

IN THE SUPREME COURT OF OHIO

No. 2008-2037

STATE OF OHIO :

Plaintiff-Appellee/Cross-Appellant :

vs. :

KEVIN WILLIAMS :

Defendant-Appellant/Cross-Appellee:

APPELLANT/CROSS-APPELLEE'S MERIT BRIEF

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SUPREME COURT OF OHIO

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STATEMENT OF THE FACTS

On July 8, 2006, LayShawn McKinney's girlfriend drove him to her grandmother's house. McKinney said that when they arrived he saw Michael Ray Washington, Bralynn Randall, a person named Raymere whose last name McKinney did not know, a man named Duce, and Kevin Williams were shooting Craps. When McKinney arrived, there was an argument going on (T. 226-228).

Mr. McKinney joined the Craps game. He was there for approximately ten minutes, when the prior argument flared up again. McKinney said that Mr. Williams pulled a gun from his waistband and everyone started running (T. 229-232).

As McKinney was running, he was shot in the back. He fell to the ground and was paralyzed. He did not see where anyone went, but did see Mr. Washington and Mr. Randall standing near him at a later time when an ambulance came and took him to Huron Road Hospital (T. 232-237). Sometime later Mr McKinney spoke with the police. In one of his conversations, the police showed him a photographic array. He identified the photograph of Mr. Williams as being the man who shot him (T. 237-238).

Patrolman Scott Vargo of the East Cleveland Police Department (T. 247) received a broadcast about the shooting and responded to the scene. He saw Mr. McKinney lying on the ground near the tree lawn. McKinney told him he had been shot and that he could not move or feel his legs (T. 248-251). McKinney told him how the shooting happened and that Kevin shot him. McKinney told Officer Vargo that he had quit the Craps game and was walking away when Mr. Williams said something to him. McKinney stopped, turned, and was shot (T. 253-254).

Detective Terry Wheeler of the East Cleveland Police Department (T. 263) was assigned to the follow-up investigation of the shooting some two months after the shooting. He read the report of Officer Vargo. He also read the statements of witnesses who were present at the time and saw the shooting. Wheeler went to McKinney's house and learned that he was still in the hospital (T. 264-267). Wheeler prepared a photographic array with Kevin Williams's picture in it, which he showed to McKinney. McKinney chose Williams's picture (T. 268-269). Wheeler learned that a man nicknamed "Duce" was present at the shooting, but the police never learned

his real name. He also learned that Bralynn Randall was present at the shooting (T. 270).

Bralynn Randall said that on July 8, 2006, he, a man named Rays, Mike Washington, and Kevin Williams were shooting Craps. A friend of Mr. Williams named "Duce" was also present, but he did not participate in the Craps game. Randall believed that Duce walked up the street (T. 331-333).

Randall and Williams got into an argument, which died down. They then shot Craps some more and the argument restarted. As Mr. Randall and Mr. Williams were arguing, Mr. McKinney and his girlfriend drove up. McKinney approached the game. Randall quit the game and McKinney took his place. Then McKinney and Williams got into an argument. At that time Williams pulled out his gun (T. 334-338). Everyone started to run. Randall heard shots and heard McKinney calling his name. He looked back and saw McKinney lying on the ground. He had been shot. McKinney told Randall to find McKinney's brother, so he left the scene. He was not there when the police arrived (T. 338-339).

Ghana Tucker, the mother of Mr. McKinney's girlfriend, was sitting on the porch on July 8, 2006 and could look down at the men playing Craps. She heard a commotion then heard a shot. She looked out the window and saw McKinney lying on the ground. She did not see what happened before the gunshot. She was not sure what happened that night (T. 350-355).

Kevin Williams called three alibi witnesses who testified that he was at the Park Avenue Lounge on July 8, 2006. Yvonne Williams, Kevin Williams's sister (T. 362), testified that July 8, 2006 was the anniversary of the day their sister, Joyce, died. She and her family had a celebration of her life on that day at the Park Avenue Lounge at Taylor and Euclid in East Cleveland. The party began at 6:00 p.m. on July 8, 2006 and lasted until 2:15 the following morning. Kevin Williams was with her the entire time and she never saw him leave the party (T. 363-365).

Marcus Upshaw, a family friend of the Williams, was the DJ at the Park Avenue Lounge on July 8, 2006 (T. 383-384). He testified the party started around 6:00 p.m. and that Kevin Williams arrived sometime between 6:15 and 6:30. They left at 2:15 the following morning, which was shortly before the bar closed at 2:30 a.m. He did not see Kevin Williams leave the party at any point. He admitted Williams may have gone outside from time to time, but for the

most part was dancing with his family and friends at the party (T. 387-388).

Dartanyian Washington works at a Lube Stop in Willoughby. He is also the head of Security at the Park Avenue Lounge (T. 396-397). On July 8, 2006, the Park Avenue Lounge hosted a party for the sister of one of the people he worked with who had died. He testified that Kevin Williams was at the party. Williams was there when Washington arrived. Washington spent the entire night at the Park Avenue Lounge and left at 2:30 the following morning. Kevin Williams was still there at that time. Washington had to tell Mr. Williams and his family to leave the bar at that time (T. 398-399). Washington stayed by the front door, the only door to the bar, the entire night and did not see Mr. Williams leave the bar. As far as he knew, Williams was there the entire night (T. 400-401).

