

NO. 07-0184

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IN THE SUPREME COURT OF OHIO

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APPEAL FROM  
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO  
NO. 87651

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STATE OF OHIO,

Plaintiff-Appellant/Cross-Appellee

-vs-

JAKEENA BROWN,

Defendant-Appellee/Cross-Appellant

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**MERIT BRIEF OF PLAINTIFF-APPELLANT/CROSS-APPELLEE**

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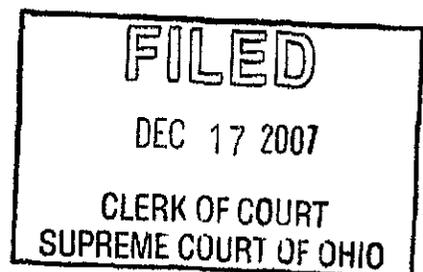
Counsel for Plaintiff-Appellant/Cross-Appellee

**WILLIAM D. MASON**  
**CUYAHOGA COUNTY PROSECUTOR**

PAMELA BOLTON (0071723)  
Assistant Prosecuting Attorneys  
The Justice Center  
1200 Ontario Street  
Cleveland, Ohio 44113  
(216) 443-7800

Counsel for Defendant-Appellee/Cross-Appellant

DAVID KING  
JOHN T. MARTIN  
Assistant Public Defender  
310 Lakeside Avenue, Suite 200  
Cleveland, OH 44113



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**MERIT BRIEF OF PLAINTIFF-APPELLANT/CROSS-APPELLEE**

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**INTRODUCTION**

Since this Court's opinion in *State v. Rance* (1999), 85 Ohio St.3d 632, 1999-Ohio-291, Ohio courts have almost unanimously followed the dictates set forth therein for determining if two charges are allied offenses of similar import. Yet, Jakeena Brown, the defendant herein, was afforded the protections provided by the multiple-count statute and this Court's precedent without proper application. By dismissing statutory construction and long-standing precedent, the Eighth District Court of Appeals has returned this well-settled principle to a state of confusion. In essence, the lower court found that Brown's two convictions for aggravated assault were in violation of double jeopardy safeguards. And it did so without proper application of the aforementioned principles.

But *Rance* can easily be applied to the case sub judice, without causing additional and unnecessary confusion in the application of the allied offenses doctrine. This Court is therefore presented with the opportunity to reestablish the bright-line test set forth in *Rance*. Its application in 1999 is equally applicable to the original case, as it is herein. And by applying the guiding principles of *Rance*, Brown's two convictions, under the alternate theories of aggravated assault, cannot be construed to constitute allied offenses of similar import.

Assuming this Court, in applying *Rance* to the within case, determines that these offenses are allied, then the two offenses must merge. The multiple-count statute codified the judicial doctrine of merger. Yet the Eighth District arbitrarily ordered the dismissal of one of the aggravated assault charges. In dismissing one of the counts, rather than merging the two counts, the court ignored the proper remedy afforded when a defendant's double jeopardy guarantees has been violated. The arbitrary dismissal of the one count also needlessly interferes with the jury's verdict. And the Eighth District thereby substituted its judgment for that of jury.

Finally, Brown's domestic violence conviction must stand, based upon this Court's recent ruling in *State v. Carswell*, 114 Ohio St.3d 210, 2007-Ohio-3723. This Court found Ohio's domestic violence statute constitutional, as it is applied to unmarried individuals, who are cohabitating, much like Brown and the her victim, Kevin Johnson.

#### **STATEMENT OF THE CASE AND FACTS**

On July 20, 2005, the Cuyahoga County Grand Jury returned a three-count indictment against Jakeena Brown. The facts giving rise to this indictment, including two counts of felonious assault and one count of domestic violence, occurred on April 4,

2005. Brown was charged with the alternate theories of felonious assault – causing serious physical harm and causing harm with a dangerous ordnance or deadly weapon. Following her arraignment on July 5, 2005, counsel engaged in several pre-trials. Unable to reach a resolution, the matter proceeded to trial on October 17, 2005.

During the State's case-in-chief, it presented three witnesses, all officers with the Cleveland Police Department. The following facts were bore out during their testimony:

Patrolman David DiMaria of the Cleveland Police Department was on duty on April 4, 2005. He received a call to respond to Greenwich Avenue; it was a priority call for an assault of a female. (Tr. 98-99.) As he and his partner, Officer Richard Rusnak, drove eastbound on Greenwich Avenue towards this address, they saw a man – later identified as Kevin Johnson – flagging the officers down. (Tr. 99.) As they neared him, both officers noticed a tremendous amount of blood on his shirt. (Tr. 100, 115.) Not only did he have blood on his shirt, but he was also holding his side. With this, Officer Rusnak called for assistance while Officer DiMaria inquired of Johnson.

Officer DiMaria instantaneously inquired, asking "what happened?" Kevin Johnson just pointed up the street, and muttered, "She stabbed me." (Tr. 100.) Officer DiMaria and his partner questioned him some more, in an attempt to seek medical assistance for him and gauge the situation. Kevin Johnson responded: "My girlfriend, she's in that truck, she stabbed me. Look." (Tr. 100.) At which, he pulled up his shirt and displayed his wound to the officers. The only thing Officer DiMaria could comprehend was the amount of blood Kevin Johnson had already lost. (Tr. 100.)

When Kevin Johnson initially pointed up the street, officers noticed a red Chevrolet Blazer parked on the wrong side of the street. (Tr. 100.) As officers were

administering assistance to Kevin Johnson and waiting for EMS to arrive, the red Blazer moved from its original position, and began traveling towards the officers. The woman operating the Blazer – subsequently identified as Brown – parked immediately next to the officers' vehicle. (Tr. 101.) Enraged, she exited the vehicle, approached Officer DiMaria, stating: "I called you because that nigger just tore my truck up." Obvious to the officers that Brown was angry, he about whom she was referring. Brown replied, "him," and pointed at Kevin Johnson. Officer DiMaria realized that the person to whom Kevin Johnson initially referred as his girlfriend, was in fact, Brown. (Tr. 101-102.)

Officer DiMaria described the scene as "volatile." Still bleeding, Kevin Johnson was excited and frenzied. And Brown was as equally animated. She related to officers that she and Kevin Johnson had gotten into a fight, and then described how he "tore my truck up." (Tr. 102.) Officer DiMaria described her state as "mad;" she was angry about the condition of her truck. (Tr. 102, 103.) Brown then told officers that Johnson broke the window to the truck, damaged the bumper, removed the temporary tag and fed it to the dog. (Tr. 107.) And because of this, Brown related to Officer DiMaria that "I cut him," with a knife. (Tr. 102.)

Officer DiMaria searched the truck for the evidence. Not able to locate the knife in her truck, he walked to the area where the Blazer was originally parked when they arrived on scene. He found the knife lying in the middle of the street, covered in blood. (Tr. 103.) The knife was similar to a steak knife; it had a black handle and a serrated edge. (Tr. 103.)

