

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :
 : Case No. 2007-1812
 :
 Plaintiff-Appellee, :
 :
 v. : On Appeal from the Hamilton
 : County Court of Appeals
 : First Appellate District
 :
 CORNELIUS HARRIS, :
 :
 : Court of Appeals
 Defendant-Appellant. : Case Nos. C-060587

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT CORNELIUS HARRIS**

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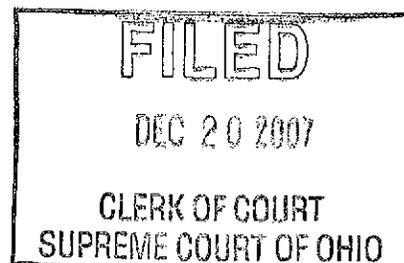


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EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTION QUESTION

Cornelius Harris attempted to rob three men at gunpoint. When a struggle ensued between Harris and two of the men, Harris dropped the gun. His partner picked up the weapon and fired. Two of the three men were struck by bullets, but both survived.

A jury convicted Harris of all counts and specifications charged in his indictment: three counts of Aggravated Robbery, three counts of Robbery, and five counts of Felonious Assault (Harris was charged with two counts of Felonious Assault for each shooting victim). Firearm specifications accompanied each count. The trial court then sentenced Harris to serve the maximum sentence for each offense consecutively, except for the gun specifications which were merged into one sentence, for a sentence totaling just under 100 years.

Harris' constitutional and statutory rights were violated when he was improperly convicted of allied offenses of similar import. Harris acted with a single animus that violated multiple statutory sections. He could not have committed aggravated robbery without committing robbery and he could not have committed five felonious assaults when three people were fired upon. Accordingly, Harris was improperly convicted and sentenced, in violation of his right to due process, his right to be free from double jeopardy, and his right to the protections afforded by R.C. 2941.25.

This Court is currently considering the application of R.C. 2941.25 in a case where the defendant both trafficked and possessed a controlled substance. *State v. Cabrales*, Case No. 2007-651. *Cabrales* will determine whether a defendant should face multiple punishments when a single act with a single animus violates two statutes. More particularly, *Cabrales* will decide whether two factually identical offenses are allied offenses of similar import even if the elements

of offenses differ slightly in the abstract. See, *State v. Rance*, 85 Ohio St.3d 632, 638, 1999-Ohio-291.

Accordingly, Harris requests that this Court accept jurisdiction over his appeal and hold his case in abeyance until this Court decides the merits of *Cabrales*.

A second reason to accept this case also relates to Harris' sentence. This case presents an ex post facto claim identical to that which this Court is considering on the merits in *State v. Elmore*, Case No. 2007-0475. This Court should accept this case and hold it for the decision in *Elmore*.

STATEMENT OF THE CASE AND THE FACTS

On April 30, 2005, Evander Kelley and another man, later identified as Cornelius Harris, went to an apartment on Clifton Avenue in Cincinnati. Kelley was a friend of the apartment's occupant, James Lawrence. Before Kelley and Harris arrived, Lawrence had been playing dominoes and smoking marijuana with two other men. A few minutes after Lawrence let Kelley and Harris into his apartment, Harris pulled a gun and ordered Lawrence and his two friends to lay down on a bed. Harris then began gathering money and other property. Lawrence's two friends rushed Harris, and during the ensuing struggle, Harris dropped the gun. Kelley picked up the gun and began firing, striking two of the three men. Harris and Kelley then fled.

Harris was not immediately identified by the victims. Eventually, however, the police arrested Harris. A Hamilton County grand jury returned an indictment on October 13, 2005, alleging that Harris committed three counts of aggravated robbery with accompanying firearm specifications, three counts of robbery with firearm specifications and five counts of felonious with firearm specifications.

Due to the absence of physical evidence linking Harris to the offenses, the primary issue at trial revolved around the witnesses' identification of Harris. None of the three victims' description of Harris included a large tattoo that covered the front of Harris' neck. While two of the three victims eventually picked Harris out of a photospread, the third could not choose between Harris' photograph and the photograph of another individual.

