

IN THE
SUPREME COURT OF OHIO

08-2047

STATE OF OHIO, : NO.
 :
 Plaintiff-Appellant, : On Appeal from the Hamilton County
 : Court of Appeals, First Appellate
 vs. : District
 :
 TOBY PALMER, : Court of Appeals
 : Case Number C010583
 Defendant-Appellee. :

MEMORANDUM IN SUPPORT OF JURISDICTION

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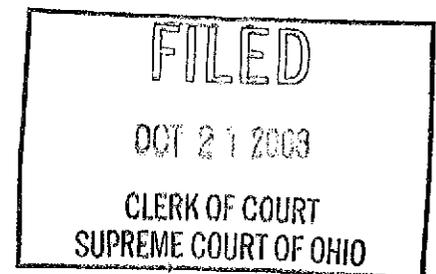


Table of Contents

Explanation of why this case is a case of public or great general interest and does involve a substantial constitutional question 1.

Statement of the Case and Facts 3.

First Proposition of Law: A new decision from the Ohio Supreme Court does not create extraordinary circumstances under App.R. 14(B) that allows reconsideration of an appellate court's previous decisions. An appellate court cannot use App.R.14(B) and App.R. 26(A) to give case law from the Ohio Supreme Court an unintended retroactive effect 8.

Authorities Presented:

App.R.14(B) 8.

App.R. 26(A) 8.

Ali v. State, 104 Ohio St. 3d 328, 2004-Ohio-6592, 819 N.E.2d 687 9.

State v. Colon II, ___ Ohio St. 3d ___, 2008-Ohio-3749, ___ N.E.2d ___ 9.

State v. Silsby, ___ Ohio St. 3d ___, 2008-Ohio-3834, ___ N.E.2d ___ 9.

Second Proposition of Law: 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. 9.

Authorities Presented:

R.C. 2911.02(A)(2) 10-11.

R.C. 2911.01(A)(1) 10-11.

State v. Cabrales, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181 9, 11.

State v. Deem (1988), 40 Ohio St.3d 205, 533 N.E.2d 294. 10.

State v. Evans, 8th Dist No. 89057, 2008-Ohio-139 11.

State v. Fanning, 8th Dist. No. 89914, 2008-Ohio-2185 11.

State v. Rance, 85 Ohio St.3d 632, 1999-Ohio-291, 710 N.E.2d 699 9.

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

Conclusion 13.

Certificate of Service 13.

Appendix A-1.

IN THE
SUPREME COURT OF OHIO

STATE OF OHIO,	:	NO.
	:	
Plaintiff-Appellant,	:	
	:	
vs.	:	
	:	
TOBY PALMER,	:	<u>MEMORANDUM IN SUPPORT OF</u>
	:	<u>JURISDICTION</u>
	:	
Defendant-Appellee.	:	

Explanation of why this case is a case of public or great general interest and does involve a substantial constitutional question

Six years after the First District ruled on his direct appeal, Toby Palmer filed a motion for reconsideration. In his motion, Palmer argued that under *State v. Cabrales* – a case decided more than 2,000 days after his appeal was originally ruled upon – he had been improperly sentenced on allied offenses of similar import. Over the State’s opposition, the First District granted Palmer’s motion for reconsideration, found that *Cabrales* applied to his case, and remanded his case for a new sentencing hearing.

This case raises two important questions.

First, Palmer’s application for reconsideration was filed six years after the First District reached its decision. Appellate Rule 26 states that applications for reconsideration are to be filed within 10 days. Appellate Rule 14(B) allows for extending this time when extraordinary circumstances exist. The First District has improperly read this to mean that anytime new case law is released from this Court that it creates an extraordinary circumstance that justifies reconsidering

any of its prior decisions. This Court should accept jurisdiction over this matter to instruct the lower courts that its decisions are not to be given this type of unintended retroactive effect.

Second, this case raises the question of whether aggravated robbery and robbery are allied offenses of similar import. This Court currently has three cases pending before it where it is considering that same issue: *State v. Evans*, *State v. Harris*, and *State v. Madaris*.¹

Both these issues are of public and great general interest. Both involve substantial constitutional questions. Therefore, the State asks this Court to accept jurisdiction over this matter.

