

**IN THE COURT OF APPEALS
THIRD APPELLATE DISTRICT
HANCOCK COUNTY**

STATE OF OHIO,

PLAINTIFF-APPELLEE,

CASE NO. 5-07-51

v.

MARTEZ E. HERBERT,

OPINION

DEFENDANT-APPELLANT.

**Appeal from Hancock County Common Pleas Court
Trial Court No. 2007-CR-136**

Judgment Affirmed

Date of Decision: March 2, 2009

APPEARANCES:

Spencer Cahoon for Appellant

Mark C. Miller for Appellee

WILLAMOWSKI, J.

{¶1} The defendant-appellant, Martez Herbert, appeals the judgment of the Hancock County Common Pleas Court convicting him of aggravated burglary, robbery, and kidnapping and sentencing him to seven years in prison. On appeal, Herbert contends there was insufficient evidence to convict him of kidnapping, and in the alternative, if the evidence was sufficient, the convictions for kidnapping and robbery should have merged as allied offenses of similar import. For the reasons set forth herein, we affirm the judgment of the trial court.

{¶2} On June 5, 2007, the Hancock County Grand Jury indicted Herbert on one count of aggravated burglary, a violation of R.C. 2911.11(A)(1), a first-degree felony, one count of kidnapping, a violation of R.C. 2905.01(A)(2), a first-degree felony, and one count of robbery, a violation of R.C. 2911.02(A)(2), a second-degree felony. The charges stemmed from an incident on June 3, 2007 during which Herbert and several other young men stole airsoft pistols and white t-shirts from a Meijer's store, broke into a man's apartment, threatened the man, ransacked his apartment, stole personal property from the man, and bound him with a fan cord before they fled. At his arraignment, Herbert pled not guilty to each of the charges.

{¶3} On November 5-6, 2007, the trial court conducted a bench trial and after hearing all evidence and arguments, took the matter under advisement so it

could review the admitted exhibits. On November 15, 2007, the trial court found Herbert guilty of aggravated burglary as a principal offender and guilty of kidnapping and robbery under Ohio's complicity statute. The court immediately proceeded to sentencing and ordered Herbert to serve concurrent prison terms of seven years for aggravated burglary, four years for kidnapping, and four years for robbery. Herbert appeals the judgment of the trial court, asserting two assignments of error for our review.

Assignment of Error No. 1

The double jeopardy clause of the Ohio and United States Constitutions and R.C. 2941.25 restrict courts from convicting an offender of allied offenses. Robbery and kidnapping can constitute allied [sic] offenses if committed without a separate animus. The court erred by convicting Mr. Herbert of both robbery and kidnapping based on the same events without a separate animus. (Judgment Entry, Nov. 15, 2007); the Double Jeopardy Clauses of the Ohio and United States Constitutions.

Assignment of Error No. 2

Convictions must be based on sufficient evidence. The State has the burden to prove each element of a charge beyond a reasonable doubt in order to sustain a conviction. The trial court erred when it convicted Mr. Herbert of kidnapping on insufficient evidence that he acted with the purpose to aid and abet about [sic] a kidnapping. (Judgment Entry, Nov. 15, 2007); the Fifth and Fourteenth Amendments to the United States Constitution; Sec. 16, Art. I, Ohio Constitution.

{¶4} For ease of analysis, we elect to address the assignments out of order. In the second assignment of error, Herbert contends the kidnapping

conviction was not supported by sufficient evidence because the state did not prove that he aided and abetted for the purpose of kidnapping the victim.

{¶5} Sufficiency of the evidence is a test of adequacy, used to “determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law.” *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, 678 N.E.2d 541, quoting Black’s Law Dictionary (6 Ed.1990) 1433; citing Crim.R. 29(A); *State v. Robinson* (1955), 162 Ohio St. 486, 124 N.E.2d 148. A conviction based on insufficient evidence constitutes a denial of due process, and the defendant may not be recharged for the offense. *Thompkins*, at 386-387, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 45, 102 S.Ct. 2211, 72 L.Ed.2d 652, citing *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed. 2d 560.