Nevertheless, a jury found Harris guilty of all counts and specifications charged in the indictment. On June 14, 2006, the trial court sentenced Harris to serve to the maximum terms on each offense and ran each sentence consecutive to the others. Additionally, the trial court ordered that the sentences imposed were to be serve consecutively to the eighteen-month term imposed in another case.

Harris filed a notice of appeal on July 12, 2006. The Hamilton County Court of Appeals affirmed the trial court's judgment by entry on August 15, 2007. Harris moved this Court for a delayed appeal. The Court granted Harris' motion on November 21, 2007.

ARGUMENT

Proposition of Law:

Aggravated Robbery and Robbery are allied offenses of similar import, and a defendant cannot be convicted of both offenses if the charges originate out of the same conduct. R.C. 2941.25(A), (B). A defendant also may not be convicted of two counts of Felonious Assault, charged pursuant to R.C. 2903.11(A)(1) and R.C. 2903.11(A)(2), if both charges arise from the same conduct towards the same victim.

Harris was convicted of three counts of aggravated robbery in violation of R.C. 2911.01(A)(1). That 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." He was also convicted of two counts of robbery in violation of R.C. 2911.02(A)(2), which provides that "[n]o person, in attempting or committing a theft offense * * * shall * * * [i]nfllict, attempt to infllict, or threaten to infllict physical harm on another."

Additionally, Harris was charged with five counts of felonious assault. Three of the felonious assault counts charged that Harris caused or attempted to cause physical harm by means of a firearm (one count for each of the three victims) in violation of R.C. 2903.11(A)(2). Two counts charged that Harris caused serious physical harm to the two men shot by Kelley, in violation of R.C. 2903.11(A)(1).

Where the same conduct can be construed to constitute two or more allied offenses of similar import, the defendant can be convicted of only one. R.C. 2941.25(A). However, if the defendant's conduct results in two or more offenses of the same or similar kind committed separately or arising out of a separate animus, the defendant may be convicted of both. R.C. 2941.25(B). Thus, the statute demands that a trial court merge allied offenses of similar import. By doing so, the statute preserves a criminal defendant's right to be free from double jeopardy.

Brown v. Ohio (1977), 432 U.S. 161, 165; *North Carolina v. Pearce* (1969), 395 U.S. 711, 717; Fifth Amendment to the United States Constitution.

This Court has set forth a two-part test for establishing compliance with R.C. 2941.25. *State v. Jones* (1997), 78 Ohio St.3d 12, 13; *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117; see, also, *Rance*, at 638. In order to determine whether two separate charges are allied offenses under R.C. 2941.25(A), the statutory elements of the crimes are compared in the abstract. *Rance*, paragraph one of the syllabus. If the elements of the charges correspond to such a degree that the commission of one crime results in the commission of the other, the crimes are allied offenses of similar import. *Id.* at 636, quoting *Jones*, at 13.

R.C. 2941.25(B) requires that the crimes be committed separately or with a separate animus as to each. *Rance*, at 639, citing *Jones*, at 14. 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, 296, 2004-Ohio-6553. Accordingly, a defendant is entitled to the protection of R.C. 2941.25(A) when he shows that the prosecution has relied on the same conduct to support both offenses charged. *Id.* at ¶17, citing *State v. Logan* (1979), 60 Ohio St.2d 126, 128. In order to make this determination, a court must analyze the particular facts of each case before it, including the conduct of the defendant. *Rance*, at 639; see, also, *State v. Nichols* (1993), 66 Ohio St.3d 431, 435, at ¶19.

In Harris' case, the aggravated robbery offenses were committed during one continuous course of conduct and with the same animus as the robbery offenses. The same conduct that occurred during the aggravated robberies also served as the basis for the robbery charges. Additionally, the dual felonious assault charges based upon the shooting of two of the three

victims arose from the same conduct. Thus, the two felonious assault charges for each victim were allied offenses of similar import.

