[Cite as *State v. Muncy*, 2012-Ohio-2830.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-A-0066**
- vs -	:	
DWAYNE ALLEN MUNCY,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Ashtabula County Court of Common Pleas, Case No. 2011 CR 79.

Judgment: Affirmed in part; reversed in part and remanded.

Thomas L. Sartini, Ashtabula County Prosecutor, and *Shelley M. Pratt*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047-1092 (For Plaintiff-Appellee).

Joseph A. Humpolick, Ashtabula County Public Defender, Inc., 4817 State Road, Suite 202, Ashtabula, OH 44004-6927 (For Defendant-Appellant).

MARY JANE TRAPP, J.

{¶1} Dwayne Allen Muncy appeals from judgments of the Ashtabula County Court of Common Pleas which convicted him of robbery and theft after a jury trial and sentenced him to two years in prison for these offenses. The convictions stemmed from a shoplifting incident in a Kmart store. Mr. Muncy contends that the robbery conviction is not supported by sufficient evidence and it is also against the manifest weight of the evidence. In addition, he argues his theft conviction should have been merged with the

robbery conviction because they are allied offenses. We conclude his convictions are supported by sufficient evidence and not against the manifest weight of the evidence. However, we also conclude his convictions should have been merged, and therefore, we remand the matter to the trial court for further proceedings on merger of allied offenses and resentencing.

Substantive Facts and Procedural History

{¶2} On the evening of October 26, 2010, Mr. Muncy took two sets of pillow cases from Kmart and attempted to leave the store without paying for the merchandise, valued at $19.99. When confronted by the store's loss prevention associate at the door, he used his upper body to push the associate out of the way, ran to his car, and drove off.

{¶3} Mr. Muncy was indicted by the grand jury on one count of robbery, a third-degree felony, in violation of R.C. 2911.02(A)(3), and theft, a first-degree misdemeanor, in violation of R.C. 2913.02(A)(1).

{¶4} The matter proceeded to a jury trial, during which Gregory Hazeltine, Kmart's loss prevention associate, testified that he was monitoring the store through the closed circuit television system when he observed Mr. Muncy, accompanied by another individual, enter the store. Mr. Muncy went to the "soft homes" department and then the electronics department, and came back to the "soft homes" department. At this point, Mr. Hazeltine moved to the vestibule area and observed Mr. Muncy's activity from there. He saw Mr. Muncy remove some pillow cases, tuck them inside the front of his pants, and cover them with his hooded sweatshirt. Mr. Muncy then headed straight to the store's exit door without going through the cash registers area.

{¶5} Mr. Hazeltine explained that when he confronts a suspected shoplifter, he typically makes his presence known by positioning himself between the suspected shoplifter and the exit door, identifying himself as the store's loss prevention associate and asking the suspect to return to the store with the unpaid merchandise. In this case, when Mr. Muncy reached the vestibule, Mr. Hazeltine so identified himself, asked Mr. Muncy for the unpaid merchandise, and requested that he return to the store.

{¶6} Without saying a word, Mr. Muncy pulled his hood up, put his hands inside his pockets, and "used [his] upper body to knock [Mr. Hazeltine] out of the door." According to Mr. Hazeltine, Mr. Muncy used his chest and shoulder to "strike" his upper body, causing him to "go backwards out of the door." Mr. Hazeltine explained that, because Mr. Muncy had "showed signs to [him] that he was willing to be aggressive," and because he could not see Mr. Muncy's hands and therefore did not know if he had a weapon in his pocket, he decided not to pursue Mr. Muncy further himself. Instead, he called the sheriff's department to report the incident and watched Mr. Muncy run to his car and leave the store's parking lot in the car.

{¶7} Another loss prevention associate, Richard Santiago, who also observed Mr. Muncy's activities via the closed circuit television system, testified as well, and he largely corroborated Mr. Hazeltine's testimony. Mr. Muncy did not testify.

{¶8} The jury found Mr. Muncy guilty of robbery and theft. The trial court imposed two years of prison time for his convictions.

{¶9} Mr. Muncy now appeals, raising two assignments of error:

{¶10} "[1]. Appellant's conviction of robbery in violation of Ohio Revised Code Section 2911.02(A)(3) is neither supported by sufficient evidence nor by the manifest weight of the evidence."

{¶11} "[2]. Ohio Revised Code 2911.02(A)(3) and 2913.02(A)(1) are allied offenses of similar import and even though appellant may be indicted for both he could only be convicted and sentenced on one of these offenses."

Sufficiency of Evidence

{¶12} When reviewing a challenge of the sufficiency of the evidence, a reviewing court examines the evidence admitted at trial and determines 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. "The pertinent 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.*

{¶13} A sufficiency challenge requires this court to review the record to determine whether the state presented evidence on each of the elements of the offense. This test involves a question of law and does not permit us to weigh the evidence. *State v. Martin*, 20 Ohio App.3d 172, 175 (1983).

