

IN THE SUPREME COURT OF OHIO

STATE OF OHIO : On Appeal from the  
Plaintiff-Appellee : Cuyahoga County Court of  
 : Appeals, Eighth Appellate  
 : District  
-vs- :  
KEVIN WILLIAMS : Court of Appeals  
 : Case No. 89726  
Defendant-Appellant :

08-2037

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MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT

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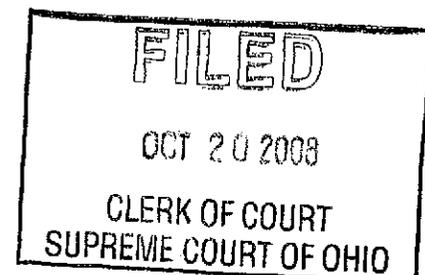
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**EXPLANATION OF WHY THIS CASE IS A CASE OF GREAT PUBLIC INTEREST OR  
GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL  
CONSTITUTIONAL QUESTION.**

The lower courts in Ohio do not know what to do with other acts evidence.

Kevin Williams was on trial for shooting a man. He was convicted of two counts of felonious assault and two counts of attempted murder as a result of a shooting incident based on State's evidence which contradicted itself on some key points. In addition, the State's key witness, the complaining witness, lied in his direct testimony and, when he was caught in the lie, had to amend his testimony. Mr. Williams presented three alibi witnesses in his defense, all of whom testified consistently that he could not have been involved in the shooting incident, as he was at a family party at the time of the shooting. The State's case was far from ironclad.

In an effort to buttress its case, the State of Ohio went out of its way to introduce improper other acts evidence. The first step in the State's deliberate plan to elicit improper other acts testimony was to create an opportunity to impeach one of Mr. Williams's alibi witnesses, his sister Yvonne Williams. The State asked her whether she had ever made a statement to the East Cleveland Police Department in the past. When Ms. Williams answered that she had not, the State sought to impeach her by introducing the statement she made to the police in the prior shooting incident. The State did not content itself with merely eliciting testimony that Ms. Williams had made a prior police statement, instead the State intentionally and deliberately continued its inquiry into the matter by seeking testimony on the details of the incident. Moreover, when Ms. Williams would not give the State the exact and specific answers it sought, the State asked direct questions which put the information it sought before the jury. The State specifically asked Ms. Williams whether her brother was involved in the shooting and whether he had been arrested for the shooting. All of this occurred over repeated defense objection.

The State of Ohio, therefore, was able to elicit evidence that Mr. Williams, who was on trial for shooting a man, had shot a man in the past as part of its effort to impeach Ms. Williams on whether she had ever made a statement to the police before. Not only was the fact that Mr. Williams had shot a man irrelevant to the question of whether Ms. Williams had ever made a

prior police report, it was devastating to Mr. Williams's case. Once the jury had heard that Mr. Williams had shot a man in the past, there was simply no way that it could have evaluated the question of whether he shot a man on this occasion in a fair and impartial manner.

The Eighth District affirmed Mr. Williams's conviction on the grounds that the other acts evidence that he had shot a man in the past—as well as the prosecutorial misconduct in eliciting said evidence—was harmless, because the jury was entitled to know Mr. Williams has been convicted of attempted felonious assault as an element of his having a weapon while under a disability charge. Such reasoning is specious. A jury is not likely to know what constitutes an attempted felonious assault. They might conclude that Mr. Williams tried to hurt someone or tried to hit someone, but did not succeed; hence the “attempt.” There is no likelihood, however, that the jury would have presumed that an “attempted felonious assault,” meant that Mr. Williams had shot a man in the past. For this reason, the fact that the jury heard he had the prior conviction was not the same thing as hearing that he had shot a man in the past. As what the jury heard was far more devastating than that Mr. Williams had a conviction for attempted felonious assault, the error in giving the jury the additional details was far from harmless.

The Eighth District must not be permitted to continue to misapply clear federal precedent and hold as harmless errors which are plainly not harmless under *Fahy* and *Yates*. The Eighth District must not be permitted to continue find that devastating evidence, such as the fact that a defendant on trial for shooting a man had shot another man on an earlier occasion, is harmless. For these reasons, this Court should accept jurisdiction over the case at bar.

#### **STATEMENT OF THE CASE**

On December 1, 2006, the Cuyahoga County Grand Jury indicted Kevin Williams, in a five-count indictment. Counts one and two charged him with felonious assault, R.C. 2903.11(A). Counts three and four charged attempted murder, R.C. 2903.02(A) and 2923.02. Counts one through four also contained one- and three-year firearm specifications. Count five charged having a weapon while under a disability, R.C. 2923.13.

Following a jury trial in the Cuyahoga County Court of Common Pleas, the jury found Mr. Williams guilty as charged in the indictment in counts one through five, as well as both firearm specifications in counts one through four. The trial court imposed sentence as follows: The court merged the firearm specifications into one specification and imposed one three-year term for the firearm specifications. The court imposed six-year terms on counts one and two and ordered them to run concurrent with each other. The court imposed seven-year sentences in counts three and four and ordered them to run concurrent. The court imposed a four-year sentence in count five. The court also ordered that the three year firearm sentence, the six-year sentence for the felonious assaults, the seven-year sentence for the attempted murders, and the four-year sentence for the having a weapon while under a disability to run consecutively with each other. The total sentence imposed was twenty years.

A timely appeal to the Ohio Court of Appeals for the Eighth Appellate District followed. On October 9, 2008, the Eighth District's journalized its decision affirming Mr. Williams's convictions but ruling that one of the attempted murder counts and both of the felonious assault counts were allied offenses of similar import to the remaining attempted murder count and remanding the matter on that issue. The within Notice of Appeal and Memorandum in Support of Jurisdiction now follows.

