

[Cite as *State v. Clark*, 2010-Ohio-3962.]

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

STATE OF OHIO,	:	APPEAL NO. C-090573
	:	TRIAL NO. B-0809416
Plaintiff-Appellee,	:	
vs.	:	<i>OPINION.</i>
TREEO CLARK,	:	
Defendant-Appellant.	:	

**Criminal Appeal From: Hamilton County Court of Common Pleas**

**Judgment Appealed From Is: Affirmed**

**Date of Judgment Entry on Appeal: August 25, 2010**

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

*Christine Y. Jones*, for Defendant-Appellant.

**SYLVIA SIEVE HENDON, Judge.**

{¶1} Following a jury trial, defendant-appellant, Treeo Clark, was convicted of aggravated burglary, aggravated robbery, felonious assault, abduction, and a firearm specification. The court imposed an aggregate sentence of 11 years' incarceration. Clark now appeals.

*Weight and Sufficiency of the Evidence*

{¶2} In his first, second, and third assignments of error, Clark challenges the weight and sufficiency of the evidence upon which his convictions were based, as well as the trial court's denial of his Crim.R. 29 motions for acquittal. He contends that the state failed to prove that he was the perpetrator of the offenses.

{¶3} In reviewing a challenge to the weight of the evidence, we sit as a "thirteenth juror."<sup>1</sup> We must review the entire record, weigh the evidence, consider the credibility of the witnesses, and determine whether the trier of fact clearly lost its way and created a manifest miscarriage of justice.<sup>2</sup>

{¶4} To determine whether a trial court has erred in overruling a Crim.R. 29 motion for an acquittal, the question is whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt.<sup>3</sup> We make the same inquiry in reviewing the sufficiency of the evidence.<sup>4</sup>

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<sup>1</sup> See *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.

<sup>2</sup> *Id.*

<sup>3</sup> See *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 381 N.E.2d 184, syllabus.

<sup>4</sup> See *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶5} At trial, the state presented evidence that, at about 1:00 a.m. on November 13, 2008, Clark had entered Carlotta Figgins' bedroom and struck her with a heavy glass decanter as she slept. Figgins testified that she had felt the decanter brush across her head before it struck her hard in the chest, causing injury.

{¶6} Figgins testified that Clark had worn gloves, as well as a white T-shirt over his face, with a hat and a hood over his head, and that he was approximately five feet four inches tall. Despite not being able to see his face, Figgins readily identified Clark by his voice because he was a long-time friend of her son and had done yard work for her several times in the preceding five months.

{¶7} Clark brandished a knife and demanded money. Figgins said, "Treeo," but Clark did not respond at first. Figgins then asked, "Treeo, why are you doing this?" and Clark said, "My name's not Treeo, it's MJ."

{¶8} Clark indicated that he had a gun and said, "[D]on't make me take this gun out of my pocket." Then Clark shut the terrified Figgins in a bathroom and warned her not to do anything to cause him to hurt her, her son, her son's girlfriend, or the girlfriend's infant child. Figgins remained in the bathroom for about 15 minutes until she heard no further movement in her house. Then she called the police.

{¶9} Figgins discovered that the home's back door had been kicked in. Her car and some of her personal property had been taken.

{¶10} Several hours after the break-in, Clark left Figgins a telephone message, falsely informing her that he had been shot and had just been released from the hospital, so he would not be able to do yard work for her.

{¶11} Two days later, police recovered Figgins' car and arrested Jumarkus Crawford, the man who had been driving the car at the time. Crawford testified that, earlier that day, Clark had picked him and Sean Wilson up and had driven around with them in Figgins' car. Then Clark told Crawford to drop him off at a girlfriend's house, and he allowed Crawford and Wilson to borrow the car. Crawford also testified that he was approximately five feet eleven inches or six feet tall, and that Wilson stood five feet ten or eleven inches.

{¶12} On November 29, 2008, 16 days after the crimes, Clark left Figgins another telephone message in which he lied about having just been released from the hospital.

{¶13} Cincinnati Police Detective Jeffrey McKinney testified that Clark had admitted that he had lied to Figgins in both of his messages to her, and that he also conceded that he had not been shot. Clark told McKinney that, on the evening of November 12, 2008, he had been skating and had arrived at home at about 10:45 p.m. He said that he had gone to bed and slept all night.

{¶14} For the defense, Clark testified that he had lied to the detective about having left home to go skating. He testified that his grandmother had locked him in the house on the evening of November 12. His grandmother and his uncle testified that Clark had slept in his bed all night and had not arisen from bed until noon the following day

{¶15} Clark explained the cryptic message he had left for Figgins hours after the robbery, in which he had lied about having been shot. According to Clark, at about 8:20 a.m. on November 13, Crawford had called him to say that "somebody had stated [Clark's] name in a robbery." Crawford did not identify the victim of the

robbery and did not indicate that a home had been broken into. Clark testified that Crawford's warning, which lacked any indication that Figgins had been robbed or that the robbery had occurred in her home, had prompted him to call Figgins within the hour to give her his alibi. Clark said that he had lied to her about being shot "to get [himself] out of something that [he] shouldn't have never caught." Clark testified that he was five feet four or five inches tall.

