through its journal entries, we need not address any misstatement that may have been made during the sentencing hearing. *State v. Watkins*, Clark App. No. 08-CA-122, 2010-Ohio-740, ¶40, citing *State v. Brooke*, 113 Ohio St.3d 199, 2007-Ohio-1533, ¶47.

{¶ 5} Stevens's first assignment of error is overruled.

II

{¶ 6} Steven's second assignment of error:

{¶ 7} "THE TRIAL COURT COMMITTED PREJUDICIAL AND REVERSIBLE ERROR IN FAILING TO DISMISS ALL COUNTS IN THE INDICTMENT THAT DID NOT INCLUDE AND ESSENTIAL ELEMENT OF THE REQUISITE MENS REA."

{¶ 8} In his second assignment of error, Stevens directs our attention to *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, and argues that the indictment against him was defective in that there was no mens rea specified for either the Aggravated Robbery or the Kidnapping charge. No specific mental state is necessary regarding the deadly weapon element of the offense of Robbery, defined as having a deadly weapon on or about the offender's person or under the offender's control. *State v. Wharf* (1999), 86 Ohio St.3d 375, 378. Stevens cites *State v. Singfield*, 183 Ohio App.3d 625, 2009-Ohio-4172, for the proposition that the mens rea of recklessness is necessary for the allegation that the defendant displayed, brandished or indicated possession of a weapon.

{¶ 9} However, that decision was reconsidered and vacated, and the Court, citing *State v. Lester*, 123 Ohio St.3d 396, 2009-Ohio-4225, at ¶1, held that the catchall culpable mental state of recklessness does not apply to R.C. 2911.01(A)(1). *State v. Singfield*, Summit App. No. 24576, 2009-Ohio-5945, at ¶10.

{¶ 10} Moreover, on August 27, 2010, the Ohio Supreme Court overruled

Colon, supra, holding: “An indictment that charges an offense by tracking the language of the criminal statute is not defective for failure to identify a culpable mental state when the statute itself fails to specify a mental state.” *State v. Horner*, ___ Ohio St.3d ___, 2010-Ohio-3830, paragraph one of the syllabus. See, also, *State v. Buehner*, 110 Ohio St.3d 403, 2006-Ohio-4707, syllabus.

{¶ 11} Stevens was indicted on one count of Aggravated Robbery, in violation of R.C. 2911.01(A)(1), which states, “No person, in attempting or committing a theft offense * * * or in fleeing immediately after the attempt or offense, shall * * * [h]ave a deadly weapon on or about the offender’s person or under the offender’s control and either display the weapon, brandish it, indicate that the offender possesses it, or use it.” His indictment tracked that language, alleging that “in attempting or committing a theft offense * * * or in fleeing immediately after the attempt or offense, [Stevens] did have a deadly weapon, to wit: HANDGUN, on or about his person or under his/her control and did recklessly display the weapon, brandish the weapon, indicate possession of the weapon or use the weapon * * * in violation of Section 2911.01(A)(1) of the Ohio Revised Code.”

{¶ 12} Stevens was also indicted on one count of Kidnapping, in violation of R.C. 2905.01(A)(2), which states, “No person, by force, threat, or deception * * * shall remove another from the place where the other person is found or restrain the liberty of the other person * * * [t]o facilitate the commission of any felony or flight thereafter.” His indictment again tracked the language of the statute, alleging that Stevens “did by force, threat or deception * * * did remove another person from the place where the other person was found or restrain the liberty of the other person,

for the purpose of facilitating the commission of a felony, to wit: AGGRAVATED ROBBERY, or flight thereafter and did release said victim in a safe place unharmed * * * in violation of Section 2905.01(A)(2) of the Ohio Revised Code.”

{¶ 13} Because Stevens’s indictment with regard to both the Aggravated Robbery charge and the Kidnapping charge tracked the language of the statutory sections under which he was charged, the indictment was not deficient for failing to specify a mens rea. Stevens’s second assignment of error is overruled.

III

{¶ 14} Stevens’s third assignment of error:

{¶ 15} “THE TRIAL COURT COMMITTED PREJUDICIAL AND REVERSIBLE ERROR IN SENTENCING AN ADDITIONAL TERM FOR A WEAPON SPECIFICATION.”

{¶ 16} In his third assignment of error, Stevens contends that rather than merge the gun specification for the Aggravated Robbery and Kidnapping convictions, the trial court should have dismissed the specification as to the Aggravated Robbery conviction because that conviction is reliant upon his possession of the same weapon. He concludes that the court’s failure to dismiss the specification amounted to a violation of his right to due process.

{¶ 17} There is no indication in the record that Stevens ever sought dismissal of the gun specification in the trial court. Because he could have raised this issue below but failed to do so, Stevens has waived the issue on appeal, and we decline to consider it for the first time on appeal. See, e.g., *State v. Ealy*, Montgomery App. No. 20994, 2006-Ohio-414, ¶12, citing *State v. Awan* (1986), 22 Ohio St.3d

120, additional citations omitted. See, also, Crim.R. 52(B).

{¶ 18} We have held that a firearm specification under R.C. 2941.145 is not “a separate criminal offense that requires proof of a culpable mental state separate from commission of the predicate offense. * * * Rather, a firearm specification is merely a penalty enhancement that attaches to some predicate offense.” *State v. Vann*, Montgomery App. No. 22818, 2009-Ohio-5308, ¶12, internal citations omitted. A penalty enhancement specification is not an offense. *State v. Miller*, Lucas App. No. L-08-1314, 2009-Ohio-3908, ¶11, citations omitted. As such, there is no due process or double jeopardy violation for sentences on both the underlying offense and the specification. *State v. Reid*, Montgomery App. No. 23409, 2010-Ohio-1686, ¶48. Because a firearm specification cannot stand alone, without an underlying offense, “a firearm specification does not require its own mens rea.” *Id.*, at ¶13, citation omitted. Therefore, even if Stevens had preserved this issue for appeal, his assignment of error would fail.

{¶ 19} Stevens’s third assignment of error is overruled.

IV

{¶ 20} Having overruled all three of Stevens’s assignments of error, the judgment of the trial court is Affirmed.

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BROGAN, J. and GRADY, J., concur.

Copies mailed to:

Michele D. Phipps
Daniel J. O’Brien
Hon. Connie S. Price