{¶6} In reviewing a claim under the sufficiency of the evidence standard, an appellate court must determine “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.” *State v. Bridge*, 3d Dist. No. 1-06-30, 2007-Ohio-1764, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, at paragraph two of the syllabus, superseded by state constitutional amendment on other grounds as stated in *State v. Smith* (1997), 80 Ohio St.3d 89, 684 N.E.2d 668.

{¶7} Ohio’s kidnapping statute, R.C. 2905.01, provides that:

(A) No person, by force, threat, or deception, * * * by any means, shall remove another from the place where the other person is found or restrain the liberty of the other person, for any of the following purposes:

* * *

(2) To facilitate the commission of any felony or flight thereafter[.]

The Revised Code states: “a person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature.”

{¶8} “While a defendant may be charged in the indictment as a principal, ‘a jury may be instructed on complicity where the evidence at trial reasonably supports a finding that he was an aider or abettor.’” *State v. Smith*, 10th Dist. No. 06-AP-1165, 2007-Ohio-6772, at ¶ 37, quoting *State v. Gonzales*, 151 Ohio App.3d 160, 2002-Ohio-4937, 783 N.E. 2d 903, at ¶ 51. “Under Ohio law, in order to support a conviction for complicity by aiding and abetting, ‘the evidence must show that the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime, and that the defendant shared the criminal intent of the principal.’” *Id.*, quoting *State v. Johnson* (2001), 93 Ohio St.3d 240, 245-246, 754 N.E.2d 796. “Further,

‘participation in criminal intent may be inferred from presence, companionship and conduct before and after the offense is committed.’” *Id.*, quoting *Johnson*, at 245.

{¶9} At trial, Tony Reichley, the victim, testified that he is disabled and is unable to walk without a cane. On June 2, 2007, Reichley was sleeping in his bedroom when he was awakened by a loud noise in his residence. (Trial Tr., Jan. 16, 2008, at 54). Reichley testified that he could see three men wearing white masks in his residence, and they demanded money. (*Id.*). The men pushed him up against a wall, made him remain in his bed, and, while pointing black guns at him, told him they would shoot him if he got up. (*Id.* at 55). One of the men also displayed a pocket knife. (*Id.*). After ransacking his bedroom and living room, one of the men cut the cord off of a fan, bound Reichley’s hands, made him get on the ground, and told him he would be shot if he tried to come after them. (*Id.* at 57). After approximately five minutes, Reichley freed himself but could not call for help because the men had ripped his phone from the wall. (*Id.* at 59). Reichley called the police from a neighbor’s house. Reichley testified that the entire incident lasted approximately 30 minutes, during which time he never left his bedroom, and that the men took various items of his property from the residence. (*Id.* at 57-58).

{¶10} Officer Christopher Scherger of the Findlay Police Department testified that, on June 2, 2007, he was dispatched to Reichley's apartment where he found the bedroom ransacked and Reichley's television with a hole in the screen. (Id. at 22-23). Reichley described the perpetrators as three black males with their faces covered. (Id. at 26). After further investigation, Scherger traveled to another Findlay residence where he encountered Richard Hudson and his mother, and four other men who were later identified as Herbert, Davaughn Smith, Charles Wooten, and David Eblin. (Id. at 30-31). Hudson's mother gave Scherger permission to search the residence, and he discovered various items matching Reichley's description of his stolen property. (Id. at 33-34). Scherger also located several black airsoft handguns and white t-shirts. (Id. at 33). Upon questioning, Herbert informed him that he had been traveling in a truck from Detroit, Michigan to Findlay with Hudson, Smith, Wooten, and Eblin, when the other men went into Reichley's apartment for reasons unknown to him while he waited in Eblin's truck. (Id. at 42).