{¶16} The aggravated-burglary statute, R.C. 2911.11(A)(1), provides that "[n]o person, by force, stealth, or deception, shall trespass in an occupied structure \* \*, when another person \* \* \* is present, with purpose to commit in the structure \* \* \* any criminal offense, if \* \* \* [t]he offender inflicts, or attempts or threatens to inflict physical harm on another." R.C. 2903.11(A)(2), governing felonious assault, prohibits knowingly "caus[ing] or attempt[ing] to cause physical harm to another \* \* \* by means of a deadly weapon."

{¶17} R.C. 2911.01(A)(1), the aggravated-robbery statute, provides that "[n]o person, in attempting or committing a theft offense \* \* \* shall \* \* \* [h]ave a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it." The firearm-specification statute, R.C. 2941.145, requires proof that "the offender had a firearm on or about the offender's person or under the offender's control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense."

{¶18} Finally, the statute covering abduction, R.C. 2905.02(A)(2), provides that "[n]o person, without privilege to do so, shall knowingly \* \* \* [b]y force or

threat, restrain the liberty of another person under circumstances that create a risk of physical harm to the victim or place the other person in fear.”

{¶19} In this case, a jury could have reasonably concluded that Clark had broken through the back door of Figgins’ home, bludgeoned her with a heavy decanter, demanded money from her while brandishing a knife, and stolen property from her. The state further demonstrated that Clark had forced her into a separate, closed room and had threatened harm to her and her son, while indicating that he possessed a gun. Following our review of the record, we hold that the state presented sufficient evidence that Clark had committed aggravated burglary, aggravated robbery, felonious assault, and abduction, and that he was guilty of the firearm specification.

{¶20} We cannot say that the jury lost its way in rejecting Clark’s alibi and finding him guilty. Accordingly, we hold that Clark’s convictions were based upon sufficient evidence and were not against the manifest weight of the evidence. We overrule the first, second, and third assignments of error.

#### *The Sentence*

{¶21} In his fourth assignment of error, Clark argues that the trial court abused its discretion by imposing an excessive sentence.

{¶22} Trial courts have full discretion to impose a prison sentence within the statutory range for an offense.<sup>5</sup> When exercising that discretion, trial courts must still carefully consider the statutes that apply to every felony case, including R.C. 2929.11, R.C. 2929.12, and any statutes that are specific to the case itself.<sup>6</sup>

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<sup>5</sup> *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, paragraph seven of syllabus.

<sup>6</sup> *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1, ¶38.

{¶23} In this case, the prison term imposed for each of the felonies was the statutory minimum. Although the trial court did not specifically state that it had considered R.C. 2929.11 and 2929.12, we may presume that it did.<sup>7</sup> In light of the foregoing, Clark's sentence was not contrary to law.

{¶24} Moreover, the court considered Clark's criminal history, which included a menacing conviction, as well as juvenile adjudications for drug trafficking, assault, and probation violations. The court also noted that Clark lacked remorse for his violent attack against a woman who had known and trusted him.

{¶25} Under the circumstances, we cannot say that the trial court abused its discretion in sentencing Clark. Consequently, we overrule the fourth assignment of error.

#### *Merger*

{¶26} In his fifth assignment of error, Clark argues that the trial court erred by sentencing him to terms of imprisonment for both aggravated robbery and abduction. He argues that the offenses are allied offenses of similar import. The state, on the other hand, contends that the offenses are not allied, and that even if they were, the offenses in this case were separately punishable because there was a separate animus for each.

{¶27} Ohio's multiple-count statute, R.C. 2941.25, provides that where the same conduct by a defendant can be construed to constitute two or more allied offenses of similar import, the defendant may be convicted of only one.<sup>8</sup> But if a defendant's

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<sup>7</sup> *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, fn. 4, citing *State v. Adams* (1988), 37 Ohio St.3d 295, 525 N.E.2d 1361, paragraph three of the syllabus.

<sup>8</sup> R.C. 2941.25(A).

conduct results in two or more offenses of similar import committed separately or with a separate animus as to each, the defendant may be convicted of all of them.<sup>9</sup>

{¶28} The Ohio Supreme Court has stated, “In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), courts are required to compare the elements of offenses in the abstract without considering the evidence in the case, but are not required to find an exact alignment of the elements. Instead, if, in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in commission of the other, then the offenses are allied offenses of similar import.”<sup>10</sup> If the offenses are allied and of similar import, the court proceeds to the second step and considers whether the offenses were committed separately or with a separate animus.<sup>11</sup>

#### A. Allied Offenses

{¶29} First, we must determine whether abduction under R.C. 2905.02(A)(2) is an allied offense of aggravated robbery as defined in R.C. 2911.01(A)(1).

