

[Cite as *State v. Long*, 2010-Ohio-1062.]

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

STATE OF OHIO,	:	APPEAL NOS. C-090248
		C-090249
Plaintiff-Appellee,	:	TRIAL NOS. B-0801689B
		B-0803723B
vs.	:	
		<i>DECISION.</i>
LONDON LONG,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: March 19, 2010

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Philip R. Cummings*,
Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Michaela M. Stagnaro, for Defendant-Appellant.

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

SYLVIA S. HENDON, Judge.

{¶1} Following a jury trial, defendant-appellant Landon Long was found guilty of aggravated robbery with an accompanying firearm specification, robbery, carrying a concealed weapon, and improperly handling a firearm in a motor vehicle. The trial court merged the offenses of aggravated robbery and robbery for sentencing, and imposed an aggregate sentence of 14 years' imprisonment.

{¶2} Long now appeals, raising four assignments of error for our review. For the following reasons, the judgment of the trial court is affirmed.

Factual Background

{¶3} Long was arrested for his participation in the robbery of Duebber's Drive-Thru and related crimes. Long filed a motion to suppress all statements made following his arrest on the basis that he had been denied his constitutional right to counsel, which, he alleged, he had attempted to invoke after receiving *Miranda* warnings. Subsequent to a hearing, the trial court denied Long's motion to suppress, and the case proceeded to trial.

{¶4} At trial, the state presented evidence that, on March 1, 2008, Long and co-defendant Christopher Johnson had stopped at Duebber's Drive-Thru, located in the far western part of Hamilton County. Clerk Corey Losacker testified that Long and Johnson had entered the establishment in a white truck, and that Long had exited from the vehicle to look around. Long explained that he was not from the area and questioned Losacker on how the business operated. Long and Johnson left without making a purchase, but returned approximately five minutes later and blocked the entrance from other vehicles. Long again exited from the truck, picked up a few items,

and asked Losacker to get him a pack of cigarettes. When Losacker turned around to deliver the cigarettes, Long had a gun pointed in his face. Long demanded money and a carton of Marlboro Smooth cigarettes. Losacker complied. When Long heard the buzzer signaling the arrival of another vehicle, he ran back into the truck. Losacker obtained the truck's license-plate number and immediately called 911. A videotape of the robbery captured on Duebber's surveillance system was played at trial. The video depicted Long threatening Losacker with a handgun.

{¶5} Hamilton County Sheriff's Deputy Daniel Snow responded to a radio dispatch regarding the robbery. While on patrol, Snow spotted a vehicle matching the broadcast description. However, Long was now driving the white truck, and the vehicle now had a Tennessee temporary tag rather than an Illinois license plate. Following a brief chase in which he viewed the suspects shuffling around, Snow stopped the truck. Long and Johnson were removed from the vehicle and placed in custody.

{¶6} During an inventory search of the vehicle, a loaded .45-caliber handgun was found on the front seat of the truck, almost completely covered by a baseball cap. A loaded .22-caliber handgun was found underneath the front seat of the vehicle, within reach of both the driver's and the passenger's seats. This gun was almost entirely covered by a black duffel bag and a brown paper bag. The vehicle also contained a bulletproof vest, an Illinois license plate, a police scanner, several pairs of black gloves, a Tennessee State Trooper patch, a battery-operated flashlight and screwdriver, several private security badges, a small prybar, several knives, and a carton of Marlboro Smooth cigarettes.

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{¶7} After being taken into custody, Long was read his *Miranda* rights by Hamilton County Sheriff's Corporal Pete Prybal. Shortly after the inventory search of the truck was conducted, Long told Prybal that he wanted to speak to the district attorney and obtain a "deal." Deputy Snow had also read Long his *Miranda* rights while he transported Long to headquarters. During transport, Long told Deputy Snow that he could not believe what had happened, and that he wished to speak to a district attorney and work out a "deal." Long further told Snow that he had been behind in his child-support payments and had recently lost his job as a corrections officer.

{¶8} Hamilton County Sheriff's Detectives Randy Fore and Brian Pitchford interviewed Long at headquarters after providing *Miranda* warnings. Long's statement was recorded and played, over objection from Long, during trial. In this statement, Long described his actions immediately prior to the robbery. Specifically, Long stated that he and Johnson had traveled to Bath, Indiana, to rob a bank. The two men had selected this location after conducting extensive Internet research. Long purposely chose a town with a small population and a bank that was not located near a law enforcement agency. Long provided a .22-caliber pistol and a .45-caliber gun for use in the robbery.

