

IN THE
SUPREME COURT OF OHIO

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

MERIT BRIEF OF PLAINTIFF-APPELLEE

Joseph T. Deters (0012084P)
Prosecuting Attorney

James Michael Keeling (0068810P)
Assistant Prosecuting Attorney
Counsel of Record

230 East Ninth Street, Suite 4000
Cincinnati, Ohio 45202
(513) 946-3178
Fax No. (513) 946-3021

COUNSEL FOR PLAINTIFF-APPELLEE, STATE OF OHIO

Theresa G. Haire
Attorney at Law
Office of the Ohio Public Defender
8 East Long St., 11th Floor
Cincinnati, Ohio 43215
(614) 466-5394

COUNSEL FOR DEFENDANT-APPELLANT, CORNELIUS HARRIS

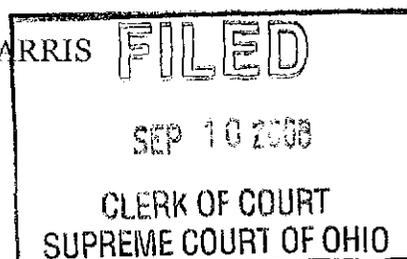


TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii.

STATEMENT OF THE CASE AND FACTS 1.

ARGUMENT 6.

Proposition of Law No. 1: Robbery in violation R.C. 2911.02(A)(2) and Aggravated Robbery in violation of R.C. 2911.01(A)(1) are not allied offenses of similar import. When their elements are compared in the abstract, without requiring an exact alignment of the elements, it is possible to commit one offense without also committing the other. 6.

Proposition of Law No. 2: The Ohio Legislature expressed an intent to protect two different societal interests when it enacted separate Felonious Assault statutes under R.C. 2911.03(A)(1) and R.C. 2911.03(A)(2), and separate punishments should be allowed for the commission of one act that results in a violation of both offenses. 9.

CONCLUSION 13.

PROOF OF SERVICE 14.

APPENDIX -

R.C. 2901.01 A-1.

R.C. 2923.11 A-6.

TABLE OF AUTHORITIES

PAGE

CASES:

Albernaz v. United States (1981), 450 U.S. 333, 101 S.Ct. 1137 11-12.

Missouri v. Hunter (1983), 459 U.S. 359, 365, 103 S.Ct. 673, 678. 11.

State v. Cabrales, 118 Ohio St.3d 54, 886 N.E.2d 181,
2008-Ohio-1625. 1-2,6-10,12-13.

State v. Carter, 8th Dist. No. 90504, 2008-Ohio-4099 2,10.

State v. Evans, 8th Dist No. 89057, 2008-Ohio-139 7-8.

State v. Deem, 40 Ohio St.3d 205, 533 N.E.2d 294. 7.

State v. Fanning, 8th Dist. No. 89914, 2008-Ohio-2185 7.

State v. Madaris, 1st Dist. No. C-070287, 2008-Ohio-2470 2.

State v. Rance, 85 Ohio St.3d 632, 1999-Ohio-291, 710 N.E.2d 699. 6,11.

State v. Smith, 1st Dist No. C-070216, 2008-Ohio-2469. 2,10.

State v. Smith, 11th Dist. No.2005-T-0080, 2006-Ohio-4669. 7-8.

STATUTES:

R.C. 2901.01(A)(3) 9.

R.C. 2901.01(A)(5). 9.

R.C. 2903.11(A)(1) 2,9-12.

R.C. 2903.11(A)(2) 2,9-12.

R.C. 2911.01(A)(1) 2,6-8.

R.C. 2911.02(A)(2) 2,6-8.

R.C. 2923.11(A). 9.

IN THE
SUPREME COURT OF OHIO

STATE OF OHIO	:	NO. 2007-1812
Plaintiff-Appellee	:	
vs.	:	
CORNELIUS HARRIS	:	<u>MERIT BRIEF OF PLAINTIFF-</u> <u>APPELLEE</u>
Defendant-Appellant	:	

STATEMENT OF THE CASE AND FACTS

Procedural Posture:

The Hamilton County Grand Jury indicted Harris charging him with 3 counts of Aggravated Robbery, 3 counts of Robbery, and 5 counts Felonious Assault. All the charges carried three-year gun specifications.

At his trial, a jury found Harris guilty as charged. The trial court imposed a 10-year sentence on each of the Aggravated Robbery charges, an 8-year sentence on each of the Robbery charges, and an 8-year sentence on each of the Felonious Assault charges. The judge also imposed a 3-year sentence on one of the gun specifications. All those sentences were run consecutively to each other.

The First District Court of Appeals affirmed Harris' conviction. But shortly afterwards, this Court released its decision in *State v. Cabrales*¹, which altered the test used to determine if two offenses are allied offenses of similar import. This Court accepted jurisdiction to determine if Harris' convictions under the two different sections of the

¹*State v. Cabrales*, 118 Ohio St.3d 54, 886 N.E.2d 181, 2008-Ohio-1625.

Felonious Assault statute were allied offenses. In addition, this Court also agreed to consider whether Aggravated Robbery and Robbery were allied offenses.

