

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-08-1408

Appellee

Trial Court No. CR0200801936

v.

Terrell Edwards

DECISION AND JUDGMENT

Appellant

Decided: June 4, 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Michael J. Loisel, Assistant Prosecuting Attorney, for appellee.

Daniel H. Grna, for appellant.

* * * * *

COSME, J.

{¶ 1} This is an appeal from a judgment issued by the Lucas County Court of Common Pleas, which found appellant guilty of one count of aggravated burglary with a gun specification, one count of aggravated robbery, and two counts of kidnapping. Appellant was sentenced to 16 years incarceration, and he appeals arguing that the trial court erred in failing to merge the offenses of aggravated robbery and kidnapping. Appellant also argues that his attorney's failure to raise the merger issue at trial

constitutes ineffective assistance of counsel, thus depriving him of his constitutional rights. We conclude that appellant's criminal conduct demonstrated separate animus sufficient to support separate convictions for both aggravated robbery and kidnapping. Accordingly, the trial court did not err by failing to merge the offenses and appellant's counsel did not render ineffective assistance. The judgment of the trial court is affirmed.

I. BACKGROUND

{¶ 2} On April 20, 2008, appellant and a co-defendant forcibly entered a house for the purpose of stealing money.¹ Inside the home were several occupants. Appellant restrained one occupant with duct tape and proceeded to direct the third co-defendant to enter the house. All three perpetrators went to the second floor where they found two additional male victims and forced them to move at gunpoint from separate bedrooms into a hallway. The victims were restrained, threatened and physically assaulted. A co-defendant then forced a female victim around the second floor of the house at gunpoint to assist in the search for money.

{¶ 3} Appellant was indicted on April 28, 2008, and he entered a guilty plea on September 24, 2008. The Lucas County Court of Common Pleas sentenced appellant to 16 years incarceration, imposing five years for aggravated burglary under R.C. 2911.11(A)(1), one year for a firearm specification under R.C. 2941.141, five years for aggravated robbery under R.C. 2911.01(A)(1), five years for kidnapping one victim under R.C. 2905.01(A)(2) and (C), and five years for kidnapping another victim under

¹According to the Presentence Investigation Report, appellant believed that "no one was supposed to be present in the home during the commission of the [burglary]."

R.C. 2905.01(A)(2) and (C). The court ordered appellant to serve the sentences consecutively, except for the final kidnapping sentence, which was to run concurrently with the others.

{¶ 4} Appellant now appeals the trial court's October 24, 2008 judgment, raising two assignments of error.

II. ALLIED OFFENSES

{¶ 5} In his first assignment of error, appellant contends that:

{¶ 6} "The trial court committed plain error when it failed to merge the offenses of aggravated robbery and kidnapping."

{¶ 7} We disagree.

{¶ 8} Appellant failed to raise this claim in the trial court. Appellant's failure to raise a claim that offenses are allied offenses of similar import in the trial court constitutes a waiver of the claimed error. *State v. Comen* (1990), 50 Ohio St.3d 206, 211. An error not raised in the trial court must be plain error in order for an appellate court to reverse. *State v. Long* (1978), 53 Ohio St.2d 91; Crim.R. 52(B). In order to prevail under a plain error analysis, appellant bears the burden of demonstrating that the outcome of the trial clearly would have been different but for the error. *Long*, supra. Notice of plain error "is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Id.* at paragraph three of the syllabus.

{¶ 9} Ohio's multiple-count statute, R.C. 2941.25, determines whether cumulative punishments for two separate offenses stemming from the same conduct violate the

Double Jeopardy Clause. *State v. Brown*, 6th Dist. No. WD-09-058, 2010-Ohio-1698, ¶ 36.

{¶ 10} R.C. 2941.25 provides: "(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.

{¶ 11} "(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."