{¶11} Wooten testified that on the evening in question, Eblin drove Hudson, Smith, Herbert, and himself from Detroit to Findlay, and during the drive, Eblin described how he had used airsoft, or pellet, guns to "hit ices," or burglarize places. (Id. at 79). Wooten stated that Herbert was seated next to him in the truck and was awake during this conversation. (Id. at 80). In Findlay, the men stopped

at a Meijer store, and he, Eblin, Smith, and Herbert went into the store where they stole several airsoft pistols, a package of white “wife-beaters” or “beaters” (t-shirts), and a pocket knife. (Id. at 81-82; 114-115). Wooten saw Herbert shoplift one of the pistols by placing it in his pants. (Id. at 82).

{¶12} Wooten testified that the men got back in the truck, and they all talked about stealing from others. (Id. at 84). Hudson discussed a residence where the men could “hit a lic.” (Id.). After making at least one other stop, the men drove to Reichley’s apartment where they tried to unlock the door with a key produced by Hudson. (Id. at 86). When the key failed to unlock the door, Herbert kicked in the door, and he, Smith, Eblin, and Wooten entered the residence wearing latex gloves, with their faces covered by the “wife-beaters,” and carrying the airsoft pistols. (Id. at 88; 109; 115). Wooten testified that Eblin and Smith went into Reichley’s bedroom and ransacked it while he and Herbert stayed in the living room and near the kitchen. (Id. at 88-90). After approximately 15 minutes, he and Herbert went back to the truck. (Id. at 90). Wooten reentered the residence and saw Eblin pinning Reichley against the bedroom wall. Wooten also saw Eblin cut the cord off the fan. (Id. at 92). The men took tools, a DVD holder, and file boxes from Reichley’s residence. (Id. at 94-95). After stopping at another residence, the men went to Hudson’s house to sleep. (Id. at 94-95).

{¶13} Smith testified that, in the truck on the way to Findlay, Eblin and Hudson began to talk about robberies, or “hittin’ a lic.” (Id. at 156). Hudson told everyone in the truck that he knew a man they could rob. (Id. at 157). When they got to Findlay, the men stopped at Meijer and stole white t-shirts and airsoft guns. (Id. at 158-159). When the men arrived at Reichley’s residence, they covered their faces with the t-shirts and put on latex gloves. (Id. at 161-162). All of the men, except Hudson, who remained in the truck, approached the residence, and Herbert kicked in the door and entered the apartment. (Id. at 163). Smith stated that he and Eblin went into Reichley’s bedroom with their guns drawn and told Reichley to get under the covers and not to move or they would shoot him. (Id. at 164). During this time, Herbert was not in the bedroom. (Id. at 165). Smith testified that he and Eblin ransacked the bedroom looking for money; that Herbert left the residence at some point; that Eblin remained in Reichley’s bedroom and cut the cord from a fan in order to tie him up; that Eblin slammed Reichley up against a wall and bound him with the fan cord; that Wooten eventually entered the room; and that as Eblin was binding Reichley, Herbert called Wooten and told them all to come back to the truck. (Id. at 165-171). Smith stated that they took various items of Reichley’s property and left in the truck.

{¶14} Smith believed Reichley was unaware of Herbert’s presence because Herbert never entered the bedroom. (Id. at 165). Smith testified that Herbert did

not actively plan the robbery, but he was seated next to Herbert in the truck, and Herbert was awake when Eblin and Hudson were making their plans. (Id. at 196-197; 205-206). Finally, Smith stated that Herbert did no more than kick in Reichley's door and walk through the living room. (Id. at 201).

