

IN THE SUPREME COURT OF OHIO

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

REPLY BRIEF OF APPELLANT CORNELIUS HARRIS

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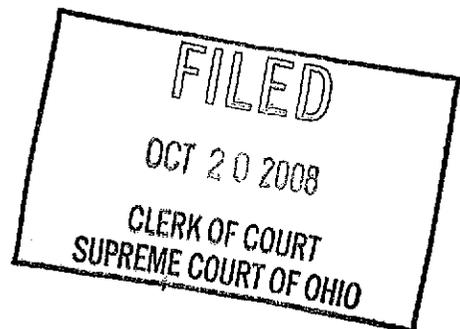


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REPLY ARGUMENT

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

The State of Ohio has offered two propositions of law, separating the question of whether the robbery offenses are allied offenses of similar import from whether the felonious assault offenses are allied as well. The same analysis determines whether either set of offenses are allied, but it is not unreasonable for the State to separate the two. Accordingly, Harris will address each in the order presented by the State.

- I. The Aggravated Robbery convictions merge with the Robbery convictions as allied offenses of similar import.

The State argues that Aggravated Robbery and Robbery are not allied because when the elements of the two offenses are compared in the abstract, the commission of one offense did not necessarily result in the commission of the other. Appellee Brief at pages 6-7. In support of its argument, the State refers to the lesser-included offense test utilized by several Ohio appellate courts to find that Robbery is not a lesser-included offense of Aggravated Robbery. Appellee Brief at pages 7-8. According to the State, the second prong of the lesser-included test, determining whether the greater offense can be committed without the lesser offense also being committed, is the “exact same test this Court set forth in *State v. Cabrales*, 118 Ohio St. 3d 54, 2008-Ohio-1625, 886 N.E.2d 181 for determining whether offenses are allied.” Appellee Brief at pages 7.

Initially, Harris would note that the Court recently rejected the State’s identical analysis of the allied offenses test in *State v. Brown*, 2008-Ohio-4569, 2008 Lexis 2535. The State

argued that the defendant's convictions for two subsections of the aggravated assault statute did not merge because when the two subsections were compared in the abstract, the commission of one offense "did not necessarily" result in the commission of the other. *Id.* at ¶8.

In *Brown*, the Court again reviewed the two-tiered test employed to determine whether offenses are allied offenses of similar import. The first step compares the elements of each crime. *Id.* at ¶19. But the textual comparison does not evaluate whether the commission of one offense does not necessarily result in the commission of the other. *Id.* This Court explicitly rejected that formulation of the test to reiterate that the first step requires comparing the elements of the two offenses to determine whether they correspond to such a degree that the commission of one crime will result in the commission of the other. *Brown* at ¶19; citing *Cabrales* at ¶14.

Accordingly, the allied offenses test is not the same as the lesser-included offenses test. If it were, then the Court never could have correctly found that kidnapping and rape are allied offenses or that aggravated robbery and kidnapping are allied offenses. See, e.g. *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, 817 N.E.2d 29, ¶¶89-95; *State v. Fears* (1999), 86 Ohio St.3d 329, 344, 715 N.E.2d 136. Indeed, there would be little need for R.C. 2941.25(A) had the legislature intended for allied offenses to be evaluated by the same standard as lesser-included offenses.

The legislative intent behind R.C. 2941.25 "is to prevent 'shotgun' convictions." *Cabrales* at ¶23. The strict textual comparison approach, which is essentially the approach that the State continues to urge upon this Court even after *Cabrales*, would defeat that intent and result in the incongruous results produced by *State v. Rance*, 85 Ohio St.3d 632, 1999 Ohio 291, 710 N.E.2d 699. *Id.* at 20. The Court should again reject the State's interpretation of the allied offenses statute.

Harris used a deadly weapon, a firearm, to commit a theft offense and to flee thereafter, in violation of R.C. 2911.01(A)(1). When Harris committed the aggravated robbery, he necessarily committed robbery by using the weapon to inflict or threaten to inflict physical harm upon the victim while committing a theft offense in violation of R.C. 2911.02(A)(2). The legislature intent behind the two statutes is the same – to prevent theft by force or threatened force. See *Brown*, ¶39. Thus, Aggravated Robbery and Robbery are allied of similar import when the robber commits the same act with the same animus.