{¶ 12} The application of this statute involves a two-tiered analysis. *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, ¶ 18, citing *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, ¶ 14. "In the first step, the elements of the two crimes are compared. 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 and the court must then proceed to the second step. In the second step, the defendant's conduct is reviewed to determine whether the defendant can be convicted of both offenses. 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." *Brown* at ¶ 19, quoting *State v. Blankenship* (1988), 38 Ohio

St.3d 116, 117. Appellant's assignment of error challenges the trial court's determination that he had a separate animus for the kidnapping and aggravated robbery, so we must address that issue.

{¶ 13} The Ohio Supreme Court has recently held that aggravated robbery, defined by R.C. 2911.01(A)(1), and kidnapping, defined by R.C. 2905.01(A)(2), are allied offenses of similar import for the purposes of applying R.C. 2941.25. *State v. Winn*, 121 Ohio St.3d 413, 2009-Ohio-1059, syllabus. Thus, appellant's conviction for aggravated robbery and two counts of kidnapping under these code sections are allied offenses of similar import.

{¶ 14} Our analysis then focuses on whether appellant's conduct demonstrates that he committed those offenses "separately or with a separate animus as to each," confirming the conviction for both crimes. R.C. 2941.25(B).

{¶ 15} In *State v. Logan* (1979), 60 Ohio St.2d 126, syllabus, the Supreme Court of Ohio adopted the following guidelines for reviewing the defendant's conduct to determine whether kidnapping and another offense of the same or similar kind are committed: "(a) Where the restraint or movement of the victim is merely incidental to a separate underlying crime, there exists no separate animus sufficient to sustain separate convictions; however, where the restraint is prolonged, the confinement is secretive, or the movement is substantial so as to demonstrate a significance independent of the other offense, there exists a separate animus as to each offense sufficient to support separate convictions; (b) Where the asportation or restraint of the victim subjects the victim to a

substantial increase in risk of harm separate and apart from that involved in the underlying crime, there exists a separate animus as to each offense sufficient to support separate convictions." The court defined "animus," for the purposes of R.C. 2941.25(B), as meaning "purpose or, more properly, immediate motive." *Id.* at 131.

{¶ 16} Applying the guidelines established by *Logan*, we conclude that appellant did commit the aggravated robbery and kidnapping separately or with separate animus as to all three victims.

{¶ 17} In the instant case, appellant and his co-defendants restrained multiple victims, and then proceeded to threaten them at gunpoint and physically assault them. This restraint exposed the victims to violence, intimidation and an increased risk of harm that exceeded that which was necessary to locate the money appellant believed was in the house. Under these circumstances, we find that the kidnappings took on a significance of their own, demonstrating separate animus sufficient to support separate convictions for both aggravated robbery and kidnapping.

{¶ 18} Therefore, we conclude that the trial court did not commit plain error by failing to merge the offenses of aggravated robbery and kidnapping. Appellant's first assignment of error is not well-taken.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

{¶ 19} In his second assignment of error, appellant contends that:

{¶ 20} "The appellant received ineffective assistance of counsel in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution as well as under Section 10, Article I, of the Ohio Constitution."

{¶ 21} We disagree.

{¶ 22} A properly licensed attorney is presumed competent. *State v. Hamblin* (1988), 37 Ohio St.3d 153, 155-56. Therefore, in order to prevail on a claim of ineffective assistance of counsel, appellant must show counsel's performance fell below an objective standard of reasonable representation and but for counsel's error, the result of the proceedings would have been different. *Strickland v. Washington* (1984), 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136, 142. In other words, appellant must show that counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. *Strickland*, 466 U.S. at 686.

{¶ 23} Having concluded under the first assignment of error that appellant's offenses were committed with separate animus as to each, we decline to find that counsel's performance fell below an objective standard of reasonable representation, which would have prejudiced appellant.

{¶ 24} Accordingly, appellant's second assignment of error is not well-taken and the judgment of the trial court is affirmed.

IV. CONCLUSION

{¶ 25} We affirm the October 24, 2008 judgment of the Lucas County Court of Common Pleas. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Arlene Singer, J.

Thomas J. Osowik, P.J.

Keila D. Cosme, J.
CONCUR.

JUDGE

JUDGE

JUDGE

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