[Cite as *State v. Shields*, 2011-Ohio-1912.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-100362 TRIAL NO. B-0904999
Plaintiff-Appellee,	:	*D E C I S I O N.*
vs.	:	
STEVEN SHIELDS,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: April 22, 2011

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Judith Anton Lapp*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Timothy J. McKenna, for Defendant-Appellant.

Please note: This case has been removed from the accelerated calendar.

FISCHER, Judge.

{¶1} In a recorded statement to police, Steven Shields admitted that he had struck pizza deliveryman Harry Collyer in the face with a two-by-four while robbing him of a pizza order even though Collyer had already dropped that order and had turned to flee from the robbery. Following a jury trial, Shields was convicted of aggravated robbery and felonious assault, and he now appeals, raising six assignments of error. For the following reasons, we affirm the judgment of the trial court.

Factual Background & Procedural Posture

{¶2} On July 20, 2009, Harry Collyer was working as a pizza deliveryman in North College Hill, Ohio. That evening, a caller identifying himself as "Chris" ordered three pizzas and a two-liter bottle of soda for delivery to an address on Loiska Lane in nearby Cincinnati. Collyer was dispatched to deliver the order.

{¶3} As he drove down Loiska Lane, Collyer was unable to find the address provided by the caller. Nevertheless, he surmised that the order was intended for one of two houses on the dead-end street. One was dark inside, but the other was well lit, so Collyer approached the latter and knocked on the front door.

{¶4} While he waited, Collyer felt something brush up against his back pocket. Sensing that someone had crept up behind him, Collyer threw down the pizzas and tried to turn around. But before he could run, Collyer was struck across the face with a blunt object and fell to the ground.

{¶5} Lying there, Collyer felt two pairs of hands on his body. As one hand rummaged through his pocket, Collyer yelled for the man to take the $8 or $9 that was there. Collyer felt the hand grab the money, and his assailants then ran off. Collyer was left bleeding on the ground with several bones in his face shattered. At

some point, he managed to pull himself to his feet and drive back to the pizza shop, where his manager called for medical assistance.

{¶6} Later that night, Shields was arrested. He made two statements to police, and he was subsequently indicted for two counts of aggravated robbery and two counts of felonious assault. Shields moved to suppress his statements to police, but the trial court denied his motion. The case was set for trial, and the jury found Shields guilty as charged. At sentencing, the trial court merged the two aggravated-robbery counts and the two felonious-assault counts. The court then sentenced Shields to consecutive terms of confinement of ten years for aggravated robbery in violation of R.C. 2911.01(A)(1) and eight years for felonious assault in violation of R.C. 2903.11(A)(1).

Suppression of Statements to Police

{¶7} In his first assignment of error, Shields argues that the trial court erred in denying his motion to suppress. Shields alleges that he was questioned by police before they advised him of his *Miranda* rights and that he waived those rights only after he had been physically threatened by a police officer.[1]

{¶8} Appellate review of a motion to suppress presents a mixed question of fact and law.[2] When we consider a ruling on a motion to suppress, we recognize that the trial court is in the best position to resolve factual questions and evaluate the credibility of witnesses.[3] Accordingly, we must accept the trial court's findings of fact so long as they are supported by competent, credible evidence.[4] We then conduct a de novo review of the trial court's application of the law to those facts.[5]

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[1] See *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602.
[2] *State v. Taylor*, 174 Ohio App.3d 477, 2007-Ohio-7066, 882 N.E.2d 945, at ¶11.
[3] *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, 850 N.E.2d 1168, at ¶100.
[4] *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, at ¶8.
[5] Id.

{¶9} In this case, however, the trial court made no findings of fact in resolving the motion to suppress. We shall, therefore, directly examine the record to determine whether there is sufficient evidence to demonstrate that the trial court's decision was supported by the record and legally justified.[6]

{¶10} Before questioning, those in custody must be advised of their *Miranda* rights.[7] These warnings protect a defendant's constitutional privilege against self-incrimination and the right to counsel.[8] A defendant, however, may waive these rights if he or she does so voluntarily, knowingly, and intelligently.[9] A waiver is considered voluntary absent evidence that the defendant's will was overborne and his or her capacity for self-determination was critically impaired because of coercive police conduct.[10]

{¶11} The two statements that Shields made to police were recorded, and they both indicate that Shields was informed of his rights before each statement. Shields expressly waived those rights each time, but he nevertheless argues that his waivers were involuntary became his will was overborne by police coercion.

