

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee.

-vs-

DAVON WINN,

Defendant-Appellant.

07 - 1842

On Appeal from the
Montgomery County Court
Of Appeals, Second
Appellate District

Court of Appeals
Case No. 21710

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT DEVON
WINN

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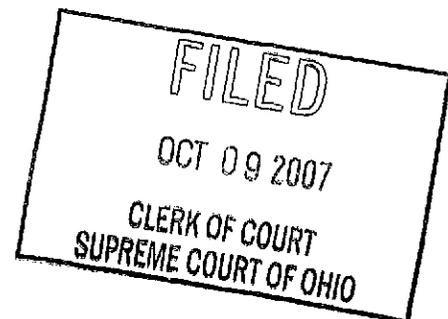


TABLE OF CONTENTS

	<u>Page</u>
EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION.....	1
STATEMENT OF THE CASE AND FACTS.....	1
ARGUMENTS IN SUPPORT OF PROPOSITION OF LAW.....	3
<u>Proposition of Law No. I:</u> . . . When in the course of a criminal trial, trial counsel fails to: object, request specific jury instructions and move under Criminal R. 29, a defendant is prejudiced if there was a reasonable probability that the outcome would have been different had counsel objected, requested, and so moved, especially when insufficient evidence exists to support a conviction.....	3
CONCLUSION.....	6
PROOF OF SERVICE.....	6
APPENDIX	<u>Appx. Page</u>
Opinion of the Montgomery County Court of Appeals (August 24, 2007).....	1
Judgment Entry to the Montgomery County Court of Appeals (August 24, 2007).....	12

EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC
OR GREAT GENERAL INTEREST AND INVOLVES
A SUBSTANTIAL CONSTITUTIONAL QUESTION

When a lawyer fails to make appropriate objections, request potentially helpful jury instructions, and/or move the trial court for acquittal under Crim. Rule 29, in a criminal (felony) case, thereby diminishing the defendant's right to appeal insufficiency of evidence claims, the state and federal constitutions have been abridged.

In this case, the above circumstances are present. As here, whenever the due process clauses of the state and federal constitutions are violated and a criminal defendant is prejudiced by the violations, a case of public or great general interest involving a substantial constitutional question exists.

In the case at bar, there was *no evidence* to support Appellant's tampering with evidence convictions. Moreover, because Rule 401 of the Ohio Rules of Evidence that defines "Relevant evidence" as "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," then the defendant's mere presence at the scene of the crime, without more, should have caused any lawyer to move a court pursuant to Rule 29 and for appropriate jury instructions.

STATEMENT OF THE CASE AND FACTS

The statement of the case and facts are partially taken verbatim from the Court of Appeals opinion. This is done to show that the Court of Appeals did not recite any facts that would support convictions of tampering with evidence by the Defendant-Appellant, since no evidence was offered that Mr. Winn possessed a gun (and especially since he was found not guilty of carrying a concealed weapon, one of the items which was

supposedly tampered with). The Court of Appeals decision does not suggest, nor did the evidence presented at trial demonstrate, that Appellant even knew what happened to the guns. No evidence exists that he acquiesced in his co-defendant's actions concerning the guns when they after the arrival of police at the crime scene:

Following a three-day jury trial Davon Winn was convicted of aggravated robbery; aggravated burglary; and kidnapping, all with firearm specifications; and three counts of tampering with evidence. The State dismissed one count of possession of criminal tools due to a faulty verdict form, and Winn was acquitted of one count of carrying a concealed weapon. The trial court sentenced him to an aggregate prison term of ten years. Winn appeals both his convictions and his sentence, presenting four assignments of error.

