

ORIGINAL

IN THE
SUPREME COURT OF OHIO

STATE OF OHIO	:	NO. 2009-1481
Plaintiff-Appellee	:	On Appeal from the Hamilton County Court of Appeals, First Appellate District
vs.	:	
FRED JOHNSON	:	Court of Appeals
Defendant-Appellant	:	Case Numbers C-080156, C-080158

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STATEMENT OF THE CASE AND FACTS

The Hamilton County Grand Jury indicted defendant Johnson for seven offenses stemming from Johnson's lethal beating of his girlfriend's seven-year-old son Milton Baker, as follows:

- COUNT 1: Aggravated Murder 2903.01(C) With Specification
CAPITAL - DEATH PENALTY [CD]
- COUNT 2: Felonious Assault 2903.11(A)(1)[F2]
- COUNT 3: Murder 2903.02(B)[SF] Predicate Offense: Child Endangering
- COUNT 4: Murder 2903.02(B)[SF] Predicate Offense: Felonious Assault
- COUNT 5: Endangering Children 2919.22(A)[F3]
- COUNT 6: Endangering Children 2919.22(B)(1)[F2]
- COUNT 7: Endangering Children 2919.22(B)(3)[F2]

A jury acquitted Johnson of Aggravated Murder, but found him guilty of the remaining counts. The trial court sentenced Johnson to serve an aggregate sentence of 23 years to life in prison. The trial court merged count two, the felonious assault, with count four, the felony murder predicated upon felonious assault. The trial court sentenced Johnson to fifteen years to life in prison on counts three and four, the two felony murder charges, and it ordered those terms to be served concurrently. With respect to the child endangering counts, the trial court sentenced Johnson concurrently to five years in prison for count five, to eight years in prison for count six, and to eight years in prison for count seven. The trial court otherwise made all the child endangering terms consecutive to the terms for the remaining offenses.

The First District Court of Appeals affirmed this judgment in all respects, except that it ordered the trial court to impose only a single sentence on the felony murder counts.

Of interest for this appeal, the First District specifically found that the offense of Felony Murder (child endangering as the predicate offense) and Child Endangering, R.C. 2919.22(B)(1), are not allied offenses of similar import because each statute protects separate societal interests.

Recognizing its decision to be in conflict with the Fifth Appellate District's decision in *State v. Mills*¹, the First District certified a conflict to this Court.

This Court ordered the following issue briefed:

“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?”

FACTS:

Latina Stallworth, mother of victim Milton, relocated to Cincinnati from Sandusky in 2003 – fleeing an abusive relationship. Unfortunately, while staying at a shelter in Cincinnati, Latina met Fred Johnson and moved in with him around May of 2003.

Johnson would periodically physically abuse Latina and her son Milton. Three times Latina took her children and left Johnson to go to a shelter. But each time, she would return to Johnson because she and her children missed him. Significantly, when Latina would go to these shelters, she never identified Johnson as her abuser. Latina gave false names because she wanted to protect Johnson.

R.C. 2919.22(B)(3) – Count Seven – Child Endangering – Excessive punishment

On August 10, 2006, Johnson was alone with Milton in a bedroom at their home reading a book. The rest of the family was watching Shark Tales in another room. Milton had trouble pronouncing a word. To “punish” Milton, Johnson struck Milton on the head or body and pushed him to the floor. At trial, Milton’s mother testified that she was watching a movie when she heard a boom and stomping. When she ran into the room, Johnson was yelling at Milton for mispronouncing the word “family”. Johnson said, “He [Milton] is acting like a little bitch again,” and pushed Milton to the ground.

¹ 5th Dist. No. 2007 AP07 0039, 2009-Ohio-1849

R.C. 2919.22(B)(1) – Count Six – Child Endangering – Abuse – Serious Physical Harm

After this initial blow to “punish” Milton for mispronouncing a word in his book, Milton’s mother left the room and went back to watching her movie. A few minutes later, she heard another boom and stomping. When she came into the room, Milton was lying unresponsive on the floor. Milton and Johnson were again alone in the bedroom – but this time Milton was shaking.