{¶9} But according to Long, once he and Johnson had arrived in Bath and checked out the bank, they decided that it would not be feasible to conduct a successful robbery. Instead, they attempted to steal money from an ATM machine. This attempt was unsuccessful, and the two men again considered robbing the bank. Long described in detail the second robbery plan that he and Johnson had formulated. This plan was aborted as well, and the two men left Bath, Indiana, and drove into

southwestern Ohio. There, they conducted the robbery of Duebber's Drive-Thru. In his taped statement, Long confessed to and described this robbery.

{¶10} Long testified on his own behalf at trial. He put forth the affirmative defense of duress, alleging that his co-defendant Johnson had forced him to rob the establishment. Specifically, Long testified that he had traveled to Ohio for business, and that his car had broken down in Bath, Indiana. Long asked Johnson, who, testimony revealed, weighed over 600 pounds and was in failing health, to help him. Johnson agreed to travel from Nashville, Tennessee, to pick up Long, provided that Long would reimburse him for travel expenses. Long had asked Johnson to stop by Long's apartment in Bowling Green, Kentucky, and pick up Long's debit card. But when Johnson arrived to pick him up, Long discovered that Johnson had brought the wrong debit card. As a result, the two men were stranded without any money and were forced to sleep in Johnson's truck.

{¶11} Long testified that Johnson had become agitated over their situation and had ordered him to rob Duebber's Drive-Thru. According to Long, Johnson took out two loaded weapons from a duffel bag in the car. Johnson removed the ammunition from the .45-caliber pistol and gave this gun to Long. Johnson retained the .22-caliber pistol and kept this weapon aimed at Long. Johnson told Long that if he did not rob the establishment, Long would end up in the river across the street. According to Long, his only means of escape would have been to jump from the moving vehicle. Long participated in the robbery, and the two fled from the scene. After the robbery, Johnson retrieved the weapon from Long and reinserted the ammunition. Long further testified that Johnson had ordered him to change license plates on the vehicle.

{¶12} According to Long, the entire statement that he had provided to the sheriff's detectives was false. Long testified that he had only given the statement because the detectives had threatened to inform the prosecutor that Long had not been cooperative.

Motion to Suppress

{¶13} In his first assignment of error, Long argues that the trial court erred in overruling his motion to suppress, because he had invoked his right to counsel. When reviewing a ruling on a motion to suppress, we must accept the trial court's findings of fact if they are supported by competent, credible evidence.¹ But we review de novo the trial court's application of the relevant law to the facts.²

{¶14} Long asserts that all his statements made to law enforcement officials should have been suppressed because he had invoked his right to counsel. To invoke the right to counsel, a defendant must make "at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney in dealing with custodial interrogation by the police."³ Law enforcement officials need not stop questioning a defendant if the defendant's request for counsel is ambiguous and equivocal.⁴ A defendant "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney."⁵

{¶15} Testimony at the suppression hearing established that Long had been given *Miranda* warnings immediately after being placed in custody. Deputy Snow

¹ *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶8.

² *Id.*

³ *McNeil v. Wisconsin* (1991), 501 U.S. 171, 178, 111 S.Ct. 2204.

⁴ *State v. Davis* (1994), 512 U.S. 452, 459, 114 S.Ct. 2350.

⁵ *Id.*

testified that he had again given the warnings to Long while transporting him to the sheriff's headquarters. During transport, Long had stated that he wanted to speak to a district attorney to obtain a "deal." Detectives Fore and Pitchford both testified at the suppression hearing that they had read Long his *Miranda* rights before interviewing him, and that he had never asked for an attorney. Long testified that he had not asked to speak to a district attorney, but rather had requested his own attorney.

{¶16} The trial court found that Long's request for an attorney had been ambiguous and overruled his motion to suppress. Following our review, we agree with the trial court. The trial court clearly found the sheriffs' testimony to be more credible than that given by Long. This testimony established that Long had requested to speak to a district attorney to obtain a "deal" and had not requested to have an attorney present for the custodial interrogation. A request to speak to a district attorney does not constitute a request for defense counsel, and reasonable police officers would not have understood Long's request to have been one for his own attorney.

{¶17} Long did not unequivocally invoke his right to counsel, and the trial court properly overruled Long's motion to suppress. The first assignment of error is overruled.