ARGUMENT

PROPOSITION OF LAW I:

THE ELEMENTS OF ATTEMPTED MURDER AND FELONIOUS ASSAULT ARE SO SIMILAR THAT ONE CANNOT COMMIT ATTEMPTED MURDER WITHOUT ALSO COMMITTING FELONIOUS ASSAULT. FOR THAT REASON, THE CRIMES ARE ALLIED OFFENSES OF SIMILAR IMPORT AND A DEFENDANT MAY NOT BE CONVICTED OF BOTH CRIMES, WHEN THEY ARE PART OF A SINGLE TRANSACTION.

The Fifth Amendment to the United States Constitution and Section 10, Article I, Ohio Constitution prohibit a defendant from being convicted two times for the same offense. Mr. Williams was convicted of two counts of attempted murder, one for purposefully attempting to kill Mr. McKinney and the other for attempting to kill Mr. McKinney while committing the crime of felonious assault. He was also convicted of two counts of felonious assault, one for causing serious physical harm to Mr. McKinney and the other for causing physical harm with a deadly weapon. Mr. McKinney was shot in the back one time. Mr. Williams was convicted of four crimes—two attempted murders and two felonious assaults—for one gunshot wound.

Ohio has recognized the dangers of a person being convicted of allied offenses of similar import. To guard against possible double jeopardy violations when a defendant's single act violates two or more statutes simultaneously, the Ohio Legislature enacted R.C. 2941.25, which provides, in pertinent part,

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 only of one.

As this Court noted in *State v. Baer* (1981) 67 Ohio St.3d 220,226, the Ohio General Assembly enacted R.C., 2941.25, Ohio's allied offense statute, to insure that multiple convictions do not occur in cases where the double jeopardy analysis of *Blockburger v. United States* (1932) 284 U.S. 299 does not apply,

If the General Assembly, by the enactment of R.C. 2941.24, had

not intended to prohibit more than one conviction and sentences other than where the offenses are the same for purposes of double jeopardy, there could be no purpose in the enactment of the statute.

Baer at 226. This Court has recently held that the proper test for whether crimes are allied offenses of similar import is, “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. Cabrales* (2008) 118 Ohio St.3d 54, 2008-Ohio-1625 at ¶ 26.

In the case at bar, Mr. Williams was convicted of two counts of attempted murder and two counts of felonious assault. Count one was a felonious assault conviction under R.C. 2903.11(A), knowingly causing serious physical harm to LayShawn McKinney; while count two was a felonious assault conviction under R.C. 2903.11(B), knowingly causing or attempting to cause physical harm to LayShawn McKinney with a firearm. In the same way, count three was an attempted murder conviction under R.C. 2903.02(A) and 2923.02, purposefully attempting to cause the death of LayShawn McKinney; and count four was an attempted murder under R.C. 2903.02(B) and 2923.02, attempting to cause the death of LayShawn McKinney as the proximate cause of committing a felonious assault. The four convictions stemmed from a single incident: an argument during a dice game, which resulted in Mr. McKinney being shot in the back one time.

As an initial matter, it should be noted that under this Court’s recent ruling in *State v. Brown* (2009) 119 Ohio St.3d 447, 2008-Ohio-4569, Mr. Williams may only be convicted of one attempted murder and one felonious assault. In *Brown*, this Court ruled when a defendant commits one criminal act and is prosecuted under multiple theories of the same offense, he may only be convicted of one of those theories *Id.* at ¶40. The *Brown* court ruled that when a defendant had only one animus, committed one act and was prosecuted under two theories of aggravated assault, he could only be convicted of one aggravated assault, as the two were allied offenses of similar import. The same reasoning applies to the case at bar.

Mr. Williams was convicted of two counts of attempted murder under two different

theories of guilt under R.C. 2903.02. Under *Brown*, the two attempted murder convictions should merge and Mr. Williams may only be convicted of one attempted murder. In its decision below, the Ohio Court of Appeals for the Eighth Appellate District also ruled the two attempted murder convictions as allied offenses. *State v. Williams* (Oct. 9, 2008) Cuyahoga App. No. 89726, 2008-Ohio-5286 ¶¶39-42. The State did not appeal this decision of the Eighth District and is appealing *only* the Eighth District's ruling that the felonious assault conviction should be an allied offense to the attempted murder.

Mr. Williams was also convicted of two counts of felonious assault under two different theories of R.C. 2903.01. Under *Brown*, Mr. Williams may only be convicted of one felonious assault as the two felonious assault convictions must be merged into one conviction. Therefore, as a starting point, under *Brown*, Mr. Williams may be convicted of only one attempted murder and one felonious assault.

The question presented by the State of Ohio in its appeal is whether the Eighth District properly ruled that Mr. Williams's felonious assault conviction is an allied offense of similar import to his attempted murder conviction. The State argues that felonious assault is not an allied offense of attempted murder because each has an element the other lacks, so the commission of the one crime does not automatically result in the commission of the other. The State's argument fails for several reasons.

The first problem with the State's argument is that Mr. Williams was convicted of both R.C. 2903.03(A) and (B). Under R.C. 2903.03(B), attempted murder occurs when a person purposefully attempts to cause another's death while committing a first- or second-degree felony of violence. Under R.C., 2903.03(B), if an actor commits a felonious assault which results in an attempt to cause death, the felonious assault is the underlying felony of violence in the attempted murder count. As a result, the felonious assault becomes an element of the attempted murder charge. Thus, it is clear that one could not commit attempted murder under R.C. 2903.03(B) without also committing the essential element of that attempted murder charge, the underlying

felonious assault. Thus, Mr. Williams's felonious assault convictions may not stand because they are allied offenses of similar import to his attempted murder conviction under R.C. 2903.02(B), because it is *an element* of the attempted murder conviction under 2903.02(B).