¹*State v. Harris*, Case No. 2007-1812, *State v. Evans*, Case No. 2008-0363, and *State v. Madaris*, Case No. 2008-1052.

Statement of the Case and Facts

a) **Procedural Posture:**

In April 2001 the Toby Palmer was charged in a three count indictment with aggravated robbery, in violation of R.C. 2911.01(A)(1), robbery, in violation of R.C. 2911.02(A)(2), and kidnaping, in violation of R.C. 2905.01(A)(2). A few months later, the case proceeded to a trial by jury. The jury returned a verdict of guilty of the aggravated robbery and robbery charges, but not guilty of the charge of kidnaping.

The trial court sentenced Palmer to ten years incarceration with the Department of Corrections on the aggravated robbery, plus three years incarceration on the gun specification attached to the charge. On the robbery charge, Palmer was sentenced to eight years incarceration. Those sentences were run consecutively.

Palmer appealed his convictions to the First District Court of Appeals. After the First District affirmed the matter, Palmer asked this Court to take jurisdiction over the matter. This Court declined jurisdiction. In both his direct appeal and in his memorandum in support, Palmer argued that he had been convicted of allied offenses of similar import.

Six years after the First District decided his case, Palmer filed a motion for reconsideration. Over the State's opposition, the First District granted the motion for reconsideration. It found that aggravated robbery and robbery were allied offenses of similar import, vacated Palmer's convictions, and remanded the matter for resentencing.

b) Statement of Facts:

Jeffery Horton was visiting his wife, Tammy Horton, during her stay in Good Samaritan Hospital in Clifton. The Horton's reside in Middletown, but two or three weeks prior to this date Tammy had been admitted to the hospital for complications arising from her pregnancy. Consequently, Jeffery would often drive down from Middletown to visit his wife after getting off from work. Around 9:00 or 10:00 on the night in question, Tammy spoke with Jeffery on the phone and requested that Jeffery bring dinner.

Jeffery decided he would stop for chicken at fast food place. The restaurant he chose was Richie's in Avondale. He stopped and went in and stood in line to place his order. Palmer was in front of him in line, as were Palmer's two co-defendant's, Darian Lattimore and Robert Lattimore.

Jeffery did not know the three, but struck up a conversation with one of the trio while waiting in line. Jeffrey then purchased his chicken and went back out to his Brown 1988 Lincoln Town Car. As he was leaving the parking lot he noticed the same three individuals sitting at the light in a maroon Ford Taurus wagon. Jeffery then went to a UDF near the hospital and purchased a two liter Pepsi to drink with the dinner. With the provisions in tow, Jeffery then headed to the hospital.

Jeffery backed into a spot in the parking garage and as he was exiting the car the maroon Ford Taurus wagon pulled in front of his car, boxing him in. Palmer was driving the car. Darian and Robert Lattimore then jumped out of the Taurus. Darian had a gun. Jeffery immediately put his hands up in the air and told them the keys were still in the ignition and that they could take the car.

Instead the robbers told Jeffery, "[n]o. Scoot over. You're coming with us." Darian then took the driver's seat in the Lincoln and Robert sat in the back seat. Darian handed Robert the revolver and he held it to the back of the passenger's seat, pointed at Jeffery. Darian then drove the Lincoln out

of the garage followed by Palmer driving the Tarus. After driving a short distance, Darian and Robert switched places in the Lincoln. Robert then proceeded to drive the Lincoln to another nearby location behind some apartment buildings somewhere in Avondale. Palmer followed in the Tarus. Once there, the robbers took all of Jeffery's money and jewelry and told him to start taking out the televisions in his car.