Motion to Redact

{¶18} After being taken into custody, Long provided a lengthy statement to Detectives Fore and Pitchford in which he admitted to the robbery of Duebber's Drive-Thru, as well as describing various activities preceding the robbery. Prior to trial, Long had filed a motion to redact all portions of the statement concerning his acts prior to the robbery. The trial court denied that motion. In his second assignment of error, Long asserts that the trial court's denial of the motion was in error.

{¶19} Long argues that Evid.R. 404(B) required the exclusion of these portions of his statement. Evid.R. 404(B) provides that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”

{¶20} The Ohio Supreme Court has held that, under this rule, other acts can be probative of identity when they “form part of the immediate background of the alleged act which forms the foundation of the crime charged in the indictment.”⁶ This court has further explained that “background information is admissible to give the jury the setting of a case * * * because it cannot be expected to make its decision in a void, without knowledge of the circumstances of the acts which form the basis of the crimes charged.”⁷

{¶21} In this case, the trial court correctly admitted Long’s entire statement. The portions that Long had sought to redact clarified Long’s motivation for his crimes and explained how he had arrived in Hamilton County. They provided an immediate background for the crimes charged in the indictment. Further, Long had put forth the affirmative defense of duress. The state was entitled to rebut this claim. The statements that Long had sought to redact established his plan and motive and negated his allegation of duress.

{¶22} The trial court did not err in denying Long’s motion to redact his statement, and the second assignment of error is overruled.

⁶ *State v. Lowe*, 69 Ohio St.3d 527, 531, 1994-Ohio-345, 634 N.E.2d 616, quoting *State v. Curry* (1975), 43 Ohio St.2d 66, 73, 330 N.E.2d 720.

⁷ *State v. Jones*, 1st Dist. No. C-060512, 2007-Ohio-5458, ¶32, quoting *State v. Duncan* (1998), 130 Ohio App.3d 77, 86, 719 N.E.2d 608.

Sufficiency and Weight

{¶23} In his third assignment of error, Long attacks the sufficiency and the weight of the evidence supporting his convictions.

{¶24} When reviewing the sufficiency of the evidence, this court cannot weigh the evidence.⁸ Rather, we must view all evidence and reasonable inferences in the light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the offenses beyond a reasonable doubt.⁹ But when reviewing the weight of the evidence, we must review the record, weigh the evidence, consider the credibility of the witnesses, and determine whether the jury clearly lost its way and created a manifest miscarriage of justice.¹⁰

{¶25} Long first argues that his convictions for aggravated robbery and carrying a concealed weapon were not supported by the sufficiency or the weight of the evidence because he had successfully established the affirmative defense of duress.

{¶26} A defendant has the burden of establishing an affirmative defense by a preponderance of the evidence.¹¹ Essential to the defense of duress is “a sense of immediate, imminent death, or serious bodily injury if the actor does not commit the act as instructed.”¹² The Ohio Supreme Court has further elaborated that “[t]he force used to compel the actor's conduct must remain constant, controlling the will of the unwilling actor during the entire time he commits the act, and must be of such a nature that the actor cannot safely withdraw.”¹³

⁸ *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

⁹ *Id.*

¹⁰ *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.

¹¹ *State v. Hines* (July 16, 1980), 1st Dist. No. C-790558.

¹² *State v. Getsy*, 84 Ohio St.3d 180, 199, 1998-Ohio-533, 702 N.E.2d 866.

¹³ *Id.*

{¶27} Following our review of the record, we conclude that Long failed to prove the defense of duress by a preponderance of the evidence, and that no manifest miscarriage of justice resulted from the jury's rejection of his defense. Long's version of events was simply not credible. Although he argues that he was forced to act under duress, he failed to inform the arresting deputy or the interviewing detectives that he had acted under Johnson's control. Long's own statement given to Detectives Fore and Pitchford indicated that the robbery had been planned and that he had not acted under a threat of death. The jury was entitled to reject Long's version of events and to find the testimony of the law enforcement officers credible.

{¶28} Long next argues that his convictions for carrying a concealed weapon and improperly handling a firearm in a motor vehicle were against the sufficiency and the weight of the evidence because the state had failed to prove all the required elements of these offenses.

{¶29} R.C. 2923.12(A)(2) proscribes carrying a concealed weapon and states that "[n]o person shall knowingly carry or have, concealed on the person's person or concealed ready at hand * * * a handgun other than a dangerous ordnance." R.C. 2923.16 prohibits the improper handling of firearms inside a motor vehicle, and it states that "[n]o person shall knowingly transport or have a loaded firearm in a motor vehicle in such a manner that the firearm is accessible to the operator or any passenger without leaving the vehicle."