The State relied on the same conduct to charge and prosecute Harris for these offenses. Thus, pursuant to R.C. 2941.25(A) as applied to the facts of Harris' case, Harris could not be convicted of all of the offenses charged in his indictment. *Cooper*, supra. Nonetheless, the Court of Appeals disposed Harris' allied offense error, without analysis, in one sentence: "This assignment falls on the authority of *State v. Rance* and *State v. Smith* and therefore is overruled." August 15, 2007 Judgment Entry, CA C-060587 at *4 (footnote citations omitted).

As there appears to be a conflict amongst Ohio's district courts on how to apply 2945.25 that will be resolved by *Cabrales*, Harris respectfully asks this Court to accept his case and hold his case in abeyance until this Court decides the merits of *Cabrales*.

PROPOSITION OF LAW II

A defendant is deprived the effective assistance of trial counsel when counsel fails to object to prejudicial hearsay and fails to effectively confront the witnesses against the defendant. Sixth and Fourteenth Amendments to the United States Constitution, and Section 10, Article I of the Ohio Constitution.

To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance caused prejudice. *Strickland v. Washington* (1984), 466 U.S. 668; *State v. Bradley* (1989), 42 Ohio St.3d 136. Prejudice is shown when there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

Trial counsel repeatedly failed to object to hearsay statements made by the three victims and the co-defendant to the investigating detective. These statements included various

descriptions of the perpetrator as well as the co-defendant's statements regarding Harris' street nickname.

Trial counsel was also ineffective in his cross examinations of all the victims and the detective. The victims' description of the perpetrator to the police and during a suppression hearing differed significantly from their trial testimony, yet counsel failed to use the sworn testimony to impeach the victims' trial testimony.

Because the police did not have physical or forensic evidence linking Harris to the robberies, the State's case hinged upon the witnesses' identification of Harris. Trial counsel's failure to effectively cross-examine the witnesses or object to improper hearsay prejudiced the outcome of Harris' case. Accordingly, because Harris' case involves the constitutional right to effective assistance of counsel, this Court should accept Harris' case.

PROPOSITION OF LAW III: A defendant may not be resentenced pursuant to a sentencing scheme in which the presumptive minimum sentence has been eliminated subsequent to the commission of the underlying crime.

On February 27, 2006, this Court found portions of R.C. 2929.14 and 2929.19 to be unconstitutional. *Foster* at paragraphs one, three, and five of the syllabus. In order to remedy the constitutional violations, the Court severed the unconstitutional portions of the statutes. *Id.* at paragraphs two, four, and six of the syllabus. Ohio Revised Code Sections 2929.14(B), 2929.14(C), and 2929.14(E)(4) were among the sections that were declared unconstitutional and were severed. *Id.* at ¶¶61, 64, and 67, respectively.

Revised Code Section 2929.14(B) previously stated that a minimum sentence was to be imposed upon the defendant unless the trial court found that the defendant previously served a prison term or that “the shortest prison term w[ould] demean the seriousness of the offender's conduct or w[ould] not adequately protect the public from future crime by the offender or

others.” With some exceptions not relevant to this case, a maximum sentence was permitted to be imposed only when the trial court found that the defendant committed the worst form of the offense, or that he or she posed the greatest likelihood of committing future crimes. R.C. 2929.14(C). Additionally, before *Foster* was decided, consecutive sentences could be imposed on defendants only in accordance with the limitations outlined in R.C. 2929.14(E)(4).

When the offenses giving rise to this case occurred, the factual findings mandated by R.C. 2929.14(B), 2929.14(C), and 2929.14(E)(4) had to be made at a sentencing hearing and in the journal entry of conviction. R.C. 2929.14; R.C. 2929.19; *State v. Edmonson*, 86 Ohio St.3d 324, 1999-Ohio-110; *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165. The trial court was required to sentence Harris under the Senate Bill 2 provisions that were in effect at the time of his purported crimes. Accordingly, a sentence that included non-minimum, maximum, or consecutive prison terms, but omitted the findings required by R.C. 2929.14(B), 2929.14(C), and 2929.14(E)(4), violated the Ex Post Facto and Due Process Clauses of the United States Constitution.