Jeffery's Lincoln had been heavily customized. It was appointed with gold trim and had a plethora of stereo speakers, amplifiers, equalizers and the like in the interior and trunk of the car. As a final touch Jeffery had two miniature television screens installed in the flip down sun visors of the car. Jeffery told the robbers that the televisions and stereo equipment could not be removed without tools. Upon hearing this, Darian ordered Jeffery to "get your ass in the trunk" of the Lincoln. Jeffery complied. After shutting him in the trunk, the trio then drove for quite sometime stopping at another location. Once stopped, Jeffery could hear that the stereo and video equipment was being torn from the car. Finally, Darian opened the trunk of the car and removed Jeffery. He had a gun to Jeffery's head as he did so.

Once out, Jeffery observed Palmer and Robert ransacking his vehicle removing speaker and stereo components from the trunk and interior of the vehicle. Darian forced Jeffery to help with the stripping of the car at gunpoint. At one point when the removal of an amplifier was not going particularly well, Darian became hostile and stuck the barrel of the gun in Jeffery's mouth. He then told Jeffery to lay down on the ground. Jeffery again complied. He then had Jeffery remove his shoes, pants and jacket. As a final insult, Darian told Jeffery to remove his two gold front teeth. Jeffery removed one cap, which was loose and needed to be repaired, but explained the other would not easily come out

Thinking he would not survive the robbery, Jeffery told Darian that he might as well kill him since he had taken everything he owned. Darian replied, "I ain't got no problem doing it." Jeffery then grabbed the gun Darian was holding and a struggle ensued. During the struggle for the weapon it discharged striking Darian in the shoulder. Palmer and Robert had been oblivious to the struggle while they were removing items from the car, but with the gunshot they fled along with Darian. Jeffery seeing his chance to escape jumped into the Lincoln and sped off. He began searching for a police office and before long found a nearby patrol car.

Officer Chris Bihl was on patrol and noticed the Brown Lincoln driving erratically. Then suddenly the Lincoln stopped immediately in front of the officers and Jeffery exited the car. He ran toward the cruiser frantically waving his hands above his head and screaming to the officers for help. Officer Bihl noticed Jeffery was not wearing shoes. Confronted with a hysterical person talking of being robbed and telling the officers of a gun in the front seat of his car, the officers were startled. They handcuffed Jeffery and placed him in the back seat of the cruiser. There the officers began to piece together what had happened that night. When they checked the interior of the car, the condition of the Lincoln confirmed Jeffery's story. The officers then called their supervisors and a detective to the scene. As a final measure, the officers sent Officer Rob Orchard to Good Samaritan Hospital to verify that Jeffery's wife was a patient there. When they determined she was indeed a patient, they then began to search for the maroon Tarus station wagon. Detective David Feldhaus also contacted all hospitals to make sure he was immediately informed if an individual was admitted with a gunshot wound.

That tactic proved successful. Later that night, Darian went to University Hospital for the treatment of the gunshot wound to his shoulder. A photo lineup was prepared using Darian's picture

and Jeffery identified him as one of his assailants. The search for the maroon Tarus station wagon culminated the next morning when Cincinnati Police Detective Darrin Hoderlein tracked down the vehicle to 926 Chapel St., the address of its owner Jaimee McClure. Jaimee was a friend of Palmer and Robert Lattimore. Robert had requested to borrow the car earlier in the evening on the night of the robbery. Jaimee consented. Just after the shooting took place, Robert called Jaimee using his cell phone and instructed her to report the car stolen. Jaimee did so and was on the phone with the 911 operator when Robert called her back and told her to “nevermind.” She then told the 911 operator the car was no longer missing and hung up.

Later still, Robert and Palmer came to Jaimee’s apartment and carried in some of the car stereo equipment they had taken as well as articles of Jeffery’s clothing and jewelry. Jaimee listened as Robert and Palmer described the night’s events in separate phone conversations. Specifically she heard Robert and Palmer say that the robbery started at the hospital and that they placed the victim in the trunk of the car. They also spoke of stealing stereo equipment money and jewelry from Jeffery and that Darian had been shot while struggling for the gun. When the police initially spoke with Jaimee she was reluctant to give any information and lied telling them a fictitious man nicknamed “Goldie” had stolen the car. Detective Hoderlein was not easily deterred, and after further questioning and searching Jaimee’s apartment, she confessed that Palmer and Robert Lattimore were the real persons involved. Based on this information Detective Hoderlein prepared two more photo arrays for Jeffery to view. He immediately identified Palmer and Robert as his other two assailants.