{¶12} At the suppression hearing, Shields testified that one of the two officers who had questioned him had grabbed his shirt after the first statement but before the second. Shields argues that this physical threat overbore his will and made his second waiver involuntary. The other officer, however, testified that when he met with Shields to record the second statement, there was no indication that the first officer had threatened Shields. And there was no other evidence that either waiver was coerced by police misconduct.

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[6] See *State v. Brown*, 64 Ohio St.3d 476, 1992-Ohio-96, 597 N.E.2d 97, syllabus.
[7] *State v. Holt* (1997), 132 Ohio App.3d 601, 605, 725 N.E.2d 1155.
[8] Id. (citing *Miranda*, supra).
[9] *Holt*, supra, at 605.
[10] *State v. Dailey* (1990), 53 Ohio St.3d 88, 559 N.E.2d 459, paragraph two of the syllabus.

{¶13} Given the officer's testimony, we hold that there was sufficient evidence to deny the motion to suppress. This assignment of error is overruled.

Separate Animus

{¶14} In his second assignment of error, Shields asserts that the trial court erred in sentencing him to consecutive terms of confinement for aggravated robbery and felonious assault. He argues that, as alleged by the state, these crimes were committed with the same animus, and that he could, therefore, only have been convicted of one or the other. We disagree.

{¶15} Under R.C. 2941.25(A), when the same conduct by the 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." This statute, however, is limited by R.C. 2941.25(B), which provides that a defendant may nevertheless be convicted of two or more allied offenses of similar import if the offenses were committed "separately or with a separate animus as to each." Thus, for a court to merge multiple findings of guilt into one conviction, the defendant must have committed allied offenses of similar import both together and with the same animus.[11]

{¶16} The Ohio Supreme Court interprets the term "animus" to mean "purpose or, more properly, immediate motive," and infers animus from surrounding circumstances.[12] The court has explained that when "an individual's immediate motive involves the commission of one offense, but in the course of committing that crime he must, *a priori*, commit another, then he may well possess but a single animus, and in that event may be convicted of only one crime."[13]

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[11] See *State v. Bickerstaff* (1984), 10 Ohio St.3d 62, 65-66, 461 N.E.2d 892.
[12] *State v. Logan* (1979), 60 Ohio St.2d 126, 131, 397 N.E.2d 1345.
[13] Id.

{¶17} In deciding whether two offenses were committed with a separate animus, we must address two issues: (1) whether the first offense was merely incidental to the second offense or whether the defendant's conduct in the first demonstrated a significance independent of the second; and (2) whether the defendant's conduct in the first offense subjected the victim to a substantial increase in the risk of harm apart from that involved in the second offense.[14] These particular considerations afford "separate animus" a meaning independent of both allied offenses of similar import and separately committed offenses under R.C. 2941.25.[15]

{¶18} Based on the evidence adduced at trial, we are satisfied that Shields committed aggravated robbery in violation of R.C. 2911.01(A)(1) and felonious assault in violation of R.C. 2903.11(A)(1) with separate animus. As Shields waited for Collyer to arrive, his immediate motive was apparently to rob the deliveryman of his pizzas. Thus, the ultimate physical attack on Collyer was not "slavishly tied to that initial criminal goal."[16]

{¶19} Shields admitted that he had "grabbed the pizza[s] and just ran off."[17] But Collyer had already dropped the pizzas before Shields struck him with the two-by-four. Thus, Shields could have simply taken the pizzas and run, without resorting to any separate and distinct physical violence. Indeed this assault was so unnecessary for the robbery itself that it demonstrated a significance independent of that robbery. And by physically attacking Collyer, Shields subjected the deliveryman to a substantially graver harm than if he had merely displayed, brandished, indicated his possession of, or threatened to use the two-by-four to rob Collyer of the pizzas.[18]

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[14] See *State v. Chaffer*, 1st Dist. No. C-090602, 2010-Ohio-4471, at ¶12 (citing *Logan*, supra, syllabus).
[15] Cf. *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, syllabus (requiring courts to consider "the conduct of the accused" in determining whether two offenses are allied offenses of similar import subject to merger).
[16] *State v. Williams*, 9th Dist. No. 94616, 2011-Ohio-925, at ¶75 (Gallagher, J., concurring).
[17] State's Exhibit A 11-B at 14.
[18] Compare R.C. 2903.11(A)(1) with R.C. 2911.01(A)(1).

{¶20} Accordingly, we hold on these facts that the aggravated robbery and the felonious assault were motivated by a separate animus.[19] And having found a separate animus, we need not decide whether Shields committed allied offenses of similar import. This assignment of error is overruled.