{¶30} After reviewing the record, we conclude that Long's convictions for these offenses were supported by sufficient evidence and were not against the weight of the evidence. The state presented evidence that Long had knowingly placed a loaded handgun under his clothing before exiting from his vehicle inside Duebber's Drive-

Thru. He kept that weapon concealed while speaking with Corey Losacker until he brandished it to demand money. And the evidence further demonstrated that two loaded weapons were found in the vehicle that Long was driving, both within Long's reach. Further, Long admitted to possession of these weapons in his statement given to Detectives Fore and Pitchford. The jury was entitled to reject Long's account that Johnson had transported the guns without his knowledge.

{¶31} Long's convictions were supported by the sufficiency and weight of the evidence, and the third assignment of error is overruled.

Sentencing

{¶32} In his fourth assignment of error, Long argues that the trial court erred by imposing an improper sentence and by entering convictions for allied offenses of similar import.

A. Length of Sentence

{¶33} The trial court imposed an aggregate sentence of 14 years' imprisonment. This included nine years' imprisonment for aggravated robbery and a consecutive three years' imprisonment for the accompanying firearm specification, one consecutive year of imprisonment for carrying a concealed weapon, and one consecutive year of imprisonment for improperly handling a firearm in a motor vehicle.

{¶34} Following the Ohio Supreme Court's decision in *State v. Foster*, trial courts no longer need to make findings before imposing sentence and may impose any sentence within the available sentencing ranges.¹⁴ The Ohio Supreme Court has

¹⁴ *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, paragraph seven of the syllabus.

further clarified an appellate court's role with respect to review of sentences in *State v. Kalish*.¹⁵ *Kalish* established that a reviewing court must first determine whether the sentences imposed were clearly and convincingly contrary to law. If they were not, the court must then determine whether the trial court abused its discretion when imposing the sentences.¹⁶

{¶35} In this case, the sentences imposed fell within the available ranges and were not clearly and convincingly contrary to law. Nor did the trial court abuse its discretion. Long committed numerous offenses for which he showed no remorse. Long contends that the trial court focused on his actions in Indiana when imposing the sentences, but the record does not support his contention. Although the trial court mentioned Long's actions in Indiana, it specifically stated that Long was not being sentenced or punished for those actions.

{¶36} Long briefly asserts that, based upon the United States Supreme Court's decision in *Oregon v. Ice*,¹⁷ the imposition of consecutive sentences was improper. But this court has already determined that, following *Ice*, Ohio courts have the authority to impose consecutive sentences.¹⁸

{¶37} In conclusion, we hold that the trial court fully complied with the relevant sentencing provisions and did not err in the imposition of sentence.

¹⁵ 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124.

¹⁶ *Id.* at ¶¶14-17.

¹⁷ *Oregon v. Ice* (2009), __ U.S. __, 129 S. Ct. 711.

¹⁸ *State v. McCrary*, 1st Dist. No. C-080860, 2009-Ohio-4390, ¶35.

B. Allied Offenses

{¶38} Long next argues that his convictions for aggravated robbery, carrying a concealed weapon, and improper handling of a firearm involved allied offenses of similar import.

{¶39} R.C. 2941.25 is Ohio's multiple-count statute. It provides that when a defendant's conduct can be construed to constitute two or more allied offenses of similar import, the defendant may only be convicted of one of the offenses.¹⁹ But if the defendant commits each offense separately, or with a separate animus, the defendant may be convicted of each offense.²⁰

{¶40} In this case, Long committed each of these offenses separately and with a separate animus. Long first committed the offense of carrying a concealed weapon when, upon exiting from his vehicle in Duebber's Drive-Thru, he knowingly placed a loaded handgun under his clothing with the purpose of concealing it from Corey Losacker. He then committed aggravated robbery when he brandished this weapon, aimed it at Losacker, and demanded money and cigarettes. Later, the offense of improper handling of a firearm was committed as Long fled from the scene in Johnson's vehicle with two loaded weapons placed within his reach.

{¶41} Because these offenses were committed separately and were not allied, the trial court properly convicted Long for each offense. The fourth assignment of error is overruled, and the judgment of the trial court is affirmed.

Judgment affirmed.

CUNNINGHAM, P.J., and SUNDERMANN, J., concur.

Please Note:

The court has recorded its own entry on the date of the release of this decision.

¹⁹ R.C. 2941.25(A).

²⁰ R.C. 2941.25(B).