Johnson was subsequently transported from the scene, by ambulance, to the hospital. He was treated for his stab wound and held overnight for observation. (Tr.

119.) Medical records, demonstrating the seriousness of his injuries, were admitted into evidence.

Officer DiMaria's investigation revealed that Brown and Johnson were romantically involved and living together. Despite this fact, they were experiencing domestic problems. (Tr. 100.) On the day of this incident, Brown and Johnson were fighting about his employment status. In fact, Johnson admitted to fighting with Brown over the course of three days. (Tr. 107.) So he damaged her truck. (Tr. 104-105.) But he was surprised when she attacked him. Brown came around the side of the vehicle, and without warning or hesitation, struck him with a knife. (Tr. 104.) Nonetheless, Johnson was remorseful for his actions. (Tr. 104.)

During trial, Brown admitted to fighting with Kevin Johnson, but attempted to explain away the stabbing as an accident. She stated that she "went into her pocket, and he saw I had the knife in my hand. And then he pushed me into the car, and that's how he got stabbed." (Tr. 125.) But upon being questioned whether Kevin Johnson knew she had the knife, Brown responded in the negative, and reasoned: "I guess he thought I came for him, but in the process of me explaining to him – when he saw it \* \* \* he just ran up on me, and that's how he got stabbed." (Tr. 125-26.) She contended that Kevin Johnson ran into the knife while her eyes were closed. (Tr. 128.) And her son, Damonte, also believed that Kevin Johnson ran into the knife; Brown "was trying to put the knife through \* \* \* the car window and \* \* \* he ran up on her." (Tr. 155.) Brown claims that she didn't even know he was stabbed until the police informed her of the situation. (Tr. 134.)

Brown also admitted that she initiated the police intervention. While she and Kevin Johnson were still embroiled in their fight, she alleged that she begged for any of the onlookers to call the police; she "didn't have no way to call." (Tr. 127.) After Brown stabbed Johnson, ending the fight, she drove her truck around the block and returned to the same location, and then asked someone to call for the police. (Tr. 127.)

At the close of evidence, the trial court instructed the jury on the two counts of felonious assault as well as the corresponding, inferior degrees, of aggravated assault. (Tr. 162-175.) Following a brief deliberation, the jury returned its verdict on October 19, 2005, and found Brown not guilty on the two counts of felonious assault, but guilty on the inferior offenses of aggravated assault as well as the one count of domestic violence. (T. 191-92).

On December 14, 2005, the trial court imposed sentence. It sentenced Brown to a total of two and one-half years imprisonment. (T. 195). But the trial court suspended the term of imprisonment and placed Brown on probation for a period of two years. (T. 195).

Brown appealed her convictions to the Eighth District Court of Appeals, raising seven assignments of error, including: the admission of testimonial statements, sufficiency and manifest weight of the evidence, the merger of allied offenses, the constitutionality of the domestic violence statute, and ineffective assistance of counsel. The Eighth District affirmed her convictions in part, and reversed and remanded in part. *State v. Brown*, Cuyahoga App. No. 87651, 2006-Ohio-6267. In reversing in part, the court found Brown's "conviction on both counts of aggravated assault was improper and in violation of double jeopardy safeguards. Accordingly, we reverse and remand and

direct the trial court to vacate the finding of guilt and the sentence in one of the aggravated assault convictions.” Brown at ¶ 51.

The State requested the jurisdiction of this Court based upon the Eighth District’s partial reversal of Brown’s conviction. Brown also sought the jurisdiction of this Court on several issues. Ultimately, this Court accepted three propositions of law for review – allied offenses of similar import, the merger of allied offenses, and the constitutionality of R.C. 2919.25. This Court stayed proceedings for the outcome of *State v. Carswell*, infra. These three propositions of law are further addressed below.

### **LAW AND ARGUMENT**

#### **PROPOSITION OF LAW I: CONVICTIONS FOR AGGRAVATED ASSAULT UNDER BOTH THEORIES MUST STAND WHEN THE CONVICTIONS ARISE FROM A SINGLE ACT.**

The Double Jeopardy Clause, under the Fifth Amendment, protects defendants from cumulative punishment for the same offense. *State v. Rance* (1999), 85 Ohio St.3d 632, 1999-Ohio-291, citing *State v. Moss* (1982), 69 Ohio St.2d 515. It is made applicable to the states by the Fourteenth Amendment. Prior to this Court’s decision in *Rance*, in determining if a defendant has been cumulatively punished for the same offense, courts relied on the test promulgated in *Blockburger v. United States* (1932), 284 U.S. 299. The Supreme Court required an analysis of the offenses, and if each offense required proof of an element that the other did not, then a defendant was not subjected cumulative punishments for the same offense.

However, the Ohio legislature usurped the *Blockburger* test through its adoption of R.C. §2941.25. By its passage, it effectively allows for the cumulative punishment of crimes that may constitute the same offense under the *Blockburger* analysis. Even

though two offenses may violate double jeopardy protections under *Blockburger*, “when a legislature signals its intent to either prohibit or permit cumulative punishments for conduct that may qualify as two crimes, application of *Blockburger* would be improper; the legislature’s expressed intent is dispositive.” *Rance* at 635, citing *Ohio v. Johnson* (1984), 467 U.S. 493, 499.

The multiple-count statute, as R.C. §2941.25 is commonly known, permits a defendant to be punished cumulatively for the commission of the same act, provided that the offenses are of dissimilar import. Historically, Ohio courts struggled in its application until this Court’s decision in *Rance*. And since that time, *Rance* has been applied almost universally in determining if two offenses are allied offenses of similar import, until now.

In the case sub judice, at issue is whether the singular act by Brown “can be construed to constitute two or more allied offenses of similar import \* \* \*.” R.C. 2941.25(A). If the offenses are allied, then “the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.” *Id.* In determining whether the offenses are allied offenses of similar import, it must be determined “if the elements of the crimes ‘correspond to such a degree, that the commission of one crime will result in the commission of the other crime.’” *Rance* at 636, citing *State v. Jones* (1997), 78 Ohio St.3d 12, 13.

In comparing the elements of the crime, it must be conducted in the abstract, since it is more functional. *Rance* at 636, citing *Kumho Tire Co., Ltd. V. Carmichael* (1999), 526 U.S. 137. And the facts of the case are not considered when comparing the elements of the offenses. If the elements of the crime do not correspond, then no

further inquiry is required: multiple punishments for the same conduct is permitted. But “if the elements do so correspond, the defendant may not be convicted of both unless the court finds that the defendant committed the crimes separately or with a separate animus.” *Rance* at 638-639. , citing R.C. §2941.25.