First Proposition of Law: A new decision from the Ohio Supreme Court does not create extraordinary circumstances under App.R. 14(B) that allows reconsideration of an appellate court's previous decisions. An appellate court cannot use App.R.14(B) and App.R. 26(A) to give case law from the Ohio Supreme Court an unintended retroactive effect.

Appellate Rule 26(A) allows parties to request reconsideration of any ruling made by an appellate court, but it specifies that applications must be filed either before the judgment or order of the court has been approved and journalized or within ten days of the announcement of the court's decision, whichever is later. Despite these time constraints, the First District Court of Appeals considered and granted Palmer's application even though it was filed six years after it had announced its decision. As explained in its subsequent denial of the State's motion for reconsideration, the First District found that new case law from this Court created extraordinary circumstances that justified allowing reconsideration under App.R.14(B).

Appellate Rule 26(A) was designed to preserve finality by giving appellate courts jurisdiction to reconsider their decisions only if an application is filed within ten days of the decision. The proper time for Palmer to file an application to reconsider was within ten days of the announcement of the decision on his direct appeal, not 2,098 days later. Because he did not apply within that time frame the First District should not have reconsidered its earlier decision.

Appellate Rule 14(B) does allow for extending the time for filing an application for reconsideration under "extraordinary circumstances." The First District apparently found that new case law from this Court creates extraordinary circumstances that justify reconsidering appeals no matter how old they may be. By doing so, the First District has given *State v. Cabrales* a retroactive

effect that was not intended by this Court. As this Court recently reaffirmed, a " new judicial ruling may be applied only to cases that are pending on the announcement date."²

Palmer may argue that his application for reconsideration rolled the clocks back in such a way to make his case artificially pending on the date *Cabrales* was released, but this Court just rejected a similar argument in *State v. Silsby*.³ In *Silsby*, it was argued that *State v. Foster* should be applied to a delayed appeal because, had the appeal been filed timely, it would have fallen under *Foster*. This Court rejected that argument and found that *Foster* applies only if an appeal was actually pending at the time *Foster* was released.⁴ The same logic applies here. Therefore, the First District should not have allowed reconsideration of this matter.

Second Proposition of Law: 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

²*State v. Colon II*, ___ Ohio St. 3d ___, 2008-Ohio-3749, ___ N.E.2d ___, ¶ 3 quoting *Ali v. State*, 104 Ohio St. 3d 328, 2004-Ohio-6592, 819 N.E.2d 687, ¶ 6.

³*State v. Silsby*, ___ Ohio St. 3d ___, 2008-Ohio-3834, ___ N.E.2d ___.

⁴*Id.*, syllabus.

⁵*State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181.

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

⁷*Cabrales* at ¶ 27.

⁸*Id.* at ¶ 26.

Palmer was convicted of committing 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.

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.

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.

⁹*State v. Deem* (1988), 40 Ohio St.3d 205, 533 N.E.2d 294.

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 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.

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.

¹¹*Evans*, supra at ¶ 15.

¹²*Smith* at ¶ 34.

¹³*Id.*

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. Consequently, the trial court could impose sentences for both aggravated robbery and robbery.

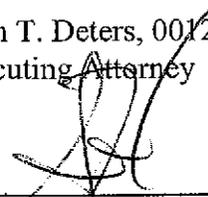
Conclusion

The First District has improperly found a way to give retroactive effect to this Court's decisions through granting applications for reconsideration. This Court should accept jurisdiction over this matter to instruct lower courts that App.R. 14 and 26 cannot be used in conjunction to create unintended retroactive case law.

Also, this Court is currently considering numerous cases that question whether aggravated robbery and robbery are allied offenses of similar import. Thus, this Court should accept the second proposition of law in this matter, but should also consider staying briefing on that issue until the other similar cases currently pending before this Court are resolved.