Force

{¶14} R.C. 2911.02, which defines the crime of robbery, provides that, "No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall * * * [u]se or threaten the immediate use of force against another." R.C. 2911.02(A)(3).

{¶15} Therefore, in order to convict Mr. Muncy of robbery, the state was required to prove beyond a reasonable doubt that, in attempting or committing theft or in fleeing immediately after the attempt or offense, he did "use or threaten the immediate use of force against another." R.C. 2911.02(A)(3).

{¶16} The term "force" is defined in R.C. 2901.01 as follows:

{¶17} "(A) 'Force' means any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing."

{¶18} On appeal, Mr. Muncy essentially argues that the state presented insufficient evidence to prove that he used the degree of force that is necessary to elevate a theft offense to robbery.

{¶19} The element of force (or harm) differentiates robbery from theft. Our review of the case law indicates that, in applying the robbery statute R.C. 2911.02(A)(3) in the shoplifting context, courts have consistently concluded that using one's body parts in any manner to resist detainment by a security guard after a shoplifting incident elevates a theft offense to robbery. Acts that have been held to fall within the statutory definition of force by Ohio courts include pushing or striking a store employee. *State v. Martin*, 10th Dist. Nos. 02AP-33, 02AP-34, 2002-Ohio-4769, ¶31. *See also State v. Zoya*, 8th Dist. No. 64322, 1993 Ohio App. LEXIS 5996 (December 16, 1993) (defendant tried to force his way past the assistant manager by using his body weight, twisting around and swinging his arms).

{¶20} Here, the state produced evidence that Mr. Muncy resisted the store's security employee's attempt to prevent him from leaving the store with unpaid merchandise, by using his upper body to "knock" the latter out of the way. In

accordance with the case law, this evidence is sufficient to prove the element of force. After viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of robbery proven beyond a reasonable doubt.

Manifest Weight

{¶21} "Unlike sufficiency of the evidence, manifest weight of the evidence raises a factual issue. 'The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" *State v. Higgins*, 11th Dist. No. 2005-L-215, 2006-Ohio-5372, ¶35, citing *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997).

{¶22} "The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Fritts*, 11th Dist. No. 2003-L-026, 2004-Ohio-3690, ¶23, citing *Martin*, *supra*, at 175.

{¶23} "[T]he weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus. When examining witness credibility, "the choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact." *State v. Awan*, 22 Ohio St.3d 120, 123 (1986). "When reviewing a judgment under a manifest-weight-of-the-evidence standard, a court has an obligation to presume

that the findings of the trier of fact are correct. * * * This presumption arises because the trial judge had an opportunity to view the witnesses and observe their demeanor in weighing the credibility of the witnesses." *State v. Reeves*, 11th Dist. No. 2006-T-0099, 2007-Ohio-4765, ¶14, citing *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 79-81 (1984).

{¶24} The state presented testimony from Mr. Hazeltine, the store's loss prevention associate, who observed Mr. Muncy removing pillow cases from the shelf and concealing them inside his clothing; when Mr. Hazeltine attempted to stop him from leaving with the unpaid merchandise, he used his upper body to push Mr. Hazeltine out of the way and left the store. Another loss prevention associate, Richard Santiago, also testified at the trial and corroborated Mr. Hazeltine's testimony. The weight to be given to the testimony and the credibility of the witnesses are solely for the trier of fact. Having reviewed the record, we cannot conclude the jury clearly lost its way and created such a manifest miscarriage of justice warranting a reversal of the finding of guilt.

{¶25} The first assignment of error is without merit.

Sentence: Allied Offenses and Merger

{¶26} At the sentencing hearing, the court, noting Mr. Muncy's prior history of theft charges and a lack of change in behavior after having served a prison term, imposed a two-year sentence for his robbery offense without mentioning his theft

offense. In the judgment entry, the court imposed two years of prison for the robbery count and six months for the theft count, but ordered them served concurrently.[1]

{¶27} Under the second assignment of error, Mr. Muncy claims the robbery offense defined in R.C. 2911.02(A)(3) and the theft offense defined in R.C. 2913.02(A)(1) are allied offenses of similar import, and therefore, he could only be convicted on one of these offenses.

{¶28} R.C. 2941.25, Ohio's multiple-count statute, prohibits the imposition of multiple punishments for the same offense. It states:

{¶29} "(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.

{¶30} "(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."

{¶31} Allied offenses of similar import must be merged for purposes of sentencing, and a defender may be convicted of only one of the offenses, even if found guilty of both. *State v. May*, 11th Dist. No.2010-L-131, 2011-Ohio-5233, ¶36 (citation omitted). For purposes of R.C. 2941.25, a "conviction" consists of a guilty verdict and the imposition of a sentence. *Id.*, citing *State v. Poindexter*, 36 Ohio St.3d 1 (1988).

1. In its initial sentence judgment entry, the court misstated the revised code section for robbery as R.C. 2921.02(A)(3). The court subsequently issued an "amended judgment of sentence" to correct the clerical error.