At trial, Johnson’s neighbors, the Collis sisters, testified that they overheard defendant beating Milton that day. Johnson would scream at Milton: “You want pain?!” Milton would plead: “No sir! No sir!!”

Ignoring Milton’s pleas for him to stop, Johnson kept beating Milton. The coroner testified that Milton would die from blunt force trauma to his head caused by at least four blows, that he also had sustained multiple blows to his body causing broken ribs and contusions, and that these injuries were the result of a massive force, such as a belt or a fist, hitting Milton’s body.

R.C. 2919.22(A) – Count Five – Child Endangering – Violation of Duty of Care

Instead of calling 9-1-1, Johnson pretended Milton was having a seizure and put him in the shower. Ultimately, Johnson and Latina took Milton to St. Luke’s hospital – a hospital needlessly distant from their home. This conduct of Johnson – failing to call for help and delaying treatment – corresponded to count five of defendant’s indictment.

When speaking to doctors and investigators, Latina continued to protect Johnson. He fled the hospital and barricaded himself in his house. A SWAT team had to be called before Johnson was eventually arrested.

Milton died as a result of extreme trauma to his head. An autopsy revealed that multiple injuries had been inflicted on Milton over time – fractured wrist, fractured ribs, fractured pelvic bone – all had “healed” without medical treatment. Doctors concluded that Milton was clearly a victim of child abuse. The injuries detected on Milton could not have been caused by a seizure as Johnson claimed.

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?”

ARGUMENT

FIRST PROPOSITION OF LAW: YES. BUT A FAIR READING OF *STATE V. BROWN*² SUPPORTS THE CONCLUSION THAT THE TWO OFFENSES CAN BE SEPARATELY PUNISHED BECAUSE THE LEGISLATURE MANIFESTED ITS INTENT TO SERVE TWO DIFFERENT SOCIETAL INTERESTS IN ENACTING THE TWO STATUTES.

Johnson was convicted of both child endangering and felony murder.

R.C. 2919.22(B)(1) Child Endangering provides:

(B) No person shall do any of the following to a child under eighteen years of age or a mentally or physically handicapped child under twenty-one years of age:

(1) Abuse the child.

R.C. 2903.02(B) Felony Murder provides:

(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.

The Court of Appeals below, citing *Brown*, held that these two offenses are not allied offenses of similar import because they protect two distinct and separate societal interests. The court's conclusion was correct, and compelled by any fair reading of *Brown*.

In *Brown*, this Court found that Aggravated Assault under R.C. 2903.11(A)(1) was allied to Aggravated Assault under R.C. 2903.11(A)(2). In reaching this conclusion, this Court eschewed the two-tiered *Rance/Cabrales* test, explaining that it was unnecessary. Instead, this

² 119 Ohio St.3d 447, 895 N.E.2d 149, 2008-Ohio-4569

Court announced a preemptive exception to the two-tiered test. This Court held that two offenses may be separately punished if the societal interests protected by the two statutes is distinguishable and distinct.

This Court stated:

“While our two-tiered test for determining whether offenses constitute allied offenses of similar import is helpful in construing legislative intent, it is not necessary to resort to that test when the legislature’s intent is clear from the language of the statute. A cardinal rule of statutory interpretation is that ‘[a] court must look to the language and purpose of the statute in order to determine ‘legislative intent.’ *State v. Cook* (1998), 83 Ohio St.3d 404, 416, 700 N.E.2d 570. “[W]hen the General Assembly has plainly and unambiguously conveyed its legislative intent, there is nothing for a court to interpret or construe, and therefore, the court applies the law as written.’ *State v. Kreischer*, 109 Ohio St.3d 391, 2006-Ohio-2706, 848 N.E.2d 496, syllabus.”