In the case sub judice, the Eighth District ruled that an allied offense analysis was not necessary. In so ruling, it determined that such an analysis “is implicated only in a situation where the conduct by a defendant could be construed to constitute two or more offenses.” *Brown* at ¶ 50. By ruling in this manner, the Eighth District dismissed statutory construction and this Court’s long-standing precedent. It completely misapprehended the Double Jeopardy Clause, as it applies to this case, and the fact that it protects from cumulative punishments for the same offense. Simply put, it failed to account for the fact that Brown’s conduct violated two separate statutory provisions.

And in so doing, the lower court failed to apply the principles of R.C. 2941.25. An analysis under the multiple-count statute is invoked when there is a single act by a defendant, and that single, solitary act results in multiple convictions. While the court rightly concluded that Brown committed only one act, the Eighth District found that an allied offenses analysis is not implicated. Dismissing the relevancy of R.C. §2941.25 to the within case, it nonetheless compared the alternate theories of aggravated assault, as is required by the multiple-count statute and this Court’s precedent. *Brown* at ¶ 51. While it did not specifically find that the two offenses are allied offenses, it is the only logical conclusion that can be drawn.

In examining the error committed by the Eighth District, it was correct in finding that Brown committed only one act, and charged with more than one offense. Under

such a situation, R.C. §2941.25 **must** be utilized. And it is the starting point for determining if a defendant's protections against double jeopardy have been violated. As this Court held in *State v. Logan* (1979), 60 Ohio St.2d 126, if an offender demonstrates reliance on the same conduct to prove multiple charges, then the protections of R.C. §2941.25 are implicated. "In addition to the requirement of similar import of the crimes committed, the defendant, in order to obtain the protection of R.C. §2941.25(A), must show that the prosecution has relied upon the same conduct to support both offenses charged." *Logan* at 128.

Herein, the same conduct was employed in proving the alternate theories of aggravated assault. Therefore, "a court need only engage in the allied-offense analysis when the same conduct, or single act, results in multiple convictions." *State v. Cooper*, 104 Ohio St.3d 293, 2004-Ohio-6553 at ¶ 17. An allied-offense analysis was required in the underlying case, since the single act by Brown resulted in multiple convictions. But the Eighth District afforded Brown the protections of the multiple-count statute without engaging in any such analysis. It placed the cart before the horse, and arbitrarily ruled that Brown's convictions under the alternate theories of aggravated assault violate double jeopardy protections. But by failing to undertake the proper analysis, and reaching an illogical conclusion, the Eighth District turned *Rance* and its progeny on its head.

Yet, "R.C. 2941.25's two-step test answers the constitutional and state statutory inquiries. The statute manifests the General Assembly's intent to permit, in appropriate cases, cumulative punishments for the same conduct. The sole question, then is one of state statutory construction: are the offenses at issue those certain offenses for which

the General Assembly has approved multiple convictions pursuant to R.C. 2941.25?" *Rance* at 639. By undertaking an analysis of the alternate theories of aggravated assault, the age-old question posed by *Rance* is answered in the affirmative.

An abstract comparison of the alternate theories of aggravated assault, R.C. §2903.12(A)(1) and (2), of which Brown was convicted of both, reveals that the commission of one does not result in the commission of the other. Under R.C. §2903.12(A)(1), "No person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, shall knowingly cause serious physical harm to another \* \* \*." On the other hand, under R.C. §2903.11(A)(2), a person commits aggravated assault when the person knowingly "cause[s] or attempt[s] to cause physical harm to another \* \* \* by means of a deadly weapon or dangerous ordnance \* \* \*."

A comparison of the elements reveals that these offenses are not allied offenses of similar import. The only common element between these two offenses is the harm. The manner in which harm is caused and the degree of the harm caused varies between these two offenses. In essence, the outcome under each of these offenses is different. On the one hand, the victim will only suffer injuries amounting to physical harm. But those injuries are caused by a deadly weapon or dangerous ordnance. On the other hand, the injuries sustained by a victim are much more serious, but the cause of the injuries is not an issue. As a result, the commission of aggravated assault by which a person suffers serious physical harm does not result in the commission of aggravated assault by use of a dangerous ordnance or deadly weapon.

Further supporting this conclusion is a line of cases from the First and Second Districts courts of appeals. In these cases, the courts of appeals compared the alternate theories of felonious assault. Nevertheless, the same issues are in play – serious physical harm versus harm caused by a dangerous ordnance or deadly weapon. So the reasoning is equally applicable herein. In *State v. Coach* (May 5, 2000), Hamilton App. No. C-990349, the First District Court of Appeals analyzed the two alternate theories of felonious and reached the following conclusion:

A charge of felonious assault under R.C. 2903.11(A)(1) alleges that the defendant knowingly caused serious physical harm to another. A charge of felonious assault under R.C. 2903.11(A)(2) alleges that the defendant knowingly caused or attempted to cause physical harm to another by means of a deadly weapon. It is apparent that the commission of felonious assault under subsection (A)(1) will not result in the commission of felonious assault under subsection (A)(2). One may cause serious physical harm to another without a weapon, or one may cause or attempt to cause physical harm to another by means of a deadly weapon, but any resulting harm may not rise to the level of serious physical harm. Either way, the elements of these offenses do not correspond so that the commission of one will result in the commission of the other.

*Coach* at \*3. The court ultimately found that the alternate theories of felonious assault were not allied offenses of similar import.

Other courts, reviewing the alternate theories of felonious assault, have also found that these charges are not allied offenses of similar import. *State v. Collins*, Montgomery App. No. 20287, 2005-Ohio-3875; *State v. Payne*, Hamilton App. No. C-060437, 2007-Ohio-3310; *State v. Reid*, Hamilton App. No. C-050465, 2006-Ohio-6450; *State v. Smith*, 168 Ohio App.3d 141, 2006-Ohio-3720; *State v. Roberts*, Hamilton App. No. C-040262, 2005-Ohio-4050; *State v. Murray*, 156 Ohio App.3d 219, 2004-Ohio-654; *State v. Thomas*, Hamilton App. No. C-010724, 2002-Ohio-7333; *State v. Sheppard* (Oct. 12, 2001), Hamilton App. No. C-000553.

Since the elements of the two theories of aggravated assault, when compared in the abstract, do not correspond to such a degree, the analysis ends there. And Brown's convictions for aggravated assault must stand. A further inquiry into the underlying facts of the case is not warranted. Therefore, the trial court properly entered judgment against Brown for both counts of aggravated assault, even though she only committed one act – stabbing the victim with a knife, resulting in both physical harm caused by a deadly weapon and serious physical harm.

However, the reasoning by the Eighth District is fatally flawed. While it properly concluded that Brown committed one act and faced multiple charges for the solitary act, it refused to acknowledge that it invokes an analysis under R.C. §2941.25. Yet, it still afforded Brown double jeopardy protections. Only once an analysis is properly undertaken, pursuant to R.C. §2941.25, and it is found that two charges correspond to such a degree that the commission of one results in the commission of the other, will a defendant be afforded double jeopardy protections, such that a defendant is cumulatively punished for the same offense. But as the foregoing has demonstrated, Brown's singular act resulted in the commission of two distinct crimes. And the commission of one does not necessarily result in the commission of the other. As such, both of Brown's convictions must stand.

