

IN THE COURT OF APPEALS OF OHIO  
THIRD APPELLATE DISTRICT  
UNION COUNTY

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STATE OF OHIO,

PLAINTIFF-APPELLEE/  
CROSS-APPELLANT,

CASE NO. 14-18-26

v.

GASUMU B. KAMARA,

OPINION

DEFENDANT-APPELLANT/  
CROSS-APPELLEE.

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Appeal from Union County Common Pleas Court  
Trial Court No. 2018-CR-0158

Judgment Affirmed in Part, Reversed in Part and Cause Remanded

Date of Decision: December 30, 2019

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APPEARANCES:

*April F. Campbell* for Appellant/Cross-Appellee

*Raymond Kelly Hamilton* for Appellee/Cross-Appellant

**PRESTON, J.**

{¶1} Defendant-appellant/cross-appellee, Gasumu B. Kamara (“Kamara”), appeals the November 28, 2018 judgment of sentence of the Union County Court of Common Pleas. Plaintiff-appellee/cross-appellant, State of Ohio, filed a notice of cross-appeal from the same judgment of sentence. For the reasons that follow, we affirm Kamara’s conviction but reverse Kamara’s sentence and remand for resentencing.

{¶2} This case arises from a May 22, 2018 incident in which Sergeant Matthew Himes (“Sergeant Himes”) initiated a traffic stop of a vehicle operated by Kamara for failure to display a front license plate. (Sept. 6, 2018 Tr. at 87, 90-91). (See State’s Exs. 1, 2). When asked for his driver’s license, Kamara gave Sergeant Himes a driver’s license issued to Raheem Gbor (“Gbor”). (Sept. 6, 2018 Tr. at 92-93, 138-139). (See State’s Ex. 3). Upon making contact with Kamara and his passenger, Lillian McWilliams (“McWilliams”), Sergeant Himes detected the odor of raw marijuana about the vehicle. (Sept. 6, 2018 Tr. at 92). Accordingly, Sergeant Himes initiated a probable cause search of the vehicle. (*Id.* at 93-95). As Sergeant Himes led Kamara to his patrol vehicle, he observed Kamara chewing and attempting to ingest raw marijuana. (*Id.* at 92-94). Sergeant Himes instructed Kamara to spit out the contraband. (*Id.* at 94). Sergeant Himes handcuffed Kamara and placed him in the back of his patrol vehicle. (*Id.* at 94-95). (See State’s Ex. 2).

While Kamara waited in the back of Sergeant Himes's patrol vehicle, Sergeant Himes retrieved McWilliams from the passenger seat of Kamara's vehicle and placed her in the back of the patrol vehicle with Kamara. (Sept. 6, 2018 Tr. at 95). (See State's Ex. 2). Thereafter, Sergeant Himes and the officers on the scene conducted a probable cause search of the vehicle. (Sept. 6, 2018 Tr. at 100). (See State's Ex. 2).

{¶3} After completing the vehicle search, Sergeant Himes removed Kamara and McWilliams from the back seat of his patrol vehicle and placed them in another officer's vehicle while he reviewed his patrol vehicle's video footage. (Sept. 6, 2018 Tr. at 101-103). Sergeant Himes's patrol vehicle footage depicted Kamara observing as Sergeant Himes searched McWilliams, who had a plastic bag containing cocaine protruding from her hair. (State's Ex. 2). (See State's Ex. 6). However, Sergeant Himes did not notice the bag of cocaine in McWilliams's hair during his search of her person. (Sept. 6, 2018 Tr. at 104). After McWilliams, who was handcuffed, was placed in the back of the patrol vehicle with Kamara, he informed McWilliams that the bag was sticking out of her hair and instructed her to lean over. (Sept. 7, 2018 Tr. at 110-111, 114, 127); (State's Ex. 2). As McWilliams leaned over, Kamara, who was still handcuffed, removed the plastic bag of cocaine from McWilliams's hair. (Sept. 7, 2018 Tr. at 127-130); (State's Ex. 2). Kamara then threw the bag of cocaine by McWilliams's feet. (Sept. 7, 2018 Tr. at 129-130);

(State's Ex. 2). McWilliams used her foot to push the bag under the driver's seat, concealing it from view. (Sept. 7, 2018 Tr. at 130); (State's Exs. 2, 4).

{¶4} After reviewing the video footage, Sergeant Himes located the bag of powder cocaine under the front seat of his patrol vehicle. (Sept. 6, 2018 Tr. at 101-103, 136-137). (See State's Exs. 4, 5, 6, 7). McWilliams and Kamara were subsequently arrested and taken to jail. (Sept. 6, 2018 Tr. at 106-107, 141). At the jail, McWilliams admitted to having additional drugs on her person and gave jail officials a bag of crack cocaine that had been concealed in her vaginal canal. (*Id.* at 141-144); (Sept. 7, 2018 Tr. at 69-77, 117-118). (See State's Exs. 5, 6, 8).