{¶32} Recognizing that the law of allied offenses post *State v. Rance*, 85 Ohio St.3d 632 (1999), has become an unworkable and unpredictable quagmire of exceptions and near absurdity, the Supreme Court of Ohio, in *State v. Johnson***,** 128 Ohio St.3d 153, 2010-Ohio-6314, revisited the allied offenses issue and overruled *Rance.* Under the new analysis, "[w]hen determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25, the conduct of the accused must be considered." *Johnson* at the syllabus.

{¶33} *Johnson* requires the court to delve into the factual underpinnings of the case to resolve the allied offense issue, akin to the factual inquiries required under *State v. Logan*, 60 Ohio St.2d 126 (1979). *See State v. Baker*, 8th Dist. No. 97139, 2012-Ohio-1833, ¶13. Although *Johnson* is only a plurality opinion, this court has adopted the analysis set forth in the lead opinion.

{¶34} "In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), the question is whether it is possible to commit one offense and commit the other with the same conduct, not whether it is possible to commit one without committing the other. * * * If the offenses correspond to such a degree that the conduct of the defendant constituting the commission of one offense constitutes [the] commission of the other, then the offenses are of similar import.

{¶35} "If the multiple offenses can be committed by the same conduct, the court must determine whether the offenses were committed by the same conduct, i.e. 'a single act, committed with a single state of mind.' * * *

{¶36} "If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged.

{¶37} "Conversely if the court determines that the commission of one offense will never result in the commission of the other, or if the offenses are committed separately, or if the defendant has a separate animus for each offense, then according to R.C. 2941.25(B), the offenses will not merge." *Johnson* at ¶48-51.

{¶38} Here, a review of the record indicates there was no analysis by the trial court regarding the merger of allied offenses at sentencing. Mr. Muncy's trial counsel did not challenge the trial court for its failure to engage in the merger analysis; however, he has not waived the error, because the imposition of multiple sentences for allied offenses of similar import constitutes plain error. *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, ¶31.

{¶39} Applying *Johnson* to the evidence presented by the state in this case, we first determine whether it is possible to commit robbery and theft with the same conduct. Having reviewed R.C. 2911.02 (A)(3) and R.C. 2913.02(A)(1), we conclude it is possible to commit the two offenses with the same conduct. Where, as here, an offender commits a theft by resisting, with the use of force, a loss prevention agent's attempt to prevent him from leaving the store with unpaid merchandise, it is possible for the defendant to have committed both theft and robbery with the same conduct.

{¶40} The next question is whether Mr. Muncy in fact *did* commit both offenses by way of a single conduct, performed with a single state of mind. *Johnson* at ¶49. *See also State v. Clay*, 196 Ohio App.3d 305, 2011-Ohio-5086, ¶24 (12th Dist.). We conclude he did: his taking the merchandise without payment and using his upper body to push his way out of the store to prevent detainment by the store's employee was a

single transaction with a single intention, i.e., to leave the store with unpaid merchandise.

{¶41} "Where there is only one victim and one single continuous transaction," the trial court erred in not merging the offenses. *State v. Sanders-Frye*, 8th Dist. No. 97443, 2012-Ohio-934, ¶32. Here, the two offenses committed by Mr. Muncy involved a single continuous transaction, and there was only one victim, namely, Kmart. Mr. Hazeltine was prevented from performing his job as the loss prevention associate, but he was not harmed or threatened with the use of force in the incident. Although the robbery count in the indictment named him as the person against whom Mr. Muncy used force, he was a "victim" only in his role as the store agent or representative.

{¶42} Because the two offenses were committed by a single conduct with a single state of mind, involving a single victim, the trial court should have merged them into a single count for conviction prior to sentencing. We recognize the trial court sentenced Mr. Muncy to concurrent sentences. However, the imposition of a concurrent sentence for an allied offense causes prejudice because it constitutes a second conviction in violation of R.C. 2941.25. *Underwood*, *supra*, at ¶31. The second assignment of error is sustained.[2]

{¶43} Therefore, insofar as the trial court failed to merge the robbery and theft offenses, its judgment convicting Mr. Muncy on both offenses and imposing separate sentences is reversed. This matter is remanded for a sentencing hearing, at which the trial court should merge the offenses and the state will elect which allied offense it will

2. In its appellee brief, the state concedes that the trial court erred in sentencing Mr. Muncy in both the robbery and theft counts without making a determination regarding merger.

pursue against Mr. Muncy. *State v. Whitefiled*, 124 Ohio St.3d 319, 2010-Ohio-2, paragraph two of the syllabus.

{¶44} The Ashtabula County Court of Common Pleas judgment finding defendant guilty of robbery and theft is affirmed and its judgment sentencing defendant is reversed. The matter is remanded for further proceedings consistent with this opinion.

CYNTHIA WESTCOTT RICE, J.,

THOMAS R. WRIGHT, J.,

concur.