This Court also so quoted Justice Rehnquist’s dissent in *Whalen v. U.S.*³:

“ . . . But as Justice Rehnquist noted in his *Whalen* dissent, the lower court considered ‘the societal interests protected by the [rape and felony murder] statutes under consideration’ in determining Congressional intent, and found that one was ‘designed to protect women from sexual assault’ while the other ‘was intended ‘to protect human life.’” *Whalen*, 445 U.S. at 713, 100 S.Ct. 1432, 63 L.Ed. 715 (Rehnquist, J. dissenting), quoting *Whalen v. United States* (D.C. App. 1977), 379 A.2d 1152, 1159. As Justice Rehnquist concluded, ‘[B]y asking whether two separate statutes each include an element the other does not, a court is really asking whether the legislature manifested an intention to serve two different interests in enacting the two statutes.’ *Whalen* at 714, 100 S.Ct. 1432, 63 L.Ed.2d 715.”

Following this Court’s lead in *Brown*, the First District Court below analyzed the two statutes at issue and concluded they were not allied because they clearly evinced a legislative intent to protect two distinct societal interests. And the court was correct. The child endangering statute was specifically designed to protect the unique societal interest in keeping children safe, while the felony murder statute was written to protect all human life.

³ (1980), 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715.

The Court of Appeals' judgment was certainly consistent with *Brown*. Because the legislature so clearly distinguished the offenses of child endangering and murder, it intended to permit separate punishments for their commission.

SECOND PROPOSITION OF LAW: PURSUANT TO THIS COURT'S RANCE/CABRALES ABSTRACT COMPARISON-OF-THE-ELEMENTS-TEST, CHILD ENDANGERING R.C. 2919.22(B)(1) AND FELONY MURDER R.C. 2903.02(B) ARE NOT ALLIED OFFENSES OF SIMILAR IMPORT AS WOULD REQUIRE MERGING FOR PURPOSES OF SENTENCING.

The Court of Appeals below properly applied this Court's precedent in *Brown* to find Johnson could be separately punished for his commission of the two offenses. And application of this Court's *Rance/Cabrales* test compels the same result.

R.C. 2941.25, Ohio's multiple count statute, provides that "[w]here 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."⁴ R.C. 2941.25(B) provides that "[w]here 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."

In *State v. Cabrales*,⁵ this Court held that R.C. 2945.25 mandates a two-step analysis. In the first step, the elements of the crimes are compared in the abstract. If the elements of the offenses "correspond to such a degree that the commission of one crime will result in the commission of the other, the crimes are allied offenses of similar import." To the extent that

⁴ R.C. 2941.25(A).

⁵ 118 Ohio St.3d 54, 2008-Ohio-1625

under *Rance*⁶ this comparison required a strict alignment of elements, *Cabrales* clarified that this is not so; in *Cabrales*, this Court indicated a more “holistic” approach.

When considering whether offenses are of similar import under R.C. 2941.25(A), a court must “compare the elements of the offenses in the abstract, without considering the evidence in the case, but is 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.⁷ If they are allied, the court proceeds to the second step and considers whether the offenses were committed separately or with a separate animus.⁸ The *Cabrales* test remains good law as it was recently cited by this Court in *State v. Williams*.⁹ Application of the test indicates that felony murder and child endangering are not allied offenses.

The felony murder statute, R.C. 2903.02(B) provides 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 [the voluntary manslaughter statute] or section 2903.04 [the involuntary manslaughter statute].” Child endangering is defined in R.C. 2919.22(B)(1), which states that “[n]o person shall do any of the following to a child under eighteen years of age * * *; (1) abuse the child.”

FELONY MURDER AND CHILD ENDANGERING ARE NOT ALLIED OFFENSES

A comparison of the elements of R.C. 2903.02(B) Felony Murder, and R.C. 2919.22(B)(1) Child Endangering in the abstract reveals that the two offenses are not allied

⁶ (1999), 85 Ohio St.3d 632

⁷ *Cabrales*, (supra); *State v. Finley*, 2008 WL 4367959 (Ohio App. 1 Dist.), 2008-Ohio-4904.