{¶5} On July 2, 2018, the Union County Grand Jury indicted Kamara on seven counts: Count One of possession of cocaine in violation of R.C. 2925.11(A), (C)(4)(e), a first-degree felony; Count Two of trafficking in cocaine in violation of R.C. 2925.03(A)(2), (C)(4)(e), a second-degree felony; Count Three of trafficking in cocaine in violation of R.C. 2925.03(A)(2), (C)(4)(f), a first-degree felony; Count Four of tampering with evidence in violation of R.C. 2921.12(A)(1), (B), a third-degree felony; Count Five of obstructing official business in violation of R.C. 2921.31(A), (B), a second-degree misdemeanor; and Counts Six and Seven of identify fraud in violation of R.C. 2913.49(B)(1), (I)(2) and R.C. 2913.49(B)(2), (I)(2), respectively, fifth-degree felonies. (Doc. No. 2). On July 11, 2018, Kamara

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appeared for arraignment and entered pleas of not guilty to the charges in the indictment. (Doc. No. 10).

{¶6} The case proceeded to a jury trial on September 6 and 7, 2018. (*See* Doc. No. 46). On September 7, 2018, the jury found Kamara guilty of all counts. (Doc. Nos. 32, 33, 34, 35, 36, 37, 38); (Sept. 7, 2018 Tr. at 315-321). (*See* Doc. No. 46).

{¶7} On November 28, 2018, a sentencing hearing was held. (Doc. No. 46). The trial court found that Counts One and Three, Counts Two and Three, and Counts Six and Seven merged for the purposes of sentencing. (Doc. No. 46). Accordingly, the State elected to sentence Kamara on Counts Three and Six. (*Id.*). The trial court sentenced Kamara to ten years of mandatory imprisonment on Count Three; 30 months of imprisonment on Count Four, to be served consecutively to the ten-year mandatory prison term for Count Three; 90 days in prison on Count Five, to be served concurrently to Counts Three and Four; and 6 months in prison on Count Six, to be served consecutively to Counts Three and Four. (*Id.*).

{¶8} On December 21, 2018, Kamara filed his notice of appeal. (Doc. No. 54). He raises two assignments of error for our review. On December 31, 2018, the State filed its cross-appeal. (Doc. No. 68). The State raises one assignment of error for our review.

**Kamara's Assignment of Error No. I**

**Kamara's right to a fair trial was denied by the trial court's decision to allow the State to use other acts evidence that Kamara was a major drug trafficker for a six-month period, in violation of Evid.R. 403, 404, and the Due Process Clause.**

{¶9} In his first assignment of error, Kamara argues that the trial court erred by permitting the State to present “other acts” evidence. Specifically, Kamara objects to McWilliams's testimony that she and Kamara had engaged in drug trafficking for a six-month period prior to Kamara's arrest on the present case. Moreover, Kamara argues that the State did not provide him sufficient notice that it intended to use the “other acts” evidence at trial.

{¶10} “Generally, evidence which tends to show that the accused has committed other crimes or acts independent of the crime for which he stands trial is not admissible to prove a defendant's character or that the defendant acted in conformity therewith.” *State v. Wendel*, 3d Dist. Union No. 14-16-08, 2016-Ohio-7915, ¶ 21, quoting *State v. Hawthorne*, 7th Dist. Columbiana No. 04 CO 56, 2005-Ohio-6779, ¶ 24, citing *State v. Elliott*, 91 Ohio App.3d 763, 770 (3d Dist.1993) and Evid.R. 404. ““Evidence of other crimes, wrongs, or acts” “may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”” *Id.*, quoting *State v. Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695, ¶ 15, quoting Evid.R. 404(B). *See also* R.C. 2945.59.

{¶11} “In *State v. Williams*, the Supreme Court of Ohio set forth the three-step analysis trial courts should conduct in determining whether ‘other acts’ evidence is admissible under Evid.R.404(B).” *Wendel* at ¶ 22, citing *Williams* at ¶ 19-20. “‘The first step is to consider whether the other acts evidence is relevant to making any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.’” *Id.*, quoting *Williams* at ¶ 20, citing Evid.R. 401. “‘The next step is to consider whether evidence of the other crimes, wrongs, or acts is presented to prove the character of the accused in order to show activity in conformity therewith or whether the other acts evidence is presented for a legitimate purpose, such as those stated in Evid.R. 404(B).’” *Id.*, quoting *Williams* at ¶ 20. “‘The third step is to consider whether the probative value of the other acts evidence is substantially outweighed by the danger of unfair prejudice.’” *Id.*, quoting *Williams* at ¶ 20, citing Evid.R. 403.

