

IN THE SUPREME COURT OF OHIO
2010

ORIGINAL

STATE OF OHIO,

Case No. 09-1481

Plaintiff-Appellee,

-vs-

On Certified Conflict from
Hamilton County Court of Appeals
First Appellate District

FRED JOHNSON,

Court of Appeals
Case No. C-080156

Defendant-Appellant.

**BRIEF OF AMICUS CURIAE
FRANKLIN COUNTY PROSECUTOR RON O'BRIEN
IN SUPPORT OF PLAINTIFF-APPELLEE STATE OF OHIO**

RON O'BRIEN 0017245
Franklin County Prosecuting Attorney
STEVEN L. TAYLOR 0043876
(Counsel of Record)
Assistant Prosecuting Attorney
373 South High Street - 13th Floor
Columbus, Ohio 43215
Phone: 614-462-3555
Fax: 614-462-6103
E-mail:
sltaylor@franklincountyohio.gov
Counsel for Amicus Curiae Franklin
County Prosecutor Ron O'Brien

JOSEPH T. DETERS 0012084
Hamilton County Prosecuting
Attorney
230 East 9th Street, Suite 4000
Cincinnati, Ohio 45202
Phone: 513-946-3000
Fax: 513-946-3100
Counsel for Plaintiff-Appellee

LINDSEY R. GUTIERREZ 0084456
Law Offices of Ravert J. Clark
114 East 8th Street, Suite 400
Cincinnati, Ohio 45202
Phone: 513-587-2887
Fax: 513-621-2525
Counsel for Defendant-Appellant

TIMOTHY YOUNG 0059200
Ohio Public Defender
JEREMY J. MASTERS 0079587
(Counsel of Record)
Assistant State Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215
Phone: 614-466-5394
Fax: 614-752-5167
E-mail: jeremy.masters@opd.ohio.gov
Counsel for Amicus Curiae Ohio Public
Defender

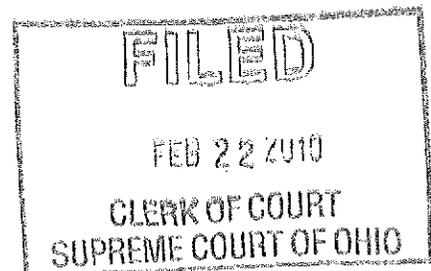


TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF AMICUS INTEREST 1

STATEMENT OF FACTS 1

ARGUMENT 2

Proposition of Law: Under R.C. 2941.25, a compound homicide offense does not merge with a predicate offense, even if the same act resulted in the predicate offense and in the homicide, as the homicide and predicate do not have “similar import.”2

Certified Question: Are the elements of child endangering [set forth in R.C. 2919.22(B)(1)] sufficiently similar to the elements of felony murder with child endangering as the predicate offense that the commission of the murder logically and necessarily also results in the commission of child endangering?.2

CONCLUSION..... 12

CERTIFICATE OF SERVICE 13

TABLE OF AUTHORITIES

CASES

<i>State v. Bickerstaff</i> (1984), 10 Ohio St.3d 62	4
<i>State v. Brown</i> , 119 Ohio St.3d 447, 2008-Ohio-4569	2, 7, 10, 11
<i>State v. Cabrales</i> , 118 Ohio St.3d 54, 2008-Ohio-1625	passim
<i>State v. Coley</i> (2001), 93 Ohio St.3d 253	4
<i>State v. Cox</i> , 4 th Dist. No. 02CA751, 2003-Ohio-1935	7
<i>State v. Dennis</i> (1997), 79 Ohio St.3d 421	5
<i>State v. Edwards</i> (1992), 83 Ohio App.3d 357	11
<i>State v. Elmore</i> , 111 Ohio St.3d 515, 2006-Ohio-6207	5
<i>State v. Harris</i> , 122 Ohio St.3d 373, 2009-Ohio-3323	8, 9
<i>State v. Henderson</i> (1988), 39 Ohio St.3d 24	4
<i>State v. Keenan</i> (1998), 81 Ohio St.3d 133.....	5
<i>State v. Keene</i> (1998), 81 Ohio St.3d 646.....	4
<i>State v. Moss</i> (1982), 69 Ohio St.2d 515	passim
<i>State v. Mughni</i> (1987), 33 Ohio St.3d 65	3
<i>State v. Rance</i> (1999), 85 Ohio St.3d 632.....	passim
<i>State v. Reynolds</i> (1998), 80 Ohio St.3d 670	5
<i>State v. Richey</i> (1992), 64 Ohio St.3d 353	5
<i>State v. Smith</i> (1997), 80 Ohio St.3d 89.....	5
<i>State v. Winn</i> , 121 Ohio St.3d 413, 2009-Ohio-1059	8, 9
<i>State v. Williams</i> , ___ Ohio St.3d ___, 2010-Ohio-147.....	9, 10