The State might wish to argue that, because *Brown* gives the State the option of choosing which count in a series of merged counts it will retain and which it will discard, the State can choose to merge count four in the case at bar, the count charged under R.C. 2903.02(B), into count three, the count charged under R.C. 2903.93(A). The State might then argue that, as it maintains that felonious assault is not a lesser included offense of attempted murder charged under R.C. 2903.02(A), once the attempted murder counts are merged and only count three remains, the felonious assault counts cannot merge into the remaining attempted murder count. If the State makes this argument, it is incorrect.

The State may not merge the counts as outlined above, for the reason that, if it attempts to merge the counts in this manner, the State is refusing to do what it has a legal obligation to do: merge all possible allied offenses into each other. It is true that under *Brown*, the State may merge count two into count one or count one into count two. It may also choose to merge count four into count three or merge count three into count four. What the State *may not* do, however, is to refuse to merge all the counts for which merger exists. The State must first merge the two felonious assault counts into count four, the attempted murder count charged under R.C. 2903.02(B). The State may then decide whether it wishes to merge count three into count four or count four into count three. It may not, however, refuse to merge the felonious assault counts into count four, before it decides which attempted murder count will merge into the other attempted murder count.

R.C. 2941.24 imposes a mandatory duty on the State to merge *all* allied offenses of similar import. It may not avoid this mandatory duty by asserting, even if the felonious assault counts might merge into count four, they cannot do so in the case at bar, because count four merged into count three and is no longer available for merger.

The proper merger in the case at bar is as follows: The two felonious assault convictions in counts one and two merge into one felonious assault conviction under *Brown*. Then the remaining felonious assault conviction merges into the attempted murder conviction charged in count four under R.C. 2903.03(B) as an allied offense and a lesser included offense of that crime. Finally, the two attempted murder convictions in counts three and four merge into one conviction under *Brown*. This merger procedure is required by the rule of lenity in Ohio found in the Ohio Revised Code. R.C. 2901.04. This statute says that, "Sections of the Revised Code defining offenses *or penalties shall be strictly construed against the state*, and liberally construed in favor of the accused." (Emphasis added). The rule of strict construction in criminal cases is referred to as a rule of lenity and the Supreme Court of the United States has explained the reason for existence as follows:

Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability.

Liparota v. United States (1985) 471 U.S. 419, 428. When this Court applies the rule of lenity to the case at bar, and construes how to merge counts liberally in favor of the defendant, the correct process—that is the one which is the most forgiving to the defendant—is to merge the felonious assault convictions into the attempted murder conviction charged in count four and then to merge the attempted murder counts together. Any other construction, any reading which allows a procedure which permits the State multiple opportunities to obtain multiple convictions, is not the strictest construction against the State and, thus, forbidden by statute.

For all of the above reasons, this Court can rule that the Eighth District properly merged Mr. Williams's two felonious assault convictions into the attempted murder conviction charged in count four without even reaching the State's actual argument. This Court should, therefore, affirm the Eighth District's holding that Mr. Williams's felonious assault convictions are allied offenses of his attempted murder convictions.

Irrespective of the fact that this Court need not actually reach the merits of the State's

argument, Mr. Williams does wish to address the State's argument and explain why the argument is flawed. The State argues that felonious assault can never be an allied offense of similar import to attempted murder. The thrust of the State's argument is that one can purposefully attempt to kill another person without necessarily causing that person physical harm with a firearm. Or that one can attempt to kill without necessarily causing serious physical harm, and, for this reason, felonious assault is not an allied offense of similar import to attempted murder. The analysis which the State is asking this Court to adopt is the same one which the Eighth District used in *State v. Nicholson* (Oct. 27, 2005) Cuyahoga App. No. 85635, 2005-Ohio-5687 at ¶12. In that case, the Eighth District ruled that felonious and attempted murder were not allied offenses of similar import,

since a felonious assault may occur where the elements of attempted murder would not be satisfied, and likewise, an attempted murder may be accomplished without the use of a deadly weapon or dangerous ordnance.

The *Nicholson* case, however, was decided before this Court decided *Cabrales* and was based on the strict textual analysis of *State v. Rance* (1999) 85 Ohio St. 3d 632 which this Court rejected in *Cabrales*. In essence, the State asks this Court to return to an overly narrow reading of the allied offense statute and *Cabrales* which this Court should reject.

In *Cabrales* at ¶¶ 16-20, this Court noted that the strict application of its decision in *Rance* which many courts were using was wreaking havoc. This Court noted that a strict textual comparison of the elements of the two crimes was "overly narrow." *Cabrales* at ¶22. *Cabrales* also noted that the proper test is whether the elements are so aligned that one cannot commit the first crime without simultaneously committing the second. *Id.* at ¶¶ 26-27.

After the *Cabrales* decision, the starting point for determining whether two crimes are allied offenses is the understanding that the jury convicted defendant of both crimes; that the jury expressly found that the defendant committed both crimes. Then the court must determine whether the two crimes, which the jury confirmed had occurred, are so similar in their elements that a person cannot commit the first crime without simultaneously committing the second crime.

This analysis avoids the problem which is at the core of the State's analysis and which spurs the State to engage in hypothetical comparisons about how one crime could be committed without the other also happening. In other words, it avoids the problems which this Court noted a strict application of the *Rance* decision was creating. The correct starting point, therefore, is the following question: "Now that the jury has told us both offenses were committed, are their elements so related that the commission of one act implicates the commission of the other?"