**PROPOSITION OF LAW II: THE TWO COUNTS OF AGGRAVATED ASSAULT SHOULD MERGE.**

Assuming that this Court finds that the two alternate offenses of aggravated assault are allied offenses of similar import, the proper remedy is merger of the offenses, rather than the arbitrary dismissal of one of the counts. The Eighth District erred in dismissing one count, in that the only remedy authorized for cumulative

punishments under R.C. §2941.25 is merger. Equally important, by forcing the trial court to arbitrarily vacate one of the convictions for aggravated assault, it interfered with with the jury's verdict.

The basic tenet of the multiple-count statute provides that a defendant may be indicted, tried and found guilty of multiple counts that are allied offenses of similar import. But the defendant may be sentenced for only one count. This basic principle codifies the judicial doctrine of merger, thereby prohibiting multiple punishments for a single criminal act. *State v. Roberts* (1980), 62 Ohio St.2d 170. R.C. §2941.25 prohibits the "cumulative punishment of a defendant for the same criminal act where his conduct can be construed to constitute two statutory offenses, when in substance and effect, only one offense has been committed." *Roberts* at 172-173. The merger doctrine is also founded on the principle that multiple punishments for a single crime violate the Double Jeopardy Clauses of the United States and Ohio Constitutions. *State v. Fields* (1994), 97 Ohio App.3d 337.

As previously set forth in the first proposition of law, the Eighth District found that only one criminal offense was committed, thus affording Brown double jeopardy protections. "There was only one aggravated assault committed. As such, [Brown's] conviction on both counts of aggravated assault was improper and in violation of double jeopardy safeguards." *Brown* at ¶ 51. By ignoring statutory precedent supporting multiple punishments fro the same offense, it also ignored the remedy afforded when a defendant's double jeopardy guarantees have been violated.

But the proper remedy is merger, since Brown's double jeopardy guarantees have been implicated, rather than dismissal of one count. By merging the offenses,

both convictions still stand, but Brown will only be sentenced for one offense. And by merging the offenses, and sentencing Brown on only one, the jury's verdict still stands.

By dismissing, one count arbitrarily, the Eighth District needlessly modified Brown's conviction and substituted its judgment for that of the trier of fact. There was sufficient evidence supporting both convictions for aggravated assault. By compelling the trial court to arbitrarily vacate one count of aggravated assault, the Eighth District forces the trial court to choose under which theory Brown's actions most closely fall, when clearly, Brown's single, criminal act resulted in two distinct criminal offenses. When there is sufficient evidence supporting each conviction, the trial court cannot arbitrarily vacate one count. In dismissing one count, the Eighth District unnecessarily interfered with the jury's verdict. And, as such, the only remedy is merger.

The State maintains its position that the alternate theories of aggravated assault, for which Brown was convicted, are not allied offenses of similar import. Thus, Brown's convictions both must stand. But if this Court determines that these convictions are allied offenses of similar import, then this case must be remanded for the merger of the two offenses.

**PROPOSITION OF LAW VI: BY VIRTUE OF ARTICLE XV,  
SECTION 11 OF THE OHIO CONSTITUTION, R.C. 2919.25,  
PROHIBITING DOMESTIC VIOLENCE, DOES NOT APPLY TO  
UNMARRIED COHABITANTS WITHOUT CHILDREN.**

The Constitution of the State of Ohio was recently amended so that the "state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage." Section 11, Article XV, Ohio Constitution. Brown argues that

Ohio's domestic violence statute, R.C. §2919.25, violates the state's constitution because it grants a legal status to unmarried persons living as spouses.

However, this Court recently ruled that "[t]he term 'person living as a spouse' as defined in R.C. §2919.25 merely identifies a particular class of persons for the purposes of the domestic-violence statutes. It does not create or recognize a legal relationship that approximates the designs, qualities, or significance of marriage, as prohibited by Section 11, Article XV of the Ohio Constitution. *State v. Carswell*, 114 Ohio St.3d 210, 2007-Ohio-3723 at syllabus. In so ruling, this Court found that the domestic violence statute is not unconstitutional. *Id.* at ¶ 37.

Since this Court found the domestic violence statute constitutional as it relates to unmarried individuals living as spouses, the Sixth Proposition of Law must be decided in favor of the State.

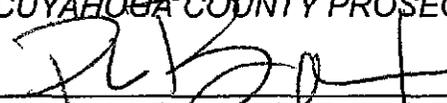
### **CONCLUSION**

The State posits that the Eighth District erred in vacating the finding of guilt and the sentence for one count of aggravated assault. Both convictions, under the alternate theories of aggravated assault must stand, since the convictions are not allied offenses of similar import. However, the Eighth District refused to acknowledge that an allied offenses analysis was implicated. Yet, it ruled that Brown's double jeopardy safeguards had been violated; the Eighth District failed to apply the guiding principles set forth in R.C. 2941.25 and *Rance*, supra. In the alternative, these offenses merge, obviating the dismissal of one of the counts. Finally, Brown's domestic violence conviction stands, based upon this Court's recent decision in *Carswell*, supra. For these reasons, the State of Ohio respectfully asks this Court to reverse the judgment of the Eighth District.

Respectfully submitted,

WILLIAM D. MASON  
CUYAHOGA COUNTY PROSECUTOR

By:

  
PAMELA BOLTON (0071723)  
*Assistant Prosecuting Attorney*  
The Justice Center, 8th Floor  
1200 Ontario Street  
Cleveland, Ohio 44113  
(216) 443-7800

**SERVICE**

A copy of the foregoing MERIT BRIEF OF PLAINTIFF-APPELLANT/CROSS-APPELLEE has been mailed this 17th day of December, 2007, to David King and John T. Martin, Assistant Public Defender, 310 Lakeside Avenue, Suite 200, Cleveland, OH 44113.

  
*Assistant Prosecuting Attorney*

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 87651

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**STATE OF OHIO**

CA 87651

PLAINTIFF-APPELLEE

PAMELA BOLTON  
ASSISTANT COUNTY PROSECUTOR  
8TH FLOOR JUSTICE CENTER  
1200 ONTARIO STREET  
CLEVELAND, OH 44113

vs.