After *Cabrales*, Ohio Courts of Appeal have split on whether these offenses are allied. The First District has held that the 2903.11(A)(1) and 2903.11(A)(2) Felonious Assault convictions are allied offenses of similar import.² It has also held that Aggravated Robbery, under R.C. 2911.01(A)(1) and Robbery, under R.C. 2911.02(A)(2) are allied offenses of similar import.³

The Eighth District, applying the same test set forth in *Cabrales*, came to a different conclusion. It held that the two different sections of Felonious Assault are not allied offenses of similar import.⁴

Statement of Facts:

On a Friday night after getting off from work, three childhood friends gathered for their weekly dominoes game. (T.p. 461-462). James Lawrence and Demon Meatchem would gather at James' apartment for the game. (T.p. 462). Dwight Lawrence, James' brother, would join in the game. *Id.* During these games, the trio would wager small amounts of money on the outcome of the contests. (T.p. 473). This particular game was running late in the night, in part because Dwight had to take a break to go to the movies with his girlfriend. (T.p. 514-515).

²*State v. Smith*, 1st Dist No. C-070216, 2008-Ohio-2469.

³*State v. Madaris*, 1st Dist. No. C-070287, 2008-Ohio-2470 ¶ 37.

⁴*State v. Carter*, 8th Dist. No. 90504, 2008-Ohio-4099 ¶ 20.

When James and his girlfriend returned, Dwight rejoined the game in James' apartment and his girlfriend went upstairs to their apartment. (T.p. 515). The trio was playing when they heard a knock at the door. (T.p. 466). Not expecting any visitors at that time of night, James cautiously went to the door. *Id.* On the other side was Evander Kelly and Harris. (T.p. 467).

The Lawrence brothers knew Kelly from childhood. *Id.* He had grown up in the same neighborhood. *Id.* None of the three knew Harris. (T.p. 467, 519, 464). But since he was with a person they knew James let both of them in the apartment. (T.p. 470). The three continued playing dominoes as Kelly asked if he could use the bathroom. (T.p. 471-472). When Kelly returned, Harris asked if he could use the bathroom. *Id.* All the while, Kelly and the Lawrence brothers joked around in normal conversation. *Id.*

All this changed when Harris returned from the bathroom. (T.p. 473). He had a gun in his hand. *Id.* Harris struck Dwight in the back of the head with the gun. *Id.* As he did so he told the trio to, "[l]ay it down." *Id.* By this he meant the group was to give him everything they had. *Id.* He then ordered the three to lie face down on the bed. (T.p. 474). When they did so, Harris began ransacking the apartment looking for anything of value. (T.p. 475). He took the money from the dominoes game, cell phones, CD's, and DVD's. (T.p. 474-476). While he was tearing the apartment apart, Harris came upon a hammer. (T.p. 527). He picked it up and implied that he was going to use it to kill all of them saying, "[y]ou all going to make me go on some real killer stuff." *Id.*

At that point, Demon began begging for his life saying that he had a little girl that he needed to go home to. (T.p. 479). Harris ordered him back on the bed saying "[L]ay your

bitch back down” and “I’m not trying to hear that.” (T.p. 479, 528). Harris then went back to ransacking the apartment. (T.p. 479).

Near the conclusion, Harris told the three to hold pillows up over their heads. (T.p. 476). Demon thought that Harris was going to shoot them execution style. (T.p. 571). So Demon decided to fight back rather than die. (T.p. 571-572). He rushed Harris and grabbed him. (T.p. 572). Dwight joined in and the two struggled with Harris. (T.p. 573).

During this fight, the gun slipped from Harris’ hand and skittered across the floor to Kelly. (T.p. 480). Kelly picked up the gun and used it to shoot Dwight and Demon. (T.p. 481). He also shot at, and narrowly missed, James. *Id.* With the gunshots, Kelly and Harris took off and ran out the door. (T.p. 483). James’ girlfriend saw the pair fleeing together through the parking lot. (T.p. 552).

James used his cell phone to call 9-1-1 and the authorities. (T.p. 483). James told the officers that one of the assailants was Evander Kelly. (T.p. 489). But because they did not know Harris’ name, they could only give a physical description. (T.p. 490). All three of the victims gave Detective Karaguleff the same description. (T.p. 626). All of them described him as a light-skinned black male in his early 20's around six feet tall, with braids. *Id.* The most identifying feature was Harris’ rather distinctive tattoo. *Id.* Harris has the word “Drama” tattooed across the front of his neck. (State’s Exhibit Nos. 23, 24, & 38). A drawing of a bullet bookends each side of the word. *Id.* While the victims were not sure of what the tattoo said at the time, they all knew it was a large tattoo on his neck. (T.p. 469, 520-521, 579-580, 626).

Detective Karaguleff investigated the case for three-and-a-half months before receiving information concerning Harris’ name. (T.p. 628-629). Once he received that tip,

Detective Karaguleff prepared a photo array with Harris' picture in it. (T.p. 629-630). He then showed it to all the robbery victims separately. Both James and Dwight picked Harris as their assailant. (T.p. 633, 634). Demon could only say the robber was one of two pictures on the array. (T.p.). One of those two was the picture of Harris. (T.p. 633-634).

ARGUMENT

Proposition of Law No. 1: Robbery in violation R.C. 2911.02(A)(2) and Aggravated Robbery in violation of R.C. 2911.01(A)(1) are not allied offenses of similar import. When their elements are compared in the abstract, without requiring an exact alignment of the elements, it is possible to commit one offense without also committing the other.

In *State v. Cabrales*⁵, this Court clarified the *State v. Rance*⁶ test for determining whether two offenses are allied offenses of similar import. This Court held that, although the elements should still be compared in the abstract, an exact alignment of the elements is not required.⁷ Instead, when two offenses are compared in the abstract, the question is whether the offenses are so similar that the commission of one necessarily results in commission of the other.⁸

Harris was convicted of committing, among other things, Robbery in violation of R.C. 2911.02(A)(2) and Aggravated Robbery in violation of R.C. 2911.01(A)(1). Robbery prohibits an offender from inflicting, attempting to inflict, or threatening to inflict physical harm on another while committing or attempting to commit a theft offense or in fleeing immediately thereafter. Aggravated Robbery prohibits an offender from having a deadly weapon on or about their person or under their control and either displaying, brandishing, indicating possession of, or using the deadly weapon while committing or attempting to commit a theft offense or in fleeing immediately thereafter.

⁵118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181.

⁶85 Ohio St.3d 632, 1999-Ohio-291, 710 N.E.2d 699.

⁷*Cabrales* at ¶ 27.

⁸*Id.* at ¶ 26.

Given these statutory definitions, the commission of one of the crimes does not necessarily result in the commission of the other. It is possible to commit Robbery without also committing Aggravated Robbery and vice versa. For example, one would be guilty of Robbery for inflicting physical harm by beating a victim while committing a theft offense, but would be not guilty of Aggravated Robbery. Likewise, one could be found guilty of Aggravated Robbery for having a gun sticking out of the front of the waistband while committing a theft offense. Without the use or threat to use the gun to inflict physical harm, however, one would not be guilty of Robbery. Additionally, one could satisfy all the requirements of the Aggravated Robbery statute without another person ever being present. A conviction under the Robbery statute requires the presence of another person.

Aggravated Robbery and Robbery and the Lesser Included Test

Perhaps the clearest example of this reasoning is seen when deciding if Robbery under R.C. 2911.02(A)(2) is a lesser included of Aggravated Robbery under R.C. 2911.01(A)(1). To do so, this Court requires the use of the tri-partite test set forth in *State v. Deem*.⁹ The second prong of that test is whether the greater offense can be committed without the lesser offense also being committed. Other than the “greater” and “lesser” language, this is the exact same test this Court set forth in *Cabrales* for determining whether offenses are allied.

Using this test for lesser include offenses, several courts have held the (A)(2) Robbery is not a lesser included of the (A)(1) Aggravated Robbery.¹⁰ The reasoning used in

⁹*State v. Deem*, 40 Ohio St.3d 205, 533 N.E.2d 294.

¹⁰*State v. Fanning*, 8th Dist. No. 89914, 2008-Ohio-2185; *State v. Evans*, 8th Dist No. 89057, 2008-Ohio-139; *State v. Smith*, 11th Dist. No.2005-T-0080, 2006-Ohio-4669.

all of these cases is that Aggravated Robbery can be committed without committing the Robbery.

The most persuasive is the 8th District's opinion in *State v. Evans*. In that decision, the court points out that Robbery contains a use or threat of physical harm element that is simply not present in the crime of Aggravated Robbery.

The reality or threat of physical harm is an element of robbery which is not contained in aggravated robbery. Robbery under R.C. 2911.02(A)(2) is therefore not a lesser included offense of aggravated robbery under R.C. 2911.01(A)(1).¹¹

In addition, the 11th District pointed out in *State v. Smith* that a person could violate the Aggravated Robbery statute by using a gun during a theft offense with no one present.¹² But the Robbery statute requires harm, attempt to harm or threat of harm to another.¹³ Therefore, one could violate the Aggravated Robbery statute without committing the (A)(2) Robbery.

The conclusion of both of these discussions is that it is possible to commit Aggravated Robbery under R.C. 2911.01(A)(1) without committing Robbery under R.C. 2911.02(A)(2). Since that is the case, even using the test as reformulated in *Cabrales*, the two are crimes are not allied offenses of similar import.

Because the commission of Aggravated Robbery does not necessarily result in the commission of a Robbery, the two offenses are not allied offenses of similar import.

¹¹*Evans* at ¶ 15.

¹²*Smith* at ¶ 34.

¹³*Id.*

Consequently, the trial court could impose sentences for both Aggravated Robbery and Robbery.

Proposition of Law No. 2: The Ohio Legislature expressed an intent to protect two different societal interests when it enacted separate Felonious Assault statutes under R.C. 2911.03(A)(1) and R.C. 2911.03(A)(2), and separate punishments should be allowed for the commission of one act that results in a violation of both offenses.

Similarly, applying the test for allied offenses in *Cabrales* to the two Felonious Assault statutes does not lead to the conclusion that they are allied offenses of similar import.

R.C. 2903.11(A)(1) prohibits knowingly “[c]aus[ing] serious physical harm to another.” R.C. 2903.11(A)(2) prohibits knowingly “[c]aus[ing] or attempt[ing] to cause physical harm to another * * * by means of a deadly weapon.” A deadly weapon is further defined as “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.”¹⁴ “Serious physical harm” and “physical harm” are also defined by the Revised Code. While the definitions are lengthy and convoluted, the difference between the two is generally the gravity and duration of the injury.¹⁵

Applying *Cabrales*, one can cause serious physical harm without a deadly weapon. In fact, one could cause serious physical harm without any weapon. A beating with mere

¹⁴R.C. 2923.11(A).

¹⁵R.C. 2901.01(A)(3) and R.C. 2901.01(A)(5).

fists, which inflicts severe physical harm on the victim, would meet the requirements of R.C. 2903.11(A)(1) but not R.C. 2903.11(A)(2).

Additionally, violating the (A)(2) section does not necessarily mean a defendant has violated the (A)(1) section. A defendant could inflict less than serious physical harm with a deadly weapon and still be guilty under A(2) and not A(1). An example of this might be a bruise inflicted by a baseball bat being used as a bludgeon or a grazing wound inflicted by a firearm.

The Eighth District Court of Appeals has considered these two crimes after *Cabrales* and found they are not allied offenses of similar import¹⁶. Using the test given by this Court, the Eighth District in *State v. Carter* found that the commission of one of the Felonious Assault sections did not necessarily result in the commission of the other. As the court said:

Comparing these two crimes in the abstract, 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.¹⁷

Legislative Intent Behind the Two Forms of Felonious Assault

Despite this, the First District reached a contrary holding. After *Cabrales*, the First District held that the two forms of Felonious Assault correspond to such a degree that a defendant may only be sentenced on one of the charges when one victim is involved.¹⁸

¹⁶*State v. Carter*, 8th Dist. No. 90504, 2008-Ohio-4099.

¹⁷*Carter* at ¶ 19.

¹⁸*State v. Smith*, 1st Dist No. C-070216, 2008-Ohio-2469.

This holding does not take into account the fact that the (A)(1) and (A)(2) sections address different societal interests. The legislature wrote R.C. 2903.11(A)(1) to prohibit the infliction of serious physical harm to another. But R.C. 2903.11(A)(2) prohibits the use of a deadly weapon to cause or attempt to cause physical harm to another. When an offender causes serious physical harm to a victim by shooting the victim, the offender has violated both statutes and should be sentenced on both.

The United States Supreme Court cases this Court relied on in *State v. Rance*¹⁹ have a common thread – a discussion of what the legislature intended when it enacted the statutes for criminal conduct. In *Missouri v. Hunter*, the U.S. Supreme Court emphasized that “[w]ith respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.”²⁰ *Hunter* involved the issue of cumulative punishments for the crimes of armed criminal action and first degree robbery. As the Court simply put it, “Legislatures, not courts, prescribe the scope of punishments.”²¹

Similarly, in *Albernaz v. United States*,²² the U.S. Supreme Court held that the importation of marijuana and the distribution of that drug “impose diverse societal harms,” and that Congress has in effect decided that a conspiracy to both import and distribute is twice as serious as a conspiracy to do either singly. “[T]he question of what punishments

¹⁹*State v. Rance*, 85 Ohio St.3d 632, 1999-Ohio-291, 710 N.E.2d 699

²⁰(1983), 459 U.S. 359, 365, 103 S.Ct. 673, 678.

²¹ *Id.*

²²(1981), 450 U.S. 333, 101 S.Ct. 1137

are constitutionally permissible is no different from the question of what punishment the Legislative Branch intended to be imposed. Where Congress intended, as it did here, to impose multiple punishments, imposition of such sentences does not violate the Constitution.”²³ The U.S. Supreme Court further explained that a statute’s silence on whether cumulative punishments can be imposed does not equate with an intent to impose only one prison term.

Here, the Ohio General Assembly saw fit to enact R.C. 2903.11(A)(1), which prohibits the infliction of serious physical harm to another. It also enacted R.C. 2903.11(A)(2), which prohibits the use of a deadly weapon when one attempts or does cause physical harm. Clearly, the legislature intended to punish offenders for causing serious physical harm, regardless of the means, and also to punish offenders who use deadly weapons against victims. The fact that the statutes do not specifically state that separate punishments are intended cannot be the basis of an argument to the contrary. As stated in the cases cited above, silence does not indicate an intent to disallow cumulative punishment.

The two forms of Felonious Assault at issue here are distinctly different offenses worthy of separate convictions and sentences. Using the test set forth *Cabrales*, the commission of one does not necessarily result in the commission of the other. Consequently, Harris’ convictions for the two different sections of the Felonious Assault statute were not allied offenses of similar import and it was proper for the trial court to sentence him for both.

²³*Id.* at 344.

CONCLUSION

Using the test for allied offenses of similar import set forth in *Cabrales*, Aggravated Robbery and Robbery are not allied offenses. Committing Aggravated Robbery does not necessarily result in the commission of Robbery and vice versa.

Likewise, applying the same test to the two divisions of the Felonious Assault statute shows that they are not allied offenses of similar import either. A defendant can cause serious physical harm without a deadly weapon and can cause a lesser degree of harm with a deadly weapon. Therefore, the commission of one does not necessarily result in the commission of the other. Additionally, the multiple punishments afforded these two separate crimes reflects the legislative intent to punish for both .

For all these reasons, the trial court's decision to impose multiple sentences should be affirmed.

Respectfully,

Joseph T. Deters, 0012084P
Prosecuting Attorney



James Michael Keeling, 0068810P
Assistant Prosecuting Attorney
230 East Ninth Street, Suite 4000
Cincinnati, Ohio 45202
Phone: (513) 946-3178

Attorneys for Plaintiff-Appellee

CERTIFICATE OF SERVICE

I hereby certify that I have sent a copy of the foregoing Merit Brief of Plaintiff-Appellee, by United States mail, addressed to Theresa G. Haire, Office of the Ohio Public Defender, 8 East Long St., 11th Floor, Cincinnati, Ohio 43215, counsel of record, this 9 day of September, 2008.



James Michael Keeling, 0068810P
Assistant Prosecuting Attorney

APPENDIX



Baldwin's Ohio Revised Code Annotated Currentness

Title XXIX. Crimes--Procedure (Refs & Annos)

Chapter 2901. General Provisions

General Provisions

→ 2901.01 Definitions

(A) As used in the Revised Code:

- (1) "Force" means any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing.
- (2) "Deadly force" means any force that carries a substantial risk that it will proximately result in the death of any person.
- (3) "Physical harm to persons" means any injury, illness, or other physiological impairment, regardless of its gravity or duration.
- (4) "Physical harm to property" means any tangible or intangible damage to property that, in any degree, results in loss to its value or interferes with its use or enjoyment. "Physical harm to property" does not include wear and tear occasioned by normal use.
- (5) "Serious physical harm to persons" means 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.
- (6) "Serious physical harm to property" means any physical harm to property that does either of the following:
 - (a) Results in substantial loss to the value of the property or requires a substantial amount of time, effort, or money to repair or replace;
 - (b) Temporarily prevents the use or enjoyment of the property or substantially interferes with its use or enjoy-

ment for an extended period of time.

(7) "Risk" means a significant possibility, as contrasted with a remote possibility, that a certain result may occur or that certain circumstances may exist.

(8) "Substantial risk" means a strong possibility, as contrasted with a remote or significant possibility, that a certain result may occur or that certain circumstances may exist.

(9) "Offense of violence" means any of the following:

(a) A violation of section 2903.01, 2903.02, 2903.03, 2903.04, 2903.11, 2903.12, 2903.13, 2903.15, 2903.21, 2903.211, 2903.22, 2905.01, 2905.02, 2905.11, 2907.02, 2907.03, 2907.05, 2909.02, 2909.03, 2909.24, 2911.01, 2911.02, 2911.11, 2917.01, 2917.02, 2917.03, 2917.31, 2919.25, 2921.03, 2921.04, 2921.34, or 2923.161, of division (A)(1), (2), or (3) of section 2911.12, or of division (B)(1), (2), (3), or (4) of section 2919.22 of the Revised Code or felonious sexual penetration in violation of former section 2907.12 of the Revised Code;

(b) A violation of an existing or former municipal ordinance or law of this or any other state or the United States, substantially equivalent to any section, division, or offense listed in division (A)(9)(a) of this section;

(c) An offense, other than a traffic offense, under an existing or former municipal ordinance or law of this or any other state or the United States, committed purposely or knowingly, and involving physical harm to persons or a risk of serious physical harm to persons;

(d) A conspiracy or attempt to commit, or complicity in committing, any offense under division (A)(9)(a), (b), or (c) of this section.

(10)(a) "Property" means any property, real or personal, tangible or intangible, and any interest or license in that property. "Property" includes, but is not limited to, cable television service, other telecommunications service, telecommunications devices, information service, computers, data, computer software, financial instruments associated with computers, other documents associated with computers, or copies of the documents, whether in machine or human readable form, trade secrets, trademarks, copyrights, patents, and property protected by a trademark, copyright, or patent. "Financial instruments associated with computers" include, but are not limited to, checks, drafts, warrants, money orders, notes of indebtedness, certificates of deposit, letters of credit, bills of credit or debit cards, financial transaction authorization mechanisms, marketable securities, or any computer system representations of any of them.

(b) As used in division (A)(10) of this section, "trade secret" has the same meaning as in section 1333.61 of the Revised Code, and "telecommunications service" and "information service" have the same meanings as in section 2913.01 of the Revised Code.

(c) As used in divisions (A)(10) and (13) of this section, "cable television service," "computer," "computer software," "computer system," "computer network," "data," and "telecommunications device" have the same meanings as in section 2913.01 of the Revised Code.

(11) "Law enforcement officer" means any of the following:

(a) A sheriff, deputy sheriff, constable, police officer of a township or joint township police district, marshal, deputy marshal, municipal police officer, member of a police force employed by a metropolitan housing author-

- ity under division (D) of section 3735.31 of the Revised Code, or state highway patrol trooper;
- (b) An officer, agent, or employee of the state or any of its agencies, instrumentalities, or political subdivisions, upon whom, by statute, a duty to conserve the peace or to enforce all or certain laws is imposed and the authority to arrest violators is conferred, within the limits of that statutory duty and authority;
- (c) A mayor, in the mayor's capacity as chief conservator of the peace within the mayor's municipal corporation;
- (d) A member of an auxiliary police force organized by county, township, or municipal law enforcement authorities, within the scope of the member's appointment or commission;
- (e) A person lawfully called pursuant to section 311.07 of the Revised Code to aid a sheriff in keeping the peace, for the purposes and during the time when the person is called;
- (f) A person appointed by a mayor pursuant to section 737.01 of the Revised Code as a special patrolling officer during riot or emergency, for the purposes and during the time when the person is appointed;
- (g) A member of the organized militia of this state or the armed forces of the United States, lawfully called to duty to aid civil authorities in keeping the peace or protect against domestic violence;
- (h) A prosecuting attorney, assistant prosecuting attorney, secret service officer, or municipal prosecutor;
- (i) A veterans' home police officer appointed under section 5907.02 of the Revised Code;
- (j) A member of a police force employed by a regional transit authority under division (Y) of section 306.35 of the Revised Code;
- (k) A special police officer employed by a port authority under section 4582.04 or 4582.28 of the Revised Code;
- (l) The house of representatives sergeant at arms if the house of representatives sergeant at arms has arrest authority pursuant to division (E)(1) of section 101.311 of the Revised Code and an assistant house of representatives sergeant at arms;
- (m) A special police officer employed by a municipal corporation at a municipal airport, or other municipal air navigation facility, that has scheduled operations, as defined in section 119.3 of Title 14 of the Code of Federal Regulations, 14 C.F.R. 119.3, as amended, and that is required to be under a security program and is governed by aviation security rules of the transportation security administration of the United States department of transportation as provided in Parts 1542. and 1544. of Title 49 of the Code of Federal Regulations, as amended.
- (12) "Privilege" means an immunity, license, or right conferred by law, bestowed by express or implied grant, arising out of status, position, office, or relationship, or growing out of necessity.
- (13) "Contraband" means any property that is illegal for a person to acquire or possess under a statute, ordinance, or rule, or that a trier of fact lawfully determines to be illegal to possess by reason of the property's involvement in an offense. "Contraband" includes, but is not limited to, all of the following:
- (a) Any controlled substance, as defined in section 3719.01 of the Revised Code, or any device or paraphernalia;
- (b) Any unlawful gambling device or paraphernalia;

(c) Any dangerous ordnance or obscene material.

(14) A person is "not guilty by reason of insanity" relative to a charge of an offense only if the person proves, in the manner specified in section 2901.05 of the Revised Code, that at the time of the commission of the offense, the person did not know, as a result of a severe mental disease or defect, the wrongfulness of the person's acts.

(B)(1)(a) Subject to division (B)(2) of this section, as used in any section contained in Title XXIX of the Revised Code that sets forth a criminal offense, "person" includes all of the following:

(i) An individual, corporation, business trust, estate, trust, partnership, and association;

(ii) An unborn human who is viable.

(b) As used in any section contained in Title XXIX of the Revised Code that does not set forth a criminal offense, "person" includes an individual, corporation, business trust, estate, trust, partnership, and association.

(c) As used in division (B)(1)(a) of this section:

(i) "Unborn human" means an individual organism of the species *Homo sapiens* from fertilization until live birth.

(ii) "Viable" means the stage of development of a human fetus at which there is a realistic possibility of maintaining and nourishing of a life outside the womb with or without temporary artificial life-sustaining support.

(2) Notwithstanding division (B)(1)(a) of this section, in no case shall the portion of the definition of the term "person" that is set forth in division (B)(1)(a)(ii) of this section be applied or construed in any section contained in Title XXIX of the Revised Code that sets forth a criminal offense in any of the following manners:

(a) Except as otherwise provided in division (B)(2)(a) of this section, in a manner so that the offense prohibits or is construed as prohibiting any pregnant woman or her physician from performing an abortion with the consent of the pregnant woman, with the consent of the pregnant woman implied by law in a medical emergency, or with the approval of one otherwise authorized by law to consent to medical treatment on behalf of the pregnant woman. An abortion that violates the conditions described in the immediately preceding sentence may be punished as a violation of section 2903.01, 2903.02, 2903.03, 2903.04, 2903.05, 2903.06, 2903.08, 2903.11, 2903.12, 2903.13, 2903.14, 2903.21, or 2903.22 of the Revised Code, as applicable. An abortion that does not violate the conditions described in the second immediately preceding sentence, but that does violate section 2919.12, division (B) of section 2919.13, or section 2919.151, 2919.17, or 2919.18 of the Revised Code, may be punished as a violation of section 2919.12, division (B) of section 2919.13, or section 2919.151, 2919.17, or 2919.18 of the Revised Code, as applicable. Consent is sufficient under this division if it is of the type otherwise adequate to permit medical treatment to the pregnant woman, even if it does not comply with section 2919.12 of the Revised Code.