{¶15} Hudson testified that Eblin drove him from Detroit to Findlay along with Herbert, Wooten, and Smith. Hudson stayed in the truck when the men stopped at Meijer in Findlay, but Eblin told him he was going to rob Reichley. When they arrived at Reichley's house, Eblin, Smith, Herbert, and Wooten all got out of the truck with white t-shirts around their necks and went into the residence. (Id. at 245). Hudson testified that Herbert did not wait in the truck with him during the incident; that Herbert and Wooten came back to the truck after approximately ten minutes; and that Eblin and Smith returned after 20 to 30 minutes. (Id. at 245-247).

{¶16} Herbert testified that he rode from Detroit to Findlay with Eblin, Hudson, Wooten, and Smith. Herbert stated that he slept in the truck for about half of the drive and awoke only when the men stopped at Meijer in Findlay. (Id. at 289-290). Herbert admitted that he, Eblin, Smith, and Wooten shoplifted airsoft pistols and a package of t-shirts from Meijer, but he claimed nobody told him why they had stolen the items. (Id. at 290; 314). The men eventually drove to Reichley's apartment, where Herbert believed they were going to sleep. He

testified that he never heard any conversation about “hittin’ a lic,” and when they approached the residence, Wooten, Eblin, and Smith had white t-shirts around their necks, but he did not. (Id. at 294-295; 314). When the key Hudson gave them did not unlock the apartment, Herbert testified that he returned to the truck, where he sat and talked to his girlfriend on the phone. (Id. at 294; 296). Herbert denied knowing that the men were planning to engage in criminal activity, denied kicking in the door, and denied entering the apartment. (Id. at 297; 300; 304-305). Herbert stated he did not become aware of any criminal activity until he called one of the men’s cell phones to find out what they were doing. (Id. at 301). Although law enforcement officers found one of the airsoft pistols inside his bag of clothing, Herbert claimed he did not know how it got there, but he was not involved in the robbery, aggravated burglary, or kidnapping. (Id. at 303).

{¶17} On this record, there is sufficient evidence to support Herbert’s conviction for kidnapping. Both Smith and Wooten testified that Herbert was awake when the plans were made to rob Reichley, and at that time, Herbert was seated between Smith and Wooten in the back seat of the truck. There was testimony that Herbert had at least one airsoft pistol in his possession when he kicked in the door and entered Reichley’s apartment. The evidence showed that Herbert helped to steal the airsoft pistols from Meijer and knew his acquaintances were going to rob a man at his home. A reasonable person could infer that the

guns were necessary to frighten the victim into submission, to prevent the victim from calling law enforcement, or to inflict bodily harm on the victim. Were the men stealing from an uninhabited or vacant location, there would be little, if any, need to be armed. Likewise, a reasonable person could infer that the t-shirts, which had been stolen, were used to prevent the victim or others from identifying the perpetrators – another indicator that the men expected to encounter another human during the commission of the crime.

{¶18} In *State v. Hayes*, 10th Dist. No. 06AP-290, 2007-Ohio-3056, at ¶ 34-38, the court of appeals found the defendant's conviction for kidnapping supported by sufficient evidence under facts similar to this case. The state relies on *Hayes* in its brief, and Herbert discounts the case, arguing that the Tenth Appellate District did not discuss the element of mens rea. While the court did not specifically focus on the mens rea of purpose, we find Herbert's basic argument to be misplaced. Herbert essentially argues that R.C. 2905.01(A)(2) requires the state to prove that he aided and abetted for the purpose of kidnapping. However, the plain language of the statute states that kidnapping is committed if the offender purposefully facilitates the commission of *any* felony or flight thereafter. At the very least, Herbert kicked in the door, which facilitated the commission of the other felony offenses. Although there is no testimony that the men specifically discussed kidnapping as part of their plan, they knew Reichley would be present in

his home, which apparently necessitated the shoplifting and use of the guns, t-shirts, and latex gloves. Construing the record in favor of the state, as we must, the evidence is sufficient to show that Herbert “supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime.”