Due process prohibits the retroactive application of any judicial construction of a criminal statute that is unexpected and indefensible by reference to the law which has been expressed prior to the conduct in issue. *Bouie v. Columbia* (1964), 378 U.S. 347, 354. As this Court has recognized, “an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law * * *,” and thus violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *State v. Garner* (1995), 74 Ohio St.3d 49, 57, quoting *Bouie v. Columbia*, 378 U.S. at 353 (internal citations omitted).

Accordingly, although the constitutional prohibition against ex post facto law is applicable only to legislative enactments, judicial enlargement of a statute implicates the same

concerns expressed by the Ex Post Facto Clause. *State v. Garner*, 74 Ohio St.3d at 57. The Clause provides simply that “no State shall . . . pass any . . . ex post facto Law.” Art. I, §10, United States Constitution. The scope of the Ex Post Facto Clause’s protection includes “[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.” *Calder v. Bull* (1798), 3 U.S. 386, 390 (seriatim opinion of Chase, J.).

- A. When applied retroactively, the remedy that this Court adopted in *State v. Foster* operates as an unforeseeable judicial enlargement of Ohio’s statutes.

As illustrated by United States Supreme Court precedent, the retroactive application of the remedy that this Court mandated in *Foster* violates due process. An analogous situation occurred in *Miller v. Florida* (1987), 482 U.S. 423. In *Miller*, the United States Supreme Court vacated a defendant’s sentence based on the same basic constitutional concerns that invalidate the remedy put forth in *Foster*. *Id.* at 432. The Court determined that the Ex Post Facto and Due Process Clauses were violated when a trial court applied Florida’s revised sentencing guidelines to a defendant whose crimes occurred before the revisions took effect. *Id.*

This Court’s severance of the unconstitutional statutes operates retrospectively and disadvantages Harris. The sentencing statutes in effect when Harris’ offenses occurred mandated minimum, concurrent sentences unless a judge made the findings required by statute. R.C. 2929.14(A)-(E). By severing the statute, this Court allowed Harris to be sentenced to non-minimum, maximum, and consecutive terms without any of the findings required under R.C. 2929.14(B), 2929.14(C), and 2929.14(E)(4).

Eliminating the presumptive sentencing levels contained within the severed statutes and the judicial factfinding that attended the imposition of sentences exceeding the presumptive sentencing range has effectively foreclosed appellate review. In *Miller*, the Supreme Court

found that the elimination of appellate review was a second reason to find that the defendant had been “substantially disadvantaged” by the retrospective application of the revised guidelines to his crime. *Miller v. Florida*, 482 U.S. at 433.

Recently, the United States Supreme Court held that a state court cannot apply the *Booker* severance to state sentencing statutes in a manner similar to that applied to Ohio’s statutes. In *Cunningham v. California* (2007), ___ U.S. ___, 127 S.Ct. 856, 166 L.Ed. 2d. 856, the Court found that California’s application of the *Booker* severance remedy to the California sentencing findings was unconstitutional. California’s attempt to compare its sentencing scheme with *Booker* was “unavailing,” for the same reasons that Harris argues that Ohio’s *Booker* application is unavailing. *Cunningham*, 127 S.Ct. at 870.

The *Foster* remedy gives sentencing courts unbridled discretion. The *Foster* decision left R.C. 2929.11 and 2929.12 intact to ensure reasonableness and to provide guidance to the sentencing court, *Foster*, at ¶98, but as *Cunningham* demonstrates, that is not enough.

Additionally, the remedy that was adopted by this Court in *Foster* was unexpected. On the date that the alleged offenses occurred, Harris could not have foreseen that this Court would replace the portions of Senate Bill 2 that gave a trial court “guided discretion” with unfettered, unreviewable discretion. *Foster* at ¶89. Even after the United States Supreme Court issued its decision in *Blakely v. Washington* (2004), 542 U.S. 296, Ohio defendants could not have foreseen severance. See *State ex rel. Mason v. Griffin*, 104 Ohio St.3d 279, 2004-Ohio-6384, at ¶17 (prior to issuing the *Foster* decision, this Court held that if the sentencing statutes were ultimately found to be unconstitutional, a trial court “should apply the pertinent sentencing statutes without any enhancement provisions found to be unconstitutional”).

- B.** The remedy that was adopted by this Court in *State v. Foster* is not analogous to the United States Supreme Court's resolution in *United States v. Booker* (2005), 543 U.S. 220.

Although severance was constitutional in *United States v. Booker* (2005), 543 U.S. 220, the variances between the amended federal and state statutes demonstrate that severance as applied to the Ohio Revised Code was unconstitutional. In *Booker*, only a limited portion of the federal sentencing statute was severed, and the significant parts of the statute designed to effect Congressional intent were maintained. As *Foster* notes, the Court severed the subsection that “require[d] sentencing courts to impose a sentence within the applicable Guideline range...and the provision that set forth standards of review on appeal.” *Foster* at n. 97, quoting *United States v. Booker*, 543 U.S. at 259. But *Foster* failed to recognize that the majority of the federal sentencing statute was left intact in order to insure that the intent of the statute was preserved. *United States v. Booker*, 543 U.S. at 259-261.

The *Booker* majority explained that even without the mandatory provision, sentencing courts would still be required to consider the “Guidelines sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant.” *United States v. Booker*, 543 U.S. at 259-260, internal citations omitted. And the Court did not sever 18 U.S.C. §3553(c)(2), which requires the sentencing court to state its reasons for departing from the guidelines. Consequently, although the four separate standards of appellate review were severed, the statute as amended set forth an implicit standard of review—whether the imposed sentence was reasonable. *United States v. Booker*, 543 U.S. at 260, 261.

By contrast, the severance employed in *Foster* eliminated key provisions of Ohio's sentencing statutes. And by doing so, the Court eliminated the ability of an appellate court to effectively review a sentence. The severance also disposed of any real chance of accomplishing

the legislature's goal of establishing uniformity and proportionality in Ohio's criminal sentencing scheme. R.C. 181.24(B)(1)-(3). See, also, Griffin & Katz, *Sentencing Consistency: Basic Principles Instead of Numerical Grids: The Ohio Plan*, 53 Case W.Res.L.Rev. 1, 12 (Fall, 2002) (“[c]onsistency and proportionality are hallmarks of the new sentencing law”).

The purpose and intent of Senate Bill 2 was to reserve consecutive sentences for the worst offenses and offenders. *State v. Comer*, 2003-Ohio-4165, at ¶21, citing *State v. Boland*, 147 Ohio App.3d 151, 2002-Ohio-1163. And before imposing consecutive sentences, a trial court was required to state the findings in R.C. 2929.14(E)(4) and give supporting reasons for the sentence at the dispositional hearing. *Comer* at ¶21. Setting forth the findings at the sentencing hearing gave trial counsel the opportunity to correct obvious errors. It also required trial courts to do what the legislature intended by requiring a trial court at sentencing to decide how the statutory sentencing factors applied to the facts of any given case instead of simply fitting the factors to the sentence after the sentence was imposed. *Id.*, internal citations omitted. Now, post-*Foster*, a trial court may impose consecutive sentences without considering consistency or proportionality, and without giving any reasons for the sentence.

Harris' offenses occurred prior to *Foster*. Accordingly, the trial court could not impose consecutive prison terms without violating Harris's due process rights.

PROPOSITION OF LAW IV: A defendant is deprived the effective assistance of appellate counsel when appellate counsel fails to raise reversible errors on direct appeal.

If Harris has waived any of the issues raised in the memorandum at either the trial or appellate level, such a failure was the result of the ineffective assistance of trial and appellate counsel. Harris has been denied his right to the effective assistance of counsel because the

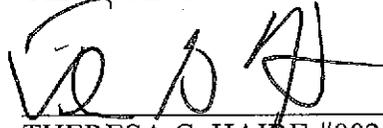
deficient failure of counsel to raise the issue properly prejudiced Harris by denying him a new sentencing hearing at which his sentence could not get worse. *Roe v. Flores-Ortega* (2000), 528 U.S. 470, *Strickland v. Washington* (1984), 466 U.S. 668, Sixth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

For the foregoing reasons, the Court should accept jurisdiction over this case.

Respectfully submitted,

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Ohio Public Defender



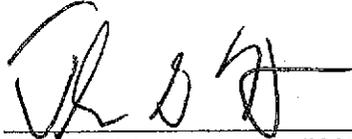
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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT CORNELIUS HARRIS was forwarded by regular U.S. Mail, postage prepaid to the office of Judith Anton Lapp, Assistant Hamilton County Prosecutor, 230 E. 9th Street, Suite 4000, Cincinnati, Ohio 45202 this 20th day of December, 2007.



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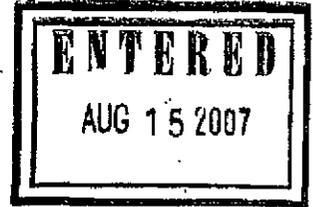
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APPENDIX TO

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT CORNELIUS HARRIS

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



STATE OF OHIO,

Plaintiff-Appellee,

vs.

CORNELIUS HARRIS,

Defendant-Appellant.

APPEAL NOS. C-060587

C-060588

TRIAL NOS. B-05010000-A

B-0510709

JUDGMENT ENTRY.

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

In case number C-060587, Cornelius Harris appeals from the judgment of the trial court convicting him of three counts of aggravated robbery and accompanying firearm specifications, three counts of robbery and specifications, and five counts of felonious assault and specifications. The trial court made Harris's sentences consecutive to each other and to the sentence imposed in case number C-060588, for a total of over 99 years' incarceration. Harris has advanced no assignments of error in case number C-060588 and has therefore abandoned that appeal. It is hereby dismissed.

At trial in case number C-060587, the state produced testimony and other evidence establishing that Harris and his friend Evander Kelley had robbed James Lawrence, Dwight Lawrence, and Demon Meatchem of money, cellular phones, and compact discs from inside James Lawrence's apartment. Kelley had been a friend of the Lawrences, and so he was allowed into the apartment along with Harris. Several minutes

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

of normal conversation in a fully lit apartment passed before Harris drew a handgun on the Lawrences and Meatchem and then proceeded to rob them. During the robbery, Meatchem and Dwight rushed Harris, and he dropped his gun. Kelly recovered the weapon and fired shots, striking Dwight and Meatcham, but missing James Lawrence. Kelley and Harris then fled. Harris was not immediately apprehended by police. The most contested issue at trial was whether the state's witnesses had properly identified Harris as one of the robbers. Harris now raises four assignments of error. We affirm.

In his first assignment of error, Harris urges that trial counsel was ineffective. To demonstrate ineffective assistance of trial counsel, the accused must establish that counsel's performance was deficient and that the deficient performance prejudiced the accused to the extent that he was deprived of a fair trial.²

Harris first contends that trial counsel was ineffective for failing to object to the testimony of investigating detective Karaguleff concerning the victims' descriptions of Harris. Harris claims that these statements were impermissible hearsay. They were not. In part, Evid.R. 801(D)(1)(c) provides that a statement is not hearsay (1) if the declarant testifies at trial and is subject to cross-examination, and (2) if the statement offered is one of identification of a person made shortly after perceiving him, provided the circumstances demonstrate the reliability of the identification.

All three victims testified at trial and were cross-examined by defense counsel. And the victims had had an opportunity to view their assailants in un-threatening circumstances for several minutes in a fully lit apartment before the robbery occurred. Finally, Karaguleff began interviewing the victims shortly after they had been robbed. Under these circumstances, the victims' descriptions were not hearsay under Evid.R.