#### **STATEMENT OF THE FACTS**

On July 8, 2006, LayShawn McKinney's girlfriend drove him to her grandmother's house at the intersection of Gainsboro and Hayden in East Cleveland. When they arrived they saw several people shooting Craps outside the house. The people included Michael Ray Washington, Bralynn Randall, a person named Raymere whose last name McKinney did not know, a man named Duce, and Kevin Williams.

Mr. McKinney joined the Craps game. Approximately ten minutes later, a prior argument between Kevin Williams and Bralynn Randall flared up again. McKinney said that Mr. Williams pulled a gun from his waistband and everyone started running.

As McKinney was running, he was shot in the back. He fell to the ground and was paralyzed. He did not see where anyone went. However, when an ambulance arrived later, Mr. Washington and Mr. Randall were standing near him.

On cross-examination, Mr. McKinney affirmed that he spoke with the police, including a conversation with Patrolman Vargo on the date of the incident. He said the only other people present during the Craps game were Mike Washington, Bralynn Randall and Kevin Williams. He then amended that statement to add that someone named Duce, a friend of Kevin Williams, was present but was not playing dice. At the preliminary hearing, he testified that only Mike Washington and Bralynn Randall were present. He also told Detective Wheeler that he had gone into the house and was coming out of it when he saw the Craps game. McKinney claimed on the stand that he did not remember making either of these prior, contradictory statements.

During his preliminary hearing testimony, McKinney said that "We got into an argument." On the witness stand, he denied that he was ever part of the argument. He testified that only one shot was fired, although he had told the police earlier that two shots were fired. He said that after he had been shot, a friend named Alex told McKinney who had shot him.

McKinney testified that he did not take any drugs on that day and testified that he "never did" drugs. His hospital records showed that he tested positive for marijuana on the day of the shooting. He admitted that he was not "completely honest" when he denied ever using drugs.

Although McKinney testified that he saw the gun, he originally told the police that he never saw the gun. He also told the police that he suspected that Kevin Williams shot him, but did not know it for a fact. McKinney testified that he would not have told the police that he never saw the gun. Defense counsel played an audio recording of McKinney's interview with Detective Wheeler. McKinney identified his own voice and admitted that he did tell the police that he did not see the gun at the time of the shooting.

Patrolman Scott Vargo of the East Cleveland Police Department received a broadcast about the shooting and responded to the scene. He saw Mr. McKinney lying on the ground.

McKinney told him he had been shot and that he could not move or feel his legs. McKinney told Vargo how the shooting happened and that Kevin shot him.

Detective Terry Wheeler of the East Cleveland Police Department was assigned to do a follow-up investigation of the shooting in September of 2006, some two months after the shooting. Wheeler prepared a photographic array with Kevin Williams's picture in it, which he showed to McKinney. McKinney choose Williams's picture. Wheeler learned that a man nicknamed "Duce" was present at the shooting, but the police never learned his real name. He also learned that Bralynn Randall was present at the shooting.

On cross-examination, Detective Wheeler testified that in his statement to the police, McKinney said that he had gone into the house on Gainsboro and was coming out of it, when he saw the dice game. McKinney also said that he did not participate in the Craps game.

After Wheeler testified, the State and Mr. Williams entered into a stipulation. The stipulation was that Williams was convicted of felonious assault on October 13, 2004 in CR 453333. The dockets for CR 453333 show that Mr. Williams actually pled guilty to, and was convicted of, attempted felonious assault in the case, not felonious assault.

Kevin Williams called three alibi witnesses on his own behalf who all testified that he was at the Park Avenue Lounge on July 8, 2006. Yvonne Williams, Kevin Williams's sister, testified that July 8, 2006 was the anniversary of the day their sister, Joyce, died. She and her family had a celebration of her life on that day at the Park Avenue Lounge at Taylor and Euclid in East Cleveland. The party began at 6:00 p.m. on July 8, 2006 and lasted until 2:15 the following morning. She testified that Kevin Williams was with her the entire time and she never saw him leave the party.

Marcus Upshaw is a family friend of the Williams. He served as the DJ at the Park Avenue Lounge on July 8, 2006. He testified the party started around 6:00 p.m. and that Kevin Williams arrived sometime between 6:15 and 6:30. The party ended at 2:15 the following morning, and that was when everybody left the party. He did not see Kevin Williams leave the

party at any point. He admitted Williams may have gone outside from time to time, but for the most part was dancing with his family and friends at the party.

Dartanyian Washington works at a Lube Stop in Willoughby. He is also the head of Security at the Park Avenue Lounge. On July 8, 2006, the Park Avenue Lounge hosted a party for the sister of one of the people he worked with who had died. He testified that Kevin Williams was at the party. Williams was there when Washington arrived. Washington spent the entire night at the Park Avenue Lounge and left at 2:30 the following morning. Kevin Williams was still there at that time. Washington had to tell Mr. Williams and his family to leave the bar at that time. Washington stayed by the front door, the only door to the bar, the entire night and did not see Mr. Williams leave the bar that night. As far as he knew, Williams was there the entire night.

### ARGUMENT

**PROPOSITION OF LAW I: WHEN A DEFENDANT IS ON TRIAL FOR SHOOTING A MAN, THE DEVASTATING AND IMPROPER EVIDENCE THAT HE HAD SHOT ANOTHER MAN ON AN EARLIER OCCASION IS PREJUDICIAL ERROR AND CANNOT BE HARMLESS.**

Both the Sixth Amendment to the United States Constitution and Section 5, Article I, Ohio Constitution guarantee defendants a fair and impartial fact finder; one that is free from outside considerations. See *Sheppard v. Maxwell* (1966) 384 U.S. 333. When outside influences improperly bias the fact finder and taint the deliberations, then the defendant is denied a fair trial. *Sheppard*. One of the most-common ways in which a fact finder can be prejudiced against a criminal defendant is when the fact finder is informed of other bad acts which the defendant has allegedly committed; acts for which the defendant is not on trial.

Evidence about a defendant's prior bad acts or bad character is not generally admissible.

