ORIGINAL

NO. 2008-2037

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 89726

STATE OF OHIO,

Plaintiff-Appellee, Cross-Appellant

v.

KEVIN WILLIAMS

Defendant-Appellant, Cross-Appellee.

MERIT BRIEF OF PLAINTIFF-APPELLEE, CROSS-APPELLANT

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STATEMENT OF THE FACTS

On July 8, 2006 at a location within the City of East Cleveland, Cuyahoga County, Ohio, Kevin Williams twice fired a gun at LayShawn McKinney. McKinney was stuck once in the back.

McKinney testified at trial that was in a wheelchair since the events that occurred on July 8, 2006. (Tr. 226.) McKinney stated that on that day he arrived with his girlfriend in East Cleveland and that several people were playing dice outside on the street. Among them was the defendant, Kevin Williams, whom McKinney had not known previously. (Tr. 226-228.)

McKinney testified that he joined the game for several minutes before an argument between Williams and another male occurred—and Williams pulled a gun from his waistband. (Tr. 229-232.) McKinney testified that people scattered and ran, including himself, but that he was shot in the back as he tried to flee the area. McKinney remembered hearing the shot and falling to the ground paralyzed—and that he was transported to a hospital for treatment. (Tr. 232-237.) McKinney identified for police Williams as the gunman. (Tr. 237-238.)

Police Officer Scott Vargo of the City of East Cleveland responded to the scene upon the report of a shooting. (Tr. 263.) Officer Vargo testified that he found McKinney on the ground, that McKinney said that he had been shot, and that McKinney could not feel or move his legs. (Tr. 248-251.) Officer Vargo stated that McKinney indicated that Williams shot him. (Tr. 251-254.)

East Cleveland Detective Terry Wheeler testified that McKinney identified a photo of Williams from an array indicating that Williams was the shooter. (Tr. 268-269.)

Bralynn Randall testified that he was present at the scene and that Williams and McKinney had gotten into an argument before Williams pulled out the gun. (Tr. 331-338.) Randall heard the shots fired and heard McKinney calling to him. Randall testified that McKinney had been shot and was lying on the ground. (Tr. 338-339.)

Ghana Tucker, McKinney's girlfriend testified that she was at her mother's house when the shooting occurred. She heard the gun fire but did not see what happened—when she looked, McKinney was lying on the ground. (Tr. 350-355.)

In his defense, Williams presented three alibi witnesses who all testified that on July 8, 2006 Williams was at the Park Avenue Lounge in the City of East Cleveland. (Tr. 362-365; 384-388; 396-401.

Upon appeal, the Eighth District Court of Appeals summarized the pertinent facts as follows:

> 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 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.

State v. Williams, Cuyahoga App. No. 89726, 2008-Ohio-5286, ¶ 2-3.

STATEMENT OF THE CASE

The case proceeded to a jury trial and on March 19, 2007 the jury returned its verdict finding Kevin Williams guilty. Williams appealed to the Eighth District Court of Appeals his convictions of two counts of Attempted Murder, two counts of Felonious Assault, and one count of Having a Weapon While Under Disability. Williams' asserted that his multiple convictions for Attempted Murder and Felonious Assault placed him twice in jeopardy for the same offense.

The Eighth District determined "the separate counts of felonious assault as conceptually grouped by the state are offenses of similar import to the separate charges of attempted murder." *State v. Williams*, Cuyahoga App. No. 89726, 2008-Ohio-5286, ¶ 33. The Court also concluded that the two counts of Attempted Murder were allied with one another such that, all told, Williams could only be convicted of a single count of Attempted Murder. Id. at ¶ 40.

Williams petitioned this Supreme Court for jurisdiction and the State filed its cross-appeal. The State's argument in support of its single proposition of law follows.

LAW AND ARGUMENT

Proposition of Law No. I:
R.C. § 2923.02/2903.02, Attempted Murder, is not an allied offense of similar import with R.C. § 2903.11(A)(1), Felonious Assault.

Further, R.C. § 2923.02/2903.02, Attempted Murder, is not an allied offense of similar import with the offense of R.C. § 2903.11(A)(2), Felonious Assault.

Therefore, a defendant may be found guilty and sentenced separately for these Felonious Assaults in addition to Attempted Murder.

Summary of Argument.

Felonious Assault under R.C. § 2903.11(A)(1) or (2) is not an allied offense of similar import with the crime of Attempted Murder. The standard for comparison of offenses has been set forth: in determining whether offenses are allied, courts must compare the elements of the offenses in the abstract, without considering the evidence in the case—and an exact alignment of elements is not necessary. *State v. Cabrales*, 118 Ohio St.3d 54, 886 N.E.2d 181, 2008-Ohio-1625, ¶ 27. Compared in the abstract and without consideration of the evidence in this case, the offenses of Felonious Assault are not allied with Attempted Murder. Therefore, this Court should review this matter, set forth this proposition of law, and affirm the trial court's sentence.

Merger doctrine and the allied offense test.

Ohio Revised Code Section 2941.25 is a codification of the merger doctrine. This statute provides:

> (A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
>
> (B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same of similar kind committed separately or with a separate animus to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

This statute is used to enforce the constitutional protection against double jeopardy and to prevent multiple punishments for the same crime. The instant matter calls for a determination of whether Felonious Assault is an allied offense of similar import with Attempted Murder.

In *State v. Rance* (1999), 85 Ohio St.3d 632, 710 N.E.2d 699 this Court articulated the test for determining whether two offenses are allied under the statute. The Court noted, "[a] problem inherent in the application of the test for similar/dissimilar import is whether the court should contrast the statutory elements in the abstract or consider the particular facts of the case. We think it is useful to settle this issue for Ohio courts, and we believe the comparison of the statutory elements in the abstract is the more functional test, producing 'clear legal lines capable of application in particular cases.'" Id. at 636.

More recently the Court clarified the allied offense test in *State v. Cabrales*, 118 Ohio St.3d 54, 886 N.E.2d 181, 2008-Ohio-1625. At syllabus one of *Cabrales* the Court stated,

> 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, 710 N.E.2d 699, clarified.)

In the instant case, the Eighth District Court of Appeals did not properly apply the law as set forth in *Rance* and *Cabrales* in that the appellate court did not consider the elements of Felonious Assault and Attempted Murder and compare them in the abstract.

The appellate court acknowledged *Rance* and *Cabarales* and noted, "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." *State of Ohio v. Williams*, Cuyahoga App. No. 89726, 2008-Ohio-5286, ¶ 31. Yet the court drew its conclusion regarding whether or not the Felonious Assaults and Attempted Murders

were allied based on the facts of the case—not via an abstract comparison. The lower court held:

> 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, [citation omitted], 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.

Id. at ¶ 33.[1]

Among other charges, the jury found Williams guilty of one count of Attempted Murder under R.C. § 2903.02(A) and § 2923.02 (that Williams did attempt purposely to cause the deaths of the victim), one count of Attempted Murder under R.C. § 2903.02(B) and § 2923.02 (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 a felony of the first or second degree), one count of Felonious Assault under R.C. § 2903.11(A)(2) (that Williams did knowingly cause or attempt to cause physical harm to the victim by means of a deadly weapon—a gun), and one count of Felonious Assault under R.C. § 2903.11(A)(1) (that Williams did knowingly cause serious physical harm to the victim). As these offenses are not allied, the trial court properly issued Williams a sentence for each.[2] The trial court sentenced Williams to six years on the two Felonious Assault counts, which were ordered concurrent, and seven years on the two Attempted

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[1] This Supreme Court has accepted the State's cross-appeal in *State of Ohio v. Michael Sutton*, No. 2008-1996, which the Eighth District was referring to in its *Williams* opinion. The Court has stayed briefing in *Sutton* and is holding that case for a decision in the instant matter.

[2] Citing pages 516-517 of the transcript the Eighth District stated, "The state conceded, however, that count 1 and count 3 could merge because the element of physical harm was present in each count." However, the trial court disagreed having imposed a separate sentence for each of these counts. *Ohio v. Williams*, Cuyahoga App. No. 89726, 2008-Ohio-5286, ¶ 24-25.

Murder counts, which were also ordered concurrent to each other—but consecutive to the Felonious Assault counts. With the firearm specifications and the weapon under disability charge, Williams was sentenced to a total of twenty years.

These offenses are not allied because, when the elements are compared in the abstract without consideration of the evidence in this case, they are not so similar that the commission of one offense will necessarily result in commission of the others.

Attempted Murder under R.C. § 2903.02(A) and 2923.02 is not allied with Felonious Assault under R.C. § 2903.11(A)(2).

One of the charges that Williams was found guilty of was attempting to purposely cause the death of the victim. [Attempted Murder, R.C. § 2903.02(A) and 2923.02.] Williams was also found guilty of knowingly causing or attempting to cause physical harm to the victim by means of a deadly weapon or dangerous ordnance—in this case, a gun. [Felonious Assault, R.C. § 2903.11(A)(2).] Attempting to purposely cause the death of another is not the same offense as knowingly causing or attempting to cause physical harm with a gun.[3]

Considered in the abstract and without evaluation of the evidence, attempting to purposely cause the death of another does not necessarily result in knowingly causing or attempting to cause physical harm with a gun. Likewise, in the abstract and without evaluating the evidence, knowingly causing or attempting to cause physical harm with a gun does not necessarily result in an attempt to purposely cause the death of another.

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[3] In *State v. Barnes* (2002), 94 Ohio St.3d 21, 759 N.E.2d 1240, this Court compared the elements of Attempted Murder under R.C. § 2903.02(A) and 2923.02 with the elements of Felonious Assault under R.C. § 2903.11(A)(2) in a lesser-included offense analysis. The Court held, "Our comparison of the statutory elements of the two offenses at issue here leads us to conclude that felonious assault under R.C. 2903.11(A)(2) is not a lesser included offense of attempted murder because it is possible to commit the greater offense without committing the lesser one." Id. at 26.

Consequently, this version of Felonious Assault and this version of Attempted Murder are not allied offenses of similar import according to the first prong of the *Cabrales* test. See also, *State v. Nelson* (2000), Tuscarawas App. No. 1999AP020007, *4-5 (attempted murder and felonious assault not allied); *State v. Johnson*, Lucas App. No. L-03-1206, 2005-Ohio-1222, ¶ 25-30 (attempted murder and felonious assault not allied); and *State v. Love*, Hamilton App. Nos. C-070782, C-080078, 2009-Ohio-1079, ¶ 14-23 (attempted murder and felonious assault not allied).

Yet the Eighth District Court of Appeals found the offenses allied with the broad statement, "the separate counts of felonious assault as conceptually grouped by the state are offenses of similar import to the separate charges of attempted murder." The appellate court made no specific findings and drew no elemental comparison of Felonious Assault under R.C. § 2903.11(A)(2) versus the Attempted Murder under R.C. § 2903.02(A)—or, for that matter, with Attempted Murder under R.C. § 2903.02(B).[4]

Notably, the appellate court's decision in *Williams* completely contradicts its own earlier holdings in *State v. Nicholson*, Cuyahoga App. No. 85635, 2005-Ohio-5687 and *State v. Bostick*, Cuyahoga App. No. 82933, 2004-Ohio-1676. In *Nicholson* and *Bostick* the Eighth District determined that Felonious Assault with a deadly weapon and Attempted Murder were *not* allied offenses and therefore did not merge for purposes of sentencing. *State v. Nelson*, supra, at ¶ 5-14; *State v. Bostick*, supra, ¶ 4-8. The *Williams* opinion fails to address or resolve this inter-district conflict.

Attempted Murder under R.C. § 2903.02(A) and 2923.02 is not allied with Felonious Assault under R.C. § 2903.11(A)(1).

[4] The Court only comparison of elements ever completed by the court of appeals was between the two Attempted Murder charges—attempted murder and attempted felony murder. *State v. Williams, supra*, at ¶ 39.

Williams was also found guilty of knowingly causing serious physical harm to the victim. Again, attempting to purposely cause the death of another [Attempted Murder, R.C. § 2903.02(A) and 2923.02] is not the same offense as knowingly causing serious physical harm to another [Felonious Assault, R.C. § 2903.11(A)(1).] Considered in the abstract and without evaluation of the evidence, attempting to purposely cause the death of another does not necessarily result in knowingly causing serious physical harm to another. Likewise, in the abstract, knowingly causing serious physical harm to another does not necessarily result in an attempt to purposely cause the death of another.

This version of Felonious Assault requires actual serious physical harm while this Attempted Murder does not. Consequently, this Felonious Assault and this Attempted Murder are not allied offenses of similar import according to the first prong of the *Cabrales* test. See also, *State v. Waddell* (2000), Franklin App. No. 99AP-1130, *7-9 (attempted murder and felonious assault not allied); *State v. Hardges*, Summitt App. No. 24175, 2008-Ohio-5567, ¶ 44-45 (attempted murder and felonious assault not allied).

However the Eighth District Court of Appeals found these offenses allied with the broad assertion, "the separate counts of felonious assault as conceptually grouped by the state are offenses of similar import to the separate charges of attempted murder." Again the appellate court made no specific findings and drew no elemental comparison of Felonious Assault under R.C. § 2903.11(A)(1) versus the Attempted Murder under R.C. § 2903.02(A).

Attempted Murder under R.C. § 2903.02(B) and 2923.02 is not allied with Felonious Assault under R.C. § 2903.11(A)(2).

Williams was also found guilty of Attempted Murder under R.C. § 2903.02(B) and 2923.02—known as felony murder. This version of Attempted Murder, like the version defined in subsection (A), is not allied with Felonious Assault under R.C. § 290.11(A)(2).

Considered in the abstract, attempting to cause the death of another as a proximate result of committing or attempting to commit an offense of violence that is a felony of the first or second degree is not the same offense as knowingly causing or attempting to cause physical harm to the victim by means of a deadly weapon or dangerous ordnance—in this case, a gun. The commission of one does not necessarily result in the commission of the other.

A person can attempt to cause the death of another as a proximate result of committing an offense of violence[5] that is a felony of the first or second degree without doing so by means of a deadly weapon or dangerous ordnance. Section 2901.01(A)(9) defines "offense of violence" to include kidnapping, rape, aggravated arson, aggravated robbery, robbery, aggravated burglary, burglary, and escape.

Felonious Assault adds the element of "deadly weapon or dangerous ordnance", and felony murder includes the possibility of causing someone's death as the proximate result of an offense of violence that has nothing to do with deadly weapons or dangerous ordnances. Accordingly the elements of these two offenses do not correspond to such a

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[5] R.C. § 2901.01(A)(9) provides:
(9) "Offense of violence" means any of the following:
(a) A violation of section 2903.01, 2903.02, 2903.03, 2903.04, 2903.11, 2903.12, 2903.13, 2903.15, 2903.21, 2903.211, 2903.22, 2905.01, 2905.02, 2905.11, 2907.02, 2907.03, 2907.05, 2909.02, 2909.03, 2909.24, 2911.01, 2911.02, 2911.11, 2917.01, 2917.02, 2917.03, 2917.31, 2919.25, 2921.03, 2921.04, 2921.34, or 2923.161, of division (A)(1), (2), or (3) of section 2911.12, or of division (B)(1), (2), (3), or (4) of section 2919.22 of the Revised Code or felonious sexual penetration in violation of former section 2907.12 of the Revised Code.

degree that the commission of one crime will result in the commission of the other and these offenses are not allied. See also, *State v. Nesbitt*, Hamilton App. No. C-0800010, 2009-Ohio-972, ¶ 29-33 (felony murder and felonious assault not allied); and *State v. Jones*, Montgomery App. No. 21522, 2007-Ohio-1035, ¶ 15-18 (felony murder and felonious assault not allied).

Yet the Eighth District Court of Appeals merged these two offenses as allied without ever comparing the elements. *State v. Williams, supra*, at ¶ 39.

Attempted Murder under R.C. § 2903.02(B) and 2923.02 is not allied with Felonious Assault under R.C. § 2903.11(A)(1).

Felony murder is likewise not allied with Felonious Assault under R.C. § 2903.11(A)(1). Considered in the abstract, attempting to cause the death of another as a proximate result of committing or attempting to commit an offense of violence that is a felony of the first or second degree [Attempted Murder] is not the same offense as knowingly causing serious physical harm to another [Felonious Assault]. The commission of one does not necessarily result in the commission of the other.

A person can attempt to cause the death of another as a proximate result of committing an offense of violence that is a felony of the first or second degree without causing serious physical harm. This version of Felonious Assault requires serious physical harm while felony murder does not. Accordingly the elements of these two offenses do not correspond to such a degree that the commission of one crime will result in the commission of the other and these offenses are not allied. See also, *State v. Carroll*, Clermont App. Nos. CA2007-02-030, CA2007-03-041., 2007-Ohio-7075, ¶ 102-104 (felony murder and felonious assault not allied), citing *State v. Keene* (1998), 81 Ohio St.3d 646, 668, 396 N.E.2d 246, 1998-Ohio-342; *State v. Jones*, Montgomery App.

No. 21522, 2007-Ohio-1035, ¶ 15-18 (felony murder and felonious assault not allied); *State v. Henry*, Franklin App. No. 04AP-1061, 2005-Ohio-3931, ¶ 59 (felony murder and felonious assault not allied); and *State v. Gomez-Silva*, Butler App. No. CA2000-11-230, 2001-Ohio-8649, at *13 (felony murder and felonious assault not allied.)

Nevertheless the Eighth District Court of Appeals merged these two offenses as allied—without comparing the elements. *State v. Williams*, supra, at ¶ 39.

When the elements of the offenses are compared in the abstract and without consideration of the facts of the case, Attempted Murder—whether under R.C. § 2903.02(A) or (B)—is not allied with Felonious Assault under R.C. § 2903.11(A)(1) or (2).

While the elements do not have to align exactly, they must align to such a degree that one offense cannot be committed without also committing the second. As set forth above, the elements of these two Felonious Assaults as defined under R.C. § 2903.11(A)(1) and (2) are not allied offenses of similar import with the crime of Attempted Murder as defined by R.C. § 2903.02(A) and (B).

The Eighth District's reasoning in *Williams* is flawed in that the appellate court included its interpretation of the evidence in its analysis of whether the offenses are allied. *State of Ohio v. Williams*, Cuyahoga App. No. 89726, 2008-Ohio-5286, ¶ 33. Under syllabus one of *Cabrales*, courts must evaluate the elements of the offenses in the abstract—without considering the evidence in the case.

The precedent of *Williams* effectively undermines the Legislature's intent in creating the two separate Felonious Assault offenses in addition to the two separate

versions of Attempted Murder and because the precedent of *Williams* dictates that defendants may only ever be sentenced for one.[6]

The Eighth District's decision to merge all four offenses into a single conviction is contrary to R.C. § 2941.25(B), as Williams' conduct involved more than a single act and animus.

Where similar criminal acts are committed separately or with a separate animus to each, they are not allied offenses and they will not merge. R.C. § 2941.25(B). The facts and evidence in this case supported the findings of guilt of multiple charges in that Williams fired a gun at the victim at least two times. Therefore, the Eighth District's remand and order of merger cannot be left to stand.

The Eighth District's decision in *Williams* is flawed in that the appellate court determined that the multiple gunshots fired by Williams at McKinney amounted to a single count of Attempted Murder. *State v. Williams*, Cuyahoga App. No. 89726, 2008-Ohio-5286, ¶ 34 *et seq.*

Simply because McKinney was only struck once does not mean that he was not separately assaulted each time Williams decided to pull the trigger of his gun. Just as firing a single bullet at a group of five people may constitute five separate offenses,[7] firing more than one bullet at a single person may constitute separate offenses. See *State v. Clark* (April 29, 1992), Cuyahoga App. No. 44015, *7-9.

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[6] "[T]he legislature has manifested different intents with respect to felony murder and felonious assault. While the felonious assault statute was designed to prevent physical harm to persons, the felony-murder statute was designed to protect human life." *State v. Nesbitt*, Hamilton App. No. C-0800010, 2009-Ohio-972, ¶ 32, citing, *State v. Brown* 119 Ohio St.3d 447, 895 N.E.2d 149.

[7] See *State v. Baldwin*, Cuyahoga App. No. 83327, 2004-Ohio-2850, ¶ 11-13; see also *State v. Phillips* (1991), 75 Ohio App.3d 785, 600 N.E.2d 825, and *State v. Forte* (Aug. 17, 1995), Cuyahoga App. No. 62230, *3 citing *State v. Gregory* (1993), 90 Ohio App.3d 124, 129, 628 N.E.2d 86.