⁸ *Id.*

⁹ 2010 WL 323298 (Ohio), 2010-Ohio-147

offenses because the commission of one will not automatically result in the commission of the other. One of the elements of felony murder is proof of an underlying offense of violence that is a felony of the first or second degree, other than voluntary or involuntary manslaughter. However, the underlying offense of violence need not be child endangering. Further, felony murder requires that a death occur; child endangering does not. By contrast, child endangering requires a victim under 18 years of age; felony murder does not. Clearly, the commission of one offense can occur without the commission of the other, and these offenses are not allied offenses of similar import.¹⁰

This result compelled by application of *Cabrales*, is consistent with “compound homicide” case law from this Court which has held that predicate offenses do not merge with their respective homicide offenses.¹¹ In *State v. Moss*,¹² this Court held that aggravated murder does not merge with its predicate aggravated burglary, because no essential nexus exists between the two offenses. This Court stated:

“As regards aggravated murder and aggravated burglary, no 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 as kidnapping was incidental to and an element of the rape in *State v. Donald*, supra. ...”

Likewise, here, felony murder is not incidental to child endangering and vice versa. Moreover, felony murder cannot be said to be of similar import to child endangering. Child endangering protects against excessive corporal punishment among other societal interests. In no way can child endangering be equated to or found to be of “similar import” to felony murder – which protects human life itself.

¹⁰ See *State v. Hoover-Moore*, Franklin App. No. 03AAP-1186, 2004-Ohio-5541; *State v. Carroll*, 2007 WL 4555782 (Ohio App. 12 Dist.) 2007-Ohio-7075.

¹¹ See Brief of Franklin Co. Prosecutor Ron O’Brien, Amicus Curie in Support of Appellee for a chronicle of such case law.

¹² 69 Ohio St.2d 515, 433 N.E.2d 181, 23 Ohio Opp.3d 447

JOHNSON ACTED WITH A SEPARATE ANIMUS IN COMMITTING
THE TWO OFFENSES

The evidence at trial demonstrated that Johnson beat Milton – and continued to beat Milton – for a span of time.

After an initial blow to “punish” Milton for mispronouncing a word in his reading book, defendant continued to beat Milton – inflicting multiple blows with his fist or belt causing severe head injuries, bruising and cuts to the scalp and broken bones. Defendant used massive force, repeatedly, to the most vital organ of Milton’s body – his head. The Collis sisters both testified to overhearing defendant beat Milton: “Do you want pain?!” defendant said. Milton relied “No, sir! No sir!” (T.p. 694-710, 1330-31)

Child endangering was committed with defendant’s first strike of Milton. The murder occurred countless blows later. Unlike *State v. Williams*,¹³ wherein two shots were fired at the victim in rapid succession, here Johnson spent a good part of the day beating Milton. Simple child endangering was committed long before the beating constituted murder.

The abuse that this child suffered at Johnson’s fists was not necessary to complete the murder. Much like kidnapping, - though always present in a rape or robbery, will not be allied if it goes above and beyond what is needed to complete the rape or robbery,¹⁴ - the abuse Milton suffered went above and beyond what was needed to kill him.

This Court’s discussion in *State v. Moss*¹⁵ illustrates the point:

Even assuming, arguendo, that aggravated murder and aggravated burglary are allied offenses of similar import, as the two offenses were “committed separately,” the trial court, in the case sub judice, still acted properly in sentencing the appellee to consecutive terms of imprisonment. Appellee completed commission of the crime of aggravated burglary once he trespassed,

¹³ 2010 WL 323298 (Ohio) 2010-Ohio-147

¹⁴ See *State v. Logan* (1979), 60 Ohio St.2d 126, 135, 397 N.E.2d 1345; *State v. Fears* (1999), 86 Ohio St.3d 329, 715 N.E.2d 136; and *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, 817 N.E.2d 29.