STATUTES

R.C. 2903.02(B)..... 8

R.C. 2919.22(B)(1) 2

R.C. 2941.25 passim

R.C. 2941.25(A)..... 2, 6

R.C. 2941.25(B)..... 3

R.C. 2941.25(A) & (B) 11

OTHER AUTHORITIES

Committee Comment to R.C. 2941.25..... 3

STATEMENT OF AMICUS INTEREST

The present case raises the question of whether a compound homicide offense like felony murder will merge with its underlying predicate felony, in this case, second-degree felony child endangering. The Office of the Franklin County Prosecutor prosecutes cases in which the offender is found guilty of both a compound homicide offense and one or more predicate offenses. Because merger results in a reduction in the potential punishment for the offender, current Franklin County Prosecutor Ron O'Brien has a strong interest in whether such merger is required. In the interest of aiding this Court's review of the present appeal, Franklin County Prosecutor Ron O'Brien therefore offers the following amicus brief in support of the State of Ohio.

STATEMENT OF FACTS

Amicus Franklin County Prosecutor Ron O'Brien adopts by reference the procedural and factual history of the case as set forth in plaintiff-appellee State of Ohio's merit brief.

ARGUMENT

Proposition of Law: Under R.C. 2941.25, a compound homicide offense does not merge with a predicate offense, even if the same act resulted in the predicate offense and in the homicide, as the homicide and predicate do not have “similar import.”

Certified Question: Are the elements of child endangering [set forth in R.C. 2919.22(B)(1)] sufficiently similar to the elements of felony murder with child endangering as the predicate offense that the commission of the murder logically and necessarily also results in the commission of child endangering?

Defendant and his supporting amicus have briefed this case as if the only question is whether *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, can override the two-prong test for merger of allied offenses of similar import. But they miss an important point: their merger argument *fails* under the first prong of the allied-offenses test. This Court’s long-standing and settled case law has concluded that a compound homicide offense does not merge with its predicate offense. This Court’s recent case law on the allied-offenses test does not change this conclusion.

A.

Under *State v. Rance* (1999), 85 Ohio St.3d 632, this Court set forth a two-part test for determining whether offenses will “merge” for sentencing purposes under R.C. 2941.25. Under the first step pursuant to R.C. 2941.25(A), the test is whether the elements of the offenses correspond to such a degree that the commission of one offense will automatically result in the commission of the other offense. *Rance*, 85 Ohio St.3d at 636, 638, 639. In the first step, the elements of the offenses are compared in the abstract. *Id.* at paragraph one of the syllabus. The comparison occurs in the *statutory* abstract, i.e., at the level of the statute as written, not at the level of how the indictment is worded. *Id.*

at 637. If the offenses do not satisfy this test, then the offenses have a dissimilar import, the “merger” inquiry ends, and multiple sentences are allowed. *Id.* at 636.

If the offenses have similar import under the first step, the analysis proceeds to a second step under R.C. 2941.25(B), where the court must determine whether the offenses were committed separately or with a separate animus. *Rance*, 85 Ohio St.3d at 636. If the offenses were committed separately or with a separate animus, the defendant may be punished for both. *Id.* If not, the court must merge the offenses of similar import. *Id.*

“The defendant bears the burden of establishing his entitlement to the protection provided by R.C. 2941.25 against multiple punishments for a single criminal act.” *State v. Mughni* (1987), 33 Ohio St.3d 65, 67.