{¶30} Abduction is a lesser-included offense of kidnapping,<sup>12</sup> and therefore abduction and kidnapping are allied offenses.<sup>13</sup> So the Ohio Supreme Court’s recent decision in *State v. Winn*,<sup>14</sup> which addressed kidnapping and aggravated robbery, is instructive.

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<sup>9</sup> R.C. 2941.25(B).

<sup>10</sup> *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, paragraph one of the syllabus.

<sup>11</sup> *Id.* at ¶31.

<sup>12</sup> *State v. Maurer* (1984), 15 Ohio St.3d 239, 271, 473 N.E.2d 768; see, also, *State v. Webster*, 1st Dist. Nos. C-070027 and C-070028, 2008-Ohio-1636, discretionary appeal not allowed, 119 Ohio St.3d 1447, 2008-Ohio-4487, 893 N.E.2d 517; *State v. Lusby* (Oct. 17, 1997), 1st Dist. No. C-960472; but, see, *State v. Harris*, 10th Dist. No. 02AP-977, 2003-Ohio-2414; *State v. Wetzel* (Aug. 23, 1999), 5th Dist. No. CA-862.

<sup>13</sup> See *State v. Evans*, 122 Ohio St.3d 381, 2009-Ohio-2974, 911 N.E.2d 889, ¶31 (lesser-included offenses are necessarily allied offenses of similar import).

<sup>14</sup> 121 Ohio St.3d 413, 2009-Ohio-1059, 905 N.E.2d 154.

{¶31} In *Winn*,<sup>15</sup> the supreme court held that kidnapping as defined in R.C. 2905.01(A)(2) and aggravated robbery as defined in R.C. 2911.01(A)(1) are allied offenses of similar import. In comparing the elements of both offenses, the court stated, “It is difficult to see how the presence of a weapon that has been shown or used, or whose possession has been made known to the victim during the commission of a theft offense, does not also forcibly restrain the liberty of another.” The court held that even though the elements of the two offenses do not align exactly, they are so similar that the commission of one will necessarily result in commission of the other.<sup>16</sup>

{¶32} But the court did not reach the second step of the multiple-count analysis to determine whether the crimes were committed with a separate animus. In that regard, the court specifically noted that the state had not challenged the appellate court’s determination that Winn did not have a separate animus for the kidnapping and aggravated robbery.

{¶33} Like the defendant in *Winn*, Clark was convicted of aggravated robbery as defined in R.C. 2911.01(A)(1). But unlike Winn, who was additionally convicted of kidnapping, Clark was convicted of abduction as defined in R.C. 2905.02(A)(2).

{¶34} Because, as the supreme court said in *Winn*, the display, brandishing, indicated possession or use of a deadly weapon necessarily restrains another’s liberty by force so as to constitute kidnapping, it follows that the presence of the weapon would also create a risk of physical harm to the victim or place the victim in fear so as to constitute abduction. Following that reasoning, we hold that aggravated robbery as defined in R.C. 2911.01(A)(1) and abduction as defined in R.C. 2905.02(A)(2) are allied offenses of similar import.

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<sup>15</sup> Id.

<sup>16</sup> Id.

{¶35} Even so, we must determine whether the two offenses were in this case committed with a separate animus.

**B. Separate Animus**

{¶36} The Ohio Supreme Court's discussion of animus in the context of kidnapping is helpful in the context of abduction.<sup>17</sup> The court has held that a separate animus does not exist for kidnapping and an underlying offense "[w]here the restraint or movement of the victim is merely incidental to a separate underlying crime."<sup>18</sup> But the court has also held that "where the restraint is prolonged \* \* \* [or] 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 to support separate convictions."<sup>19</sup>

{¶37} We necessarily must review the facts of each case involving allied offenses very carefully, and the facts of this case reflect a separate animus for abduction. The moving of the victim from her bedroom to a separate room was not simply incidental to the aggravated robbery. Clark had already demanded money from Figgins at knifepoint in her bedroom when he threatened her with a gun and ordered her into the bathroom. He prolonged the restraint when, as he closed Figgins in the bathroom, he warned her not to do anything that would cause him to hurt her or her son. A terrified Figgins waited 15 minutes before she emerged from the bathroom. Under these circumstances, the restraint of the victim was sufficient to have demonstrated a significance apart from the aggravated robbery. Consequently, we hold

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<sup>17</sup> See *State v. Logan* (1979), 60 Ohio St.2d 126, 397 N.E.2d 1345.

<sup>18</sup> *Id.*, syllabus.

<sup>19</sup> *Id.*

that the trial court properly sentenced Clark for both offenses. We overrule the fifth assignment of error and affirm the trial court's judgment.

Judgment affirmed.

**CUNNINGHAM, P.J., and MALLORY, J.,** concur.

Please Note:

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