This Court showed how a post-*Cabrales* allied offense analysis should progress in *State v. Winn* (2009) 121 Ohio St.3d 413 2009-Ohio-1059. In *Winn* at ¶21, this Court compared the elements of kidnapping and aggravated robbery and concluded by saying:

It is difficult to see how the presence of a weapon that has been shown or used, or whose possession has been made known to the victim during the commission of a theft offense, does not also forcibly restrain the liberty of another. These two offenses are "so similar that the commission of one offense will necessarily result in the commission of the other." (Citing *Cabrales*)

Winn, thus, showed that in comparing the elements, even in the abstract, a court does not look only at the elements themselves. Rather the court must also look at what act the offender committed and determine whether this act will "necessarily" result in the commission of multiple crimes whose elements are similar. Under *Winn*, the court starts by examining what act the defendant performed and of what crimes the jury convicted the defendant based on that act.

In the case at bar, the jury found that Mr. Williams shot LayShawn McKinney with a firearm and returned guilty verdicts against him in four related counts. The jury found Mr. Williams guilty of attempted murder in count three for purposefully attempting to kill LayShawn McKinney with a firearm. The jury found Mr. Williams attempted to kill Mr. McKinney while committing a felonious assault in count four. The jury found Mr. Williams caused serious physical harm to McKinney by shooting him in count one and caused LayShawn McKinney physical harm with a deadly weapon in count two. Thus Mr. Williams's act of shooting McKinney resulted in four crimes and four convictions: two attempted murder convictions and two felonious assaults. To paraphrase this Court in *Winn* at ¶21, "it is difficult to see how," an

offender could shoot another person intending to kill him without also causing serious physical harm to him or without causing physical harm with a deadly weapon. The one act “necessarily” results in the commission of four offenses whose elements are similar and interrelated.

Under *Cabrales* and *Winn*, Mr. Williams’s felonious assault convictions are allied offenses to the attempted murder charged under either R.C. 2903.03(A) or (B), because no one can attempt to kill another man by shooting him without also, and simultaneously, committing two different felonious assault convictions on the same victim. Moreover, there could only be one animus in all the acts, to kill the other man. As no one can kill another man multiple times, there cannot be multiple animi in the act of shooting another man to kill him. So, even though that one act results in multiple crimes, there is only one animus involved. The crimes are, therefore, allied offenses of similar import and only one conviction may lie.

The State of Ohio seeks to have this Court narrow its ruling in *Cabrales* and return to the *Rance* analysis it specifically rejected in *Cabrales*. This Court should decline the State’s invitation and proceed under *Cabrales*.

The State asserted in its final argument at pages 13-14 of its Merit Brief, that the Eighth District erred in merging the counts, because he committed two criminal acts, not one. The State argued that Mr. Williams fired two shots at McKinney and it did not matter that only one of the shots actually hit him; each shot was a separate act with a separate animus. The State argues that as two separate acts occurred, Mr. Williams may be convicted of more than one count. This final argument by the State is also flawed.

The evidence is far from conclusive that Mr. Williams fired two shots. Although Mr. McKinney claimed that two shots were fired when he appeared in Mr. Williams’s trial, when he appeared for Mr. William’s preliminary hearing, he testified that only one shot was fired. Bralynn Randall said he heard shots being fired. Ghana Tucker testified that she heard only one shot being fired. The evidence was inconclusive as to exactly how many shots were fired. It would be mere speculation of the worst kind to permit the State more than one conviction based on the

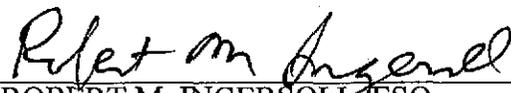
belief that two shots were fired, when the evidence about how many shots were fired is so contradictory and inconclusive.

Assuming arguendo that the evidence does support a conclusion that Mr. Williams fired two shots, the State's argument must still fail. Mr. McKinney testified that when he first arrived at Ghana Tucker's house, the Craps game was already under way and that Mr. Williams and Bralynn Randall were arguing. That argument died down and McKinney joined the Craps game. After ten minutes, Mr. Williams and Mr. Randall began to argue again and Mr. Williams pulled out a firearm at which point everyone began to run. As Mr. McKinney was running, he was shot once in the back. Bralynn Randall also testified that it was he and Mr. Williams that argued during the Craps game, an argument which died down that flared up again later. Thus the evidence indicates that Mr. Williams was angry with Mr. Randall and not with Mr. McKinney. Mr. Williams may have been shooting at McKinney, but what is more likely is that, if he fired any shots at all, he was shooting at Mr. Randall. If Mr. Williams fired two shots and not one, the most logical scenario is that Mr. Williams fired one shot at Randall, with whom he had argued, missed him, and hit Mr. McKinney. Then he fired a second shot at Mr. Randall and missed again. Even though Mr. Williams was not shooting at McKinney, he may be convicted for shooting McKinney under the doctrine of transferred intent. He may not, however, also be convicted of shooting Mr. McKinney with the second shot which was fired at Mr. Randall and which missed both McKinney and Randall. The doctrine of transferred intent does not apply to this second shot as it did not hit McKinney. Had the State wished to charge Mr. Williams for attempted murder or felonious assault of Mr. Randall for the second shot, it could have pursued those charges. It did not. However, it may not charge Mr. Williams for attempted murder or felonious assault on Mr. McKinney for shots fired at Mr. Randall which missed both him and Mr. McKinney. For all of the above reasons, the State's argument that Mr. Williams fired two shots at Mr. McKinney and may be convicted of two acts is incorrect and this Court should reject the State's position.