II. The Felonious Assaults are allied offenses in accordance with *State v. Brown*.

The defendant in *Brown* stabbed her boyfriend with a knife. She was convicted of two counts of Aggravated Assault based upon the single stab wound. First, the jury found that she violated R.C. 2903.12(A)(1) when she caused serious physical harm to another. The jury also found that the defendant violated R.C. 2903.12(A)(2) when she used a deadly weapon.

The offenses differed by the degree of harm required and the use of a deadly weapon. Had the Court applied a test that compared the offenses in the abstract, the commission of one aggravated assault as charged would not have necessarily resulted in the commission of the other and so the offenses would not have been allied. *Brown* at ¶35.

The Court, however, did not review the elements to determine whether the commission of one offense would not have necessarily resulted in the commission of the other. Instead, the Court referred to rules of statutory construction to determine whether the legislative intended for the two aggravated assault subsections to be allied offenses of similar import. *Id.* at ¶¶35, 37. Noting that the Aggravated Assault statute set forth two means of committing the same offense, either by causing serious physical harm or by causing physical harm by means of a deadly weapon, the Court found that the legislature manifested the same intent “to prevent physical

harm to persons.” Id. at ¶39. Accordingly, the legislature did not intend to separately punish violations of R.C. 2903.12(A)(1) and R.C. 2903.12(A)(2) when the offenses resulted from a single act and the same animus. Id. at 40.

Based upon *Brown*, Harris agrees with the State’s call to look to the legislature’s intent in determining whether the felonious assault offenses were allied. Harris was convicted of two subsections of the Felonious Assault statute, R.C. R.C. 2903.11(A), that are identical to the subsections relevant to *Brown*. Harris caused serious physical harm and he caused physical harm by means of a deadly weapon. By providing alternate means to commit the same offense of Felonious Assault, the legislature evinced an intent to prevent physical harm to people. Id. at ¶39. Accordingly, the offenses are allied offenses of similar import. Harris may only be convicted of one form of the offense that arose from a single act and animus. Id. at 41.

CONCLUSION

Aggravated robbery and robbery are allied offenses of similar import. Felonious assaults committed with a deadly weapon that result in serious physical harm as well as physical harm are also allied offenses of similar import. Accordingly, the First District’s judgment should be reversed and the case should be remanded to the trial court with an order to re-sentence Harris.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER



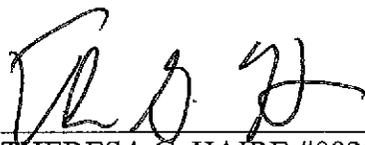
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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing **REPLY BRIEF OF APPELLANT CORNELIUS HARRIS** was forwarded by regular U.S. Mail, postage prepaid to the office of James Michael Keeling, Assistant Hamilton County Prosecutor, 230 E. 9th Street, Suite 4000, Cincinnati, Ohio 45202 this 20th day of October, 2008.



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APPENDIX TO

REPLY BRIEF OF APPELLANT CORNELIUS HARRIS

LEXSTAT ORC ANN. R.C. 2903.12

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*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED
WITH THE SECRETARY OF STATE THROUGH OCTOBER 13, 2008 ***

*** ANNOTATIONS CURRENT THROUGH JULY 1, 2008 ***

*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JULY 20, 2008 ***

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2903. HOMICIDE AND ASSAULT
ASSAULT

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ORC Ann. 2903.12 (2008)

§ 2903.12. Aggravated assault

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

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

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

(B) Whoever violates this section is guilty of aggravated assault, a felony of the fourth degree. If the victim of the offense is a peace officer or an investigator of the bureau of criminal identification and investigation, aggravated assault is a felony of the third degree. If the victim of the offense is a peace officer or an investigator of the bureau of criminal identification and investigation, and if the victim suffered serious physical harm as a result of the commission of the offense, aggravated assault is a felony of the third degree, and the court, pursuant to division (F) of *section 2929.13 of the Revised Code*, shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the third degree.

(C) As used in this section:

(1) "Investigator of the bureau of criminal identification and investigation" has the same meaning as in *section 2903.11 of the Revised Code*.

(2) "Peace officer" has the same meaning as in *section 2935.01 of the Revised Code*.