B.

Although *Rance* addressed how the two-step test operates, it also was addressing how the allied-offenses statute applies to compound homicide offenses. Beginning with *State v. Moss* (1982), 69 Ohio St.2d 515, this Court has repeatedly rejected the argument that the predicate offense merges with the compound homicide offense. The *Moss* Court recognized that aggravated felony murder and the separate count of aggravated burglary would not merge, even though aggravated burglary was the predicate for the homicide. “As regards aggravated murder and aggravated burglary, * * * no such [essential] nexus exists. The two offenses are not prerequisites, one for the other. To consummate either offense, the other need not by definition be committed. Aggravated murder and aggravated burglary are never merely incidental to each other * * *.” *Id.* at 520. The *Moss* Court noted that the Committee Comment to R.C. 2941.25 recognized that aggravated robbery would not merge with aggravated murder in the case of an armed

robber who purposely kills two victims. “Robbery and murder are dissimilar offenses * * *.” Id. at 521-22 (quoting Committee Comment).

In *State v. Bickerstaff* (1984), 10 Ohio St.3d 62, 66, this Court reaffirmed the *Moss* analysis and concluded that aggravated robbery and aggravated felony murder were not allied offenses of similar import. “Clearly, the crimes and their elements do not correspond to such a degree that commission of one offense constitutes commission of the other, nor is the commission of one merely incidental to the offense.” Id. at 66.

By the time of *State v. Keene* (1998), 81 Ohio St.3d 646, this Court deemed it to be a “settled issue” that aggravated felony murder and the predicate felony do not merge:

In his twelfth proposition of law, appellant claims it is double jeopardy to sentence him for both felony-murder and the underlying felony, as the trial court did with respect to the Wilkerson, Gullette, and Abraham murders. However, felony-murder under R.C. 2903.01(B) is not an allied offense of similar import to the underlying felony. See, e.g., *State v. Moss* (1982), 69 Ohio St.2d 515, 520; *State v. Bickerstaff* (1984), 10 Ohio St.3d 62, 66; *State v. Henderson* (1988), 39 Ohio St. 3d 24, 28. That being the case, R.C. 2941.25 authorizes punishment for both crimes, and no double jeopardy violation occurs. See *Moss* at 521-522, and paragraph one of the syllabus. * * *

More recently, this Court has stated:

[T]he constitutional protection against double jeopardy does not preclude a defendant from being separately punished for an aggravated murder and for felonies involved in that murder. In order to commit murder, neither aggravated robbery nor kidnapping need be committed. This court has repeatedly rejected similar double-jeopardy claims and held that aggravated murder is not an allied offense of similar import to an underlying aggravated robbery.

State v. Coley (2001), 93 Ohio St.3d 253, 264.

Time and again, this Court has found that aggravated felony murder and the underlying felony are not allied offenses of similar import under the first prong of the test. *State v. Elmore*, 111 Ohio St.3d 515, 2006-Ohio-6207, ¶ 51; *State v. Keenan* (1998), 81 Ohio St.3d 133, 154-55; *State v. Reynolds* (1998), 80 Ohio St.3d 670, 681; *State v. Smith* (1997), 80 Ohio St.3d 89, 117 (even though “felony-murder contains all the elements necessary to prove the underlying robbery,” aggravated felony murder and aggravated robbery are not allied offenses of similar import); *State v. Dennis* (1997), 79 Ohio St.3d 421, 432; *State v. Richey* (1992), 64 Ohio St.3d 353, 369.