At about 9:25 on the morning of January 11, 2006, Treva Hummons was lying in bed when she heard noise at her front door. Her grandson's girlfriend, Teila Huffman, had spent the night and left earlier that morning, so Ms. Hummons thought Huffman was returning. As Ms. Hummons walked toward the living room, the door opened, and a man entered brandishing a handgun. The man pointed the gun in her face and ordered her back into the bedroom. He told her to lie on the bed and cover her face with a pillow, which she did. Ms. Hummons's could feel the gun pushed against her head through the pillow while the man kept yelling "where's the money?" Ms. Hummons said that the only money she had was a \$ 200 money order on her night stand.

Meanwhile, Ms. Hummons's neighbor, Charles Perkins, had heard the banging on Ms. Hummons's door. He looked through his peephole and saw a man using a pry bar to open her door while two other men stood by. Perkins immediately dialed 911.

In the midst of ransacking Ms. Hummons's home, one of the intruders looked out the window and saw that police had arrived. He warned the others. They hid a gun under Ms. Hummons's mattress along with gloves and a mask. They hid another gun in a box and the pry bar behind the dresser. Two of the men, Carlos Whiting and Timothy Body, complied with police orders to come out of the apartment, but Winn stayed in the kitchen until officers went in to get him. Perkins saw Whiting and Body leave the apartment, followed by Winn several minutes later. Perkins believed that it was Winn, by far the shortest of the three intruders, who had used the pry bar on the door.

At trial Winn claimed that when seeking a ride home, he was forced into committing the crimes by Whiting and Body, who believed that Ms. Hummons's incarcerated grandson, Toby McLardy, had drugs and money in a safe that he kept

in the apartment. Winn previously gave police three other versions of the events of January 11, 2006, each differing from his trial testimony.

(Court of Appeals Opinion, p. 1-3)

On August 24, 2007, the Montgomery County Court of Appeals issued its opinion and entered its judgment entry affirming Defendant-Appellant's convictions except that his kidnapping conviction, which was reversed as being an allied offense of the aggravated robbery conviction committed without a separate animus.

The instant request for appeal follows.

ARGUMENTS IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law No. I: When in the course of a criminal trial, trial counsel fails to: object to jury instructions or request specific jury instructions regarding an affirmative defense supported by the evidence, and counsel fails to move for acquittal under Crim. Rule. 29, a defendant is prejudiced if there is a reasonable probability that the outcome would have been different had counsel taken the above actions.

The state submitted no evidence at trial which tended to show that Mr. Winn knew about, acquiesced in, or aided and abetted in the crime of tampering with evidence. The state's theory in the court below was because Mr. Winn participated in the burglary and/or robbery that he was ipso facto guilty of his co-defendants' act of "hiding guns" and other evidence of the crimes, after they became aware of the arrival of police. These acts of hiding evidence, was furthermore, inconsistent with Mr. Winn's defense, as expressed to police officers at the time of his arrest, that he had acted under duress. In addition, there was no evidence presented that Mr. Winn did not act under duress. Thus, his affirmative defense of duress should have resulted in an acquittal.

The law is well established that a person may be convicted of complicity if the state proves he acted "with the kind of culpability required for the commission of an

offense to aid or abet another committing the offense. R.C. 2923.03(A)(2). See also, State v. Chapman (1986), 21 Ohio St.3d 41; Clark v. Jago (6th Cir. 1982), 679 F.2d 1099.

As related to guns and evidence being “hid” in the robbery victim’s apartment, notwithstanding the fact that Mr. Winn did not physically possess a gun, the evidence showed that one of the defendants yelled, “police,” during the course of a robbery, that police arrived and announced they were going to send the canines in to the apartment, Mr. Winn’s two co-defendants emerged and surrendered to the police, while Mr. Winn stayed on the kitchen floor yelling “help,” until an officer arrived. Thus, Mr. Winn would not have even had the time to form the intent required for complicity or aiding and abetting the hiding of the guns and evidence. The hiding of the guns was inconsistent with Mr. Winn’s defense, that he was forced to participate at gunpoint in the burglary and robberies at gunpoint (by the two codefendants). His defense, as expressed immediately at the crime scene, and in his subsequent statements to police, in fact depended upon the officers locating the guns. There was no evidence offered that Mr. Winn possessed an intent to hide any evidence at the crime scene after the arrival of police.