**JAKEENA BROWN**

DEFENDANT-APPELLANT

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**JUDGMENT:  
AFFIRMED IN PART;  
REVERSED AND REMANDED IN PART**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-467287

**BEFORE:** McMonagle, J., Cooney, P.J., and Calabrese, J.

**RELEASED:** November 30, 2006

**JOURNALIZED:** DEC 19 2006

CA06087651

42936808



VOL 0626 00453

**ATTORNEY FOR APPELLEE**

William D. Mason  
Cuyahoga County Prosecutor

BY: Pamela Bolton  
Assistant Prosecuting Attorney  
The Justice Center, 8<sup>th</sup> Floor  
1200 Ontario Street  
Cleveland, OH 44113

**ATTORNEY FOR APPELLANT**

Robert L. Tobik  
Cuyahoga County Public Defender

BY: David M. King  
Assistant Public Defender  
1200 West Third Street, N.W.  
100 Lakeside Place  
Cleveland, OH 44113

**FILED AND JOURNALIZED  
PER APP. R. 22(E)**

**DEC 19 2006**

**GERALD E. FUERST  
CLERK OF THE COURT OF APPEALS  
BY [Signature] DEP.**

**ANNOUNCEMENT OF DECISION  
PER APP. R. 22(B), 22(D) AND 26(A)  
RECEIVED**

**NOV 30 2006**

**GERALD E. FUERST  
CLERK OF THE COURT OF APPEALS  
BY [Signature] DEP.**

CA06087651

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

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CHRISTINE T. MCMONAGLE, J.:

Defendant-appellant, Jakeena Brown, appeals her conviction on two counts of aggravated assault and one count of domestic violence. For the reasons that follow, we affirm in part, and reverse and remand in part.

Appellant was indicted by a Cuyahoga County Grand Jury on two counts of felonious assault, counts one and two of the indictment. Count one charged appellant with knowingly causing serious physical harm to the victim, Kevin Johnson. Count two charged appellant with knowingly causing or attempting to cause physical harm to Johnson by means of a deadly weapon or dangerous ordnance, to-wit: a knife. Both felonious assault charges were second-degree felonies. The third and final count of the indictment charged appellant with domestic violence against Johnson, a misdemeanor of the first degree.

The case proceeded to a jury trial. At the conclusion of the State's case-in-chief, the defense made a Crim.R. 29 motion for acquittal as to all three counts. The motion was denied. Appellant presented evidence on her behalf; she testified, and called her son and the investigating detective, Earl Brown. At the conclusion of her case-in-chief, appellant renewed her Crim.R. 29 motion; the motion was again denied.

The jury found appellant guilty of two counts of fourth-degree aggravated assault, inferior offenses of felonious assault, and domestic violence, as indicted. Appellant was sentenced to two years of community control sanctions.

At trial, Officer David DiMaria ("DiMaria") testified that he and his partner, Officer Richard Rusnak ("Rusnak"), responded to Greenwich Avenue in Cleveland after receiving a dispatch for an assault of a female. DiMaria described seeing the victim, Johnson, flag down the officers as they approached Greenwich Avenue. As the officers got closer to Johnson, DiMaria observed that Johnson was bleeding and holding his side. Rusnak called for medical assistance while DiMaria inquired of Johnson, whom he described as "injured" and "excited," what happened. Johnson told Officer DiMaria that his girlfriend had stabbed him. As Johnson explained to the officer what had happened to him, he pointed up the street to a red Blazer and indicated that his girlfriend was in the vehicle. DiMaria testified that he observed a "one-inch slit" in Johnson's abdomen, and that Johnson had lost a lot of blood.

While the officers were administering assistance to Johnson, the driver of the red Blazer, later identified as appellant, drove to the area where Johnson and the police were. Appellant exited the vehicle and told the officers that she had called them because Johnson had damaged her truck. Both officers described appellant as being angry over the situation. DiMaria testified that

appellant told him that Johnson broke the window to her truck, damaged the bumper and allowed a dog to destroy her temporary license plates. Appellant told the officer that, angry about Johnson's actions, she "cut him." Appellant never told the officer that she accidentally injured Johnson. When questioned as to what she cut him with, appellant told DiMaria that she used a knife. She told DiMaria that the knife was located in the Blazer.

Johnson was transported by ambulance from the scene to the hospital, where he was treated for his wound and admitted overnight for observation and pain control. His medical records were admitted into evidence at trial.

The officers were unable to locate the knife in the Blazer, but found a knife with blood on it lying in the street in the area where the Blazer was originally parked when the officers arrived on the scene. DiMaria described the knife as a steak knife. The knife was admitted into evidence at trial.

The investigation into the incident revealed that appellant and Johnson, girlfriend and boyfriend, were living together at the time of the incident, but experiencing "relationship difficulties." In particular, on the day of the offense, the two had been arguing about Johnson's employment status.

At trial, appellant admitted to fighting with Johnson, but characterized the stabbing as an accident. Appellant testified that earlier in the day, while she and Johnson had been arguing, Johnson angrily removed her temporary license

plates from her Blazer and left the home they shared together. Appellant testified that she received a phone call from her cousin, who resided on Greenwich Avenue, informing her that the temporary plates were at her home. Appellant explained that in order to drive to her cousin's house, she put a set of old license plates on her Blazer. Appellant testified that she used a knife to put the plates on her vehicle, because she did not have a screwdriver. Unbeknownst to appellant, Johnson was at her cousin's house.

When appellant arrived at her cousin's house, she and Johnson resumed arguing. Appellant testified that she reached into her pocket and took the knife out, and that Johnson, upon seeing the knife, "ran up on" her and got stabbed. Appellant explained that she had her eyes closed and was not even aware that Johnson had been stabbed until the police informed her. Appellant testified that after her encounter with Johnson, she drove around the block, summoned someone to call the police, and then parked her vehicle down the street and awaited their arrival. She explained that she was scared for her life and for the safety of her children, who were in the vicinity.

Appellant denied that she told Officer DiMaria that she "cut" Johnson. She testified that the police repeatedly asked her how deep she had cut Johnson, and she repeatedly told them that she did not know what had happened.

Similarly, appellant denied telling the police that they could find the knife in her vehicle.

After finishing their investigation at the scene, the police went to the hospital to obtain a formal statement from Johnson. Johnson admitted he fought with appellant and damaged her car and expressed remorse for his actions. He maintained, however, that appellant had stabbed him.

In her first assignment of error, appellant contends that the trial court erred by allowing inadmissible testimonial statements of Johnson to be admitted through DiMaria's testimony. Specifically, appellant contends that the statements violated the United States Supreme Court's holding in *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354.

Initially, we note that defense counsel did not object to the officer's testimony about Johnson's statements and, thus, pursuant to Crim.R. 52, has waived all but plain error. Plain error is an error or defect affecting a substantial right. Crim R. 52(B). As will be explained below, the trial court did not err by allowing the officer's testimony as to Johnson's statements.

The Confrontation Clause of the Sixth Amendment provides: "[i]n all criminal prosecutions, the accused shall enjoy the right \*\*\* to be confronted with the witnesses against him." In *Crawford*, supra, the United States Supreme Court held that "testimonial" hearsay statements may only be admitted where

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the witness is unavailable and where there was a prior opportunity to cross-examine the witness. *Id.* at 68-69. Although the Court did not set forth a comprehensive definition of “testimonial,” it did provide examples of the types of statements that belong to the “core class” of testimonial statements: “extrajudicial statements \*\*\* contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions[;]” “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statements would be available for use at a later trial[;]” and “statements taken by police officers in the course of interrogations.” *Id.* at 51-52. (Citations omitted.)