{¶19} The dissent relies on the uncontroverted testimony that Herbert never entered the bedroom and did not participate in restraining the victim. Had Herbert engaged in either of these acts, a conviction as a principal offender would have been supported. The dissent also relies on the uncontroverted evidence that Herbert was not in the residence when the victim was bound with the fan cord. However, as stated above, Herbert kicked in the door to the apartment so he and the others could enter the residence. Prior to that, he helped to obtain weapons and t-shirts and knew about the plan for the robbery since it was discussed in the truck while he was awake. The law does not require Herbert to contemplate a kidnapping or to be physically present at the location of the kidnapping if he was otherwise complicit, and he was. Herbert kicked in the door of the apartment, which allowed Eblin and Smith to restrict Reichley in his bedroom and later to bind him with the fan cord. The second assignment of error is overruled.

{¶20} In the first assignment of error, Herbert contends the trial court should have merged the offenses of kidnapping and robbery as allied offenses of similar import because there was no separate animus for the kidnapping. Herbert

recognizes that he was not prejudiced by being sentenced for both offenses, since they were ordered to be served concurrently; however, he argues that the collateral ramifications of the additional conviction are prejudicial.

{¶21} Both the state and federal constitutions protect citizens from “successive prosecutions and cumulative punishments for the ‘same offense.’” *State v. Rance*, 85 Ohio St.3d 632, 634, 1999-Ohio-291, 710 N.E.2d 699, quoting *State v. Moss* (1982), 69 Ohio St.2d 515, 518, 433 N.E.2d 181. The General Assembly “may prescribe the imposition of cumulative punishments for crimes that constitute the same offense * * * without violating the federal protection against double jeopardy or corresponding provisions of a state's constitution.” *Rance*, at 634, citing *Albernaz v. United States* (1981), 450 U.S. 333, 344, 101 S.Ct. 1137, 67 L.Ed.2d 275; *State v. Bickerstaff* (1984), 10 Ohio St.3d 62, 65, 461 N.E.2d 892. R.C. 2941.25 was enacted to allow cumulative punishments if the multiple offenses are of dissimilar import. *Rance*, at 636, citing R.C. 2941.25(B); *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117, 526 N.E.2d 816. However, “if a defendant commits offenses of similar import separately or with a separate animus, he may be punished for both * * *.” *Rance*, at 636, citing R.C. 2941.25(B); *State v. Jones*, (1997), 78 Ohio St.3d 12, 13-14, 676 N.E.2d 80.

{¶22} To determine if offenses are of similar import, the Supreme Court has promulgated a two-step test and has stated:

“In the first step, the elements of the two crimes are compared. If the elements of the offenses correspond to such a degree that the commission of one crime will result in the commission of the other, the crimes are allied offenses of similar import and the court must then proceed to the second step.”

Jones, at 14, quoting *Blankenship*, at 117. Herbert was convicted on one count of kidnapping under R.C. 2905.01(A)(2), which states:

No person, by force, threat, or deception, * * * by any means, shall remove another from the place where the other person is found or restrain the liberty of the other person, for any of the following purposes: * * * To facilitate the commission of any felony or flight thereafter* * *.

Herbert was also convicted on one count of robbery under R.C. 2911.02(A)(2), which states:

No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following: * * * Inflict, attempt to inflict, or threaten to inflict physical harm on another* * *.

{¶23} The Supreme Court has required that we compare the elements of the offenses in the abstract, that is, by the elements established by the General Assembly, and not based on the facts of each case. *Rance*, at 639. However, the court has previously held that kidnapping merges with robbery “unless the offenses were committed with a separate animus.” See *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, at ¶ 18, citing *State v. Fears*

(1999), 86 Ohio St.3d 329, 344, 715 N.E.2d 136, citing *State v. Jenkins* (1984), 15 Ohio St.3d 164, 198, 473 N.E.2d 264.