¹⁵ 69 Ohio St.2d 515, 433 N.E.2d 181, 23 Ohio Opp.3d 447.

using force or stealth and with the intent to therein commit a theft offense, in an occupied structure and assumed control of a deadly weapon. Thus, all criminal actions he subsequently undertook, i.e., the aggravated murder of the victim, were separate acts for the purpose of R.C. 2941.25. In *State v. Frazier* (1979), 58 Ohio St.2d 253, 389 N.E.2d 1118, this court has held similarly in finding that a defendant, charged with aggravated robbery and aggravated burglary, may be convicted of both offenses under the “separate acts” provision of R.C. 2941.25 when each offense is consummated at a distinct time during the course of the criminal conduct giving rise to the charges. ...”

Because the evidence shows that the child endangering that occurred in this case was committed with a separate animus, the second prong of the allied offenses analysis shows that Johnson was properly punished for both crimes.

CONCLUSION

The above demonstrates why felony murder and child endangering do not merge – not in the abstract and certainly not in Johnson’s case (because he acted with a separate animus.) Nonetheless, the State anticipates it is likely this Court will find the offenses allied using the “close enough” test or the “commission of one offense “probably” results in the other” test recently enunciated in *Winn*¹⁶ and *Williams*. These cases start by citing the *Rance/Cabral* abstract test, but end by abandoning its application to reach a result informed by the wording the particular indictment or the facts of the case. Of course, this is exactly what *Rance* rejected:

“ . . . We agree with Justice Rehnquist’s view that if it is necessary to compare criminal elements in order to resolve a case, those elements should be compared in the statutory abstract. In the past this court has applied R.C. 2941.25(A) both ways. In some cases the court has compared the elements of the crimes by reference to the particular facts alleged in the indictment. See, e.g. *Newark v. Vazirani* (1990), 48 Ohio St.3d 81, 83 549 N.E.2d 520, 522 (“Given the facts of this case, we find that [the two crimes charged are allied offenses of similar import]”). (Emphasis added.) In other cases, this court has compared the statutory elements of the offenses in the abstract. See e.g., *State v. Richey* (1992), 64 Ohio St.3d 353, 369, 595 N.E. N.E.2d 915, 928.

* * *

¹⁶ 121 Ohio St.3d 413, 2008 Ohio 1625

...[W]e today clarify that under an R.C. 2941.25(A) analysis the statutorily defined elements of offenses that are claimed to be of similar import are compared in the abstract. *Newark v. Vazirani*, *supra*, and language in other opinions to the contrary, are overruled. ...”

If the court is indeed inclined to find these two offenses allied, the State requests that this Court do so clearly by reversing *Rance* and refocusing the analysis upon a particular defendant’s conduct as in *Newark v. Vazirani*¹⁷.

The beauty of *Rance* was that it provided a bright-line test that was easy to apply. But courts were understandably troubled by the absurd outcomes sometimes compelled by its application. This Court has struggled to resolve allied offense issues while retaining the *Rance/Cabrales* doctrine. The result has been a series of clarifications, pre-emptions, modifications and qualifications such that the *Rance/Cabrales* test can no longer be applied with any predictability or consistency. It has simply lost its efficacy. This Court has bended and shaped allied offense jurisprudence to do justice in cases where a straightforward application of *Rance* would not allow it. *Rance* exists today as only a tattered remnant of its former incarnation. Claiming adherence to the *Rance* standard (if not actually practiced) should not be elevated above doing justice and avoiding absurd results.

The *Newark* standard would avoid absurd results by focusing on a defendant’s conduct.¹⁸ And a given defendant’s punishment could be better tailored to his culpability as the legislature intended.

¹⁷ (1990), 48 Ohio St.3d 81, 83 549 N.E.2d 520, 522

¹⁸ R.C. 2941.25

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I hereby certify that I have sent a copy of the foregoing Memorandum in Response, by United States mail, addressed to Lindsey R. Gutierrez, Esq. (084456), Law Offices of Ravert J. Clark, 114 E. 8th Street, Suite 400, Cincinnati, Ohio 45202, counsel of record, this 22 day of February, 2010.


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