The Ninth District Court of Appeals recently addressed the distinction between testimonial and nontestimonial statements in *Akron v. Hutton*, Summit App. No. C.A. 22424, 2005-Ohio-3300. In that case, the trial court allowed the admission of statements made to the police by the defendant’s wife, the victim in the case who was unavailable for trial. The court, in distinguishing *Crawford*, relied on *Fowler v. Indiana* (2004), 809 N.E.2d 960, wherein an Indiana court of appeals held that nontestimonial out-of-court statements may be admitted without the defendant having an opportunity to cross-examine the witness if the statements fall within a hearsay exception, such as an excited utterance. In *Fowler*, the police questioned the victim of a domestic violence incident at the

scene, but the victim refused to testify at trial; the victim's statements were admitted at trial through an officer's testimony. The *Fowler* court held that the victim's statements were nontestimonial excited utterances, subject to exception from the hearsay rule.

On appeal, the Supreme Court of Indiana agreed with the court of appeals that responses to initial inquiries at a crime scene are typically not testimonial. *Hammon v. Indiana* (2005), 829 N.E.2d 444, 453. The court, however, disagreed with the court of appeals' holding that a statement that qualifies as an excited utterance is necessarily nontestimonial. *Id.* In disagreeing with the court of appeals on this issue, the Supreme Court of Indiana held that whether a statement from a declarant to a police officer is testimonial depends upon the intent of the declarant in making the statement and the purpose for which the police officer elicited the statement.—*Id.* at 457. If the declarant is making a statement to the police with the intent that his or her statement will be used against the defendant at trial, the statement is testimonial. Likewise, if the police officer elicits the statement in order to obtain evidence in anticipation of a potential criminal prosecution, the statement is testimonial. *Id.*

On appeal, the United States Supreme Court held as follows:

"Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary

purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis v. Washington* (2006), 126 S.Ct. 2266, 2273-2274.

Here, Johnson's on-the-scene statement to DiMaria and the officer's questions to Johnson were to meet an ongoing emergency. The initial call to which the police were responding was for an assault on a female. Upon approaching the area to which they were dispatched, however, the police officers were flagged down by Johnson. The officers immediately noticed the amount of blood on Johnson's shirt and went to his aid. The officer's questions, and Johnson's responses thereto, indicated that the primary purpose of the interrogation was to enable the police to assist Johnson in an ongoing emergency, not to establish or prove events potentially relevant to criminal prosecution. Therefore, these statements were nontestimonial and appropriately admitted.

The statement taken from Johnson at the hospital, however, was testimonial and should not have been admitted. That notwithstanding, we find its admission harmless; it was not inconsistent with appellant's testimony that she and Johnson had fought, Johnson had damaged her vehicle, and she had

stabbed Johnson. Appellant maintained that the stabbing was accidental. There was no testimony of Johnson's opinion of whether appellant accidentally or purposefully stabbed him.

Accordingly, appellant's first assignment of error is overruled.

In her second, third and fourth assignments of error, appellant challenges the sufficiency of the evidence. A Crim.R. 29 motion challenges the legal sufficiency of the evidence. When a defendant challenges the sufficiency of the evidence, he or she is arguing that the State presented inadequate evidence on each element of the offense to sustain the verdict as a matter of law. *State v. Hawn* (2000), 138 Ohio App.3d 449, 471, 741 N.E.2d 594.

"An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant 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." *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, at paragraph two of the syllabus.

In her second assignment of error, appellant contends that there was insufficient evidence to support a finding that Johnson suffered serious physical

harm. In her third assignment of error, appellant contends that there was insufficient evidence that she possessed a deadly weapon.

R.C. 2903.12, governing aggravated assault, provides as follows:

“(A) No person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, shall knowingly:

“(1) Cause serious physical harm to another or to another's unborn;

“(2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance, as defined in section 2923.11 of the Revised Code.”

R.C. 2901.01(5) defines serious physical harm to persons as any of the following:

“(a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;

“(b) Any physical harm that carries a substantial risk of death;

“(c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;

“(d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement;

“(e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain.”

Appellant argues that Johnson’s wound did not constitute serious physical harm because, aside from the officers seeing blood and a one-inch slit, “no other description of the harm caused [Johnson] was given.” Appellant also argues that Johnson’s medical records, which were admitted into evidence, “do very little to shed light on the severity of the injury[,]” and “[t]hus, a reasonable person would not find beyond a reasonable doubt that the injury was ‘of such gravity as would normally require hospitalization.’” We disagree.

The officers observed Johnson bleeding profusely and immediately acted to obtain medical treatment for him. Officer DiMaria described the wound as an one-inch slit in Johnson’s stomach. Further, Johnson *was* hospitalized for his injury. While hospitalized, Johnson’s wound was treated and observed.

This court has held that “[g]enerally, a trial court does not err in finding serious physical harm where the evidence demonstrates the victim sustained injuries necessitating medical treatment.” *State v. Scott*, Cuyahoga App. No. 81235, 2003-Ohio-5374, quoting *State v. Davis*, Cuyahoga App. No. 81170, 2002-Ohio-7068.

We find that there was sufficient evidence in this case that Johnson's injury constituted serious physical harm. Appellant's second assignment of error is overruled.

R.C. 2923.11(A) defines a deadly weapon as follows: "any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon." The Committee Comment to R.C. 2923.11(A) specifically mentions a knife as an example of a deadly weapon.

Appellant's injuries were caused by a steak knife. Ohio courts, including this court, have held that a steak knife can constitute a deadly weapon. See, for example, *State v. Burrows* (Feb. 11, 1988), Cuyahoga App. No. 54153; *In re J.R.*, Medina App. No. 04CA0066, 2005-Ohio-4090; *State v. Knecht* (Dec. 16, 1983), Portage App. No. 1306.

Accordingly, appellant's third assignment of error is overruled.

In her fourth assignment of error, appellant challenges the sufficiency of the evidence as it relates to the domestic violence charge. In particular, appellant argues that the domestic violence statute, contained in R.C. 2919.25, violates the State's Constitution because it grants a legal status to unmarried persons living as spouses. This issue has already been decided by this court.

The issue of the constitutionality of R.C. 2919.25 came about as a result of the November 2004 approval of the Ohio constitutional amendment known as Issue 1. Issue 1 amended the Ohio Constitution by defining marriage as follows:

“Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.” Section 11, Article XV, Ohio Constitution.