{¶12} “Generally, ‘[a] trial court is given broad discretion in admitting and excluding evidence, including “other bad acts” evidence.’” *Id.* at ¶ 23, quoting *State v. Williams*, 7th Dist. Jefferson No. 11 JE 7, 2013-Ohio-2314, ¶ 7, citing *State v. Maurer*, 15 Ohio St.3d 239, 265 (1984). “Thus, a reviewing court will not reverse a trial court’s evidentiary ruling absent an abuse of discretion that materially prejudices the affected party.” *State v. Glenn-Coulverson*, 10th Dist. Franklin No. 16AP-265, 2017-Ohio-2671, ¶ 24, citing *State v. Issa*, 93 Ohio St.3d 49, 64 (2001).

An abuse of discretion implies that the trial court acted unreasonably, arbitrarily, or unconscionably. *State v. Adams*, 62 Ohio St.2d 151, 157 (1980).

{¶13} We conclude that the trial court did not abuse its discretion by admitting “other acts” evidence. The “other acts” evidence to which Kamara objects is evidence of his drug trafficking activities from 2017 until the date of arrest. At trial, McWilliams testified that on May 22, 2018, she and her husband met with Kamara and Kamara’s cousin, Tito, in Columbus. (Sept. 7, 2018 Tr. at 102, 104-107, 111-112). While in Columbus, Kamara handed Tito two separate plastic bags—one containing powder cocaine and one containing crack cocaine. (*Id.* at 105, 116-118). McWilliams testified that Tito handed the plastic bags to McWilliams who put the bag of powder cocaine in her hair and the bag of crack cocaine in her vaginal canal. (*Id.*). While McWilliams and Kamara were traveling from Columbus to Bellefontaine, they were stopped by Sergeant Himes and the instant criminal charges followed therefrom. (*Id.* at 101-102, 122).

{¶14} McWilliams further testified that she traveled to Columbus from Bellefontaine to pick up powder cocaine from Kamara multiple times a week from November 2017 to May 22, 2018. (*Id.* at 118-121, 136-138). McWilliams testified that she had carried cocaine obtained from Kamara on her person “quite a few times” while traveling with Kamara to Bellefontaine, where she and her husband sold the cocaine. (*Id.*). McWilliams and her husband then gave the money they received



from selling the drugs to Kamara. (*Id.* at 141). McWilliams testified that in exchange for carrying the cocaine for Kamara, she received a portion of the drugs for her personal use. (*Id.* at 135-136).

{¶15} Under the first step of the *Williams* analysis, the evidence that Kamara had engaged in drug trafficking on other occasions is relevant in that this evidence makes it more probable that Kamara trafficked drugs in this case. *See State v. Jones*, 3d Dist. Logan No. 8-16-18, 2017-Ohio-4351, ¶ 11 (concluding that “evidence that Jones was convicted of forgery \* \* \* for passing bad checks is relevant to making it more probable that Jones committed the forgeries in this case”), citing *State v. Regan*, 5th Dist. Delaware No. 13 CAA 08 0067, 2014-Ohio-3797, ¶ 19; *State v. Ranes*, 3d Dist. Putnam No. 12-15-03, 2016-Ohio-448, ¶ 20 (finding that evidence of Ranes’s past conviction for illegal assembly or possession of chemicals for the manufacture of drugs “had a tendency to make more probable that Ranes had criminal intent when purchasing and collecting items such as pseudoephedrine”). According to McWilliams’s testimony, Kamara’s actions on the day of his arrest were consistent with the other occasions in which Kamara trafficked drugs. Further, McWilliams’s testimony undermines Kamara’s defense that he was unaware that McWilliams was carrying drugs on her person.

{¶16} Concerning the second step of the *Williams* analysis, McWilliams’s testimony regarding other instances of drug trafficking demonstrate intent,

knowledge, and plan. *See* Evid.R. 404(B). According to McWilliams’s testimony, her and Kamara’s actions on May 22, 2018 were part of the same scheme that the pair participated in for approximately six months. Moreover, McWilliams’s testimony that her relationship with Kamara was predicated on their drug-trafficking activities undermines Kamara’s defense that he was unaware that McWilliams was carrying drugs on her person. McWilliams’s testimony of her and Kamara’s drug scheme also demonstrates the pair’s purpose for traveling from Columbus to Bellefontaine on May 22, 2018. *See State v. Moorer*, 3d Dist. Seneca No. 13-12-22, 2013-Ohio-650, ¶ 25.

{¶17} Finally, the third and final step of the *Williams* analysis involves a consideration of whether the probative value of the “other-acts” evidence is substantially outweighed by the danger of unfair prejudice. *Wendel*, 2016-Ohio-7915, at ¶ 28. Here, the trial court gave the jury the following limiting instruction before McWilliams testified to her and Kamara’s ongoing drug-trafficking scheme:

I want to give you an instruction that you may hear evidence from this point on by this witness that talks about other bad acts. \* \* \* [T]his is what we call other acts evidence and there’s [sic] rules that allow that evidence to come in. We do not, however, in this Court or any other Court in the State convict somebody because of bad character.

So, character isn't at issue here. Character of the defendant isn't at issue when we're talking about any other acts that you might hear about from this point on or even heretofore, if you believe that you've heard something heretofore that's not directly related to what happened on this day and at the time.

The testimony isn't being admitted to show the defendant's character or that he acted in conformity with that character. It's being admitted to prove other elements of the offense[,] such as \* \* \* proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.<sup>1</sup>

\* \* \*

I want you to consider that when you're evaluating the testimony before the Court by this witness.

(Sept. 7, 2018 Tr. at 113-114). Thus, McWilliams's testimony that she and Kamara had engaged in a drug-trafficking scheme for approximately six months "is not unduly prejudicial "because the trial court instructed the jury that this evidence could not be considered to show that [Kamara] acted in conformity with a character trait."”” *Jones*, 2017-Ohio-4351, at ¶ 13, quoting *Wendel* at ¶ 28, quoting *Williams*,

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<sup>1</sup> The State agreed to exclude "identity" from the list of permissible purposes for the "other-acts" evidence, because the "other-acts" evidence was not being offered for that purpose. (Sept. 7, 2018 Tr. at 25-26, 113-114). Accordingly, the trial court informed the jury that the "other-acts" evidence was not being offered for the purpose of "identity." (*Id.* at 113-114).

134 Ohio St.3d 521, 2012-Ohio-5695, at ¶ 24. (*See* Sept. 7, 2018 Tr. at 113-114). The trial court’s limiting instruction lessened any prejudicial effect of McWilliams’s testimony that she and Kamara had been engaged in a drug-trafficking scheme for approximately six months prior to Kamara’s arrest for the instant offenses. As detailed in the discussion of the first two steps of the *Williams* analysis, McWilliams’s testimony of her and Kamara’s drug activity was relevant to establish McWilliams’s relationship with Kamara and was relevant to establishing intent, knowledge, and plan. Thus, any prejudicial effect did not substantially outweigh the probative value of the evidence. *See Regan*, 2014-Ohio-3797, at ¶ 19. *See also Wendel* at ¶ 28, citing *Williams* at ¶ 24.

{¶18} Kamara further argues under his first assignment of error that the State failed to comply with the notice requirement of Evid.R.404(B). Specifically, Kamara argues that the State did not provide notice that it planned to use 404(B) evidence against him “until [he] was already in trial” and, consequently, he was “ambushed” with the “other-acts” evidence during trial. (Appellant’s Brief at 7). Kamara also argues that the State failed to comply with the notice requirement of Evid.R. 404(B) because it only provided him with written notice of additional discovery and not written notice that it intended to use the discovery. Finally, Kamara argues that he was not provided with either the notice of additional discovery or the additional discovery sufficiently in advance of trial.

{¶19} “Evid.R. 404 was amended in 2012 to adopt a notice requirement.” *State v. Nuzum*, 6th Dist. Lucas No. L-15-1122, 2016-Ohio-2744, ¶ 20. As a result of that amendment, “[t]he proponent of other-acts evidence must provide ‘reasonable notice in advance of trial’ of the general nature of any such evidence it intends to introduce at trial.” *State v. Yoder*, 5th Dist. Licking No. 16-CA-54, 2017-Ohio-903, ¶ 24, quoting Evid.R. 404(B). “[T]he notice given to the defense regarding ‘other crimes’ evidence must be sufficiently clear so as ‘to permit pretrial resolution of the issue of its admissibility.’” *Id.*, quoting *State v. Tran*, 8th Dist. Cuyahoga No. 100057, 2014-Ohio-1829, ¶ 23, quoting *United States v. Long*, 814 F.Supp. 72, 74 (D.Kan.1993). “Following its amendment, the Ohio rule is now similar to the federal rule, which requires reasonable notice of the general nature of any such evidence in order to prevent unfair surprise.” *Nuzum* at ¶ 20, citing *State v. Plevyak*, 11th Dist. Trumbull No. 2013-T-0051, 2014-Ohio-2889, ¶ 12. “Whether notice is ‘reasonable’ will depend on the facts and circumstances of each case.” *Yoder* at ¶ 24, quoting *Plevyak* at ¶ 19. Evid.R. 404(B)’s notice requirement “should not be construed to exclude otherwise relevant and admissible evidence solely because of a lack of notice, absent a showing of bad faith.” 2012 Staff Note, Evid.R. 404.