Respectfully,

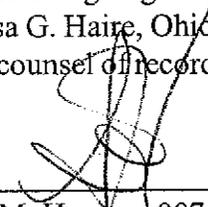
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Certificate of Service

I hereby certify that I have sent a copy of the foregoing Memorandum in Support of Jurisdiction, by United States mail, addressed to Theresa G. Haire, Ohio Public Defender's Office, 8 East Long Street, 11th Floor, Columbus, Ohio 43215, counsel of record, this 20th day of October, 2008.



Scott M. Heenan, 0075734P
Assistant Prosecuting Attorney

Appendix

Copy of Judgement Entry and Entry Granting Enlargement
of Time and Application for Reconsideration

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

ENTERED
SEP 12 2008



D80138173

STATE OF OHIO,	:	APPEAL NO. C-010583
	:	TRIAL NO. B-0102212B
Plaintiff-Appellee,	:	
vs.	:	<i>JUDGMENT ENTRY AND</i>
	:	<i>ENTRY GRANTING MOTION</i>
TOBY PALMER,	:	<i>FOR ENLARGEMENT OF TIME</i>
	:	<i>AND APPLICATION FOR</i>
Defendant-Appellant.	:	<i>RECONSIDERATION.</i>

This cause is considered upon the application for reconsideration, the motion to enlarge the time for filing the application, and the state's response.

The court grants reconsideration and enlarges the filing time because the Ohio Supreme Court's recent decision in *State v. Cabrales*¹ both discloses an obvious error in our initial decision that warrants reconsideration² and provides extraordinary circumstances that warrant enlarging the time for applying for reconsideration.³

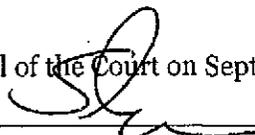
And for the reasons set forth in the Decision on Reconsideration filed this date, the sentences are vacated and the cause is remanded.

Further, the court holds that there were reasonable grounds for this appeal, allows no penalty, and orders that costs are taxed under App.R. 24.

The court further orders that a copy of this Judgment Entry, with a copy of the Decision on Reconsideration attached, constitutes the mandate, and that the mandate be sent to the trial court for execution under App.R. 27.

To the Clerk:

Enter upon the Journal of the Court on September 12, 2008
per order of the Court.


Presiding Judge

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

² See App.R. 26(A); *State v. Black* (1991), 78 Ohio App.3d 130, 132, 604 N.E.2d 171.

³ See App.R. 14(B).

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

STATE OF OHIO,	:	APPEAL NO. C-010583
Plaintiff-Appellee,	:	TRIAL NO. B-0102212B
vs.	:	
TOBY PALMER,	:	<i>DECISION ON</i>
Defendant-Appellant.	:	<i>RECONSIDERATION.</i>

**PRESENTED TO THE CLERK
OF COURTS FOR FILING**

Criminal Appeal From: Hamilton County Court of Common Pleas

SEP 12 2008

Sentences Vacated and Cause Remanded

COURT OF APPEALS

Date of Judgment Entry on Appeal: September 12, 2008

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Scott M. Heenan*,
Assistant Prosecuting Attorney, for Plaintiff-Appellee,

David H. Bodiker, Ohio Public Defender, and *Theresa G. Haire*, Assistant State
Public Defender, for Defendant-Appellant.

Please note: we have removed this case from the accelerated calendar.

HILDEBRANDT, Judge.

{¶1} Defendant-appellant Toby Palmer appeals from the judgment of the Hamilton County Court of Common Pleas convicting him, following a jury trial, of aggravated robbery in violation of R.C. 2911.01, robbery in violation of R.C. 2911.02, and one gun specification. The trial court imposed a ten-year prison term for the aggravated robbery, a three-year prison term for the gun specification, and an eight-year prison term for robbery and ordered these sentences to be served consecutively.

{¶2} Palmer now brings forth three assignments of error. Upon our determination that the trial court violated R.C. 2941.25 when it sentenced Palmer for both aggravated robbery and robbery, we affirm the findings of guilt, but vacate the sentences, including the sentence imposed for the gun specification.