Sufficiency and Weight of the Evidence

{¶21} We next consider Shields's third and fourth assignments of error together. In his third assignment of error, Shields argues that there was insufficient evidence to support his aggravated-robbery conviction, and in his fourth assignment of error, Shields argues that the same conviction was contrary to the manifest weight of the evidence.

{¶22} To reverse a conviction for insufficient evidence, we must determine whether "any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt."[20] In contrast, when reviewing the weight of the evidence, we act as a "thirteenth juror."[21] We review the entire record, weigh the evidence, consider the credibility of witnesses, and determine whether the trier of fact clearly lost its way and created a manifest miscarriage of justice in finding the defendant guilty.[22]

{¶23} In these assignments of error, Shields essentially argues that there was no evidence presented at trial that Shields had robbed Collyer of anything. However, in his second statement to police, Shields admitted that he "hit [Collyer]

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[19] See *State v. Peelman*, 1st Dist. No. 090686, 2010-Ohio-4472, at ¶13 (finding separate animus because defendant's assault "went far beyond what was necessary to commit the robbery"). Cf. *State v. Terrell*, 1st Dist. No. C-080286, 2009-Ohio-3257, at ¶15 (finding no separate animus for kidnapping because restraint of victim did not subject her to a substantial increase in risk of harm that was more than necessary to compel her to submit to rape).
[20] *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.
[21] *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.
[22] Id.

and grabbed the pizza and just ran off."[23] This corresponded with Collyer's description of the attack.

{¶24} Viewing this evidence and all the other evidence adduced at trial in the light most favorable to the state, we cannot say that no rational trier of fact could have found Shields guilty of aggravated robbery beyond a reasonable doubt. Likewise, we cannot say that the jury clearly lost its way and created a manifest miscarriage of justice in finding Shields guilty. His third and fourth assignments of error are, therefore, overruled.

Consecutive, Maximum Sentences

{¶25} In his fifth assignment of error, Shields argues that the trial court erred in imposing consecutive, maximum sentences without considering the purposes and principles of felony sentencing.[24] Shields contends that his sentences are inconsistent with the principles of felony sentencing articulated in R.C. 2929.11 and 2929.12. When reviewing felony sentences, we must determine (1) whether the sentences are clearly and convincingly contrary to law; and if they are not, (2) whether the trial court abused its discretion in imposing the sentences.[25]

{¶26} Here, the sentences imposed by the trial court were not contrary to law. Shields was sentenced to eight years for felonious assault, a felony of the second degree,[26] and to ten years for aggravated robbery, a felony of the first degree.[27] These sentences were within the range permitted by statute.

{¶27} Furthermore, although the trial court did not specifically state that it had considered R.C. 2929.111 and 2929.12, we may presume that it did.[28] Having

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[23] State's Exhibit A 11-B at 14.
[24] See R.C. 2929.11 and 2929.12.
[25] *State v. Garrett*, 1st Dist. No. C-090592, 2010-Ohio-5431, ¶55.
[26] See R.C. 2929.14(A)(2) and 2903.11(D)(1).
[27] See R.C. 2929.14(A)(1) and 2911.01(C).
[28] *State v. Brown*, 1st Dist. Nos. C-100309 and C-100310, 2011-Ohio-1029, at ¶14.

presided over the jury trial, the trial court was well acquainted with the facts of the aggravated robbery and the felonious assault. It also listened to trial counsel's argument in mitigation. With this record, we cannot say that the trial court abused its discretion by acting unreasonably, arbitrarily, or unconscionably in imposing the sentences.[29]

Ineffective Assistance of Counsel

{¶28} In his sixth assignment of error, Shields argues that he was denied the effective assistance of counsel. This argument is also without merit.

{¶29} To prevail on a claim of ineffective assistance of counsel, an appellant must show that trial counsel's performance was deficient, and that the outcome of the proceedings would have been different but for counsel's deficient performance.[30]

{¶30} Shields cites only his statement to the court on the record after voir dire that his trial counsel had seen him only twice between then and the suppression hearing three days earlier. Standing alone, such a performance was patently not deficient. Nor can it be said that, in its absence, the outcome of the proceedings would have been different. We overrule this assignment of error.

{¶31} Therefore, the judgment of the trial court is affirmed.

Judgment affirmed.

DINKELACKER, P.J., and **HILDEBRANDT, J.,** concur.

Please Note:

The court has recorded its own entry this date.

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[29] See id.
[30] *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052.