{¶24} The “separate animus” exception leads us to the second part of the analysis. ““In the second step, the defendant’s *conduct* is reviewed to determine whether the defendant can be convicted of both offenses. If the court finds either that the crimes were committed separately or that there was a separate animus for each crime, the defendant may be convicted of both offenses.” (Emphasis sic.). *Jones*, at 14, quoting *Blankenship*, at 117. Therefore, if the kidnapping is “merely incidental” to the other crime (robbery), there is no separate animus. *Fears*, at 344, citing *State v. Logan* (1979), 60 Ohio St.2d 126, 397 N.E.2d 1345, at syllabus. “However, where the restraint is prolonged, the confinement is secretive, or the movement is substantial, there exists a separate animus as to each offense.” *Id.*, citing *Logan*, at syllabus. The Supreme Court has defined “animus” as the “same purpose, intent, or motive.” *Blankenship*, at 119. With these standards in mind, we must review the record de novo. See *State v. McKittrick*, 3d Dist. No. 5-06-46, 2007-Ohio-4233, citing *State v. Cox*, 4th Dist. No. 02CA751, 2003-Ohio-1935.

{¶25} The Supreme Court has also held that an offender may not benefit from the protection provided by R.C. 2941.25(A) unless he or she shows ““*that the prosecution has relied upon the same conduct to support both offenses charged.*””

(Emphasis sic.). *State v. Cooper*, 104 Ohio St.3d 293, 2004-Ohio-6553, 819 N.E.2d 657, quoting *Logan*, at 128. In reviewing the record to determine whether the state relied on the same conduct to support both the kidnapping and robbery charges, we conclude that it did not.

{¶26} Reichley's freedom was restrained when he was held at gun-point to prevent his escape or interference while the perpetrators ransacked his apartment and stole his personal property. Reichley's freedom was further restrained when Eblin cut the power cord from a fan, bound him, and threatened him to prevent him from leaving the apartment to seek assistance or from calling law enforcement. While holding Reichley at gun-point during the commission of the robbery *may* have been merely incidental to the robbery, binding him with the fan cord certainly was not, particularly since Reichley's restraint was prolonged after the men left his apartment. Reichley estimated that it took approximately five minutes to loosen his bindings. (Trial Tr., at 59). After he was freed, Reichley could not call law enforcement because the men had ripped the phone out of the jack, so he had to use a neighbor's phone. (Id.). On this record, the robbery and kidnapping were committed with a separate animus, and the trial court did not err when it convicted and sentenced Herbert on both offenses. See *McKittrick*. The first assignment of error is overruled.

{¶27} The judgment of the Hancock County Common Pleas Court is affirmed.

Judgment Affirmed

SHAW, J., concurs.

/jlr

ROGERS, J., dissents.

{¶28} The majority has cited all the reasons why Appellant should be convicted of aiding and abetting the offenses of burglary and robbery but have offered no separate logic for a conviction of kidnapping. All the testimony of the co-defendants acknowledges that there was discussion of a robbery on the trip from Detroit to Findlay. There is no testimony that kidnapping, or acts which could constitute kidnapping, were discussed prior to entering Reichley's residence. It is uncontroverted that Herbert did not enter the bedroom where Reichley was eventually tied up with an electrical cord. There is testimony that the three men who entered that bedroom were Smith, Eblin, and Wooten, and Reichley testified that he saw only three men. Although Herbert aided in the act of burglary with the intent to rob Reichley by kicking in the door, the evidence is that he then left the residence and had no further participation in whatever acts were taken by the co-defendants, and there is no evidence of a separate animus as to the kidnapping.

{¶29} The majority makes much of the fact that the parties acquired pellet guns and must have anticipated that they would “encounter another human during the commission of the [robbery].” They further comment that it could be inferred “that the guns were necessary to frighten the victim into submission, to prevent the victim from calling law enforcement, or to inflict bodily harm on the victim.” However, all of these inferences relate to the robbery, and none relate to the separate offense of kidnapping.

{¶30} I would find insufficient evidence to support the offense of kidnapping and reverse the conviction on that offense.

/jlr