CONCLUSION

WHEREFORE, for the foregoing reasons, Mr. Williams prays this Court to affirm the decision of the Eighth District in the case at bar.

Respectfully submitted,



ROBERT M. INGERSOLL, ESQ.
Counsel for Appellant

CERTIFICATE OF SERVICE

A copy of the foregoing Appellee's Merit Brief and Assignment of Error was served by ordinary mail upon William D. Mason, Cuyahoga County Prosecutor, The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 on this 4th day of June, 2009.



ROBERT M. INGERSOLL, ESQ.
Counsel for Appellant

APPENDIX

[Cite as *State v. Nicholson*, 2005-Ohio-5687.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 85635

STATE OF OHIO :
 :
 Plaintiff-Appellee : JOURNAL ENTRY
 :
 -VS- : AND
 :
 ANTOINE NICHOLSON : OPINION
 :
 Defendant-Appellant :

Date of Announcement
 of Decision: OCTOBER 27, 2005

Character of Proceeding: Criminal appeal from
 Court of Common Pleas
 Case No. CR-455398

Judgment: Sentence vacated; remanded
 for resentencing.

Date of Journalization:

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JAMES J. SWEENEY, P.J.:

{¶ 1} Defendant-appellant Antoine Nicholson ("defendant") appeals his sentences imposed by the Cuyahoga County Common Pleas Court upon his multiple convictions for felonious assault, attempted felonious assault, and attempted murder. For the following reasons, we vacate defendant's sentence and remand for resentencing.

{¶ 2} The record reveals the following: On August 12, 2004, the Cuyahoga County Grand Jury indicted defendant on one count of attempted murder with firearm specifications, in violation of R.C. 2923.03/2903.03 and 2941.144/2941.145; three counts of felonious assault, in violation of R.C. 2903.11 and 2941.11/2941.145; and two counts of domestic violence, in violation of R.C. 2919.25. Several of these charges contained multiple specifications for firearms.

{¶ 3} On October 28, 2004, defendant pleaded guilty to one count of felonious assault, one count of attempted felonious assault, and one count of attempted murder, with one firearm specification. On December 1, 2004, the trial court sentenced defendant to consecutive seven-year terms of imprisonment for the attempted murder and felonious assault offense, along with a mandatory three-year sentence for the firearm specification, and an additional consecutive three-year term for the attempted felonious assault, for a total of 20 years in prison.

{¶ 4} Defendant timely appealed and assigns four errors for our review, which will be addressed out of order and together where appropriate.

{¶ 5} "III. The trial court erred by ordering convictions for separate counts of felonious assault and attempted murder to be served consecutively because the offenses are allied offenses pursuant to R.C. 2941.25 and they are part of the same transaction under R.C. 2929.14."

{¶ 6} In his third assignment of error, the defendant argues that the trial court improperly failed to merge his convictions for felonious assault and attempted murder. We disagree.

{¶ 7} R.C. 2941.25, Ohio's allied offenses statute, protects against multiple punishments for the same criminal conduct in violation of the Double Jeopardy Clauses of the United States and Ohio Constitutions. *State v. Moore* (1996), 110 Ohio App.3d 649, 653. Specifically, R.C. 2941.25 states:

{¶ 8} "(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.

{¶ 9} "(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 or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them."

{¶ 10} In determining whether crimes are allied offenses of similar import under R.C. 2941.25(A), courts must assess whether the statutory elements of the crimes correspond to such a degree that the commission of one crime will result in the commission of the other. *State v. Rance* (1999), 85 Ohio St.3d 632, 638. If the elements do so correspond, the defendant may not be convicted of both unless the court finds that the defendant committed the crimes separately or with separate animus. *Id.* at 638-639. The burden of establishing that two offenses are allied falls upon the defendant. *State v. Douse* (Nov. 29, 2001), Cuyahoga App. No. 79318.

{¶ 11} Here, defendant was convicted of felonious assault, in violation of R.C. 2903.11, and attempted murder, in violation of R.C. 2923.02/2903.02. R.C. 2903.11 provides that no person shall knowingly cause serious physical harm to another or cause or attempt to cause physical harm to

another by means of a deadly weapon or dangerous ordinance. R.C. 2903.02, in combination with R.C. 2923.02, provides that attempted murder is committed by purposely engaging in conduct that, if successful, would constitute or result in the purposeful death of another person.

{¶ 12} This Court has previously held that felonious assault and attempted murder are not allied offenses of similar import, since a felonious assault may occur where the elements of attempted murder would not be satisfied, and likewise, an attempted murder may be accomplished without the use of a deadly weapon or dangerous ordinance. *State v. Bostick*, Cuyahoga App. No. 82933, 2004-Ohio-1902; *State v. Axson*, Cuyahoga App. No. 81231, 2003-Ohio-2182, reversed on other grounds by *State v. Axson*, 104 Ohio St.3d 24, 2004-Ohio-6396. See, also, *State v. Johnson*, Lucas App. No. L-03-1206, 2005-Ohio-1222; *State v. Williams* (Jan. 17, 2003), Licking App. No. 02-CA-82; *State v. Waddell* (Aug. 15, 2000), Franklin App. No. 99 AP-1130.

