

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

STATE OF OHIO,	:	APPEAL NO. C-090913
	:	TRIAL NO. B-0804412
Plaintiff-Appellee,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
ROGER TUCKER,	:	
	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.<sup>1</sup>

Following a jury trial, defendant-appellant Roger Tucker was found guilty of two counts of aggravated murder, one count of aggravated robbery, and one count of aggravated burglary. Tucker has appealed from the convictions entered upon the jury's verdict and raises six assignments of error.

Herbert Abraham, an 83-year-old resident of Price Hill, was found by police dead in his home. Abraham was naked, his ankles were bound together with his own neckties, and a belt was tied around his hand. A necktie around Abraham's neck was tied so tight that it had broken his neck in two places and strangled him to death. As police investigated, they discovered that Abraham's car was missing and found a silver car in the parking lot near Abraham's home. The silver car belonged to a couple in Covington, Kentucky, whose home had been burglarized. The wife, who

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<sup>1</sup> See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

was hearing-impaired, had woken up the morning after the burglary to find a baseball bat next to the bed where she had been sleeping.

The day after Abraham was found dead, police in Park Hills, Kentucky, found a car illegally parked in a cul-de-sac and Tucker in the backyard of one of the residences. Kentucky police arrested Tucker on open warrants and towed the car. The car belonged to Abraham. Tucker admitted to police that he had broken into Abraham's home, robbed him, and tied the necktie around Abraham's neck, although Tucker denied purposely killing Abraham.

We consider Tucker's first three assignments of error together. In Tucker's first assignment of error, he claims that the evidence was insufficient to support his conviction for aggravated murder. 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."<sup>2</sup> In Tucker's third assignment of error, he argues that the trial court erred in overruling his motion for an acquittal on the aggravated-murder charge. Our standard for reviewing a trial court's decision on a motion to acquit pursuant to Crim.R. 29 is the same as our review for the sufficiency of the evidence.<sup>3</sup> In Tucker's second assignment of error, he claims that his conviction for aggravated murder was against the manifest weight of the evidence. Appellate review of the weight of the evidence puts the appellate court in the role of a "thirteenth juror."<sup>4</sup> Thus, we must review the entire record, weigh the evidence, consider the credibility of the witnesses, and determine whether

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

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

<sup>4</sup> *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.

the trier of fact clearly lost its way and created a manifest miscarriage of justice in finding Tucker guilty.<sup>5</sup>

When viewing the evidence presented in a light most favorable to the state, we cannot say that no rational trier of fact could have found Tucker guilty beyond a reasonable doubt of aggravated murder. Furthermore, we cannot say that the jury clearly lost its way and created a manifest miscarriage of justice in finding Tucker guilty of aggravated murder. Thus, we overrule Tucker's first, second, and third assignments of error.

In Tucker's fourth assignment of error, he argues that the trial court's sentence was excessive. Specifically, Tucker argues that the trial court erred by imposing the maximum sentences despite Tucker's mitigating circumstances, and by imposing consecutive sentences without making findings of fact. As to the duration of sentences, a trial court has full discretion to impose any sentence within the applicable statutory range.<sup>6</sup> A reviewing court must first determine whether the sentence was clearly and convincingly contrary to law, and if the sentence was not contrary to law, the appellate court then reviews the sentence under an abuse-of-discretion standard.<sup>7</sup> The sentences imposed in this case were all within the applicable statutory ranges, and given the facts in the record, we cannot hold that the trial court abused its discretion in imposing the sentences.

As to the imposition of consecutive sentences, Tucker argues that the United States Supreme Court's decision in *Oregon v. Ice*<sup>8</sup> required that the trial court make findings of fact before imposing consecutive sentences. This argument was rejected

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<sup>5</sup> Id.

<sup>6</sup> *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, paragraph seven of the syllabus.

<sup>7</sup> *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶14-17.

<sup>8</sup> (2009), 555 U.S. 160, 129 S.Ct. 711.

by the Ohio Supreme Court in *State v. Hodge*.<sup>9</sup> Therefore, we overrule Tucker's fourth assignment of error.

In his fifth assignment of error, Tucker claims that the trial court erred in admitting "other acts" evidence under Evid.R. 404(B). Evid.R. 404(B) allows the admission of other crimes, wrongs, or acts, not to establish bad character, but "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

Tucker filed a motion to preclude the admission of evidence of other burglaries or attempted burglaries, which the trial court granted in part and denied in part. The trial court allowed evidence to be presented regarding the robbery of the Covington, Kentucky, residence where Tucker had placed a baseball bat next to the sleeping victim and stolen the silver car that he had later left at Abraham's house. The trial court also permitted the use of evidence showing that, the day after Abraham's death, Tucker was found by police with Abraham's car in Park Hills, Kentucky, while Tucker was allegedly attempting to burglarize a residence. The admitted evidence of Tucker's other acts was not used for the improper purpose of showing Tucker's bad character. The evidence was used to show a common scheme or plan that, as the trial court noted, was "part and parcel" of the events that unfolded at Abraham's home, as well as for other purposes listed in Evid. R. 404(B). We overrule Tucker's fifth assignment of error.

In Tucker's sixth assignment of error, he argues that the trial court erred in sentencing him consecutively on all four counts of which he was found guilty. Specifically, Tucker argues that the trial court should have merged the aggravated-burglary count with the aggravated murder charged in count two, and that it also

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<sup>9</sup> \_\_\_ Ohio St.3d \_\_\_, 2010-Ohio-6320, \_\_\_ N.E.2d \_\_\_, paragraph three of the syllabus.

should have merged the aggravated-robbery count with the aggravated murder charged in count four.

In determining whether offenses are allied offenses of similar import under R.C. 2941.25, the court must ask whether “[t]he offenses correspond to such a degree that the conduct of the defendant constituting commission of one offense constitutes commission of the other \* \* \*.”<sup>10</sup> Thus, “[w]hen determining whether two offenses are allied[,] the conduct of the accused must be considered.”<sup>11</sup> In this case, Tucker’s conduct in committing aggravated robbery and aggravated burglary did not constitute the commission of aggravated murder. Moreover, Tucker had a separate animus for each offense.<sup>12</sup>

However, we note that while the trial court properly stated on the record that it was merging the two aggravated-murder counts, its written judgment entry unfortunately does not reflect that merger. We are convinced that this was a simple clerical mistake, and that the trial court properly intended to impose only one sentence for the two aggravated-murder counts.<sup>13</sup> We, therefore, sustain Tucker’s sixth assignment of error, but only to the limited extent of the clerical error, which imposed two sentences for aggravated murder. Accordingly, we must vacate those two sentences and remand this case to the trial court for the limited purpose of correcting the clerical error in its judgment entry to reflect the imposition of only one sentence for the two aggravated-murder counts. The trial court’s judgment is affirmed in all other respects.

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<sup>10</sup> *State v. Johnson*, \_\_\_ OhioSt.3d. \_\_\_, 2010-Ohio-6314, \_\_\_ N.E.2d \_\_\_, ¶48.

<sup>11</sup> *Id.* at paragraph one of the syllabus.

<sup>12</sup> *Id.* at ¶49.

<sup>13</sup> See CrimR. 36.

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Further, a certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

**DINKELACKER, P.J., HENDON and FISCHER, JJ.**

*To the Clerk:*

Enter upon the Journal of the Court on February 16, 2011  
per order of the Court \_\_\_\_\_.  
Presiding Judge