Rance continued this line of authority. In the *Rance* syllabus, this Court concluded that “[i]nvoluntary manslaughter and aggravated robbery are not allied offenses of similar import.” *Rance*, at paragraph two of the syllabus. When any one of multiple predicate offenses may serve as a basis for a compound offense, an individual predicate offense does not merge with the compound offense. Thus, involuntary manslaughter does not merge with its predicate felony or misdemeanor, see *Rance*, and aggravated felony murder does not merge with its predicate offense. *Moss*, supra. “[A]ggravated robbery is only one of the many felonies that may support a charge of involuntary manslaughter.” *Rance*, 85 Ohio St.3d at 639. “Reviewed in the abstract, then, involuntary manslaughter and aggravated robbery are not allied offenses because the commission of one will not automatically result in commission of the other.” *Id.* at 639.

C.

Defendant might contend that *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, has changed the analysis. But *Cabrales* did not change the allied-offenses analysis

under *Rance*. Instead, the *Cabrales* Court criticized those lower courts that had misapplied *Rance* to impose a “strict textual comparison” test on the first prong of the test:

{¶ 22} * * * [N]owhere does *Rance* mandate that the elements of compared offenses must exactly align in order to be allied offenses of similar import under R.C. 2941.25(A). To interpret *Rance* as requiring a strict textual comparison would mean that only where *all* the elements of the compared offenses coincide *exactly* will they be considered allied offenses of similar import under R.C. 2941.25(A). Other than identical offenses, we cannot envision any two offenses whose elements align *exactly*. We find this to be an overly narrow interpretation of *Rance*’s comparison test.

Cabrales, supra (footnote omitted). The *Cabrales* Court *retained* the *Rance* analysis:

{¶ 26} Thus, we have already implicitly recognized that *Rance* does not require a strict textual comparison under R.C. 2941.25(A). 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.

{¶ 27} It is clear that interpreting *Rance* to require a strict textual comparison under R.C. 2941.25(A) conflicts with legislative intent and causes inconsistent and absurd results. Accordingly, we clarify that in determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), *Rance* requires courts to compare the elements of offenses in the abstract, i.e., without considering the evidence in the case, but does not require an exact alignment of elements.

The Court then proceeded by “[a]pplying *Rance* in [t]his [c]ase.” *Id.* at ¶¶ 27-28.

As can be seen, *Cabrales* retained *Rance*’s focus on comparing the elements of the offenses in the statutory abstract. *Cabrales* repeatedly focused on the “elements” and repeatedly stated in the syllabus and the opinion that the *Rance* analysis continued to

apply. *Cabrales*, at syllabus (“compare the elements * * * in the abstract”; “comparing the elements”); *id.* at ¶¶ 26, 27, 29, 30, 32. *Cabrales* “clarified” *Rance* but did not overrule it.

The continuing validity of the *Rance* abstract “elements” test is confirmed by *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569. In *Brown*, the Court applied the abstract “elements” test as “set forth in *Rance* and clarified in *Cabrales*” and concluded that the two aggravated assault offenses did not satisfy that test. *Id.* at ¶ 34. The *Brown* Court then superimposed over the *Rance-Cabrales* test a “same societal interest” test to address whether different interests underlay the two aggravated-assault offenses.

D.

Some have misread the *Cabrales* Court’s citation to *State v. Cox*, 4th Dist. No. 02CA751, 2003-Ohio-1935, as indicating that a compound homicide offense will merge with its predicate offense. In section III.B. of the *Cabrales* opinion, the Court generally referred to *Rance* causing “confusion” and “unreasonable results” and courts “struggl[ing]” with applying the *Rance* standard, but the Court did not specifically characterize into which category *Cox* fell, i.e., “struggling” or “unreasonable” or “confusion” or “absurd.” Since the quote from *Cox* stated that “*Rance* forces us to affirm,” the problem was not “confusion.” *Rance*’s holding was clear.

Nor was there an indication that the *Cabrales* Court viewed the result in *Rance* as “unreasonable” or “absurd,” since the Court “clarified” *Rance* by keeping its test.

Since *Cox* believed the non-merger of involuntary manslaughter with its predicate was “intuitively wrong,” the *Cabrales* Court apparently was only referring to *Cox* as a case that had “struggled” with *Rance*. The *Cabrales* Court never said that *Rance* was

wrongly decided, however. The fact that the *Cabrales* Court noted such “struggling” did not mean that it was overruling *Rance* as applied to involuntary manslaughter. Even after noting such lower-court “struggling,” the *Cabrales* Court retained the *Rance* abstract comparison test. As a result, *Rance*’s holding that involuntary manslaughter does not merge with its underlying predicate offense remains good law, as does the *Moss* line of cases holding that aggravated felony murder does not merge with its underlying predicate offense.

As a compound homicide offense, felony murder under R.C. 2903.02(B) fits in comfortably with this *Moss-Rance* line of authority. Just like aggravated felony murder and involuntary manslaughter, felony murder includes the commission of a predicate offense. But, judged in the statutory abstract, the commission of a particular predicate is not necessary for the compound offense, as any one of several predicates would be sufficient. As between felony murder and any particular predicate, “[t]he two offenses are not prerequisites, one for the other. To consummate either offense, the other need not by definition be committed.” *Moss*, 69 Ohio St.2d at 520. No *essential* nexus exists. *Id.* at 520. Given that the relationship between felony murder and the predicate offense is the same as exists for aggravated felony murder and involuntary manslaughter, felony murder is indistinguishable in this respect from aggravated felony murder and involuntary manslaughter. The *Moss-Rance* line of authority fully applies to felony murder.

E.

Recent cases have not changed this result. In *State v. Harris*, 122 Ohio St.3d 373, 2009-Ohio-3323, and in *State v. Winn*, 121 Ohio St.3d 413, 2009-Ohio-1059, this Court

adhered to the *Rance/Cabrales* abstract-element-comparison approach. *Winn* reiterated *Rance*'s holding that "the first step * * * requires comparing the statutory elements in the abstract, rather than comparing the offenses as charged in a particular indictment." *Winn*, at ¶ 11. *Harris* reiterated that "*Rance* requires courts to compare the elements of offenses in the abstract * * *." *Harris*, at ¶ 12 (quoting *Cabrales*). Neither overruled the *Rance* abstract approach, and neither overruled the *Moss-Rance* line of cases holding that a predicate felony does not merge with the compound homicide offense. In judging whether one offense (in the abstract) will necessarily result in the other (in the abstract), *Harris* and *Winn* support the view that implausible hypotheticals will not defeat a merger argument. But it is hardly implausible that felony murder might occur through the commission of a predicate offense other than child endangering, and, likewise, it is not implausible that child endangering can occur without a felony murder. The *Moss-Rance* case law remains valid and supports the conclusion that felony murder does not merge with a predicate child-endangering offense.

This conclusion remains true in light of *State v. Williams*, ___ Ohio St.3d ___, 2010-Ohio-147. Like *Harris* and *Winn*, *Williams* adhered to the *Rance-Cabrales* abstract-comparison-of-elements approach, emphasizing that the comparison occurs "in the abstract without considering the evidence in the case * * *." *Williams*, ¶ 16. *Williams* reiterated that the offenses will satisfy the first prong of the test "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 the commission of the other * * *." *Id.* at ¶ 16. This Court specifically rejected the defense argument that the first prong should be watered down to a "can result" test. *Id.* at ¶ 19.

Notably, the *Williams* Court did not adopt the defense argument that attempted felony murder would necessarily result in felonious assault because felonious assault was the predicate offense for the attempted felony murder. Instead, this Court found that these offenses satisfied the first part of the test because the reverse was true: felonious assault would necessarily result in attempted felony murder because the felonious assault, i.e., knowingly causing serious physical harm, sufficiently equated with purposely or knowingly attempting to cause death as a proximate result of felonious assault. *Id.* at ¶ 23.

Williams does not support merger in the present case. It only involved *attempted* felony murder, not felony murder as involved here. This Court's conclusion that attempted felony murder and felonious assault are close enough to allow merger does not support the view that a completed felony murder would merge with child endangering. The latter two offenses are much further apart. As stated above, it is hardly implausible that felony murder might occur through the commission of a predicate offense other than child endangering, and, likewise, it is not implausible that child endangering can occur without a felony murder. These offenses do not satisfy the first prong of the test.