I. On Reconsideration

{¶3} Palmer was convicted in 2001. He appealed, and in 2002, we affirmed his convictions in all respects.¹ In response to Palmer's challenge in his third assignment of error to his consecutive sentences for aggravated robbery and robbery, we applied the Ohio Supreme Court's decision in *State v. Rance*² to hold (albeit reluctantly) that the trial court could have, consistent with R.C. 2941.25, sentenced Palmer for both aggravated robbery and robbery because the offenses were not allied offenses of similar import.³ The Ohio Supreme Court declined to accept Palmer's appeal for review.⁴

¹ *State v. Palmer*, 148 Ohio App.3d 246, 2002-Ohio-3536, 772 N.E.2d 726.

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

³ See *Palmer*, 148 Ohio App.3d 246, 772 N.E.2d 726, at ¶9-13.

⁴ *State v. Palmer*, 97 Ohio St.3d 1425, 2002-Ohio-5820, 777 N.E.2d 278.

{¶4} But in April of 2008, the supreme court, in *State v. Cabrales*,⁵ affirmed this court's holding that R.C. 2941.25 precluded sentencing a defendant for both possession of a controlled substance under R.C. 2925.11(A) and trafficking in the same controlled substance under R.C. 2925.03(A)(2).⁶ In so doing, the supreme court did not overrule *Rance*. Instead, citing with disapproval our 2002 decision in *Palmer*, the supreme court rejected as "overly narrow" the "view of numerous Ohio appellate districts * * * that *Rance* 'requires a strict textual comparison' of elements under R.C. 2941.25(A)."⁷

{¶5} In March of 2008, a month before the supreme court decided *Cabrales*, we had decided *State v. Madaris*.⁸ In that decision, we had declared ourselves compelled by *Rance* and *Palmer* to hold (again, reluctantly) that the trial court could have, consistent with R.C. 2941.25, sentenced Madaris for both aggravated robbery and robbery.

{¶6} In May of 2008, in the wake of *Cabrales*, we reconsidered our March 2008 decision in *Madaris*. In our Decision On Reconsideration, we held that the trial court could not have, consistent with R.C. 2941.25, sentenced Madaris for both aggravated robbery and robbery, because "the commission of aggravated robbery under R.C. 2911.01(A)(1) necessarily results in the commission of robbery under R.C. 2911.02(A)(2)," and thus the offenses are allied and of similar import. Accordingly,

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

⁶ See *id.*, paragraph two of the syllabus, affirming *State v. Cabrales*, 1st Dist. No. C-050682, 2007-Ohio-857.

⁷ 118 Ohio St.3d 54, 886 N.E.2d 181, at ¶21.

⁸ 1st Dist. No. C-070287, 2008-Ohio-1440.

we overruled our 2002 decision in *Palmer* to the extent that we had there held otherwise.⁹

{¶7} In July of 2008, citing *Cabrales*, Palmer applied under App.R. 26 for reconsideration of our 2002 decision in his case. The supreme court's decision in *Cabrales* and our subsequent decision in *Madaris* made apparent our error in overruling Palmer's third assignment of error, challenging the imposition of consecutive prison terms for aggravated robbery and robbery.¹⁰ And those decisions provided the extraordinary circumstances that warranted enlarging the time for applying for reconsideration.¹¹ Accordingly, we reconsider, and substitute this decision for, our 2002 decision.

II. The Assignments of Error

A. Lattimore's Testimony

{¶8} In his first assignment of error, Palmer urges that the lower court erred by failing to require co-defendant Darian Lattimore to testify pursuant to Palmer's subpoena. We are unpersuaded.

{¶9} The record discloses that Palmer called Lattimore as a defense witness. Lattimore and his nephew, Robert, had been indicted as co-defendants. Palmer's case was separated from the Lattimores' cases following Palmer's motion to sever. Although Lattimore and the state had entered into a plea agreement in which Lattimore had pleaded guilty to the same charges that Palmer faced, Lattimore had not yet been sentenced at the time he was subpoenaed to testify at Palmer's trial.

⁹ *State v. Madaris*, 1st Dist. No. C-070287, 2008-Ohio-2470, ¶13.