{¶ 13} We note that the Fifth Appellate District recently addressed this issue in *State v. Church*, 161 Ohio App.3d 589, 2005-Ohio-2984 and also concluded that felonious assault and attempted murder are not allied offenses of similar import. One of the judges in *Church* noted that this holding conflicted with holdings made in *State v. Puckett* (Mar. 27, 1988), Greene App. No. 97CA43 and *State v. Gimenez* (Sept. 4, 1997), Cuyahoga App. No. 71190.¹ Both *Puckett* and *Gimenez* determined that felonious assault and attempted murder were allied offenses of similar

¹In *Gimenez*, this Court concluded that attempted murder and felonious assault were allied offenses of similar import where the offender pointed a gun at an officer and pulled the trigger. However, the court in *Gimenez* did not engage in a comparison of the elements of the crimes of felonious assault and attempted murder as was done in the subsequent decisions of this Court in *Bostick* and *Axson*. In those cases, this Court concluded that the elements of the respective crimes do not correspond to such a degree that the commission of one offense would result in the commission of the other offense. On that basis, this Court held in both *Bostick* and *Axson* that the crimes of felonious assault and attempted murder are not allied offenses.

import. As the dissent points out, both the felonious assault charge and the attempted murder charge stem from the exact same factual nucleus and involve the same victim. Common sense and fairness dictate the result advocated by the dissent to prohibit sentencing on each charge independently. Nonetheless, we feel constrained by the existing law that prohibits a finding of allied offenses where the elements of felonious assault and attempted murder do not correspond to the degree required for merger. R.C. 2941.25; *Rance*, supra.

{¶ 14} Accordingly, a defendant may be convicted of both offenses, and a separate sentence for each offense does not violate R.C. 2941.25 or the constitutional protections against double jeopardy. Assignment of Error III is overruled.

{¶ 15} "I. The trial court erred in sentencing appellant to more than the minimum prison sentence when he had not previously served a prison term.

{¶ 16} "II. The trial court erred by ordering appellant to serve a consecutive sentence without making the appropriate findings required by R.C. 2929.14(E)(4)."

{¶ 17} In his first and second assignments of error, defendant claims that the trial court did not comply with R.C. 2929.14(B) when it departed from the minimum sentence and imposed consecutive sentences. We agree.

{¶ 18} Pursuant to R.C. 2929.14(B), a trial court must impose the minimum sentence for a felony offender who has not previously served a prison term unless the court specifies on the record that a minimum sentence would demean the seriousness of the offender's conduct or not adequately protect the public from future crime by the offender or others. *State v. Comer* (2003), 99 Ohio St.3d 463, 469, 2003-Ohio-4165; *State v. Edmonson* (1999), 86 Ohio St.3d 324, 326, 1999-Ohio-110.

{¶ 19} The trial court is not required to explain its reasoning for giving more than the minimum sentence; however, it must be clear from the record that it first considered the minimum sentence and then decided to impose a longer sentence based on one of the two statutorily sanctioned reasons under R.C. 2929.14(B). *Edmonson*, supra at 328; *State v. Mondry*, Cuyahoga App. No. 82040, 2003-Ohio-7055. In addition, the statutory findings must be clearly and convincingly supported by the record. R.C. 2953.08(G).

{¶ 20} Pursuant to R.C. 2929.14(E)(4), a trial court may impose consecutive sentences for multiple convictions only when the trial court concludes that the sentence is (1) necessary to protect the public from future crime or to punish the offender; (2) not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public; and (3) the court finds one of the following: (a) the crimes were committed while awaiting trial or sentencing, under sanction or under post-release control; (b) the harm caused by multiple offenses was so great or unusual that a single prison term would not adequately reflect the seriousness of the offense; or (c) the offender's criminal history demonstrates that consecutive sentences are necessary to protect the public from future crime.

{¶ 21} R.C. 2929.19(B)(2) requires the trial court to state its findings, and its reasons for those findings, on the record when imposing consecutive prison terms for multiple convictions. *Comer*, supra. Failure to sufficiently state these reasons on the record constitutes reversible error. *Id.*

{¶ 22} Here, at the sentencing hearing, the trial judge stated the following, in pertinent part:

{¶ 23} "After consideration of the record in this case, the oral statements made here today, the pre-sentence investigation report and the purposes and principles of sentencing under Revised

Code Section 2929.11, the seriousness and recidivism factors pursuant to Revised Code Section 2929.12, and the sentencing guidelines under Revised Code Sections 2929.13 and .14, and the need for deterrence, incapacitation, rehabilitation and restitution, the Court finds that the defendant has pled guilty to felonious assault, attempted murder with a three-year firearm specification, and attempted felonious assault.

{¶ 24} "After weighing both the seriousness and recidivism factors required by law, the Court finds that the defendant's conduct is more serious than conduct normally constituting the charged offenses, and the recidivism factors indicate that the defendant is more likely to commit future crimes.

{¶ 25} ****

{¶ 26} "However, there are other exacerbating factors with respect to the age of the victim, [E.K.], being eight years of age at the time of the offense. The offenses at issue were also committed within the vicinity of a child. That being [S.A.'s] child. And the defendant at this point in time, at least in court, does show some remorse for his action.

{¶ 27} "However, after weighing these factors, the Court does find that a term of incarceration is consistent with the purposes and principles of sentencing set forth in Revised Code Section 2929.11, and will therefore order that the defendant will be sentenced as follows ***."

{¶ 28} As can be seen from the excerpt above, the trial court failed to make the necessary findings. First, to properly impose more than the minimum sentence, the trial court had to make at least one of the findings stated in R.C. 2929.14(B)(2), that is, that the shortest term would demean the seriousness of the offense or that the shortest term would not protect the public adequately from future crime. *Edmonson*, supra at 326. Here, the trial court did address the seriousness of

defendant's crime; however, it did not specify either of the two reasons listed in R.C. 2929.14(B)(2) as supporting its deviation from the minimum sentence.