F.

While this conclusion is supported by this Court's longstanding *Moss-Rance* line of cases, it is also supported by the "similar import" language of the merger statute. The *Brown* same-societal-interest test can displace the two-part test when it is apparent that the statutory prohibitions serve dissimilar interests. *Brown* stated that the two-part test "is helpful in construing legislative intent, [but] it is not necessary to resort to that test when the legislature's intent is clear from the language of the statute." *Brown*, ¶ 37. This

is in keeping with the merger statute, which *expressly* sets forth a “similar import” requirement. Only offenses of “similar import” shall be merged, and crimes of “dissimilar import” shall not be merged, even when they arise from the same conduct. R.C. 2941.25(A) & (B).

While a compound homicide offense and its predicate may be “allied” when they were committed by the same act, they do not have “similar import.” Death is different, not only in its finality, but also in the fact that injuries causing death are, by definition, far beyond anything that was required for the commission of the predicate offense, even an offense requiring proof of serious physical harm. A child-endangering offense resulting in “serious physical harm” does not require that death ensue, as injuries less serious than death will justify a finding of “serious physical harm.” For example, a noticeable scar can be sufficient “serious physical harm.” See *State v. Edwards* (1992), 83 Ohio App.3d 357. In the final analysis, a homicide offense has substantially greater import than an underlying endangering offense, and so the two offenses should not be considered as having a “similar import” that would allow merger.

Any test for merger must keep in mind the express “similar import” language of the merger statute, as, ultimately, such a test must take into account the relative “import” of the offenses. The offenses must have “similar import” to be merged. The *Rance-Cabrales* abstract-comparison test performs this assessment adequately in the present case, as it leads to the correct conclusion that felony murder should not merge with a predicate of child endangering. The same result is reached under a “same societal interest” analysis. As aptly stated by the First District in the present case:

{¶195} In *State v. Morin*, the Fifth Appellate District utilized the Ohio Supreme Court’s analysis in *Brown* to conclude

that the offenses of felonious assault and child endangering are offenses of dissimilar import because they protect different societal interests. Central to its analysis was the recognition that the legislature intended to “bestow special protection upon children” when “crafting” the offense of child endangering.

{¶96} In comparing the unique societal interest protected by the child-endangering statute to the societal interest protected by the felony-murder statute, which is to protect all human life, we likewise conclude that the General Assembly intended to distinguish these offenses and to permit separate punishments for the commission of these two crimes. As a result, we hold that the offense of felony murder and the offense of endangering children are not allied offenses of similar import. (Footnotes omitted)

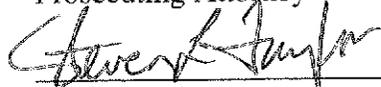
The felony-murder and child-endangering statutes protect unique and distinct societal interests that warrant separate punishment in the protection and furtherance of such interests. To be sure, these offenses have coincided under the facts of this particular case, but such coincidence does not perforce make them have “similar import.”

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the First District Court of Appeals should be affirmed.

Respectfully submitted,

RON O'BRIEN 0017245
Prosecuting Attorney



STEVEN L. TAYLOR 0043876
(Counsel of Record)
Assistant Prosecuting Attorney

Counsel for Amicus Curiae Franklin County
Prosecutor Ron O'Brien

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was mailed by regular U.S. mail on this 22nd day of Feb., 2010, to the following known counsel of record involved in the case:

Joseph T. Deters
Hamilton County Prosecuting Attorney
230 East 9th Street, Suite 4000
Cincinnati, Ohio 45202
Counsel for Plaintiff-Appellee

Lindsey R. Gutierrez
Law Offices of Ravert J. Clark
114 East 8th Street, Suite 400
Cincinnati, Ohio 45202
Counsel for Defendant-Appellant

Jeremy J. Masters
Assistant State Public Defender
Office of the Ohio Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215
Counsel for Amicus Curiae Ohio Public
Defender



STEVEN L. TAYLOR
Assistant Prosecuting Attorney