¹⁰ See App.R. 26(A); *State v. Black* (1991), 78 Ohio App.3d 130, 132, 604 N.E.2d 171.

¹¹ See App.R. 14(B).

{¶10} At Palmer's trial, Lattimore, after consulting with his counsel, declined to testify, asserting his Fifth Amendment privilege. Palmer contends that since Lattimore had already tendered his plea of guilty, he should have been required to testify, regardless of whether sentencing had occurred. We disagree. When a co-defendant has pleaded guilty, but has not yet been sentenced, he may properly assert his Fifth Amendment privilege, as the plea-bargaining process has not yet been completed.¹² Accordingly, the trial court's decision to allow Lattimore to invoke his Fifth Amendment privilege was proper.

{¶11} Palmer also asserts that the trial court abused its discretion by delaying the sentencing of Lattimore until after Palmer's trial, effectively preventing Lattimore from testifying. But the length of the delay between Lattimore's plea and sentence is not of record. When relevant portions of the record are not transmitted for our review, we must presume regularity in the proceedings below.¹³ Accordingly, the first assignment of error is overruled.

B. Prosecutorial Misconduct

{¶12} In his second assignment of error, Palmer maintains that the trial court erred by failing to declare a mistrial based upon prosecutorial misconduct. Palmer asserts that the assistant prosecutor engaged in misconduct when he asserted, during closing argument, that one of the state's witnesses had been scared to testify because of threats she had allegedly received from Palmer. We find this assignment of error unpersuasive.

¹² *State v. Griffin* (1992), 73 Ohio App.3d 546, 552, 597 N.E.2d 1178; *State v. Acevedo* (Aug. 3, 2000), 8th Dist. No. 76528.

¹³ See App.R. 9(B); *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199, 400 N.E.2d 384.

{¶13} Although Palmer did not request a mistrial following the prosecutor's comments, he did object to the alleged misconduct and thus preserved this issue for appeal. Prosecutorial misconduct constitutes reversible error only when the conduct complained of has deprived the defendant of a fair trial.¹⁴ Here, although the witness did express some reluctance to testify, we conclude that it was improper for the prosecutor to continue to argue that the witness's reluctance was based on a fear of Palmer after the trial court had sustained Palmer's objections to those comments. Nevertheless, our review of the record convinces us that Palmer's substantial rights were not affected by the prosecutor's remarks.¹⁵ The trial court sustained the objections and gave a curative instruction to the jury. Furthermore, based on the strength of the evidence against Palmer, we cannot say that the prosecutorial misconduct denied Palmer a fair trial. Accordingly, the second assignment of error is overruled.

C. Allied Offenses of Similar Import

{¶14} In his third and final assignment of error, Palmer contends that the trial court erred by imposing maximum, consecutive sentences for aggravated robbery and robbery. We agree in part.

{¶15} Under *Madaris*, aggravated robbery and robbery are allied offenses of similar import.¹⁶ And the offenses in this case were not committed separately or with a separate animus as to each. Therefore, the trial court violated R.C. 2941.25 when it sentenced Palmer for both aggravated robbery and robbery. Accordingly, we sustain

¹⁴ *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 24, 514 N.E.2d 394.

¹⁵ *State v. Lott* (1990), 51 Ohio St.3d 160, 165, 555 N.E.2d 293.

¹⁶ See *Madaris*, supra, at ¶3.

the third assignment of error to the extent of its challenge to Palmer's sentences under R.C. 2941.25, and we hold that the remaining challenges to his sentences are moot.

III. Guilt Is Affirmed; the Sentences Are Vacated

{¶16} We affirm the findings of guilt, but vacate the sentences and remand the case for resentencing for either aggravated robbery or robbery and, as appropriate, for the gun specification.

Sentences vacated and cause remanded.

SUNDERMANN, P.J., concurs.

PAINTER, J., concurs separately.

PAINTER, J., concurring separately.

{¶17} Since I dissented in the original decision and urged the supreme court to rethink its position, obviously I concur in finally making this case right.

Please Note:

The court has recorded its own entry on the date of the release of this decision.