Williams did not fire a single gunshot at McKinney. Rather, Williams fired more than once and ultimately shot McKinney in the back as McKinney attempted to run away. While the acts that Williams committed were similar in nature, they were committed separately in the sense that Williams had to pull the trigger of his gun in separate motions. Accordingly, these offenses are not allied offenses of similar import and the Eighth District's remand for merger cannot be left to stand.

CONCLUSION

Under syllabus one of *Cabrales*, when engaging in allied offense analysis, courts must first evaluate the elements of the two offenses in the abstract to determine whether they align to the extent that commission of one offense will automatically result in commission of the other.

In this case, the Eighth District determined that Williams could not be sentenced for the two Felonious Assaults in addition to his sentences for the two Attempted Murder counts. The Eighth District's reasoning is flawed in that it failed to properly apply the law this Court set forth in *State v. Rance* (1999), 85 Ohio St.3d 632, 710 N.E.2d 699 and *State v. Cabrales*, 118 Ohio St.3d 54, 886 N.E.2d 181, 2008-Ohio-1625. The Eighth District Court of Appeals failed to conduct an elemental analysis of Felonious Assault under R.C. § 2903.11(A)(1) and (2) versus Attempted Murder under R.C. § 2903.02(A) and (B) and 2923.02 before determining that these offenses are allied.

Further, based on the evidence submitted at trial, the crimes committed are not allied because the defendant's conduct constituted more than a single act and animus.

Therefore, the State of Ohio respectfully requests this Honorable Court determine that Felonious Assault is not an allied offense of similar import with the offense of Attempted Murder.

Respectfully submitted,

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A true and accurate copy of the foregoing Merit Brief has been sent by regular United States Mail this 17th day of April, 2009 to the following:

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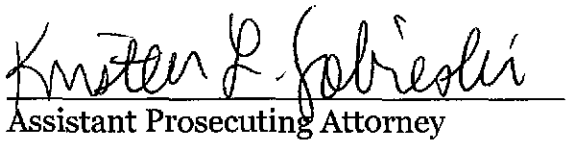
Assistant Prosecuting Attorney

OCT 9 - 2008

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 89726

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

KEVIN WILLIAMS

DEFENDANT-APPELLANT

CA070089726
53981162

CA 89726
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JUDGMENT: AFFIRMED IN PART, REVERSED IN PART AND REMANDED

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[1]

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

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

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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.

B

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.

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C

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

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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.

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.

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED

NO. 2008-2037

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 89726

STATE OF OHIO,

Plaintiff-Appellee, Cross-Appellant

v.

KEVIN WILLIAMS

Defendant-Appellant, Cross-Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF OHIO

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FILED
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CLERK OF COURT
SUPREME COURT OF OHIO

NO. 2008-2037

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 89726

STATE OF OHIO,

Plaintiff-Appellee, Cross-Appellant

v.

KEVIN WILLIAMS

Defendant-Appellant, Cross-Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF OHIO

Now comes the State of Ohio and hereby give Notice of Appeal to the Supreme Court of Ohio from a judgment and final order of the Court of Appeals for Cuyahoga County, Ohio, Eighth Judicial District, journalized October 9, 2008, which affirmed the Trial Court's Decision.

Said cause did not originate in the Court of Appeals, is a felony, involves a substantial constitutional question, and is of great general and public interest.

Respectfully submitted,

WILLIAM D. MASON
CUYAHOGA COUNTY PROSECUTOR

BY: Lisa Reitz Williamson (by Steven L. Taylor 0043876 per authority)
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SERVICE

A copy of the foregoing Notice of Appeal has been mailed this 20th day of November, 2008 to Robert M. Ingersoll, Assistant Public Defender, 310 Lakeside Avenue, Suite 200, Cleveland, OH 44113; Kevin Williams A524136, Southern Ohio Correctional Facility, Lucasville-Minford Road, PO Box 45699, Lucasville, OH 45699; and the Ohio Public Defender's Office, 8 East Long Street, 11 Floor, Columbus, OH 43215.

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