Moreover, while the lower court concentrated on Mr. Winn’s contradictory statements given to the police and at trial, it must be understood that the state’s burden of proof was not alleviated nor did it shift to Mr. Winn merely because Mr. Winn, who was hysterical and crying at the substation, apparently made contradictory statements to the investigating officers. The robbery victim testified that she had only observed Mr. Winn in her apartment after the robbery was over, when he was on her kitchen floor (following which he was led out of the apartment by Deputy Sheriffs). The state was required to prove beyond a reasonable doubt that Mr. Winn was an active, voluntary

participant, and not merely present at the scene of the crime. See, State v. Widner (1982), 69 Ohio St.2d 267.

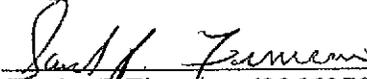
Based upon the facts of this case trial counsel had a duty to move for an acquittal pursuant to Rule 29 of the Ohio Criminal Rules of Procedure. Moreover, although evidence of Mr. Winn's contradictory statements was presented, Mr. Winn's testimony and statements consistently suggested an abandonment defense. The state did not present evidence to controvert this defense. Thus, counsel should have requested an abandonment instruction. Contrary to the Court of Appeals apparent holding, an instruction or claim of duress (the jury instruction which was provided) is not mutually exclusive with an instruction of abandonment. A defendant could be under duress in committing a crime and then additionally or alternatively, abandon purpose during the commission of a crime.

In the case at bar, Mr. Winn could have been under duress to assist in helping the the co-defendants gain "into the apartment," by use of the crowbar, but once in the apartment, abandon all intent and actions that would be considered crimes after these defendants entered the apartment, e.g. he could have abandoned intent to participate in an aggravated robbery. The aggravated robbery, tampering with evidence and other alleged felonious conduct, did not occur until after the three defendants entered the apartment. Thus, counsel had a duty to request an instruction on the affirmative defense of abandonment based upon Mr. Winn's testimony. Counsel also had a duty to object to instructions that did not contain such an instruction. There exists a reasonable probability that Mr. Winn would have been acquitted had an abandonment instruction been provided. See, Strickland v. Washington (1986), 466 U.S. 468.

CONCLUSION

Defendant-Appellant move this Court to accept jurisdiction of his appeal and reverse the decision of the lower court.

Respectfully submitted,

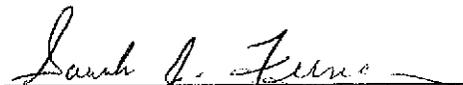


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was forwarded via ordinary U.S. mail to Jill Sink, Assistant Montgomery County Prosecuting Attorney this 8th day of October, 2007.



Sandra J. Finucane

APPENDIX

tampering with evidence. The State dismissed one count of possession of criminal tools due to a faulty verdict form, and Winn was acquitted of one count of carrying a concealed weapon. The trial court sentenced him to an aggregate prison term of ten years. Winn appeals both his convictions and his sentence, presenting four assignments of error.

I

At about 9:25 on the morning of January 11, 2006, Treva Hummons was lying in bed when she heard noise at her front door. Her grandson's girlfriend, Teila Huffman, had spent the night and left earlier that morning, so Ms. Hummons thought Huffman was returning. As Ms. Hummons walked toward the living room, the door opened, and a man entered brandishing a handgun. The man pointed the gun in her face and ordered her back into the bedroom. He told her to lie on the bed and cover her face with a pillow, which she did. Ms. Hummons could feel the gun pushed against her head through the pillow while the man kept yelling "where's the money?" Ms. Hummons said that the only money she had was a \$200 money order on her night stand.

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At trial Winn claimed that when seeking a ride home, he was forced into committing the crimes by Whiting and Body, who believed that Ms. Hummons's incarcerated grandson, Toby McLardy, had drugs and money in a safe that he kept in the apartment. Winn previously gave police three other versions of the events of January 11, 2006, each differing from his trial testimony.