In *State v. Burk*, 164 Ohio App.3d 740, 2005-Ohio-6727, 843 N.E.2d 1254, this court found that Ohio’s domestic violence statute is neither incompatible with, nor unconstitutional in light of, Issue 1. See, also, *Cleveland v. Voies*, Cuyahoga App. No. 86317, 2006-Ohio-815; *State v. Douglas*, Cuyahoga App. Nos. 86567 & 86568, 2006-Ohio-2343. Further, the Fifth, Seventh, Ninth and Twelfth Appellate Districts have also addressed this issue and found R.C. 2919.25 constitutional in light of Issue 1. See *State v. Newell*, Stark App. No. 2004CA00264, 2005-Ohio-2848; *State v. Rexroad*, Columbiana App. Nos. 05 CO 36, 05 CO 52, 2005-Ohio-6790; *State v. Nixon*, 165 Ohio App. 3d 178, 2006-Ohio-72, 845 N.E.2d 544; *State v. Carswell*, Warren App. No. CA2005-04-047, 2005-Ohio-6547. But, see, *State v. Ward*, Greene App. No. 2005-CA-75, 2006-Ohio-1407, wherein the Second Appellate District reached the opposite conclusion.

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The issue is presently pending in the Supreme Court of Ohio, and unless and until this court is reversed by the Supreme Court, we follow our precedent.

Accordingly, appellant's fourth assignment of error is overruled.

In her fifth assignment of error, appellant contends that her two convictions for aggravated assault are allied offenses of similar import and should have been merged into a single count. As there was no objection to the convictions at the trial court level, appellant has waived all but plain error. Pursuant to Crim.R. 52(B), as previously mentioned, plain error is an error or defect affecting a substantial right. See, also, *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804,

Although both appellant and the State have briefed the issue of the conviction on two counts of aggravated assault as implicating an analysis of whether the offenses are allied offenses, we find that such an analysis is not implicated. An allied offenses analysis is implicated only in a situation where the conduct by a defendant could be construed to constitute two or more offenses. See R.C. 2941.25.

Here, however, appellant committed only one act of aggravated assault. The indictment contained two separate counts of aggravated assault, each alleging a different means or method, but both referring to a single act. Count one charged appellant with knowingly causing serious physical harm to Johnson,

and count two charged appellant with knowingly causing or attempting to cause physical harm to Johnson by means of a deadly weapon or ordnance. There was only one aggravated assault committed. As such, appellant's conviction on both counts of aggravated assault was improper and in violation of double jeopardy safeguards. Accordingly, we reverse and remand, and direct the trial court to vacate both the finding of guilt and the sentence in one of the aggravated assault convictions.

Appellant's fifth assignment of error is sustained.

In her sixth assignment of error, appellant argues that she was denied the effective assistance of counsel.

In order to demonstrate a claim of ineffective assistance of counsel, appellant must show that her counsel deprived her of a fair trial. In particular, appellant must show that: (1) defense counsel's performance at trial was seriously flawed and deficient; and (2) the result of the trial would have been different if defense counsel had provided proper representation at trial. *Strickland v. Washington* (1984), 466 U.S. 668; *State v. Brooks* (1986), 25 Ohio St.3d 144.

A presumption that a properly licensed attorney executes his or her duty in an ethical and competent manner must be applied to any evaluation of a claim of ineffective assistance of counsel. *State v. Smith* (1985), 17 Ohio St. 3d 98;

*Vaughn v. Maxwell* (1965), 2 Ohio St. 2d 299. In addition, this court must accord deference to defense counsel's strategic choices during trial and cannot examine the strategic choices of counsel through hindsight. *Strickland*, supra at 689.

As her first ground for her claim of ineffective assistance of counsel, appellant cites the fact that her counsel did not object to Johnson's on-the-scene statements to the police.<sup>1</sup> As we already discussed, the statements Johnson made to the police were made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation was to enable police assistance to meet an ongoing emergency and, thus, were not testimonial. The statements were properly admitted, and defense counsel was not ineffective by not objecting to them.

Appellant's next claim of ineffective assistance of counsel is that her counsel failed to object to the convictions on the two counts of aggravated assault as being allied offenses. Because we are directing the trial court to vacate one of the aggravated assault convictions, this contention is moot.

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<sup>1</sup>In response to this contention, the State argues, inconsistently with its response to appellant's first assignment of error, that counsel did object to the introduction of Johnson's statements. A review of the transcript, however, reveals that Officer DiMaria primarily testified about Johnson's statements, and no objection by defense counsel was rendered. The two objections cited by the State were during the investigating detective's testimony and Officer Rusnak's testimony.

Appellant next contends that her counsel was ineffective by not challenging the sufficiency of the evidence relative to the domestic violence charge.<sup>2</sup> Again, as already mentioned, this court has ruled on the issue of the constitutionality of Ohio's domestic violence statute, and found it to be constitutional. Counsel, therefore, was not ineffective by not challenging the statute.

As her final claim of ineffective assistance of counsel, appellant cites her counsel's failure to object to a remark made by the assistant prosecuting attorney in her opening statement. Specifically, the assistant prosecuting attorney remarked that Johnson "doesn't want to be here[,]" and the jury would hear his statements through the police. As previously discussed, Officer DiMaria's testimony about Johnson's on-the-scene statements was permissible; his unobjected to testimony about Johnson's statements at the hospital did not constitute plain error. Moreover, the assistant prosecuting attorney's statements would have been prejudicial, if at all, to the State, which had to prosecute its case without its victim. Appellant's contention of ineffective assistance based upon that remark is therefore without merit.

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<sup>2</sup>Counsel did make a general Crim.R. 29 motion as to all the counts of the indictment and, thus, preserved the issue for appeal. See *State v. Plough* (June 8, 2001), Portage App. No. 99-P-0029.

Based upon the above discussion, appellant's sixth assignment of error is overruled.

In her seventh and final assignment of error, appellant argues that her convictions were against the manifest weight of the evidence. We disagree.

*State v. Martin* (1983), 20 Ohio App. 3d 172, 485 N.E.2d 717, set forth the following test to determine whether a conviction is against the manifest weight:

"The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of 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 \*\*\*." *Id.* at 175.

The Supreme Court of Ohio recognized the test in *State v. Thompkins* (1997), 78 Ohio St. 3d 380, 678 N.E.2d 541, wherein it stated:

"\* \* \* Weight of the evidence concerns 'the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue which is to be established before them.'" *Id.* at 387, quoting Black's Law Dictionary (6 Ed.1990) at 1594.

In this assignment of error, appellant maintains that the State failed to prove that she acted "knowingly," an element required for a conviction on all three counts. We disagree.

DiMaria described seeing Johnson flag down the police vehicle as the police responded to a call of an assault of a female. DiMaria observed that Johnson was bleeding and holding his side. Rusnak called for assistance while DiMaria inquired of Johnson as to his apparent injury. Johnson, who Officer DiMaria described as "injured" and "excited," stated that his girlfriend had stabbed him. As Johnson explained to DiMaria what had happened to him, he pointed up the street to a red Blazer and indicated that his girlfriend, appellant, was in the vehicle. DiMaria testified that he observed a "one-inch slit" on Johnson's abdomen, and that Johnson had lost a lot of blood.