{¶20} First, we note that, unlike other rules of evidence, the plain language of Evid.R. 404(B) requires that the defendant receive “reasonable notice in advance

of trial” and not *written* notice of the general nature of “other acts” evidence the State intends to introduce at trial. Evid.R. 404(B). *Compare* Evid.R. 609(B) (requiring “sufficient advance written notice of intent to use” a conviction more than ten-years-old to impeach a witness). Following McWilliams change of plea hearing on Friday, August 31, 2018, she gave a recorded interview which apparently detailed her involvement in the events of May 22, 2018 as well as additional drug-trafficking activities she engaged in with Kamara over several months. (Sept. 7, 2018 Tr. at 19). The prosecuting attorney was present for the interview, but Kamara’s trial counsel was not present. (*Id.*). The prosecuting attorney stated that he provided Kamara’s trial counsel with the documents relating to the change of plea immediately. (*Id.* at 20). However, the State explained to Kamara’s trial counsel on August 31, 2018 that an audio recording of McWilliams’s interview needed to be downloaded onto the server and would be forthcoming. (*Id.* at 20-21); (Sept. 6, 2018 Tr. at 32-34). The prosecutor’s office was closed on Monday, September 3, 2018 for Labor Day. (Sept. 7, 2018 Tr. at 20). The audio recording of McWilliams’s interview was sent to Kamara’s trial counsel at approximately 9:00 a.m. on Tuesday, September 4, 2018. (*Id.* at 20-21, 27-28). The prosecuting attorney stated that he telephoned Kamara’s trial counsel on Wednesday, September 5, 2018 and they discussed the contents of the interview and “the different parameters of what [McWilliams] said” and the portions of the interview “that were important for

[Kamara’s trial counsel’s] purposes.” (Sept. 6, 2018 Tr. at 32-34); (Sept. 7, 2018 Tr. at 17, 27-28). Trial commenced on Thursday, September 6, 2018 and McWilliams’s testified on Friday, September 7, 2018. (Sept. 7, 2018 Tr. at 100).

{¶21} Given the specific facts and circumstances of the case, we find that the State gave Kamara reasonable notice in advance of trial of its intention to use the “other-acts” evidence at trial. *See Jones*, 2017-Ohio-4351, at ¶ 16 (concluding that the State gave Jones sufficient notice of its intention to use “other-acts” evidence at trial when the State notified Jones of its intention to use “other-acts” evidence two days before trial); *Plevyak*, 2014-Ohio-2889, at ¶ 20, 22 (concluding that Plevyak did not “demonstrate either unfair surprise or prejudice” when the State notified Plevyak on the morning of trial that it intended to introduce “other-acts” evidence during the trial). *See also State v. Heiney*, 6th Dist. Lucas No. L-16-1042, 2018-Ohio-3408, ¶ 66 (concluding that the trial court’s ruling admitting “other-acts” evidence was not an abuse of discretion because the Defendant had actual notice of the “other-acts” evidence through other discovery and there was no evidence of bad faith); *In re. T.N.*, 3d Dist. Marion No. 9-15-36, 2016-Ohio-5774, ¶ 73 (finding that the State met its burden of providing reasonable notice to the defendant of its intent to offer “other-acts” evidence when it provided written statements of potential witnesses and listed the potential witnesses on its witness list).

{¶22} Moreover, Kamara’s trial counsel raised an objection to the “other-acts” evidence on the first day of trial, after the jury had been selected, but before the parties gave their opening statements. (Sept. 6, 2018 Tr. at 14-17, 27-40). Thus, the record suggests that Kamara’s counsel had actual notice that the State was planning to offer “other-acts” evidence under Evid.R. 404(B) prior to trial and was not “ambushed” with the evidence at trial, as Kamara suggests in his brief. Accordingly, Kamara cannot say that he was unfairly surprised by the State’s use of the “other-acts” evidence because he was certainly aware of the State’s intent to use it. Additionally, the record is devoid of a showing of bad faith.

{¶23} For these reasons, we hold that the trial court did not abuse its discretion by admitting the “other-acts” evidence in this case.

Kamara’s first assignment of error is overruled.

### **Kamara’s Assignment of Error No. II**

#### **Kamara’s identity fraud counts were legally insufficient as a matter of law.**

{¶24} In his second assignment of error, Kamara contends that the State failed to present sufficient evidence to support his identity-fraud convictions. Specifically, Kamara argues that the State did not present sufficient evidence to establish that Kamara did not have Gbor’s consent to use his identification.

{¶25} “An appellate court’s function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at



trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt." *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus, *superseded by state constitutional amendment on other grounds*, *State v. Smith*, 80 Ohio St.3d 89 (1997). Accordingly, "[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *Id.*

{¶26} "Circumstantial evidence and direct evidence inherently possess the same probative value and therefore should be subjected to the same standard of proof." *Id.* at paragraph one of the syllabus. "A conviction can be sustained based on circumstantial evidence alone." *State v. Franklin*, 62 Ohio St.3d 118, 124 (1991). "[I]n some instances, certain facts can only be established by circumstantial evidence" and a conviction based thereon "is no less sound than one based on direct evidence." *State v. Smith*, 12th Dist. Butler No. CA2008-03-064, 2009-Ohio-5517, ¶ 80. "If the state 'relies on circumstantial evidence to prove an element of the offense charged, there is no [requirement that the evidence must be] irreconcilable with any reasonable theory of innocence in order to support a conviction[,] so long as the jury is properly instructed as to the burden of proof, i.e., beyond a reasonable doubt." *State v. Bates*, 6th Dist. Williams No. WM-12-002, 2013-Ohio-1270, ¶ 50, quoting *Jenks* at paragraph one of the syllabus.

R.C. 2913.49(B) provides:

No person, without the express or implied consent of the other person, shall use, obtain, or possess any personal identifying information of another person with intent to do either of the following:

- (1) Hold the person out to be the other person;
- (2) Represent the other person's personal identifying information as the person's own personal identifying information.

{¶27} Kamara was convicted of two counts of identity fraud: Count Six concerned Kamara providing Sergeant Himes with Gbor's driver's license during the traffic stop and Count Seven involved Kamara providing the jail staff with Gbor's identifying information during the booking process. (*See* Doc. No. 16). Here, Kamara's sole argument is that the State did not present sufficient evidence that he lacked Gbor's consent to use Gbor's identifying information. Accordingly, we will address only the lack of consent element of the offense.

{¶28} At trial, the State presented the testimony of Sergeant Himes, who testified that after he initiated a traffic stop of a vehicle driven by Kamara, he asked Kamara for his driver's license. (Sept. 6, 2018 Tr. at 92). In response, Kamara produced a driver's license issued to Gbor. (*Id.* at 92-93, 138-139). (*See* State's Ex. 3). Sergeant Himes identified State's Exhibit 3 as the driver's license issued to Gbor that Kamara presented to him during the traffic stop. (Sept. 6, 2018 Tr. at 138-

139). (*See* State’s Ex. 3). Sergeant Himes testified that during the booking process, Kamara represented himself as Gbor. (*Id.* at 142).

{¶29} Sergeant Himes identified State’s Exhibit 10 as the jail intake form for Kamara that Sergeant Himes completed. (*Id.* at 149-150). (*See* State’s Ex. 10). The name of the inmate listed on the form is “Raheem Henry Gbor,” which was the name Kamara gave Sergeant Himes to identify himself. (State’s Ex. 10); (Sept. 6, 2018 Tr. at 150-151). Moreover, State’s Exhibit 10 includes Gbor’s social security number, which Sergeant Himes testified that he obtained from the LEADS database. (State’s Ex. 10); (Sept. 6, 2018 Tr. at 151-152).

{¶30} Sergeant Himes testified that several days after Kamara’s arrest, the patrol post received a phone call from a Raheem Henry Gbor. (Sept. 6, 2018 Tr. at 152). Based on the message, Sergeant Himes testified that he received some information that Gbor was not the individual he arrested on May 22, 2018. (*Id.* at 152-153).

{¶31} Sergeant Himes then contacted the jail and inquired whether the individual who had been booked on May 22, 2018 as “Raheem Gbor” was still incarcerated. (*Id.* at 157). At that time, Sergeant Himes was informed that that individual had been released from jail on bond. (*Id.* at 157-158). Sergeant Himes testified that after receiving the message from Gbor and contacting the jail, he had suspicions that the person he arrested on May 22, 2018 was not actually Gbor. (*Id.*).

{¶32} Next, Sergeant Himes set up an interview at the patrol post with Gbor. (*Id.* at 158). Sergeant Himes testified that Gbor appeared at the patrol post in person and Sergeant Himes obtained a written statement from him. (*Id.*). Following his interview with Gbor, Sergeant Himes reached out to other agencies for assistance in identifying the male that he arrested on May 22, 2018. (*Id.* at 160-162). As a result of his investigation, Sergeant Himes stated that he determined that Gbor is not the person he arrested. (*Id.* at 164).

{¶33} We conclude that the State presented sufficient evidence that Kamara did not have Gbor's consent to use Gbor's identifying information. Sergeant Himes's testimony that he received a message several days after Kamara's arrest from Gbor that caused him to suspect that Gbor was not the individual he arrested, coupled with his testimony that he met with Gbor in-person and obtained a statement from Gbor, support the inference that Gbor did not give Kamara his consent to use his identification. Although the jury was not able to consider the content of Sergeant Himes's contact with Gbor, the fact that Gbor himself initiated the contact could allow the jury to infer that Gbor was contacting the police because Kamara did not have Gbor's consent to use his identification.