² *Strickland v. Washington* (1984), 466 U.S. 688, 687, 104 S.Ct. 2052.

801(D)(1)(c). Defense counsel was not deficient in failing to object to Karaguleff's testimony.

Next, Harris maintains that counsel should have objected to Karaguleff's testimony that Kelley had said that he knew Harris by the name "Drama,"—which was a word that Harris had had tattooed on his neck. Kelley did not testify at trial. While we agree that this statement should not have been admitted, counsel's decision not to object could have been a trial tactic. And since Harris was identified by his three victims, we can not say that counsel's failure to object in this instance deprived Harris of a fair trial.

Harris's final argument in support of this assignment is that trial counsel's cross-examination of the victims and Karaguleff was ineffective. But the record belies Harris's contention. Counsel strenuously examined each of the witnesses in an effort to cast doubt on the validity of each identification. The first assignment of error is overruled.

In his second assignment of error, Harris contends that the trial court erred by admitting the victims' and Kelly's identification testimony because the testimony denied Harris due process and his right of confrontation. We have already determined that the victims' identification testimony was properly admitted. And all the victims testified at trial. So Harris's constitutional right to confrontation was satisfied in this regard. While Kelly's statement should not have been admitted, in light of the overwhelming identification testimony in the record, we find that this error was harmless beyond a reasonable doubt.³ Harris's second assignment of error is overruled.

In his third assignment of error, Harris declares that his convictions were against the manifest weight of the evidence and were not supported by sufficient evidence. This argument has no merit.

³ See *Chapman v. California*, (1967), 386 U.S. 18, 24, 87 S.Ct. 824; *State v. Madrigal*, 87 Ohio St.3d 378, 388, 2000-Ohio-488, 721 N.E.2d 52.

OHIO FIRST DISTRICT COURT OF APPEALS

Our review of the record convinces us that, for each of the three victims, the state presented sufficient evidence to establish the essential elements of aggravated robbery, robbery, felonious assault, and the accompanying specifications.⁴ And while Harris attempted to shed doubt on the validity of the victims' identification of him, we conclude that the jury did not "lose its way" in choosing to believe the version of events presented by the state.⁵ Accordingly, the third assignment of error is overruled.

In his fourth assignment of error, Harris submits that the lower court erred by imposing consecutive sentences for aggravated robbery, robbery, and felonious assault because they were allied offenses of similar import.⁶ This assignment fails on the authority of *State v. Rance*⁷ and *State v. Smith*,⁸ and is therefore overruled.

The judgment of the trial court is affirmed in case number C-060587, and the appeal numbered C-060588 is dismissed.

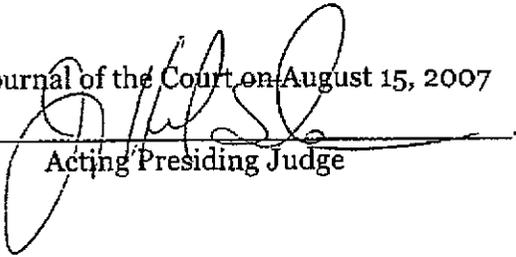
A certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App. R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., HENDON and WINKLER, JJ.

RALPH WINKLER, retired, from the First Appellate District, sitting by assignment.

To the Clerk:

Enter upon the Journal of the Court on August 15, 2007
per order of the Court


Acting Presiding Judge

⁴ *State v. Eley* (1978), 56 Ohio St.2d 169, 383 N.E.2d 132, syllabus.

⁵ See *Tibbs v. Florida* (1982), 457 U.S. 31, 102 S.Ct. 2211; *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus.

⁶ See R.C. 2941.25(A).

⁷ (1999), 85 Ohio St.3d 632, 710 N.E.2d 699.

⁸ (Mar. 25, 2005), 1st Dist. No. C-040348, 2005-Ohio-1325.