II

Winn's second assignment of error:

"TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO MAKE OR RENEW A RULE 29 MOTION BECAUSE INSUFFICIENT EVIDENCE WAS PRESENTED TO PROVE DEFENDANT-APPELLANT'S GUILT OF KIDNAPPING, AGGRAVATED ROBBERY, AGGRAVATED BURGLARY, AND THREE COUNTS OF TAMPERING WITH EVIDENCE AND THE ACCOMPANYING FIREARM SPECIFICATIONS IN VIOLATION OF THE DUE PROCESS CLAUSE, AND/OR THE DEFENDANT-APPELLANT WAS ENTITLED TO BE ACQUITTED BECAUSE HE PROVED HIS AFFIRMATIVE DEFENSE OF DURESS BY [A] PREPONDERANCE OF THE EVIDENCE."

Winn's fourth assignment of error:

"TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO REQUEST A JURY INSTRUCTION ON THE AFFIRMATIVE DEFENSE OF ABANDONMENT AND/OR FAILING [TO] OBJECT TO THE COURT'S JURY INSTRUCTIONS WHICH DID NOT INCLUDE SUCH AN INSTRUCTION."

In his second and fourth assignments of error, Winn contends that his trial counsel

was ineffective. First, he insists that counsel should have made and renewed a Crim.R. 29 motion for acquittal both because there was insufficient evidence of his guilt and because he had proven his affirmative defense of duress. Winn also argues that counsel should have ensured that a instruction on the affirmative defense of abandonment was given. We disagree in both regards.

In order to prevail on a claim of ineffective assistance of counsel, the defendant must demonstrate both deficient performance and resulting prejudice. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. To show deficiency, the defendant must show that counsel's representation fell below an objective standard of reasonableness. *Id.* Trial counsel is entitled to a strong presumption that his conduct falls within the wide range of effective assistance. *Id.* Moreover, the adequacy of counsel's performance must be viewed in light of all of the circumstances surrounding the trial court proceedings. *Id.* Hindsight may not be allowed to distort the assessment of what was reasonable in light of counsel's perspective at the time. *State v. Cook* (1992), 65 Ohio St.3d 516, 524, 605 N.E.2d 70.

Even assuming that counsel's performance was ineffective, the defendant must still show that the error had an effect on the judgment. *State v. Bradley* (1989), 42 Ohio St.3d 136, 142, 538 N.E.2d 373. Reversal is warranted only where the defendant demonstrates that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id.* In this case Winn fails to meet either prong.

Because, when faced with a Crim.R. 29 motion for acquittal, a trial court must view the evidence in a light most favorable to the State, "[f]ailure to move for an acquittal under Crim.R. 29 is not ineffective assistance of counsel where the evidence in the State's case

demonstrates that reasonable minds can reach different conclusions as to whether the elements of the charged offense[s] have been proved beyond a reasonable doubt, and that such a motion would have been fruitless." *State v. Poindexter*, Montgomery App. No. 21036, 2007-Ohio-3461, ¶29, citations omitted. Here the State offered sufficient evidence to prove all elements of all offenses with which Winn was charged to warrant submitting the case to the jury.

In regards to counsel's decision to not seek an instruction on abandonment, we first note that it cannot be said that the jury would have believed Winn's claim of abandonment had the instruction been given, particularly since the abandonment theory directly conflicts with Winn's claim of duress. Therefore, it is likely that counsel made that strategic choice to pursue the duress defense rather than the abandonment theory. Trial strategy decisions such as this will not be the basis of a finding of ineffective assistance of counsel. *State v. Dixon*, 101 Ohio St.3d 328, 2004-Ohio-1585, ¶52, citation omitted.

Finding no lack in Winn's legal representation and discerning no prejudice to his defense, we overrule Winn's second and fourth assignments of error.

III

Winn's first assignment of error:

"THE ADMISSION OF A PHOTOGRAPH OF A PHOTOGRAPH OF A PERSON WHO WAS PURPORTED TO BE THE DEFENDANT VIOLATED THE BEST EVIDENCE RULE, EVID.R. 1002, AND DEFENDANT'S RIGHT TO DUE PROCESS AS GUARANTEED BY ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION AND THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION."

In his first assignment of error, Winn argues that the introduction and admission of

a photograph of Ms. Hummons's living room, which was marked as State's Ex. 15, violated the best evidence rule and that his trial counsel was ineffective for failing to object to the use of the photo. Because testimony regarding the contents of a photograph depicted within State's Ex. 15 was not closely related to a controlling issue, the original of the depicted photograph was not necessary under Ev.R. 1004(4), and counsel was not ineffective for electing not to object to the use of State's Ex. 15. Accordingly, Winn's first assignment of error fails.

Evidence Rule 1002 states: "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio." However, there are exceptions to that rule. Relevant to this case is Evid.R. 1004(4), which states: "The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if: (4) The writing, recording, or photograph is not closely related to a controlling issue."

During the State's case in chief, State's Ex. 15 was offered to depict the scene of the crime, and the trial court admitted it as such with no objection from Winn. When Winn took the stand, he denied knowing the victim's grandson, Toby McLardy. Although Winn later conceded that he knew McLardy from the neighborhood, he insisted that the two were not friends. The State called McLardy's girlfriend, Teila Huffman, as a rebuttal witness. Huffman explained that not only were Winn and McLardy friends, but she had seen a framed photograph of the two men together on top of the television in Ms. Hummons's living room. At that point the State again used State's Ex. 15 in which could be seen a framed photograph on top of the television. Although the contents of the framed

photograph were unidentifiable in the exhibit photograph, Huffman identified the framed photograph as the one of Winn and McLardy about which she had testified.

When Huffman testified that the photo was one of Winn and McLardy, she implicitly testified that, in fact, Winn and McLardy were portrayed in the photo, thus implicating Ev.R. 1002. However, the friendship of Winn and McLardy is not closely related to a controlling issue in this case. There is no question that Winn was involved in the crimes against Ms. Hummons. He admitted to being present at the scene, claiming duress as his defense. The question of whether Hummons had a photo of Winn and McLardy on her television set is, at best, an issue collateral to Winn's guilt or innocence of the crimes alleged. Accordingly, the original photograph of Winn and McLardy was not required. Ev.R. 1004(4).

Winn also presents a cursory statement that trial counsel was ineffective for failing to object to the admission of State's Ex. 15. As already stated, the exhibit was admitted during the State's case in chief to depict the scene of the crime. There was no basis for objection at that point. Even if counsel had objected to use of the photo during Huffman's rebuttal testimony, such use was permissible pursuant to Evid.R. 1004(4). We cannot say that but for Huffman's testimony regarding the photograph, the outcome of the trial would have been different. Therefore, Winn cannot demonstrate the prejudice prong of *Strickland and Brady, supra*.

For these reasons, Winn's first assignment of error is without merit and is overruled.

IV

Winn's third assignment of error:

"THE DEFENDANT-APPELLANT'S KIDNAPPING CONVICTION VIOLATES THE

THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT

DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND SECTION 10, ARTICLE I, OF THE OHIO CONSTITUTION."

Here Winn maintains that his kidnapping and aggravated robbery convictions were required to be merged because the charges are allied offenses of similar import that were committed with the same animus. Because this issue was not raised in the trial court, Winn has waived all but plain error. *State v. Long* (1978), 53 Ohio St.2d 91, 95-96, 372 N.E.2d 804; Crim.R. 52(B). We have previously applied a plain error analysis in cases concerning alleged allied offenses of similar import and found that a defendant's substantial rights are violated by conviction for two felonies rather than one where the offenses are allied offenses of similar import and committed with a single animus. *State v. Coffey*, Miami App. No. 2006 CA 6, 2007-Ohio-21, ¶14. See, also, *State v. Puckett* (March 27, 1998), Greene App. No. 97 CA 43.