(b) In a manner so that the offense is applied or is construed as applying to a woman based on an act or omission of the woman that occurs while she is or was pregnant and that results in any of the following:

(i) Her delivery of a stillborn baby;

(ii) Her causing, in any other manner, the death in utero of a viable, unborn human that she is carrying;

(iii) Her causing the death of her child who is born alive but who dies from one or more injuries that are sustained while the child is a viable, unborn human;

(iv) Her causing her child who is born alive to sustain one or more injuries while the child is a viable, unborn human;

(v) Her causing, threatening to cause, or attempting to cause, in any other manner, an injury, illness, or other physiological impairment, regardless of its duration or gravity, or a mental illness or condition, regardless of its duration or gravity, to a viable, unborn human that she is carrying.

(C) As used in Title XXIX of the Revised Code:

(1) "School safety zone" consists of a school, school building, school premises, school activity, and school bus.

(2) "School," "school building," and "school premises" have the same meanings as in section 2925.01 of the Revised Code.

(3) "School activity" means any activity held under the auspices of a board of education of a city, local, exempted village, joint vocational, or cooperative education school district; a governing authority of a community school established under Chapter 3314. of the Revised Code; a governing board of an educational service center; or the governing body of a nonpublic school for which the state board of education prescribes minimum standards under section 3301.07 of the Revised Code.

(4) "School bus" has the same meaning as in section 4511.01 of the Revised Code.

CREDIT(S)

(2006 H 241, eff. 7-1-07; 2002 H 675, eff. 3-14-03; 2002 H 364, eff. 4-8-03; 2002 H 545, eff. 3-19-03; 2002 S 184, eff. 5-15-02; 2000 S 317, eff. 3-22-01; 2000 H 351, eff. 8-18-00; 2000 S 137, eff. 5-17-00; 1999 S 107, eff. 3-23-00; 1999 H 162, eff. 8-25-99; 1999 S 1, eff. 8-6-99; 1998 H 565, eff. 3-30-99; 1996 S 277, eff. 3-31-97; 1996 S 269, eff. 7-1-96; 1996 S 239, eff. 9-6-96; 1996 H 445, eff. 9-3-96; 1995 S 2, eff. 7-1-96; 1991 S 144, eff. 8-8-91; 1991 H 77; 1990 S 24; 1988 H 708, § 1)

UNCODIFIED LAW

1996 S 269, § 3, eff. 7-1-96, amended 1995 S 2, § 5, to read:

Sec. 5. The provisions of the Revised Code in existence prior to July 1, 1996, shall apply to a person upon whom a court imposed a term of imprisonment prior to that date and, notwithstanding division (B) of section 1.58 of the Revised Code, to a person upon whom a court, on or after that date and in accordance with the law in existence prior to that date, imposes a term of imprisonment for an offense that was committed prior to that date.

The provisions of the Revised Code in existence on and after July 1, 1996, apply to a person who commits an offense on or after that date.

HISTORICAL AND STATUTORY NOTES

Ed. Note: In the version eff. 7-1-07, comparison of these amendments [2006 H 241, eff. 7-1-07 and 2002 H 364,

C

Baldwin's Ohio Revised Code Annotated Currentness

Title XXIX. Crimes--Procedure (Refs & Annos)

Chapter 2923. Conspiracy, Attempt, and Complicity; Weapons Control (Refs & Annos)

Weapons Control

→ 2923.11 Definitions (later effective date)

<Note: See also version(s) of this section with earlier effective date(s).>

As used in sections 2923.11 to 2923.24 of the Revised Code:

(A) "Deadly weapon" means 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.

(B)(1) "Firearm" means any deadly weapon capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant. "Firearm" includes an unloaded firearm, and any firearm that is inoperable but that can readily be rendered operable.

(2) When determining whether a firearm is capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant, the trier of fact may rely upon circumstantial evidence, including, but not limited to, the representations and actions of the individual exercising control over the firearm.

(C) "Handgun" means any of the following:

(1) Any firearm that has a short stock and is designed to be held and fired by the use of a single hand;

(2) Any combination of parts from which a firearm of a type described in division (C)(1) of this section can be assembled.

(D) "Semi-automatic firearm" means any firearm designed or specially adapted to fire a single cartridge and automatically chamber a succeeding cartridge ready to fire, with a single function of the trigger.

(E) "Automatic firearm" means any firearm designed or specially adapted to fire a succession of cartridges with a single function of the trigger. "Automatic firearm" also means any semi-automatic firearm designed or specially adapted to fire more than thirty-one cartridges without reloading, other than a firearm chambering only .22 caliber short, long, or long-rifle cartridges.

(F) "Sawed-off firearm" means a shotgun with a barrel less than eighteen inches long, or a rifle with a barrel less than sixteen inches long, or a shotgun or rifle less than twenty-six inches long overall.

(G) "Zip-gun" means any of the following:

(1) Any firearm of crude and extemporized manufacture;

(2) Any device, including without limitation a starter's pistol, that is not designed as a firearm, but that is spe-

cially adapted for use as a firearm;

(3) Any industrial tool, signalling device, or safety device, that is not designed as a firearm, but that as designed is capable of use as such, when possessed, carried, or used as a firearm.