Evid.R. 404(B) states:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith.

The policy reason supporting the rule of inadmissibility was explained fully in the case *State v. Curry* (1975), 43 Ohio St.2d 66, 68 as:

(1) the overstrong tendency to believe the defendant guilty of the charge, merely because he is a person likely to do such acts; (2) the tendency to condemn not because he is believed guilty of the present charge but because he had escaped punishment from other offenses; (3) the injustice of attacking one who is not prepared to demonstrate the attacking evidence is fabricated; and (4) the confusion of issues which might result from bringing in evidence of other crimes.

In *State v. Allen* (1987), 29 Ohio St.3d 53, 55 this Court said,

The existence of a prior offense is such an inflammatory fact that ordinarily it should not be revealed to the jury unless specifically permitted under statute or rule. The *undeniable effect* of such information is to incite the jury to convict *based on past misconduct rather than to restrict their attention to the offense at hand.* (Emphasis added)

In addition, this Court held that other acts rule “must be construed *against* admissibility, and the standard for determining admissibility of such evidence is *strict.*” *State v. Coleman* (1989) 45 Ohio St.3d 298, 299 (Emphasis added).

During the cross-examination of Yvonne Williams, the State asked her whether she ever told the East Cleveland Police that her brother was at the Park Avenue Lounge on the evening in question. She answered that she had not. Over objection, the State asked her whether she had ever made a statement to the East Cleveland Police and she answered she had not. Over another objection, The State then showed Ms. Williams State’s Exhibit # 6 and asked her what it was. She acknowledged that it was a statement she made to the East Cleveland Police Department on March 23, 2004. At that point whatever slight evidentiary value that could be gained by impeaching Ms. Williams on this collateral matter had been gained. The State had established that Ms. Williams had made statements to the East Cleveland Police in the past, knew how to do it, and certainly could have made a statement to the East Cleveland Police department about Kevin Williams’s alibi in the case at bar. The State having accomplished its goal of impeaching Ms. Williams should have moved on to another topic of cross-examination. It did not do so.

Instead of moving on, and over still another defense objection, the State pressed the matter further. The State asked Ms. Williams to describe the essence of the statement. She said it involved a shooting at a bar named either the Room or the Fireside. Over another objection, the State elicited information that Ms. Williams and members of her family were at the bar. Over objection, the State asked who was involved in the shooting. Ms. Williams said several people

were involved in the shooting. The State then asked whether Kevin Williams was one of the persons involved in the shooting.

The defense objected to the question immediately. The trial court overruled the objection. Ms. Williams testified that her brother was involved in the shooting. The State asked whether he was arrested for the shooting and she answered that he had been arrested for the shooting. The trial court, which had already allowed the question over objection—thereby tacitly informing the jury that the question and answer were acceptable and proper—did not even give a curative instruction as to this testimony, an instruction that the jury could not infer Mr. Williams was likely to have committed the shooting offense in the case at bar, because he had committed a shooting offense in the past. All the trial court did was to overrule a defense objection. The trial court allowed the testimony to go to the jury without limitation and allowed the jury to use the information for the purpose of assuming Mr. Williams's guilt from his past, violent character.

It is obvious from the questions asked, that the State intentionally put the evidence of Mr. Williams's prior shooting incident before the jury. The case at bar is not one in which the State asked a question and a witness blurted out an answer the State did not anticipate. Rather the transcript shows that the State went out of its way to put this improper evidence before the jury. The State asked question after question, over objection after objection, specifically to get the information that Mr. Williams had been arrested for a prior shooting before the jury. The transcript shows that when the State asked a question which might have elicited the information but did not get the answer it sought, the State pressed on with a more direct question designed to inform the jury that Mr. Williams had been involved in a prior shooting incident. Indeed, when the State could not elicit the exact information it wanted, it put the information before the jury itself by asking, first, "Well, was one of those persons involved in the shooting alleged to be your brother, Kevin Williams?" and "And he was arrested for that, wasn't he?" The State did not elicit the testimony of Mr. Williams's prior shooting incident by accident. It elicited the improper evidence in a planned and deliberate way. The State knew what answers it wanted to elicit and went out of its way to obtain them, regardless of Mr. Williams's right to a fair trial before an

impartial jury which had not been prejudiced by improper evidence that he was involved in a prior shooting incident.

The trial court was incorrect to permit the above testimony. The testimony did nothing other than to supply the jury with the improper information that Mr. Williams had been arrested for shooting another individual some years earlier. The testimony that Ms. Williams had made a police report in the past may have impeached her trial testimony. The testimony that Mr. Williams had been arrested in a prior shooting incident, however, did not make any fact in issue more or less likely to be true so was not relevant. Evid.R. 401. As the evidence was not relevant, it had no probative value. It did, however, have tremendous prejudicial effect. For that reason, the evidence was not admissible under Evid.R. 402. Moreover, even if the evidence were relevant, which it was not, it had no probative value. The State's purpose of impeaching Ms. Williams had been accomplished without the further testimony that her statement to the police involved an incident in which her brother had been arrested for shooting another individual. The evidence, however, had great prejudicial effect. Its exclusion was mandatory under Evid.R. 404(B).

In affirming Mr. Williams's conviction, the Eighth District agreed that the State's questions were wrong and put improper other acts evidence before the jury *State v. Williams* (May 29, 2008) Cuyahoga App. No. 89726, 2008-Ohio-5286 at ¶8. The Eight District affirmed because it ruled the error to be harmless. It felt that as the jury was entitled to know of Mr. Williams's prior conviction, because it was an element of his having a weapon while under a disability charge, the fact that Mr. Williams shot a man in the past could not have "affected the outcome of the trial." *Id.* at ¶9. In reaching this conclusion, the Eighth District has misapplied clearly established federal precedent and had erred grievously.

Mr. Williams was aware that the jury was entitled to know that he had been convicted of the attempted felonious assault for the barroom shooting as part of the State's case in his having a weapon while under a disability count. However, the jury was not entitled to know the details of the case or that he had been arrested for shooting a man.