While the officers were administering assistance to Johnson, appellant drove her red Blazer to the area where Johnson and the police were. Appellant exited the vehicle, and angrily told the officers that she had called them because Johnson had damaged her truck. DiMaria testified that appellant told him that Johnson had broken the window to her truck, damaged the bumper and allowed a dog to destroy her temporary license plates. Appellant told the officer that, angry about Johnson's actions, she "cut" him. Appellant never told the police that she accidentally injured Johnson. When questioned as to what she cut him

with, appellant told DiMaria that she used a knife and that it was located in her Blazer. Although the knife was not recovered from the Blazer, it was found in the area where the Blazer was parked when the officers initially arrived on the scene.

Appellant's recount of the events differs, however. According to appellant, she had the knife because she had used it to put license plates on her vehicle, because she did not have a screwdriver. She claimed that when she received the call from her cousin informing her that the plates were at her house, she did not know that Johnson was at her cousin's house. Nonetheless, appellant admitted that upon arriving at her cousin's house, she and Johnson resumed arguing. According to appellant, she reached into her pocket and took out the knife, and Johnson, upon seeing the knife, "ran up on" her and got stabbed. Appellant testified that as Johnson "ran up" on her, she had her eyes closed and was not even aware that he had been stabbed until the police informed her.

Appellant denied that she told the police that she "cut" Johnson. She testified that the police repeatedly asked her how deep she had cut Johnson, and she repeatedly told them that she did not know what had happened. Similarly, appellant denied telling the police that they could find the knife in her vehicle.

Appellant essentially argues that her recitation of the events is more credible than the officer's testimony. Deference, however, must be given to the

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determinations of the finders of fact, as they are in the best position to observe the witnesses and their demeanor. *State v. Antill* (1964), 176 Ohio St. 61. To that end, only where the finders of fact "clearly lost [their] way and created such a manifest miscarriage of justice" will we reverse the conviction and grant a new trial. *Thompkins*, supra at 387.

Upon review of the record, we cannot find that the jury clearly lost its way so as to create a manifest miscarriage of justice. We therefore overrule appellant's seventh assignment of error.

Judgment affirmed in part, reversed in part, and remanded to the lower court for further proceedings consistent with this opinion.

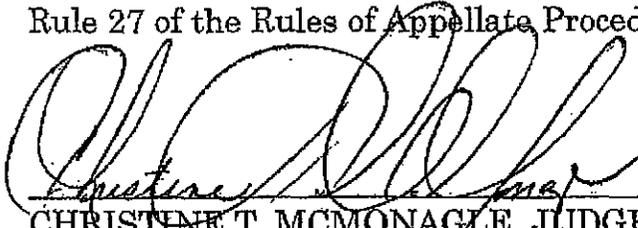
It is ordered that appellee and appellant equally share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to

Rule 27 of the Rules of Appellate Procedure.



CHRISTINE T. MCMONAGLE, JUDGE

COLLEEN CONWAY COONEY, P.J., and  
ANTHONY O. CALABRESE, JR., J., CONCUR

NOTICE MAILED TO COUNSEL  
FOR ALL PARTIES-COSTS TAXED

VOL 0626 000476

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NO. **07-0184**

IN THE SUPREME COURT OF OHIO

APPEAL FROM  
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO  
NO. 87651

STATE OF OHIO,

Plaintiff-Appellant

-vs-

JAKEENA BROWN,

Defendant-Appellee

NOTICE OF APPEAL TO THE SUPREME COURT OF OHIO

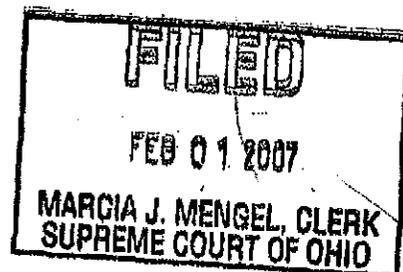
Counsel for Plaintiff-Appellant

**WILLIAM D. MASON**  
Cuyahoga County Prosecutor

**PAMELA BOLTON (0071723)**  
Assistant Prosecuting Attorney  
The Justice Center  
1200 Ontario Street  
Cleveland, Ohio 44113  
(216) 443-7800

Counsel for Defendant-Appellee

**DAVID KING**  
1200 West 3<sup>rd</sup> Street  
Cleveland, Ohio 44113



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NO.

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IN THE SUPREME COURT OF OHIO

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APPEAL FROM  
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO  
NO. 87651

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STATE OF OHIO,  
Plaintiff-Appellant

-vs-

JAKEENA BROWN,  
Defendant-Appellee

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NOTICE OF APPEAL TO THE SUPREME COURT OF OHIO

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Now comes the State of Ohio and hereby gives Notice of Appeal to the Supreme Court of Ohio from a judgment and final order of the Court of Appeals for Cuyahoga County, Ohio, Eighth Judicial District, journalized December 19, 2006, which affirmed in part, reversed and remanded in part, the decision of the trial court.

Said cause did not originate in the Court of Appeals and involves a felony.

Respectfully submitted

WILLIAM D. MASON  
CUYAHOGA COUNTY PROSECUTOR

BY:

  
PAMELA BOLTON (0671723)  
Assistant Prosecuting Attorney  
Justice Center, 9th Floor  
1200 Ontario Street  
Cleveland, Ohio 44113  
(216) 443-7800

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**SERVICE**

A copy of the foregoing Notice of Appeal has been mailed this 31<sup>st</sup> day of January 2007, to David King, 1200 West 3<sup>rd</sup> Street, Cleveland, Ohio 44113.

  
Assistant Prosecuting Attorney

*Pam  
for your review.*

CR 467287

FILED

OCT 04 2007

CLERK OF COURT  
SUPREME COURT OF OHIO

# The Supreme Court of Ohio

State of Ohio

*Appellant  
cross appellee*

Case No. 2007-0184

v.

ENTRY

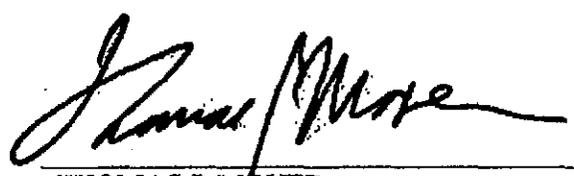
Jakeena Brown

Upon consideration of the jurisdictional memoranda filed in this case, the Court accepted the appeal on Propositions of Law Nos. I and II, and the cross-appeal on Proposition of Law No. VI, and held the cause for a decision in Supreme Court Case No. 2006-0151, *State v. Carswell*.

It is ordered by the Court, sua sponte, that briefing shall proceed in the appeal on Propositions of Law Nos. I and II.

The Clerk shall issue an order for the transmittal of the record from the Court of Appeals for Cuyahoga County, and the parties shall brief this case in accordance with the Rules of Practice of the Supreme Court of Ohio.

(Cuyahoga County Court of Appeals; No. 87651)



THOMAS J. MOYER  
Chief Justice

*28*