(H) "Explosive device" means any device designed or specially adapted to cause physical harm to persons or property by means of an explosion, and consisting of an explosive substance or agency and a means to detonate it. "Explosive device" includes without limitation any bomb, any explosive demolition device, any blasting cap or detonator containing an explosive charge, and any pressure vessel that has been knowingly tampered with or arranged so as to explode.

(I) "Incendiary device" means any firebomb, and any device designed or specially adapted to cause physical harm to persons or property by means of fire, and consisting of an incendiary substance or agency and a means to ignite it.

(J) "Ballistic knife" means a knife with a detachable blade that is propelled by a spring-operated mechanism.

(K) "Dangerous ordnance" means any of the following, except as provided in division (L) of this section:

(1) Any automatic or sawed-off firearm, zip-gun, or ballistic knife;

(2) Any explosive device or incendiary device;

(3) Nitroglycerin, nitrocellulose, nitrostarch, PETN, cyclonite, TNT, picric acid, and other high explosives; amatol, tritonal, tetrytol, pentolite, pecretol, cyclotol, and other high explosive compositions; plastic explosives; dynamite, blasting gelatin, gelatin dynamite, sensitized ammonium nitrate, liquid-oxygen blasting explosives, blasting powder, and other blasting agents; and any other explosive substance having sufficient brisance or power to be particularly suitable for use as a military explosive, or for use in mining, quarrying, excavating, or demolitions;

(4) Any firearm, rocket launcher, mortar, artillery piece, grenade, mine, bomb, torpedo, or similar weapon, designed and manufactured for military purposes, and the ammunition for that weapon;

(5) Any firearm muffler or silencer;

(6) Any combination of parts that is intended by the owner for use in converting any firearm or other device into a dangerous ordnance.

(L) "Dangerous ordnance" does not include any of the following:

(1) Any firearm, including a military weapon and the ammunition for that weapon, and regardless of its actual age, that employs a percussion cap or other obsolete ignition system, or that is designed and safe for use only with black powder;

(2) Any pistol, rifle, or shotgun, designed or suitable for sporting purposes, including a military weapon as issued or as modified, and the ammunition for that weapon, unless the firearm is an automatic or sawed-off fire-arm;

(3) Any cannon or other artillery piece that, regardless of its actual age, is of a type in accepted use prior to

1887, has no mechanical, hydraulic, pneumatic, or other system for absorbing recoil and returning the tube into battery without displacing the carriage, and is designed and safe for use only with black powder;

(4) Black powder, priming quills, and percussion caps possessed and lawfully used to fire a cannon of a type defined in division (L)(3) of this section during displays, celebrations, organized matches or shoots, and target practice, and smokeless and black powder, primers, and percussion caps possessed and lawfully used as a propellant or ignition device in small-arms or small-arms ammunition;

(5) Dangerous ordnance that is inoperable or inert and cannot readily be rendered operable or activated, and that is kept as a trophy, souvenir, curio, or museum piece.

(6) Any device that is expressly excepted from the definition of a destructive device pursuant to the "Gun Control Act of 1968," 82 Stat. 1213, 18 U.S.C. 921(a)(4), as amended, and regulations issued under that act.

(M) "Explosive" means any chemical compound, mixture, or device, the primary or common purpose of which is to function by explosion. "Explosive" includes all materials that have been classified as division 1.1, division 1.2, division 1.3, or division 1.4 explosives by the United States department of transportation in its regulations and includes, but is not limited to, dynamite, black powder, pellet powders, initiating explosives, blasting caps, electric blasting caps, safety fuses, fuse igniters, squibs, cordeau detonant fuses, instantaneous fuses, and igniter cords and igniters. "Explosive" does not include "fireworks," as defined in section 3743.01 of the Revised Code, or any substance or material otherwise meeting the definition of explosive set forth in this section that is manufactured, sold, possessed, transported, stored, or used in any activity described in section 3743.80 of the Revised Code, provided the activity is conducted in accordance with all applicable laws, rules, and regulations, including, but not limited to, the provisions of section 3743.80 of the Revised Code and the rules of the fire marshal adopted pursuant to section 3737.82 of the Revised Code.

CREDIT(S)

(2008 H 562, eff. 9-23-08; 2004 H 12, eff. 4-8-04; 1995 S 2, eff. 7-1-96; 1990 S 96, eff. 6-13-90; 1987 H 24; 1986 H 51; 1978 H 728; 1972 H 511)

HISTORICAL AND STATUTORY NOTES

Ed. Note: 2923.11 contains provisions analogous to former 2907.021, 2923.03, and 2923.06, repealed by 1972 H 511, eff. 1-1-74.

Ed. Note: Former 2923.11 repealed by 1972 H 511, eff. 1-1-74; 1953 H 1; GC 12693; see now RC 2927.01 for provisions analogous to former 2923.11.

Pre-1953 H 1 Amendments: RS 7035

Amendment Note: 2004 H 12 rewrote division (C), which prior thereto read:

"(C) 'Handgun' means any firearm designed to be fired while being held in one hand."

Amendment Note: 1995 S 2 added division (M); and made other nonsubstantive changes.

LEGISLATIVE SERVICE COMMISSION