{¶ 29} Next, to properly impose consecutive sentences, the trial court had to make three findings as stated in R.C. 2929.14(E)(4), that is, a consecutive term is necessary to protect the public from future crime or to punish the offender, is not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and the crimes were committed while awaiting trial or sentencing, under sanction or under post-release control, the harm caused by multiple offenses was so great or unusual that a single prison term would not adequately reflect the seriousness of the offense, or the offender's criminal history demonstrates that consecutive sentences are necessary to protect the public from future crime. *Comer*, supra. Here, the trial court did not specify any of the reasons listed in R.C. 2929.14(E)(4) as supporting its decision to impose consecutive sentences.

{¶ 30} Assignments of Error I and II are sustained.

{¶ 31} "IV. Appellant's sentencing was a violation of his Sixth and Fourteenth Amendments guarantee of a jury standing between him and the power of the State of Ohio."

{¶ 32} Defendant's argument that his non-minimum sentence violates the U.S. Supreme Court's decision in *Blakely v. Washington*² has been addressed in this Court's en banc decision of *State v. Atkins-Boozer*.³ In *Atkins-Boozer*, we held that R.C. 2929.14(B), which governs the imposition of minimum sentences, does not implicate the Sixth Amendment as construed in *Blakely*.

²(2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403.

³(May 31, 2005), Cuyahoga App. No. 84151.

Accordingly, in conformity with that opinion, we reject defendant's contentions and overrule his fourth assignment of error.

Sentence vacated; remanded for resentencing.

[Cite as *State v. Nicholson*, 2005-Ohio-5687.]

It is ordered that appellant recover of appellee his costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. Case remanded to the trial court for resentencing.

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

MARY EILEEN KILBANE, J., CONCURS.
CHRISTINE T. McMONAGLE, J., CONCURS
IN PART AND DISSENTS IN PART. (See
attached concurring and dissenting
opinion).

JAMES J. SWEENEY
PRESIDING JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. 112, Section 2(A)(1).

[Cite as *State v. Nicholson*, 2005-Ohio-5687.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 85635

STATE OF OHIO,

Plaintiff-Appellee

v.

ANTOINE NICHOLSON,

Defendant-Appellant

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CONCURRING AND DISSENTING

OPINION

DATE: OCTOBER 27, 2005

CHRISTINE T. McMONAGLE, J., CONCURRING AND DISSENTING:

{¶ 33} I concur with the majority that the trial court failed to make the requisite findings upon the record sufficient to justify the consecutive sentence imposed upon appellant and that this matter should be remanded for resentencing. However, I dissent from the finding of the majority that felonious assault (no person shall knowingly cause or attempt to cause physical harm to another by means of a deadly weapon or dangerous ordnance) as it relates to victim Sarah Andrew, and attempted murder (no person shall purposely cause or attempt to cause the death of another) as it relates to the same shooting of Sarah Andrew, are not allied offenses of similar import.

{¶ 34} In this case, the two charges are indistinguishable: they involve identical conduct, identical evidence, derive from the same transaction, point toward a single objective and involve a single discrete animus. In committing the felonious assault upon Sarah Andrew, appellant, by definition, committed attempted murder upon her as well.

{¶ 35} Thus, I would hold that upon resentencing, the trial court should consider the felonious assault upon Sarah Andrew and the attempted murder upon her as allied offenses of similar import, and that while appellant may be found guilty of both charges, he can be sentenced upon only one.

2901.04 Rules of construction for statutes and rules of procedure.

(A) Except as otherwise provided in division (C) or (D) of this section, sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused.

(B) Rules of criminal procedure and sections of the Revised Code providing for criminal procedure shall be construed so as to effect the fair, impartial, speedy, and sure administration of justice.

(C) Any provision of a section of the Revised Code that refers to a previous conviction of or plea of guilty to a violation of a section of the Revised Code or of a division of a section of the Revised Code shall be construed to also refer to a previous conviction of or plea of guilty to a substantially equivalent offense under an existing or former law of this state, another state, or the United States or under an existing or former municipal ordinance.

(D) Any provision of the Revised Code that refers to a section, or to a division of a section, of the Revised Code that defines or specifies a criminal offense shall be construed to also refer to an existing or former law of this state, another state, or the United States, to an existing or former municipal ordinance, or to an existing or former division of any such existing or former law or ordinance that defines or specifies, or that defined or specified, a substantially equivalent offense.

Effective Date: 03-23-2000; 09-23-2004

2903.02 Murder.

(A) No person shall purposely cause the death of another or the unlawful termination of another's pregnancy.

(B) No 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.

(C) Division (B) of this section does not apply to an offense that becomes a felony of the first or second degree only if the offender previously has been convicted of that offense or another specified offense.

(D) Whoever violates this section is guilty of murder, and shall be punished as provided in section 2929.02 of the Revised Code.

Effective Date: 06-30-1998

2903.11 Felonious assault.

(A) No person shall knowingly do either of the following:

(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.

(B) No person, with knowledge that the person has tested positive as a carrier of a virus that causes acquired immunodeficiency syndrome, shall knowingly do any of the following:

(1) Engage in sexual conduct with another person without disclosing that knowledge to the other person prior to engaging in the sexual conduct;

(2) Engage in sexual conduct with a person whom the offender knows or has reasonable cause to believe lacks the mental capacity to appreciate the significance of the knowledge that the offender has tested positive as a carrier of a virus that causes acquired immunodeficiency syndrome;

(3) Engage in sexual conduct with a person under eighteen years of age who is not the spouse of the offender.