A jury is not likely to know what constitutes an attempted felonious assault. They might conclude that Mr. Williams tried to hurt someone or tried to hit someone, but did not succeed; hence the “attempt.” There is no likelihood, however, that the jury would have presumed that an “attempted felonious assault,” meant that Mr. Williams had shot a man in the past. For this reason, the fact that the jury heard he had the prior conviction was not the same thing as hearing that he had shot a man in the past. As what the jury heard was far more devastating than that Mr. Williams had a conviction for attempted felonious assault, the error in giving the jury the additional details was far from harmless.

The jury heard devastating evidence that Mr. Williams, who was on trial for shooting a man, had been arrested once before for shooting a man. Once the jury heard this improper fact, it could no longer evaluate the evidence in any meaningful manner.

Mr. McKinney gave several inconsistent accounts of the incident. When he first spoke with the police, he told them that he did not see a gun. He also told the police that he only knew who shot him, because he had heard it from other people. He also told the police that he had entered the house and saw the crap game when he left the house. When he testified, he said: he saw the gun; he described the gun; he saw the shooter; and he never entered the house. Mr. McKinney said that a James Wingfield was not present at the shooting, despite the fact that Wingfield was clearly present. McKinney’s account at trial differed from his earlier accounts in several key areas. Moreover, in his direct examination, Mr. McKinney testified that he had not used drugs on that day. When the defense confronted him with his medical records, which proved that he had used drugs that day, he admitted he had not been truthful in his direct testimony about the drugs.

The defense offered the testimony of three witnesses—Yvonne Williams, Marcus Upshaw, and Dartanyian Washington—that Mr. Williams was could not have shot Mr. McKinney or participated in the craps game, because he was at the Park Avenue Lounge. Ms. Williams testified that she did not see her brother leave the bar at any time. Mr. Washington testified that he was by the front door the whole night and Mr. Williams did not leave the bar.

Although Mr. Upshaw testified that Mr. Williams might have gone outside the bar a couple of times, he did not know whether Mr. Williams went outside the bar. Mr. Upshaw was not certain as to whether Mr. Williams ever went outside the bar. Mr. Upshaw did, however, see Mr. Williams for most of the night and the testimony of the other alibi witnesses did establish that Mr. Williams remained in the bar all night.

The evidence for the State was not overwhelming. Mr. McKinney's account of the incident seemed to change as many times as he gave it. Moreover, McKinney admitted to the jury that he had lied about one aspect of his direct testimony. Finally, three defense witnesses testified that Mr. Williams was at another location all night, so could not have been the shooter. The jury had to decide whether it believed the self-contradictory evidence of Mr. McKinney, the confessed perjurer, or the evidence of Mr. Williams's alibi witnesses. When the jury made its evaluation of the conflicting testimony, it would have considered the evidence that Mr. Williams has been arrested for shooting a man in the past. This was evidence that a jury would have assumed was proper. Moreover, as the jury received no limiting instruction, the jury would have given the evidence its natural use and assumed Kevin Williams shot a man in the past, so he must have done so on this occasion, too. When the jury was trying to decide which side to believe, the jury would have to be swayed by testimony of Kevin Williams's propensity to violence and his having shot a man in the past. Thus, the fact that Mr. Williams had shot a man in the past was something upon which the jury would very likely have relied in choosing the State's self-contradictory evidence over the consistent and not-contradicted defense evidence. When improperly-admitted evidence is of the type that the jury would reasonably have relied upon in the deliberations, then the error occasioned by admitting the testimony is not harmless, no matter how much other evidence might have been admitted.

As the Supreme Court of the United States said in *Fahy v. Connecticut*, (1963) 375 U.S. 85 when it assessed whether an error was harmless:

We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of *might* have contributed to the conviction. (Emphasis added)

In *Chapman v. California* (1967) 386 U.S. 18, 23-24 the court held:

Certainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless. It is for that reason that the original common-law harmless-error rule put the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment. There is little, if any, difference between our statement in *Fahy v. Connecticut* about "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction" and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. We, therefore, do no more than adhere to the meaning of our *Fahy* case when we hold, as we now do, that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.

The Supreme Court continues to adhere to this harmless error standard. See *Yates v. Evatt* (1991) 500 U.S. 391. Because the fact that Mr. Williams had shot another man was the type of evidence upon which the jury would have relied in reaching its verdict, the Eighth District ignored clearly established federal precedent in finding the error to be harmless. This Court must, therefore, accept jurisdiction over the case at bar and re-affirm the clear federal precedent.

**PROPOSITION OF LAW II: IN A PROSECUTION FOR ATTEMPTED MURDER AND FELONIOUS ASSAULT WITH A FIREARM, THE PROSECUTOR COMMITS PROSECUTORIAL MISCONDUCT WHEN HE GOES OUT OF HIS WAY TO ELICIT EVIDENCE THAT THE DEFENDANT SHOT ANOTHER MAN ON A PRIOR OCCASION.**

The prosecutor in a criminal prosecution serves in a special position. As the United States Supreme Court has observed, the prosecutor is:

the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but *that justice shall be done*. As such he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, *he is not at liberty to strike foul ones*. It is as much his duty *to refrain from improper methods calculated to produce a wrongful conviction* as it is to use every legitimate means to bring about a just one. (Emphasis added).

*Berger v. United States* (1935), 295 U.S. 78, 88.

When prosecutorial misconduct has a material affect on the jury and its deliberations, then reversible error has occurred. *State v. Liberatore* (1982), 69 Ohio St.2d 583, 589-90, and

*State v. Stephens* (1970), 24 Ohio St.2d 76. The test regarding prosecutorial misconduct is whether the remarks were improper and if so, whether the misconduct prejudicially affected the substantial rights of the defendant. *State v. Smith* (1984), 14 Ohio St.3d 13, 14.

As noted in Proposition of Law I, during its cross-examination of Yvonne Williams, the State of Ohio went out of its way to elicit from her improper testimony that Kevin Williams had previously been arrested for shooting a man. For all of the reasons and arguments put forth in Assignment of Error I, the other acts evidence was improper and prejudiced Mr. Williams's right to a fair trial. It is simply impossible that, when the jury was evaluating the deeply conflicting testimony it heard in the case at bar, it did not conclude that Mr. Williams must be guilty of shooting Mr. McKinney, as he had been guilty of shooting another man in the past. In the interests of judicial economy, Mr. Williams will not repeat his arguments from Proposition of Law I here, but does incorporate them by reference into the within Proposition of Law.

The State of Ohio could not be so unfamiliar with the law that it could have presumed the other acts testimony it elicited from Ms. Williams was proper. Nevertheless, the State not only elicited the improper testimony that Kevin Williams had shot a man in the past, the State went out of its way to elicit the testimony.

The first step in the State's deliberate plan to elicit improper other acts testimony was to create an opportunity to impeach Ms. Williams. The State asked her whether she had ever made a statement to the East Cleveland Police Department in the past. When Ms. Williams answered that she had not, the State sought to impeach her by introducing the statement she made to the police in the prior shooting incident. The State did not content itself with merely eliciting testimony that Ms. Williams had made a prior police statement, instead the State intentionally and deliberately continued its inquiry into the matter by seeking testimony on the details of the incident. Moreover, when Ms. Williams would not give the State the exact and specific answers it sought, the State asked direct questions which put the information it sought before the jury. The State specifically asked Ms. Williams whether her brother was involved in the shooting and whether he had been arrested for the shooting.

In the case at bar, the State engaged in a detailed and planned tactic to do one thing and one thing only: To put before the jury improper testimony that Mr. Williams had shot a man in the past. The State did this by first creating an inconsistency in Ms. Williams's testimony so that it could impeach her with the inconsistency. The State then pressed the inconsistency further, so that it could ask Ms. Williams the specific questions it wanted to ask: Whether Kevin Williams was involved in the prior shooting and whether he had been arrested for that prior shooting. In light of the State's careful, calculated, deliberate, and prolonged questioning of Ms. Williams, this Court cannot conclude that the State came by the improper other acts testimony inadvertently. Rather, the State engaged in a planned and deliberate scheme specifically designed to place the improper other acts testimony before the jury.

In affirming, the Eighth District wrote that it did not find prosecutorial misconduct in the above questions, because, pursuant to the first assignment of error raised by Mr. Williams, the error was harmless. Therefore, the Eighth District reasoned, there was no misconduct. For the reasons set forth in the First Proposition of Law, the error occasioned by the prosecutorial misconduct was not harmless but extremely prejudicial. Again, as the Eighth District misapplies clearly established federal precedent, this Court must accept jurisdiction over the case at bar to uphold the federal precedent, which the Eighth District seems to ignore.

### CONCLUSION

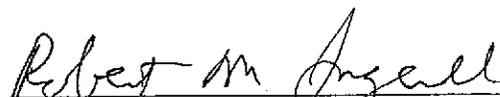
WHEREFORE, for the foregoing reasons, Mr. Williams prays this Court to accept jurisdiction over his appeal.

Respectfully submitted,

  
ROBERT M. INGERSOLL, ESQ.  
Counsel for Appellant

**CERTIFICATE OF SERVICE**

A copy of the foregoing Appellant's Brief and Assignment of Error was served by ordinary mail upon William D. Mason, Cuyahoga County Prosecutor, The Justice Center - 9<sup>th</sup> Floor, 1200 Ontario Street, Cleveland, Ohio 44113 on this 15<sup>TH</sup> day of October, 2008.

  
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ROBERT M. INGERSOLL, ESQ.  
Counsel for Appellant

## **APPENDIX**

**Attachment not scanned**

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 89726

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

VS.

**KEVIN WILLIAMS**

DEFENDANT-APPELLANT

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

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-489138

**BEFORE:** Stewart, J., Blackmon, P.J., and Dyke, J.

**RELEASED:** October 9, 2008

**JOURNALIZED:** October 9, 2008

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ON RECONSIDERATION<sup>1</sup>

MELODY J. STEWART, J.:

Defendant-appellant Kevin Williams appeals from his convictions on two counts of attempted murder, two counts of felonious assault, and one count of having a weapon while under disability. His arguments primarily center on the admission of other acts evidence relating to a past criminal charge. He maintains that this evidence not only violated Evid.R. 404(B), but that the state engaged in misconduct by eliciting it and that defense counsel acted ineffectively by failing to seek a limiting instruction as to its use. Williams also maintains that the multiple convictions for attempted murder and felonious assault placed him twice in jeopardy for the same offense. For the reasons that follow, we affirm in part and reverse in part.

Williams does not raise any assignments of error directly related to the sufficiency or quality of the evidence against him, so we state the facts in summary form. A group of men were engaged in a dice game in front of a house. Williams and a companion arrived and joined in the game. An argument broke out between Williams and one of the participants over who owed the other money after a throw. At this point, the victim arrived. The victim said that he

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<sup>1</sup>The original announcement of decision, *State v. Williams*, Cuyahoga App. No. 89726, 2008-Ohio-5149, released May 29, 2008, is hereby vacated.

and his girlfriend were visiting her grandmother's house when they saw a dice game being played on the sidewalk in front of the house. The victim heard the two men arguing and asked what was wrong. They told him that the argument was "nothing," so the victim joined the game. One of the participants testified that he thought Williams appeared "like he was on drugs or something." The victim joined the dice game and, a short while later, the argument between Williams and the other participant escalated. Williams pulled a gun from the waistband of his trousers. The participants scattered for safety. As the victim ran away, he felt a bullet strike him in the back. He told a police officer who responded to the scene that he heard two gunshots. The victim and the other game participant later identified Williams as the person who held the gun.

Williams offered an alibi defense, presenting his sister and two others who testified that he had been at a nightclub on the night of the shooting.

I

Williams raises three separate arguments relating to the state's impeachment of his sister through a police statement she had made in an unrelated police matter involving him. He argues that because the police statement showed that he had been arrested, it constituted other acts evidence under Evid.R. 404(B); that the state engaged in prosecutorial misconduct by going beyond the bare minimum needed for impeachment; and that counsel

performed ineffectively by failing to request a cautionary instruction on how the jury could consider the statement.

A

Williams presented an alibi defense at trial, notably through the testimony of his sister who testified that he had been with her at a nightclub the entire night of the shooting. At no point during the investigation of the shooting, however, did the sister go to the police and inform them about Williams' alibi. On cross-examination, the state asked her why she did not go to the police with the alibi. She replied, "[w]hy should I do that? They didn't come to me." When pressed as to how the police would know about the alibi without her coming forward, she admitted that "I can't explain it." The state then asked her if she had given statements to the police in the past. The sister replied "no." The state then asked her to examine and identify a police statement, dated March 23, 2004, that she made in an unrelated shooting. The sister agreed that she made the statement. When asked "who was involved in the shooting," the sister replied, "it was quite a few people involved in the shooting." The state then asked, "[w]ell, was one of those persons involved in the shooting alleged to be your brother, Kevin Williams?" Over objection, the sister replied, "yes." The sister then agreed that she knew it was important to make a police statement,

but that in the earlier case the police had called her seeking her statement, whereas in this case, the police did not contact her.

The state properly impeached the sister's denial of ever having given a police statement by showing her the 2004 statement she gave the police in an unrelated case involving Williams. Impeachment through a prior inconsistent statement is allowed by Evid.R. 607(A), which states that "[t]he credibility of a witness may be attacked by any party \*\*\*." The sister's claim that she could provide an alibi for Williams, but did not come forward with it because the police did not first approach her, put her credibility at issue.

Williams appears to concede that the state could impeach the sister with the fact that she made the statement to the police in 2004, but argues that the state went too far by noting that the statement involved a criminal offense unrelated to those charged at his trial. He maintains that the court should have stopped the testimony at the point where the sister admitted that she had, in fact, given a statement to the police. By allowing the state to inquire about the specifics of what caused his arrest in that matter, Williams contends that the court allowed other acts testimony into evidence.

Once the state showed the sister her prior statement, it had accomplished its goal of impeaching her with a prior inconsistent statement. By going into the specifics of what had been involved in the prior case, the state arguably violated

Evid.R. 404(B), which prohibits, with certain exceptions that are inapplicable here, the introduction of "other crimes, wrongs, or acts to prove the character of a person in order to show action in conformity therewith." The sister only denied having made a prior police statement – she did not make any claims relating to the substance of that statement which might themselves become a subject of impeachment.

Nevertheless, to the extent that the court may have erred by allowing the state to go into the substance of the prior statement, the error was harmless beyond a reasonable doubt. Crim.R. 52(A) defines "harmless error" as "any error, defect, irregularity, or variance which does not affect substantial rights." Williams elected to have the jury decide the weapons under disability count and he stipulated that he was convicted in 2004 of felonious assault. The court informed the jury of this stipulation prior to the sister's testimony. Any information relating to Williams' arrest on the 2004 charges would have been of no consequence to the jury because it knew that he had been convicted following that incident. We see no possibility that knowledge of Williams' arrest, separate and apart from his stipulation to the conviction, would have affected the outcome of the trial.

Williams next argues that he was denied his right to a fair trial by the state's reference to the sister's prior statement and his arrest following from the events described in that statement.

We review claims of prosecutorial misconduct under a two-part test. First, we examine whether the actions of the prosecuting attorney rose to the level of misconduct. Second, if the actions did amount to misconduct, we examine the record to determine whether the misconduct deprived the defendant of a fair trial. *State v. Smith* (1984), 14 Ohio St.3d 13, 14; *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 24.

We need not analyze whether the state's impeachment constituted misconduct because, consistent with our earlier conclusion, we find any error to be harmless beyond a reasonable doubt. Williams' assertion that the state offered the statement for the sole purpose of showing that he had shot a man in the past ignores the impact of his stipulation that he had been convicted from that incident. No trier of fact would have been surprised to learn that someone who had been convicted of felonious assault would also have been arrested as a result of committing that offense. Any error would have been harmless and could not have deprived Williams of a fair trial.

Finally, Williams argues that defense counsel was ineffective for failing to seek an instruction limiting the use of testimony about the prior arrest so that the jury would not consider it as substantive evidence of his guilt in this case.

To show ineffective assistance of counsel, Williams must first establish that counsel's performance was deficient by showing that counsel committed errors so serious that he or she was not, in effect, functioning as counsel. *Strickland v. Washington* (1984), 466 U.S. 668, 687. Second, Williams must demonstrate that these errors prejudiced his defense such that there exists a reasonable probability that, were it not for counsel's errors, the outcome of the trial would have been different. *State v. Bradley* (1989), 42 Ohio St.3d 136, 143.

Counsel had no duty to request the instruction suggested by Williams because the court had instructed the jury at length in the manner suggested earlier that same day of trial. During the questioning of a police detective, the parties approached the bench and at sidebar entered into a stipulation about Williams' prior conviction. The court informed the jury about Williams' stipulation to the prior conviction by saying:

"Now, the defendant is not stipulating that he knowingly acquired, had, carried or used a firearm or dangerous ordnance while being under indictment or having been convicted of a felony of violence on July 8th, 2006. That's the

part of the charge the jury is going to decide whether the State has proven or not.

“But the defendant through counsel here is stipulating that he was indeed convicted on October 13, 2004 in the Court of Common Pleas, Case 453333 of the crime of felonious assault in violation of 2903.11 and 2923.03.

“Everybody understand that? He is not stipulating but [sic] the State is accusing him of having a weapon under disability in 2006, July 8th. But the defendant is admitting, and the parties, the State and the defense, are admitting that he was convicted in 2004 of attempted felonious assault in that docket number somewhere in this Court of Common Pleas.”

Underscoring that a stipulation to a prior offense did not mean that Williams was stipulating to the current charge, the court went on to say, “[Williams] was convicted in 2004. That doesn’t mean that he did the crime in 2006, though, right? That’s what’s at issue here and that’s what the jury will decide.”

Williams has not challenged either the accuracy or completeness of this initial instruction. Although counsel did not request a new instruction at the time the state impeached Williams’ sister with her prior statement, the instruction given to the jury earlier that day was not so remote in time that it could reasonably be argued that the court needed to repeat it. We presume that

the jury follows and obeys the court's cautionary or limiting instructions. See *State v. Franklin* (1991), 62 Ohio St.3d 118, 127. Williams does not suggest that the jury disregarded this instruction, so the counsel's failure to request a second instruction contemporaneous to the testimony by the sister would not have affected the outcome of trial.

## II

The jury found Williams guilty of two counts of felonious assault and two counts of attempted murder. Williams argues that these multiple convictions for felonious assault and attempted murder violate his right not to be placed in jeopardy twice for the same offense. This argument contains two components: (1) the two convictions for felonious assault must be merged and (2) felonious assault is an allied offense of similar import to attempted murder.

## A

The two felonious assault counts charged different forms of that offense. Count 1 charged, pursuant to R.C. 2903.11(A)(1), that Williams did knowingly cause physical harm to the victim, while count 2 charged, pursuant to R.C. 2903.11(A)(2), that Williams did cause or attempt to cause physical harm to the victim by means of a deadly weapon.

The two attempted murder counts also charged different forms of that offense. Count 3 charged, pursuant to R.C. 2903.02(A), that Williams purposely

attempted to cause the victim's death, while count 4 charged, pursuant to R.C. 2903.02(B), that Williams attempted to cause the victim's death as a proximate result of committing or attempting to commit an offense of violence that is either a felony of the first or second degree.

At sentencing, Williams asked the court to merge the sentences for the two felonious assault counts and to merge the sentences for the two attempted murder counts. Williams then asked the court to merge for sentencing the newly merged felonious assault and attempted murder counts – in effect, he requested that he be sentenced for a single count of attempted murder. The state noted that two convictions could be sustained for both felonious assault and attempted murder because two shots had been fired. The state conceded, however, that count 1 and count 3 could merge because the element of physical harm was present in each count. Tr. 516-517.

The court imposed six-year sentences on the two felonious assault counts and ordered them to be served concurrent to each other. The court ordered seven-year sentences on the two attempted murder counts, and likewise ordered that they be served concurrent to each other, but consecutive to the felonious assault counts. The court merged the one and three-year firearm specifications, and ordered them to be served prior to all other counts. Finally, the court ordered a four-year sentence on the weapon under disability count, to be served

consecutively to all other counts. In total, the court ordered Williams to serve a 20-year sentence.

B

R.C. 2941.25(A) states: "Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment \*\*\* may contain counts for all such offenses, but the defendant may be convicted of only one." Subsection (B), however, permits a defendant to be convicted of and punished for multiple offenses of dissimilar import. The Committee Comment to R.C. 2941.25 states that "[t]he basic thrust of the section is to prevent 'shotgun' convictions." The Committee made it clear that "when an accused's conduct can be construed to amount to two or more offenses of similar import, he may be charged with all such offenses but may be convicted of only one."

Exactly what constitutes an offense of similar import has been difficult to determine. Until recently, the courts were bound by the test set forth in *State v. Rance*, 85 Ohio St.3d 632, 1999-Ohio-291, in which the supreme court held that offenses were of similar import if the offenses "correspond to such a degree that the commission of one crime will result in the commission of the other." *Id.*, citing *State v. Jones*, 78 Ohio St.3d 12, 13, 1997-Ohio-38. Unfortunately, this test lent itself to overly-mechanistic applications because the courts were told to

compare the elements of charged offenses in the “abstract” without considering the facts of the case. *Id.* at 336. *Rance* went on to say that offenses were not allied if “the commission of one will not *automatically* result in commission of the other.” *Id.* at 639 (emphasis added).

*Rance* came under criticism because of the mechanistic approach it ordered; namely, that two crimes could not be offenses of similar import if one crime could ever be committed without committing the other. Absent some distinction between the elements of separate crimes, the crimes would be the same, so there would be no functional distinction and no crimes could be considered offenses of similar import.

In *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, the supreme court acknowledged that the *Rance* test had produced “inconsistent, unreasonable, and, at times, absurd results.” *Id.* at ¶20. Rejecting a “strict textual comparison” of the elements of separate offenses, the supreme court clarified *Rance* by instructing the lower courts that:

“In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), courts are required to compare the elements of offenses in the abstract without considering the evidence in the case, but are not required to find an exact alignment of the elements. Instead, if, in comparing the elements of the offenses in the abstract, the offenses are so similar that the

commission of one offense will necessarily result in commission of the other, then the offenses are allied offenses of similar import. (*State v. Rance* (1999), 85 Ohio St.3d 632, 1999-Ohio-291, 710 N.E.2d 699, clarified.)” Id., paragraph one of the syllabus.

We have recently described *Cabrales* as employing a “holistic” approach to the problem of offenses of similar import, *State v. Sutton*, Cuyahoga App. No. 90172, 2008-Ohio-3677, ¶89, although it might be more accurate to describe it as a “pragmatic” one given the supreme court’s concern that *Rance* had abandoned “common sense and logic” in favor of strict textualism. *Cabrales* at ¶24. Although *Cabrales* no longer requires an exact alignment of the elements of different offenses, it still directs the courts to consider the elements of each offense in the abstract.

Our recent cases have taken a pragmatic approach when deciding whether offenses are of similar import. In *Sutton*, we considered whether attempted murder and felonious assault were offenses of similar import on facts showing that multiple shots were fired from Sutton’s car into a car with four other passengers, two of whom were shot. As relevant here, the state charged Sutton with four counts of attempted murder, six counts of felonious assault, and two counts of attempted felonious assault. The jury found Sutton guilty on all counts. We held that “shooting at someone and hitting [him], but not killing

[him], and shooting at someone but not hitting [him], are both manners in which these attempted murders were perpetrated. In fact, the various felonious assaults are subsumed in the attempted murders. Hence, the first prong (the elements of all the various felonious assaults charged here, if proved, would result in the commission of attempted murder) is satisfied." *Id.* at ¶93. Accord *State v. Wilson*, Montgomery App. No. 22120, 2008-Ohio-4130 (finding that murder and felonious assault are so similar that the commission of murder necessarily results in commission of felonious assault).

The facts of this case closely follow those of *Sutton*. Williams fired two shots at one victim in rapid succession. His intent to kill could be inferred from his use of a firearm, *State v. Shue* (1994), 97 Ohio App.3d 459, 468, and subsumed any ancillary intent to cause serious physical harm to the victim. We therefore conclude, consistent with *Sutton*, that the separate counts of felonious assault as conceptually grouped by the state are offenses of similar import to the separate charges of attempted murder.

C

We next consider whether Williams committed the attempted murder and felonious assault counts with a separate animus as required by R.C. 2941.25(B). Even though separate offenses may be of similar import, they must be committed with the same animus in order to be considered allied. The Supreme

Court has defined "same animus" as the "same purpose, intent, or motive." *State v. Blankenship* (1988), 38 Ohio St.3d 116, 119.

Unlike questions of whether offenses are of similar import, questions of whether a defendant has committed separate crimes with the same animus are fact dependent. For example, in *State v. Hines*, Cuyahoga App. No. 90125, 2008-Ohio-4236, we addressed a fact pattern in which the defendant clearly manifested a separate intent to both kill and injure a victim, thus showing a separate animus for each offense. Hines shot and wounded his victim and then followed the injured victim out of a building while pulling the trigger of his gun, only to have it misfire. The state indicted Hines on one count of attempted murder and two counts of felonious assault. The jury found him guilty on all three counts. Citing to *Cabrales*, we recognized that:

"[W]hile we can conceive of circumstances where the commission of an attempted murder necessarily results in a felonious assault, as well as circumstances where it does not so result, we need not determine whether the offenses are allied offenses of similar import in this matter. Even if we assume, without deciding the issue, that the offenses are allied offenses, the record indicates that separate incidents were involved and that a separate animus existed as to each offense." *Id.* at ¶45.

Even though Hines' first shot rendered the victim helpless, Hines followed his victim outside of the building and attempted to shoot him again, only to have his gun misfire. We found that Hines' act of following and attempting to shoot his injured victim created a "substantial independent risk of harm." Id. at ¶47. By following his victim outside and attempting to kill him, Hines broke a temporal continuum started by his initial act of shooting the victim. Although Hines may have had the same motive to kill his victim when he followed his victim out of the building, he manifested a separate intent to kill the victim after realizing that his initial attempt at murder had failed. His acts of attempted murder and felonious assault were, at all events, two nonallied criminal offenses.

Unlike *Hines*, there was no evidence in this case to show that Williams broke a temporal continuum when he fired his second shot. The evidence showed that he fired two shots in rapid succession, apparently without regard to whether he had struck the victim with the first shot. There is no evidence to show that he knew he had struck and merely injured his victim, and continued shooting so as to kill him. As in *Sutton*, the rapidity with which Williams fired the shots eliminated any doubt that he could have harbored a separate intent to both kill and injure his victim. These were two shots fired with the same purpose, intent and motive. Hence, the state could validly charge Williams with

two counts of attempted murder and two counts of felonious assault, but the court could convict him only of two attempted murder counts.

Williams next argues that the two attempted murder counts should merge because they were allied offenses of similar import and there was no evidence that he harbored a separate animus to commit two counts of attempted murder.

The state charged Williams with attempted murder and attempted felony murder. Murder is defined by R.C. 2903.02(A) to state that "[n]o person shall purposely cause the death of another or the unlawful termination of another's pregnancy." Felony murder is defined by R.C. 2903.02(B) to state that "[n]o person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree and that is not a violation of section 2903.03 or 2903.04 of the Revised Code." These offenses align such that one cannot commit felony murder without also committing murder. Both offenses require a purpose to cause the death of another, such that murder is subsumed within felony murder. Under *Cabrales*, murder and felony murder are offenses of similar import.

We also agree that there was no evidence that Williams harbored a separate animus to commit murder and felony murder. There was but one animus for the shooting – the intent to kill the victim. The state offered no facts like those presented in *Hines* to show that there was a break in the sequence of

events sufficient to allow Williams the time to form a second intent to kill. By firing in rapid succession, Williams exhibited just one intent to kill. We therefore find under the facts of this case that Williams could only be convicted of one count of attempted murder.

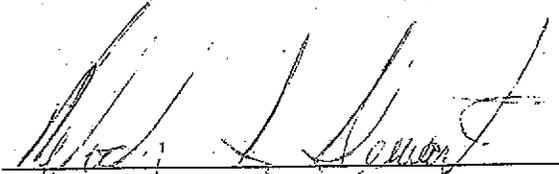
This cause is affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion.

It is ordered that the parties bear their own costs.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

  
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MELODY J. STEWART, JUDGE

PATRICIA ANN BLACKMON, P.J., CONCURS  
ANN DYKE, J., CONCURS IN JUDGMENT ONLY

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

**OCT 9 - 2008**

**GERALD E. FUERST**  
**CLERK OF THE COURT OF APPEALS**  
BY \_\_\_\_\_ DEP.