In applying R.C. §2941.25 the Ohio Supreme Court established a two-part test for determining whether multiple offenses are allied offenses of similar import. First, the court must compare the elements of the offenses in the abstract to determine whether the elements correspond to such a degree that the commission of one crime will necessarily result in the commission of the other. *State v. Rance*, 85 Ohio St.3d 632, 636, 1999-Ohio-291, citation omitted. If the elements do so correspond, the offenses are allied offenses of similar import, and the defendant may only be convicted of and sentenced for both offenses if he committed the crimes separately or with a separate animus. *Id.* at 638-39, citations omitted.

The State encourages us to reconsider our recent decision in *Coffey*, wherein we held that kidnapping and aggravated robbery are allied offenses of similar import, requiring

consideration of the second step of the analysis set forth in *Rance*. We decline to do so. While we are aware of differing opinions in other appellate courts, we believe that our decision in *Coffee* was the right one.

The Ohio Supreme Court has previously compared the elements of kidnapping and robbery and found that kidnapping is implicit within every robbery. *State v. Logan* (1978), 60 Ohio St.2d 126, 130, 397 N.E.2d 1345. "[W]hen a person commits the crime of robbery, he must, by the very nature of the crime, restrain the victim for a sufficient amount of time to complete the robbery." *Id.* at 131. Thus, kidnapping and aggravated robbery are allied offenses of similar import, and Winn may only be convicted of both crimes if he committed each with a separate animus.

The second "separate animus" step of the *Rance* analysis was first embodied in the syllabus of *Logan*, supra, wherein the Court held: "In establishing whether kidnapping and another offense of the same or similar kind are committed with a separate animus as to each pursuant to R.C. 2941.25(B), this court adopts the following guidelines:

"(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."

In this case, Winn's movement of Ms. Hummons the few steps from her hallway into her bedroom as well as his restraint of her therein was merely incidental to the aggravated robbery. Moreover, the restraint was relatively brief. It was not secretive, nor did it involve a substantial movement or increase in risk to Ms. Hummons. Certainly, Winn used far less restraint in moving his victim in this case than was seen in *Logan, supra*, wherein the Court found the same animus for kidnapping and rape when the defendant forced his victim into an alley, around a corner, and down a flight of stairs. Because Winn's victim, Ms. Hummons, was held in her bedroom in furtherance of the aggravated robbery, we cannot conclude that there was a separate animus for the kidnapping and aggravated robbery in this case.

Because kidnapping and aggravated robbery are allied offenses of similar import, and because Winn did not commit the two crimes with a separate animus, he could only be convicted of and sentenced for one of those crimes. Winn's third assignment of error is sustained.

V

Having overruled three of Winn's assignments of error and sustained the other, the judgment of the trial court will be AFFIRMED in part and REVERSED in part. We will merge Winn's kidnapping conviction into his aggravated robbery conviction and vacate the separate sentence imposed on the kidnapping charge. As modified, the judgment of conviction and sentence will be affirmed.

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

THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT

Copies mailed to:

Jill R. Sink
Sandra J. Finucane
Hon. Michael T. Hall

THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT



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IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

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STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 21710
v.	:	T.C. NO. 06 CR 99
DAVON WINN	:	<u>FINAL ENTRY</u>
Defendant-Appellant	:	

Pursuant to the opinion of this court rendered on the 24th day of AUGUST, 2007, Winn's conviction for kidnapping is merged into the conviction for aggravated robbery and the separate sentence on the kidnapping charge is vacated. As modified, the judgment of conviction and sentence is affirmed

Costs to be paid as follows: 25% by plaintiff-appellee; 75% by defendant-appellant.

WILLIAM H. WOLFF, JR., Presiding Judge

JAMES A. BROGAN, Judge

THOMAS J. GRADY, Judge

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