{¶34} Moreover, when viewing the evidence in a light most favorable to the prosecution, when Kamara initially gave Sergeant Himes Gbor's identification, Kamara knew that he was in a vehicle containing marijuana, crack cocaine, and

powder cocaine. In fact, he was in the process of attempting to ingest the marijuana as he gave Sergeant Himes Gbor's identification. Kamara continued to hold himself out as Gbor even when he was in jail facing felony drug charges, and he went as far as to post bond under Gbor's name. The serious nature of the charges against Kamara coupled with Gbor's voluntary contact with Sergeant Himes could allow the jury to infer that Kamara did not have Gbor's consent to use his identification. *See State v. Gordon*, 9th Dist. Summit No. 28331, 2017-Ohio-7147, ¶ 26 (finding sufficient evidence to support an identity fraud conviction where the victim did not testify); *State v. Seagraves*, 5th Dist. Delaware No. 09 CAA 04 0033, 2010-Ohio-308, ¶ 24 (finding that the State established the lack of consent element of a theft charge through circumstantial evidence); *Bates*, 2013-Ohio-1270, at ¶ 50. Thus, viewing the evidence in a light most favorable to the State, a rational trier of fact could have found that the State proved the lack of consent element of identify fraud.

{¶35} Kamara's second assignment of error is overruled.

### **The State's Assignment of Error**

**The trial court erred by merging Counts 2 and 3 for purposes of sentencing.**

{¶36} In its assignment of error, the State argues that the trial court erred by determining that Counts Two and Three are allied offenses of similar import under R.C. 2941.25(A). Therefore, the State argues, the trial court should not have merged Counts Two and Three and should have sentenced him on both counts.

{¶37} “A defendant bears the burden of proving that the offenses for which he has been convicted and sentenced constitute allied offenses of similar import pursuant to R.C. 2941.25.” *State v. Campbell*, 12th Dist. Butler No. CA2014-06-137, 2015-Ohio-1409, ¶ 18, citing *State v. Luong*, 12th Dist. Butler No. CA2011-06-110, 2012-Ohio-4520, ¶ 46. “A court will look to the information contained in the record to make its allied offense determination, including the indictment, bill of particulars, and the presentence investigation [“PSI”] report.” *Id.*, citing *State v. Tannreuther*, 12th Dist. Butler No. CA2013-04-062, 2014-Ohio-74, ¶ 16. Whether offenses are allied offenses of similar import is a question of law that this court reviews de novo. *State v. Stall*, 3d Dist. Crawford No. 3-10-12, 2011-Ohio-5733, ¶ 15, citing *State v. Brown*, 3d Dist. Allen No. 1-10-31, 2011-Ohio-1461, ¶ 36.

R.C. 2941.25, Ohio’s multiple-count statute, states:

(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.

{¶38} In *State v. Bailey*, the First District Court of Appeals succinctly addressed the evolving standard applied by the Supreme Court of Ohio to determine whether allied offenses are subject to merger. 1st Dist. Hamilton No. C-140129, 2015-Ohio-2997, ¶ 75-77. The First District explained:

In *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, the Ohio Supreme Court changed the standard for evaluating when allied offenses are subject to merger under the statute by overruling, in part, *State v. Rance*, 85 Ohio St.3d 632 (1999). The test in *Rance* to determine merger called for the court to first compare the statutory elements “solely in the abstract.” *Johnson* at ¶ 44. Under *Johnson*, in determining whether allied offenses are subject to merger for purposes of R.C. 2941.25, courts must “consider the offenses at issue in light of the defendant’s conduct,” but are no longer to undertake “any hypothetical or abstract comparison of the offenses at issue.” *Id.* at ¶ 46, 47.

*Id.* at ¶ 75.

{¶39} More recently, the Supreme Court of Ohio “clarified the *Johnson* test by stating that R.C. 2941.25 contemplates an evaluation of ‘three separate factors

– the conduct, the animus, and the import.” *Id.*, at ¶ 76, quoting *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, paragraph one of the syllabus. *See also State v. Earley*, 145 Ohio St.3d 281, 2015-Ohio-4615, ¶ 12. “Separate convictions are permitted under R.C. 2941.25 for allied offenses if we answer affirmatively to just one of the following three questions: (1) Were the offenses dissimilar in import or significance? (2) Were they committed separate? and (3) Were they committed with a separate animus or motivation.” *Bailey* at ¶ 76, citing *Ruff* at paragraph three of the syllabus.

{¶40} At trial, McWilliams testified that on May 22, 2018, she met up with Kamara and Tito in Columbus for the purpose of receiving drugs from Kamara that she and her husband would sell in Bellefontaine. (Sept. 7, 2018 Tr. at 102, 104-107, 111-112, 115). McWilliams stated that Kamara handed a bag of crack cocaine and a bag of powder cocaine to Tito. (*Id.* at 105, 116-118). Tito then handed the two bags of drugs to McWilliams. (*Id.* at 116-118). McWilliams testified that she placed the bag of powder cocaine in her hair and the bag of crack cocaine in her vaginal canal. (*Id.*). McWilliams testified that she had carried powder cocaine for Kamara a number of times over a period of approximately six months. (*Id.* at 136-138). However, McWilliams stated that May 22, 2018 was the first time she had received crack cocaine from Kamara. (*Id.* at 139-140). McWilliams testified that



she received the crack cocaine on that day to fulfill a request from her customers in Bellefontaine. (*Id.*).

{¶41} The State argues that the trial court erred by merging Counts Two and Three for sentencing because Kamara's actions of packaging two different forms of cocaine, which were different in quantity, form, and the method in which they are used, demonstrate a separate animus.

{¶42} Conversely, Kamara contends that because crack cocaine and powder cocaine are two forms of the same drug and he handed the drugs over simultaneously, he should have only been convicted of one count of drug trafficking.

R.C. 2925.03(A)(2) states:

No person shall knowingly \* \* \* [p]repare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance \* \* \*, when the offender knows or has reasonable cause to believe that the controlled substance \* \* \* is intended for sale or resale by the offender or another person.

R.C. 2925.03(A)(2).

{¶43} Here, Kamara was charged with and convicted of the following: Count Two of trafficking in cocaine in an amount equal to or exceeding 20 grams but not exceeding 27 grams in violation of R.C. 2925.03(A)(2), (C)(4)(e), a second-

degree felony; and Count Three of trafficking in cocaine in an amount equal to or exceeding 27 grams but not exceeding 100 grams in violation of R.C. 2925.03(A)(2), (C)(4)(f), a first-degree felony. Count Two relates to the crack cocaine and Count Three relates to the powder cocaine.

{¶44} “As explained in *Ruff*, offenses are of dissimilar import “when the defendant’s conduct constitutes offenses involving separate victims or if the harm that results from each offense is separate and identifiable.”” *State v. Carlidge*, 3d Dist. Seneca No. 13-18-33, 2019-Ohio-1283, ¶ 31, quoting *Bailey*, 2015-Ohio-2997, at ¶ 77, citing *Ruff* at paragraph two of the syllabus. “The evidence at trial \* \* \* will reveal whether the offenses have similar import.” *Ruff* at ¶ 26. “When a defendant’s conduct victimizes more than one person, the harm for each person is separate and distinct, and therefore, the defendant can be convicted of multiple counts.” *Id.*

{¶45} Here, we conclude that the trial court erred by finding that Counts Two and Three are allied offenses of similar import. First, the powder cocaine and crack cocaine were packaged separately. The packages also contained two different quantities of cocaine. Additionally, the two packages were found on different locations on McWilliams’s body. Moreover, the two packages contained different forms of the substance to be purchased by different users. McWilliams testified that

Kamara provided her with crack cocaine in addition to the powder cocaine to fulfill a special order request from McWilliams's customers.

{¶46} Nevertheless, Kamara argues that Counts Two and Three are allied offenses of similar import. Kamara's argument is primarily based on two details: (1) powder cocaine and crack cocaine are two forms of the same substance and (2) he handed off the two bags of drugs simultaneously.

{¶47} First, although powder cocaine and crack cocaine are two different forms of cocaine, that fact is not dispositive. *See Brown*, 2011-Ohio-1461, at ¶ 41 (holding that "the simultaneous possession of crack cocaine and possession of powder cocaine are separate and distinct offenses"); *Cartlidge*, 2019-Ohio-1283, at ¶ 32 (noting that the fact that two drug packages both contained heroin is "not dispositive" to determining whether Defendant's convictions for aggravated trafficking in drugs and aggravated possession of drugs are allied offenses of similar import). Furthermore, although the evidence suggests that Kamara handed off the two plastic bags of drugs simultaneously, the drugs were packaged separately. The packaging of the bag of crack cocaine separately from the powder cocaine demonstrates the separate animus of preparation for sale to at least two different drug users. *See Cartlidge* at ¶ 32.

{¶48} Based upon the foregoing, we conclude that the trial court erred by merging Counts Two and Three.

{¶49} Accordingly, the State's assignment of error is sustained.

{¶50} Having found no error prejudicial to the appellant/cross-appellee herein in the particulars assigned and argued with respect to his assignments of error, we affirm the judgment of the trial court as to those matters. However, having found error prejudicial to the appellee/cross-appellant herein in the particulars assigned and argued with respect to its assignment of error, we reverse the judgment of the trial court as to that matter and remand to the trial court for further proceedings consistent with this opinion.

*Judgment Affirmed in Part,  
Reversed in Part and  
Cause Remanded*

**ZIMMERMAN, P.J. and WILLAMOWSKI, J., concur.**

/jlr