(C) The prosecution of a person under this section does not preclude prosecution of that person under section 2907.02 of the Revised Code.

(D)(1)(a) Whoever violates this section is guilty of felonious assault. Except as otherwise provided in this division or division (D)(1)(b) of this section, felonious assault is a felony of the second degree. If the victim of a violation of division (A) of this section is a peace officer or an investigator of the bureau of criminal identification and investigation, felonious assault is a felony of the first degree.

(b) Regardless of whether the felonious assault is a felony of the first or second degree under division (D)(1)(a) of this section, if the offender also is convicted of or pleads guilty to a specification as described in section 2941.1423 of the Revised Code that was included in the indictment, count in the indictment, or information charging the offense, except as otherwise provided in this division or unless a longer prison term is required under any other provision of law, the court shall sentence the offender to a mandatory prison term as provided in division (D)(8) of section 2929.14 of the Revised Code. 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, felonious assault is a felony of the first 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 first degree.

(2) In addition to any other sanctions imposed pursuant to division (D)(1) of this section for felonious assault committed in violation of division (A)(2) of this section, if the deadly weapon used in the commission of the violation is a motor vehicle, the court shall impose upon the offender a class two suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege as specified in division (A)(2) of section

4510.02 of the Revised Code.

(E) As used in this section:

(1) "Deadly weapon" and "dangerous ordnance" have the same meanings as in section 2923.11 of the Revised Code.

(2) "Motor vehicle" has the same meaning as in section 4501.01 of the Revised Code.

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

(4) "Sexual conduct" has the same meaning as in section 2907.01 of the Revised Code, except that, as used in this section, it does not include the insertion of an instrument, apparatus, or other object that is not a part of the body into the vaginal or anal opening of another, unless the offender knew at the time of the insertion that the instrument, apparatus, or other object carried the offender's bodily fluid.

(5) "Investigator of the bureau of criminal identification and investigation" means an investigator of the bureau of criminal identification and investigation who is commissioned by the superintendent of the bureau as a special agent for the purpose of assisting law enforcement officers or providing emergency assistance to peace officers pursuant to authority granted under section 109.541 of the Revised Code.

(6) "Investigator" has the same meaning as in section 109.541 of the Revised Code.

Effective Date: 03-23-2000; 08-03-2006; 03-14-2007; 04-04-2007; 2008 HB280 04-07-2009

2923.02 Attempt to commit an offense.

(A) No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense.

(B) It is no defense to a charge under this section that, in retrospect, commission of the offense that was the object of the attempt was either factually or legally impossible under the attendant circumstances, if that offense could have been committed had the attendant circumstances been as the actor believed them to be.

(C) No person who is convicted of committing a specific offense, of complicity in the commission of an offense, or of conspiracy to commit an offense shall be convicted of an attempt to commit the same offense in violation of this section.

(D) It is an affirmative defense to a charge under this section that the actor abandoned the actor's effort to commit the offense or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of the actor's criminal purpose.

(E)(1) Whoever violates this section is guilty of an attempt to commit an offense. An attempt to commit aggravated murder, murder, or an offense for which the maximum penalty is imprisonment for life is a felony of the first degree. An attempt to commit a drug abuse offense for which the penalty is determined by the amount or number of unit doses of the controlled substance involved in the drug abuse offense is an offense of the same degree as the drug abuse offense attempted would be if that drug abuse offense had been committed and had involved an amount or number of unit doses of the controlled substance that is within the next lower range of controlled substance amounts than was involved in the attempt. An attempt to commit any other offense is an offense of the next lesser degree than the offense attempted. In the case of an attempt to commit an offense other than a violation of Chapter 3734. of the Revised Code that is not specifically classified, an attempt is a misdemeanor of the first degree if the offense attempted is a felony, and a misdemeanor of the fourth degree if the offense attempted is a misdemeanor. In the case of an attempt to commit a violation of any provision of Chapter 3734. of the Revised Code, other than section 3734.18 of the Revised Code, that relates to hazardous wastes, an attempt is a felony punishable by a fine of not more than twenty-five thousand dollars or imprisonment for not more than eighteen months, or both. An attempt to commit a minor misdemeanor, or to engage in conspiracy, is not an offense under this section.

(2) In addition to any other sanctions imposed pursuant to division (E)(1) of this section for an attempt to commit aggravated murder or murder in violation of division (A) of this section, if the offender used a motor vehicle as the means to attempt to commit the offense, the court shall impose upon the offender a class two suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege as specified in division (A)(2) of section 4510.02 of the Revised Code.

(3) If a person is convicted of or pleads guilty to attempted rape and also is convicted of or pleads guilty to a specification of the type described in section 2941.1418, 2941.1419, or 2941.1420 of the Revised Code, the offender shall be sentenced to a prison term or term of life imprisonment pursuant to section 2971.03 of the Revised Code.

(F) As used in this section:

(1) "Drug abuse offense" has the same meaning as in section 2925.01 of the Revised Code.

(2) "Motor vehicle" has the same meaning as in section 4501.01 of the Revised Code.

Effective Date: 03-23-2000; 01-02-2007; 04-04-2007

OHIO CONSTITUTION

§ 1.10 Trial for crimes; witness (1851; amended 1912)

[[View Article Table of Contents](#)]

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

(As amended September 3, 1912.)

UNITED STATES CONSTITUTION

**Amendment 5 - Trial and Punishment, Compensation for Takings. Ratified
12/15/1791.**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation