ORIGINAL

NO. 10-0897

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 91971

STATE OF OHIO

Plaintiff-Appellant

-vs-

JOSEPH WILSON

Defendant-Appellee

MEMORANDUM IN SUPPORT OF JURISDICTION

Counsel for Plaintiff-Appellant

WILLIAM D. MASON
CUYAHOGA COUNTY PROSECUTOR

MARY H. McGRATH (#0041381)
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7800

Counsel for Defendant-Appellee

BRITTA M. BARTHOL
P.O. Box 218
Northfield, Ohio 44067
(216) 577-8640

OFFICE OF THE OHIO PUBLIC DEFENDER
250 East Broad Street, Suite 1400
Columbus, Ohio 43215-9311

FILED
MAY 18 2010
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

EXPLANATION OF WHY THIS FELONY CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION OR ISSUE OF GREAT PUBLIC INTEREST 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 3

LAW AND ARGUMENT 8

PROPOSITION OF LAW I: SUMMARY REVERSAL IS REQUIRED WHERE AN APPELLATE COURT'S REMAND EXCEEDS THE SCOPE AND PROPER MANNER OF REMAND PROVIDED IN STATE V. WHITFIELD. 8

PROPOSITION OF LAW II: AN APPELLATE COURT'S ORDER OF REMAND PURSUANT TO STATE V. WHITFIELD FOR THE STATE'S ELECTION OF ALLIED OFFENSES DOES NOT AUTHORIZE A DE NOVO SENTENCING HEARING OR AN OPPORTUNITY TO LITIGATE SENTENCING ISSUES RAISED FOR THE FIRST TIME ON APPEAL. 9

CONCLUSION 11

CERTIFICATE OF SERVICE 12

APPENDIX

J.E. & OPINION 1

EXPLANATION OF WHY THIS FELONY CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION OR ISSUE OF GREAT PUBLIC INTEREST

The State of Ohio respectfully petitions this Honorable Court to accept jurisdiction and summarily reverse the Eighth District Court of Appeal's order remanding *State v. Wilson*, Cuyahoga App. No. 91971, 2010-Ohio-1196, for a *de novo* sentencing hearing to include sentencing issues unrelated to allied offenses and raised for the first time on appeal. The Eighth District's order of remand was pursuant to *State v. Whitfield,* 124 Ohio St.3d 319, 922 N.E.2d 182, 2010-Ohio-2, yet exceeds the scope and proper manner of remand as provided by this Court.

Citing *Whitfield,* the Eighth District affirmed Joseph Wilson's ("Wilson") convictions, vacated his sentence and remanded the matter to the trial court. In *Whitfield,* this Court held that, "[I]f, upon appeal, a court of appeals finds reversible error in the imposition of multiple punishments for allied offenses, the court must reverse the judgment of conviction and remand for a new sentencing hearing at which the state must elect which allied offense it will pursue against the defendant." *Whitfield,* 2010-Ohio-2, at ¶ 25. The remedy provided in *Whitfield* is narrow and concise - remand for a sentencing hearing at which the State elects which allied offense to pursue against the defendant.

In *Wilson*, however, the Eighth District's order of remand inexplicably exceeded the remedy in *Whitfield* by requiring a *de novo* sentencing hearing at which the trial court must also provide Wilson the opportunity to raise issues of sentence proportionality and judicial bias that Wilson raised for the first time on appeal. As the Eighth District's application of *Whitfield* is contrary to this Court's clear directive and

sets a dangerous precedent, summary reversal of the order of remand that exceeds *Whitfield* is the proper remedy.

STATEMENT OF THE CASE

On January 17, 2008, Wilson was indicted in a multiple count indictment on charges of Attempted Murder, Aggravated Robbery, Felonious Assault, Kidnapping and one and three-year Firearm Specifications. Wilson's indictment arose from the attack by a group of adult and juvenile males on a local attorney in Shaker Heights, Ohio. On July 15, 2008, a jury trial commenced. The State dismissed some counts and all three-year firearm specifications. On July 18, 2008, the jury convicted Wilson of Aggravated Robbery, Felonious Assault and Kidnapping, and acquitted him of the firearm specifications and Attempted Murder.

On July 21, 2008, the trial court sentenced Wilson to an aggregate prison term of twenty-five years and five years post-release control. On appeal, Wilson challenged his convictions and sentences. Wilson claimed, in part, that the trial court erred in sentencing him to consecutive sentences for allied offenses. Additionally, Wilson claimed that his sentence was disproportionate to that of similarly situated offenders and that he was sentenced by a biased court, based on statements made by the court at sentencing.

The Eighth District affirmed Wilson's convictions, but found Aggravated Robbery pursuant to R.C. 2911.01(A)(1) and Kidnapping pursuant to both R.C. 2905.01(A)(2) and (A)(3) to be allied offenses. Citing *Whitfield*, the Eighth District found that Wilson may be found guilty of both offenses, but sentenced for only one. *State v. Wilson*, 2010-Ohio-1196, at ¶¶ 92-93. The Eighth District further found Kidnapping to be an allied offense of Felonious Assault pursuant to R.C. 2901.11(A)(1), and that no separate

animus existed under the facts of the case. Citing *Whitfield*, the Eighth District found that Wilson could be found guilty of both offenses, but sentenced for only one. *State v. Wilson*, 2010-Ohio-1196, at ¶¶ 95-96.

The Eighth District, however, declined to address Wilson's assignments of error dealing with sentence proportionality and judicial bias, finding that since Wilson's case will be pending in the trial court again, these claims would more appropriately be addressed at the trial court level, as follows:

> Pursuant to the recent Ohio Supreme Court case, *Whitfield*, this court "must reverse the judgment of conviction and remand for a new sentencing hearing at which the state must elect which allied offense it will pursue against the defendant." *Id.* at paragraph two of the syllabus. Accordingly, Wilson's sentence is vacated, and he is entitled to a de novo sentencing hearing upon remand.
>
> Wilson's fourth assignment of error is sustained in part and overruled in part.
>
> Wilson's fifth and sixth assignments of error challenge other aspects of his sentence. But our disposition of his fourth assignment of error, vacating his sentence and remanding for a de novo sentencing hearing, renders his fifth and sixth assignments moot. We therefore need not address them.
>
> We note, however, that upon remand, Wilson's case will again be pending in the trial court. Wilson's fifth and sixth assignments of error dealing with sentence proportionality and judicial bias will more appropriately be addressed at the trial court level. See *State v. Breeden*, 8th Dist. No. 84663, 2005-Ohio-510 (a defendant must raise the issue of disproportionate sentences at the trial court and present some evidence to preserve the issue for appeal); and R.C. 2701.03 (exclusive means by which allegations of judicial bias should be raised in an affidavit of disqualification to the Ohio Supreme Court for cases pending in the common pleas court).
>
> Wilson's convictions are affirmed; his sentence is reversed, vacated, and remanded to the lower court for further proceedings consistent with this opinion.

State v. Wilson, 2010-Ohio-1196, at ¶¶ 98-102.

STATEMENT OF THE FACTS

The Eighth District set forth the following facts, which the State adopts:

Kevin McDermott, the victim, testified that on December 31, 2007, he left his home in Shaker Heights around 6:00 p.m. to go jogging at the track at Shaker Heights High School. He did not have any identification or anything of value in his possession.

After McDermott completed his run, he was walking back to his home when he noticed a group of seven young males standing in the middle of Van Aken Boulevard "screaming and yelling" and "banging on a car" that was waiting to turn left. McDermott explained that he crossed Van Aken, and then "all of a sudden, [he] felt somebody come up from behind [him]" and hit him on his left leg. He realized it was the same "seven kids" he had seen harassing cars.

McDermott explained that "the first kid came at [him]," and tried to hit him with his fist. Another "kid" hit him in the arm with a wooden pole, while at the same time, another was punching him in the stomach. Someone said to him, "[w]e're going to fuck you up," and someone else said, "[w]e're gonna' kill ya." When McDermott tried to run away, someone hit him with a metal rod on his right knee and "just obliterated it." He fell to the ground.

While McDermott was laying on the ground, he said that Wilson pulled out a knife and started "sticking it at me." Wilson said to him, "I'm going to cut you with the knife if you don't shut up." McDermott further testified that Wilson said, "[g]ive me your money," and McDermott replied, "asshole, I don't have any money. I'm out jogging." McDermott described the knife as having "a six-inch blade"; it was more like a "fishing" knife, not a switchblade knife.

McDermott explained that each male was involved in the attack and none of them tried to stop it. He said he was "absolutely" certain that Wilson was equally involved in the attack "because [he] thought that [Wilson] was the last person [he] was going to see on this earth." This was because he heard one of the "kids" say, "[c]lip him," and he saw a gun in another "kid's" pocket.
While McDermott was still getting kicked all over, he heard a girl from the Chelimsky's (his neighbors) house banging on the window. As he turned, McDermott said, "the knife had hit [him] in the forehead." At that point, his attackers began to run away two by two. After his attackers left, the police and paramedics arrived within minutes.

The state then showed McDermott a series of photographs, and McDermott proceeded to identify each of his attackers. He identified Demetrius Lang as the "first one that came up and tried to sucker-punch" him, and was also one of the last to leave and gave him "one of the last kicks" that was like "kicking a field goal" on his head. Miles Cole was "the tallest kid," who had the gun in his pocket. Joshua Bray was the one who had the "nunchaku." Wilson had the knife. And either Brandon Goodwin or Jerome Edwards had the wooden pole.

. . .

Hanna Chelimsky, McDermott's 14-year-old neighbor, testified that around 6:30 p.m. on the day of the attack, she was upstairs in her mother's bedroom doing her homework when she heard a commotion outside. She looked out the window and saw six or seven teenage boys beating up a man. She began pounding on the window to try to get them to stop. She could not identify any of the attackers, nor could she see any weapons, but she did say that all of the young men took part in the attack.

Police officers received reports of an assault in progress; that approximately five males were beating up a single male with knives and poles. They began to immediately scour the area looking for the suspects who were described as black males "wearing baggy clothing and some with hoodies." Demetrius Lang was stopped by police in "close proximity" to the scene because he matched "that description to a tee."

Detective Eric Conwell testified that he spoke with Lang once he was detained. Lang appeared to be intoxicated and his clothes were muddy. Lang said that he had been in a wrestling match. Based on these factors, police arrested Lang. His blood alcohol level was .105. Lang was released into his parents' custody, but he immediately ran from them.

Police later obtained a warrant to search Lang's home. Lang was still missing when they conducted the search. His brother, Jerome Edwards, was there and "basically confessed to the crime." Detective Conwell explained that Edwards told police that "he stomped and repeatedly punched the victim." Edwards further told police that "his brother Demetrius Lang was the instigator in it and that he was the one who ran up, [and] sucker-punched" McDermott. Edwards also implicated Brandon Goodwin and Miles Cole.

Police then went to Goodwin's home. Goodwin and Cole were there when police arrived. Both suspects provided further information to police. Through Goodwin, police discovered that Joshua Bray and Wilson (Bray's brother) were the fifth and sixth men allegedly involved in the attack. As of January 7, 2008, all six suspects were in police custody.

The following day, Wilson gave Detective Conwell a written statement. Wilson's statement to police mirrors his testimony at trial (see infra), except that he told Detective Conwell that after Lang first hit McDermott, everyone but him took part in the attack (he testified at trial that neither he nor Bray participated).

Three of Wilson's codefendants testified against him: Miles Cole, Demetrius Lang, and Jerome Edwards.[FN1] They were originally charged with attempted murder, aggravated robbery, felonious assault, and kidnapping. They each pled

guilty to aggravated robbery and felonious assault. As part of their plea negotiations, the state agreed to dismiss the other charges in exchange for their testimony against Wilson. They had not yet been sentenced at the time of Wilson's trial.

FN1. Cole's case was handled by the same judge; Lang's and Edwards's cases were handled by a different judge.

Cole, Lang, and Edwards testified that on New Year's Eve 2007, they were at Goodwin's house drinking and "hanging out." Bray and Wilson came over. They all knew Bray, but had just met Wilson that night. Cole, Lang, Edwards, and Goodwin were intoxicated, but said that Bray and Wilson were not drinking. Cole said that it was Wilson's and Bray's idea to rob somebody; Lang said it was Bray's; and Edwards said it was Wilson's. The six left Goodwin's home. Within minutes, they began harassing cars that were sitting at the light. When the cars pulled away, it was Lang who spotted McDermott. Lang said he picked McDermott because "he was the only one out there" and it was "a dark street." Lang ran toward McDermott and immediately punched him. Cole and Edwards both said that after Lang hit McDermott, they also hit McDermott and Edwards also kicked him.

Lang admitted that he asked McDermott for money and said that he went through McDermott's pockets. Edwards said he saw Wilson go through McDermott's wallet, despite the fact that McDermott testified that he did not have a wallet.

Cole, Lang, and Edwards testified that all six of them took part in the attack. Cole testified that Bray had a "pipe" and Wilson had a "little pocket knife" that "folds up," but denied that he, Lang, Goodwin, or Edwards had a weapon. Cole saw Wilson hold his knife to McDermott's face and tell him to "shut up," but did not see Wilson cut McDermott with the knife. Edwards said he saw Wilson with a "steak knife" and saw Wilson put the knife in McDermott's face, but did not see anyone with a gun or a pipe. Lang said he never saw any weapons. But Lang and Cole did say that Goodwin hit McDermott with a tree branch.

Cole testified that he, Goodwin, and Lang were in a gang called the "Folks," but Edwards and Lang denied being in a gang.

On cross-examination, Cole agreed that he lied to police in his original statement in January 2008 where he said there were no weapons, and that he was not in a gang. He agreed that he believed his testimony against Wilson would have "some impact" on how he was sentenced. And he agreed that "gang members are supposed to stick up for each other and watch out for each other."

Lang testified on cross-examination that he had loyalty to Edwards, Goodwin, Cole, and Bray, but not Wilson because he had "just met him."

Edwards admitted on cross-examination that one week before Wilson's trial, he made a statement that Goodwin had the stick and Bray had the knife. Edwards further agreed that he stated one week prior that Wilson did not have a weapon, and "[Bray] was kicking and punching [McDermott] and cut him with a knife one time."

At the close of the state's evidence, it moved to dismiss the three-year firearm specifications. After the state rested, Wilson moved for a Crim.R. 29 acquittal, which the trial court denied.

Four witnesses testified on Wilson's behalf, all of whom stated that they believed Wilson to be an honest person, and they were shocked when they learned that he was charged with these offenses.

Wilson then testified on his own behalf. He said that his mother dropped him and his brother off at Goodwin's house at 6:00 p.m. and was supposed to pick them up around 9:00 p.m. He said that when he and his brother (Bray) arrived at Goodwin's house, the males that were there tried to greet him with a gang handshake because they thought he was a member of the "Folks."
When the group left Goodwin's house, Wilson thought they were just going to someone else's house. Wilson explained that when the group started beating McDermott, he was "in a state of complete shock." But he said he did not do anything to stop it, which he regretted. He said he only watched for a couple of seconds before he grabbed his brother and ran away. He went back to Goodwin's house to wait for his mother to pick him and his brother up, which she was supposed to do around 9:00 p.m. Goodwin and Cole also returned to the apartment, but Wilson said they did not talk about the attack. Lang eventually arrived too, dressed in a paper blue jail suit.

Wilson explained that he did not report the attack to the police because he knew the males were in a gang and he was afraid of them. Wilson said that he never saw any weapons being used.

The jury found Wilson not guilty of attempted murder, but guilty of aggravated robbery, felonious assault, and kidnapping. It further found him not guilty of the one-year firearm specifications.

The trial court sentenced Wilson to ten years for aggravated robbery, eight years for felonious assault, and seven years for kidnapping, and then ordered that they be served consecutively, for an aggregate term of twenty-five years in prison.

State v. Wilson, 2010-Ohio-1196, at ¶¶ 12-18, 21-42.

LAW AND ARGUMENT

PROPOSITION OF LAW I: SUMMARY REVERSAL IS REQUIRED WHERE AN APPELLATE COURT'S REMAND EXCEEDS THE SCOPE AND PROPER MANNER OF REMAND PROVIDED IN STATE V. WHITFIELD.

In *Whitfield*, this Court took the opportunity "to provide guidance on the proper manner in which the courts of appeal should remand cases after finding errors committed in sentencing on allied offenses." *State v. Whitfield*, 2010-Ohio-2, at ¶ 5. This Court set forth the proper manner of remand, as follows:

> If, upon appeal, a court of appeals finds reversible error in the imposition of multiple punishments for allied offenses, the court must reverse the judgment of conviction and remand for a new sentencing hearing at which the state must elect which allied offense it will pursue against the defendant.

State v. Whitfield, 2010-Ohio-2, at ¶ 25.

This Court's opinion in *Whitfield* provides a narrow remedy upon an appellate court's determination of reversible error in multiple punishments for allied offenses, and a clear manner of remand. In *Wilson*, however, the Eighth District inexplicably and without authority expanded *Whitfield's* narrow scope of remand and ordered a *de novo* sentencing hearing for Wilson to raise issues unrelated to allied offenses, specifically, sentence proportionality and judicial basis, that Wilson failed to raise at the trial court level. The Eighth District's unauthorized expansion of the remedy provided in *Whitfield* requires summary reversal with respect to that portion of the order of remand.

PROPOSITION OF LAW II: AN APPELLATE COURT'S ORDER OF REMAND PURSUANT TO STATE V. WHITFIELD FOR THE STATE'S ELECTION OF ALLIED OFFENSES DOES NOT AUTHORIZE A DE NOVO SENTENCING HEARING OR AN OPPORTUNITY TO LITIGATE SENTENCING ISSUES RAISED FOR THE FIRST TIME ON APPEAL.

As set forth above, in *Whitfield*, this Court provided appellate courts a clear and concise remedy upon finding reversible error in multiple punishments for allied offenses – remand for the State to elect which allied offense to pursue.

Here, the Eighth District instructed the trial court to conduct a *de novo* sentencing hearing to include sentencing issues of proportionality and judicial bias Wilson raised for the first time on appeal. Not only is the Eighth District's instruction on remand far beyond *Whitfield's* narrow scope, it provides a dangerous precedent to defendants seeking to litigate sentencing issues on remand that were raised for the first time on appeal, and are wholly unrelated to allied offenses, under the guise of *Whitfield*.

In *Wilson*, the Eighth District cited *State v. Breeden*, Cuyahoga App. No. 84663, 2005-Ohio-510, in support of its instruction on remand that the trial court consider sentencing issues Wilson raised for the first time on appeal, as follows:

> We note, however, that upon remand, Wilson's case will again be pending in the trial court. Wilson's fifth and sixth assignments of error dealing with sentence proportionality and judicial bias will more appropriately be addressed at the trial court level. See *State v. Breeden,* 8th Dist. No. 84663, 2005-Ohio-510 (a defendant must raise the issue of disproportionate sentences at the trial court and present some evidence to preserve the issue for appeal)[.]

State v. Wilson, 2010-Ohio-1196, at ¶ 101.

In *Breeden*, the Eighth District rejected the appellant's claim that his sentence was contrary to law because the trial court failed to ensure it was consistent with sentences imposes upon other similarly situated offenders, finding:

> In this matter, defendant did not present evidence to the trial court or to this court to indicate that his sentence is directly disproportionate to sentences given to other offenders with similar records who have committed these offenses, nor did he present evidence as to what a "proportionate sentence" might be. Nothing of record suggests that the court-imposed sentence is inconsistent with or disproportionate to sentences that have been imposed on similar offenders who have committed similar offenses. The record further indicates that defendant has an extensive record, having been previously convicted of theft of a firearm, larceny, and breaking and entering, and he was on parole at the time of the offense. The sentence was commensurate with the seriousness of the offense, the gravity of its impact upon the victim, and the defendant's history and no disproportionality has been shown.

State v. Breeden, 2005-Ohio-510, at ¶ 81.

The Eighth District rejected Breeden's claim of sentence disproportionality due to his failure to present supporting evidence to the trial or appellate court. The Eighth District did not remand *Breeden* to provide him with an opportunity to raise and provide evidence of sentence disproportionality to the trial court. As such, *Breeden* does not support the Eighth District's remand in *Wilson* for a *de novo* sentencing hearing to address, for the first time, sentence proportionality. Providing an opportunity to raise sentence proportionality should not be bootstrapped onto a *Whitfield* remand, as *Whitfield* clearly does not provide for a *de novo* hearing or permit litigation of sentencing issues a defendant failed to raise at the trial court level.

Further, the Eighth District cited R.C. 2701.03 as the "exclusive means by which allegations of judicial bias should be raised in an affidavit of disqualification to the Ohio Supreme Court for cases pending the common pleas court." *State v. Wilson,* 2010-Ohio-1196, at ¶ 101. Under the guise of *Whitfield,* the Eighth District has remanded *Wilson* for a *de novo* sentencing hearing to include a claim of judicial bias. But the Eighth District's opinion recognizes that an affidavit of disqualification to the Ohio Supreme

Court is the exclusive means by which to raise judicial bias. Additionally, the Eighth District has found it did not have jurisdiction in a similar situation, finding:

> We have no jurisdiction to consider whether the judge was biased or prejudiced such that he should have been disqualified from acting in this case. This is the exclusive province of the Chief Justice of the Ohio Supreme Court. The procedures for disqualification set forth in R.C. 2701.03 are appellant's sole remedy for questioning the judge's objectivity. Accordingly, we have no jurisdiction to address this issue. See, e.g., *Jones v. Billingham* (1995), 105 Ohio App.3d 8, 11, 663 N.E.2d 657.

Watson v. Trivers, Cuyahoga App. No. 91606, 2009-Ohio-2256, at ¶ 7.

As such, R.C. 2701.03 does not support the Eighth District's remand for a *de novo* sentencing hearing to raise judicial bias.

CONCLUSION

The State of Ohio respectfully submits that the Eighth District's order of remand exceeds the remedy provided by this Court in *Whitfield* by requiring a *de novo* sentencing hearing at which the trial court must provide Joseph Wilson the opportunity to raise issues of sentence proportionality and judicial bias - issues unrelated to allied offenses - that Wilson raised for the first time on appeal. A remand pursuant to *Whitfield* should not be expanded to permit a defendant a "second bite at the apple." In the event that summary reversal is not granted as to that portion of the order of remand, the State requests that this Honorable Court accept jurisdiction and consider whether a remand pursuant to *Whitfield* requires a *de novo* hearing and permits litigation of sentencing issues (other than those related to allied offenses) raised for the first time on appeal.

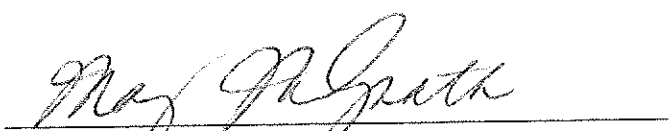
Respectfully submitted,

WILLIAM D. MASON
CUYAHOGA COUNTY PROSECUTOR

MARY H. McGRATH (#0041381)
Assistant Prosecuting Attorney
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7800

CERTIFICATE OF SERVICE

A copy of foregoing Memorandum in Support of Jurisdiction has been sent by regular U.S. Mail this 17th day of May, 2010, to Britta M. Barthol, P.O. Box 218, Northfield, Ohio 44067 and the Office of the Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215.



Assistant Prosecuting Attorney

APR 0 5 2010

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

A STEVEN DEVER
ASST. COUNTY PROSECUTOR
8TH FLOOR JUSTICE CENTER
1200 ONTARIO STREET
CLEVELAND, OH 44113

CA 91971

JOURNAL ENTRY AND OPINION
No. 91971

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOSEPH WILSON

DEFENDANT-APPELLANT

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

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-505583

BEFORE: Boyle, J., McMonagle, P.J., and Blackmon, J.

RELEASED: March 25, 2010

APR 0 5 2010

JOURNALIZED:

CA08091971
62544203

VOL 0701 PG 0816

ATTORNEY FOR APPELLANT

Britta M. Barthol
Post Office Box 218
Northfield, Ohio 44067

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor
By: Mary McGrath
A. Steven Dever
Assistant County Prosecutors
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

FILED AND JOURNALIZED
PER APP.R. 22(C)
APR 0 5 2010
GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

ANNOUNCEMENT OF DECISION
PER APP.R. 22(B) AND 26(A)
RECEIVED
MAR 2 5 2010
GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

COPIES MAILED TO COUNSEL FOR
ALL PARTIES, COSTS TAXED

CA08091971 62353128

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) 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(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten 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(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

VOL 0701 PG 0817

MARY J. BOYLE, J.:

Defendant-appellant, Joseph Wilson, appeals his convictions and sentence. He raises six assignments of error for our review:

"[1.] Appellant received ineffective assistance of counsel guaranteed by Article I, Section 10 of the Ohio Constitution and the Sixth and Fourteenth Amendment to the United States Constitution when his attorney failed to object to improper victim impact testimony.

"[2.] The prosecutor's vouching for the credibility of a witness constituted plain error.

"[3.] The appellant's convictions for aggravated robbery, felonious assault, and kidnapping are against the manifest weight of the evidence.

"[4.] The trial court erred by sentencing the appellant to consecutive sentences on the aggravated robbery, felonious assault, and kidnapping charges where those charges were allied offenses of similar import and no separate animus existed.

"[5.] The trial court failed to make a finding that the appellant's sentence is consistent with similarly situated offenders.

"[6.] The appellant was denied due process of law when he was sentenced by a biased court as evidenced by the statements made by the court at the time of sentencing."

VOL 0701 PG 0818

Finding merit to Wilson's fourth assignment of error, we affirm in part, reverse in part, and remand for a new sentencing hearing.

Procedural History

The Cuyahoga County Grand Jury indicted Wilson on 14 counts, including one count of attempted murder, in violation of R.C. 2923.02 and 2903.02; six counts of aggravated robbery, in violation of R.C. 2911.01(A)(1) and (A)(3); six counts of felonious assault, in violation of R.C. 2903.11(A)(1) and (A)(2); and one count of kidnapping, in violation of R.C. 2905.01(A)(2) and/or (A)(3). All of the counts contained one- and three-year firearm specifications. Wilson entered a plea of not guilty to the charges.

Prior to trial, the state dismissed one of the aggravated robbery counts (Count 2), and moved to consolidate the remaining counts of aggravated robbery (Counts 3 through 7 became one count). The state further explained that it would only proceed on one of the felonious assault counts (Count 8), and then moved to dismiss the remaining counts of felonious assault (Counts 9 through 13). Thus, the state proceeded against Wilson on four counts: attempted murder, aggravated robbery, felonious assault, and kidnapping, with the one- and three-year firearm specifications attached to each count.

The case proceeded to a jury trial, where the following evidence was presented.

VOL 0701 PG 0819

Jury Trial

Kevin McDermott, the victim, testified that on December 31, 2007, he left his home in Shaker Heights around 6:00 p.m. to go jogging at the track at Shaker Heights High School. He did not have any identification or anything of value in his possession.

After McDermott completed his run, he was walking back to his home when he noticed a group of seven young males standing in the middle of Van Aken Boulevard "screaming and yelling" and "banging on a car" that was waiting to turn left. McDermott explained that he crossed Van Aken, and then "all of a sudden, [he] felt somebody come up from behind [him]" and hit him on his left leg. He realized it was the same "seven kids" he had seen harassing cars.

McDermott explained that "the first kid came at [him]," and tried to hit him with his fist. Another "kid" hit him in the arm with a wooden pole, while at the same time, another was punching him in the stomach. Someone said to him, "[w]e're going to fuck you up," and someone else said, "[w]e're gonna' kill ya." When McDermott tried to run away, someone hit him with a metal rod on his right knee and "just obliterated it." He fell to the ground.

While McDermott was laying on the ground, he said that Wilson pulled out a knife and started "sticking it at me." Wilson said to him, "I'm going to cut you with the knife if you don't shut up." McDermott further testified that Wilson

said, "[g]ive me your money," and McDermott replied, "asshole, I don't have any money. I'm out jogging." McDermott described the knife as having "a six-inch blade"; it was more like a "fishing" knife, not a switchblade knife.

McDermott explained that each male was involved in the attack and none of them tried to stop it. He said he was "absolutely" certain that Wilson was equally involved in the attack "because [he] thought that [Wilson] was the last person [he] was going to see on this earth." This was because he heard one of the "kids" say, "[c]lip him," and he saw a gun in another "kid's" pocket.

While McDermott was still getting kicked all over, he heard a girl from the Chelimsky's (his neighbors) house banging on the window. As he turned, McDermott said, "the knife had hit [him] in the forehead." At that point, his attackers began to run away two by two. After his attackers left, the police and paramedics arrived within minutes.

The state then showed McDermott a series of photographs, and McDermott proceeded to identify each of his attackers. He identified Demetrius Lang as the "first one that came up and tried to sucker-punch" him, and was also one of the last to leave and gave him "one of the last kicks" that was like "kicking a field goal" on his head. Miles Cole was "the tallest kid," who had the gun in his pocket. Joshua Bray was the one who had the "nunchaku." Wilson had the knife. And either Brandon Goodwin or Jerome Edwards had the wooden pole.

McDermott explained that he saw seven young men when he first saw them in the street, "but only six encircled" him; one appeared to be afraid and ran away before the attack began.

On cross-examination, McDermott agreed that he testified at a probable cause hearing in juvenile court against the five juveniles in March 2008. He was asked at that hearing if he could identify his attackers, and what role each of them played. McDermott agreed that at that hearing, he testified that he did not "have any recollection" of Miles Cole having a weapon. McDermott further agreed that at that hearing he testified that Lang had the gun. He also agreed that in his previous testimony he always referred to the group as "seven young men" and that he never mentioned that a "seventh" young man ran away.

Hanna Chelimsky, McDermott's 14-year-old neighbor, testified that around 6:30 p.m. on the day of the attack, she was upstairs in her mother's bedroom doing her homework when she heard a commotion outside. She looked out the window and saw six or seven teenage boys beating up a man. She began pounding on the window to try to get them to stop. She could not identify any of the attackers, nor could she see any weapons, but she did say that all of the young men took part in the attack.

Police officers received reports of an assault in progress; that approximately five males were beating up a single male with knives and poles.

VOL0701 PG0822

They began to immediately scour the area looking for the suspects who were described as black males "wearing baggy clothing and some with hoodies." Demetrius Lang was stopped by police in "close proximity" to the scene because he matched "that description to a tee."

Detective Eric Conwell testified that he spoke with Lang once he was detained. Lang appeared to be intoxicated and his clothes were muddy. Lang said that he had been in a wrestling match. Based on these factors, police arrested Lang. His blood alcohol level was .105. Lang was released into his parents' custody, but he immediately ran from them.

Police later obtained a warrant to search Lang's home. Lang was still missing when they conducted the search. His brother, Jerome Edwards, was there and "basically confessed to the crime." Detective Conwell explained that Edwards told police that "he stomped and repeatedly punched the victim." Edwards further told police that "his brother Demetrius Lang was the instigator in it and that he was the one who ran up, [and] sucker-punched" McDermott. Edwards also implicated Brandon Goodwin and Miles Cole.

Police then went to Goodwin's home. Goodwin and Cole were there when police arrived. Both suspects provided further information to police. Through Goodwin, police discovered that Joshua Bray and Wilson (Bray's brother) were

the fifth and sixth men allegedly involved in the attack. As of January 7, 2008, all six suspects were in police custody.

The following day, Wilson gave Detective Conwell a written statement. Wilson's statement to police mirrors his testimony at trial (see infra), except that he told Detective Conwell that after Lang first hit McDermott, everyone but him took part in the attack (he testified at trial that neither he nor Bray participated).

Three of Wilson's codefendants testified against him: Miles Cole, Demetrius Lang, and Jerome Edwards.[1] They were originally charged with attempted murder, aggravated robbery, felonious assault, and kidnapping. They each pled guilty to aggravated robbery and felonious assault. As part of their plea negotiations, the state agreed to dismiss the other charges in exchange for their testimony against Wilson. They had not yet been sentenced at the time of Wilson's trial.

Cole, Lang, and Edwards testified that on New Year's Eve 2007, they were at Goodwin's house drinking and "hanging out." Bray and Wilson came over. They all knew Bray, but had just met Wilson that night. Cole, Lang, Edwards, and Goodwin were intoxicated, but said that Bray and Wilson were not drinking.

---

[1]Cole's case was handled by the same judge; Lang's and Edwards's cases were handled by a different judge.

VOL0701 PG0824

Cole said that it was Wilson's and Bray's idea to rob somebody; Lang said it was Bray's; and Edwards said it was Wilson's.

The six left Goodwin's home. Within minutes, they began harassing cars that were sitting at the light. When the cars pulled away, it was Lang who spotted McDermott. Lang said he picked McDermott because "he was the only one out there" and it was "a dark street." Lang ran toward McDermott and immediately punched him. Cole and Edwards both said that after Lang hit McDermott, they also hit McDermott and Edwards also kicked him.

Lang admitted that he asked McDermott for money and said that he went through McDermott's pockets. Edwards said he saw Wilson go through McDermott's wallet, despite the fact that McDermott testified that he did not have a wallet.

Cole, Lang, and Edwards testified that all six of them took part in the attack. Cole testified that Bray had a "pipe" and Wilson had a "little pocket knife" that "folds up," but denied that he, Lang, Goodwin, or Edwards had a weapon. Cole saw Wilson hold his knife to McDermott's face and tell him to "shut up," but did not see Wilson cut McDermott with the knife. Edwards said he saw Wilson with a "steak knife" and saw Wilson put the knife in McDermott's face, but did not see anyone with a gun or a pipe. Lang said he never saw any

weapons. But Lang and Cole did say that Goodwin hit McDermott with a tree branch.

Cole testified that he, Goodwin, and Lang were in a gang called the "Folks," but Edwards and Lang denied being in a gang.

On cross-examination, Cole agreed that he lied to police in his original statement in January 2008 where he said there were no weapons, and that he was not in a gang. He agreed that he believed his testimony against Wilson would have "some impact" on how he was sentenced. And he agreed that "gang members are supposed to stick up for each other and watch out for each other."

Lang testified on cross-examination that he had loyalty to Edwards, Goodwin, Cole, and Bray, but not Wilson because he had "just met him."

Edwards admitted on cross-examination that one week before Wilson's trial, he made a statement that Goodwin had the stick and Bray had the knife. Edwards further agreed that he stated one week prior that Wilson did not have a weapon, and "[Bray] was kicking and punching [McDermott] and cut him with a knife one time."

At the close of the state's evidence, it moved to dismiss the three-year firearm specifications. After the state rested, Wilson moved for a Crim.R. 29 acquittal, which the trial court denied.

000701 000826

Four witnesses testified on Wilson's behalf, all of whom stated that they believed Wilson to be an honest person, and they were shocked when they learned that he was charged with these offenses.

Wilson then testified on his own behalf. He said that his mother dropped him and his brother off at Goodwin's house at 6:00 p.m. and was supposed to pick them up around 9:00 p.m. He said that when he and his brother (Bray) arrived at Goodwin's house, the males that were there tried to greet him with a gang handshake because they thought he was a member of the "Folks."

When the group left Goodwin's house, Wilson thought they were just going to someone else's house. Wilson explained that when the group started beating McDermott, he was "in a state of complete shock." But he said he did not do anything to stop it, which he regretted. He said he only watched for a couple of seconds before he grabbed his brother and ran away. He went back to Goodwin's house to wait for his mother to pick him and his brother up, which she was supposed to do around 9:00 p.m. Goodwin and Cole also returned to the apartment, but Wilson said they did not talk about the attack. Lang eventually arrived too, dressed in a paper blue jail suit.

Wilson explained that he did not report the attack to the police because he knew the males were in a gang and he was afraid of them. Wilson said that he never saw any weapons being used.

Verdict and Sentence

The jury found Wilson not guilty of attempted murder, but guilty of aggravated robbery, felonious assault, and kidnapping. It further found him not guilty of the one-year firearm specifications.

The trial court sentenced Wilson to ten years for aggravated robbery, eight years for felonious assault, and seven years for kidnapping, and then ordered that they be served consecutively, for an aggregate term of twenty-five years in prison.

Victim Impact Testimony

In his first assignment of error, Wilson argues that his trial counsel was ineffective because he failed to object to improper victim-impact testimony being admitted at trial. Wilson cites two incidences where his trial counsel should have objected to the jury hearing the evidence: (1) when McDermott's treating physician testified, and (2) when the victim testified. Wilson maintains that this evidence "hopelessly tainted and biased" the jury with sympathy for the victim.

To succeed on a claim of ineffective assistance, a defendant must establish "both that 'counsel's representation fell below an objective standard of reasonableness,' and that there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'"

VOL0701 PG0828

Smith v. Spisak (2010), ____U.S. ____, 130 S.Ct. 685, 688, quoting *Strickland v. Washington* (1984), 466 U.S. 668, 688, 694.

First, Wilson maintains that his trial counsel should have objected to testimony given by McDermott's treating physician. The prosecutor asked the physician whether "there was any type of residual effects" on McDermott, as far as either "mental demeanor" or "emotional mental" effect. The physician responded:

"Well, you know, Kevin is, you know, a very jovial sort. And he's different. I mean there is certainly an amount of seriousness. I wouldn't say happy-go-lucky but there is certainly an amount of seriousness. I mean it's from the emotional trauma and physical trauma and just — you know, when you're 52 years old and walking around enjoying life it's tough to be a patient where people are telling you what to do or what you can't do." The prosecutor then said, "And he's a lawyer, too, on top of that?" The physician responded, "Well, you know, I think people who are used to being in control, when you're suddenly not in control of what you do everyday, its frustrating."

Second, Wilson claims that his trial counsel should have objected to victim-impact evidence being "elicited during the victim's testimony." He points to where the prosecutor asked McDermott how being a victim of a crime had affected him, "other than the physical injury." McDermott explained that he was

trying to "move on" with his life, but that he "was not there yet." McDermott further testified how his wife was "tougher than nails" and his kids were "pretty tough," but his youngest child was having trouble. McDermott also stated that his neighbors were "afraid to walk on the street" in the middle of the afternoon, and that the incident "changed the neighborhood totally." McDermott later said that he thought about the incident "a hundred times a day."

Victim impact evidence is excluded because it is irrelevant and immaterial to the guilt or innocence of the accused — it principally serves to inflame the passion of the jury. See *State v. White* (1968), 15 Ohio St.2d 146, 239 N.E.2d 65. Nevertheless, the state is not wholly precluded from eliciting testimony from victims that touches on the impact the crime had on the victims: "circumstances of the victims are relevant to the crime as a whole. The victims cannot be separated from the crime." *State v. Williams*, 99 Ohio St.3d 439, 2003-Ohio-4164, 793 N.E.2d 446, ¶43, quoting *State v. Lorraine* (1993), 66 Ohio St.3d 414, 420, 613 N.E.2d 212. In *State v. Fautenberry*, 72 Ohio St.3d 435, 439-440, 1995-Ohio-209, 650 N.E.2d 878, the Ohio Supreme Court went on to say that although "true victim-impact evidence" should not be admitted during the guilt phase of the proceeding, "evidence which depicts both the circumstances surrounding the commission of the [offense] and also the impact of the [offense]

VOL 0701 PG 0830

on the victim's family may be admissible during both the guilt and the sentencing phases." Id.

In *State v. Halder*, 8th Dist. No. 87974, 2007-Ohio-5940, this court upheld the trial court admitting similar victim-impact evidence. Id. at ¶68, 70. In *Halder*, the defendant walked into a building at Case Western Reserve University, shot and killed the first person he encountered, and continued to fire at other people in the building and at the police when they arrived. He then held numerous people hostage for approximately eight hours before surrendering.

Halder argued that the trial court improperly admitted testimony of the slain victim's brother, as well as twenty-eight other witnesses. The victim's brother testified about learning of the hostage situation, watching the news, and seeing the body of his brother being taken from the building, and how the death of his brother had affected the entire family. We disagreed that the trial court erred, holding that this "testimony comports with the law espoused in *Fautenberry*, because it describes the surrounding circumstances of the murder and the impact it has had on the victim's family." Id. at ¶68.

With respect to the testimonies of the twenty-eight other witnesses who Halder held hostage for approximately eight hours, they testified about their ordeal, that they were forced by fear of death to remain in the building, that many had received counseling since the incident, and some testified about the

fear of loud noises, and many of the victims testified that they now had to plan exit strategies whenever they entered a building. We held that "the testimony sheds light on the surrounding circumstances of the hostage situation and how the experience has impacted the lives of each victim." Id. at ¶70.

We find that the testimony admitted here was similar to the testimony that was admitted in *Halder* and thus, comports with the law espoused in *Fautenberry* and did not deny Wilson a fair trial. Accordingly, Wilson's trial counsel was not ineffective for not objecting to this testimony.

Moreover, even if Wilson's attorney should have objected to the statements, Wilson was not prejudiced by him not doing so. McDermott testified that Wilson was not only one of the six men who assaulted him, but that he was the one who cut his face with a knife. Three of Wilson's codefendants testified against him, all stating that Wilson took part in the attack. And Chelimsky testified that she saw all of the "teenage boys" attacking McDermott. Thus, if the jury had not heard evidence of how the attack affected McDermott's life and his community, it would not have changed the outcome of the trial.

Accordingly, Wilson's first assignment of error is overruled.

Prosecutorial Misconduct

In his second assignment of error, Wilson claims that the prosecutor improperly vouched for the victim's credibility during his closing arguments. He

admits that he did not object to the prosecutor's comments, but claims that it amounted to plain error.

Crim.R. 52(B) provides that "plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Courts should "notice plain error 'with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.'" *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68, 759 N.E.2d 1240, quoting *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph three of the syllabus.

The test for prosecutorial misconduct in a closing argument is "'whether the remarks were improper and, if so, whether they prejudicially affected substantial rights of the defendant.'" *State v. Hessler*, 90 Ohio St.3d 108, 125, 2000-Ohio-30, 734 N.E.2d 1237, quoting *State v. Smith* (1984), 14 Ohio St.3d 13, 14, 470 N.E.2d 883. A new trial will be ordered where the outcome of the trial would clearly have been different but for the alleged misconduct. *State v. Brewer* (June 22, 1995), 8th Dist. No. 67782.

Wilson points to the following comments made by the prosecutor in his closing arguments that were in response to Wilson testifying that he did not take part in the attack, nor did he have the kind of knife that cut McDermott:

"The defendant had that knife.

VOL 0701 PG 0833

"McDermott emphatically — why would McDermott come in here after going through this horrible event? And you look at his background. Okay? You look at the fact that he served as a public defender for 7 years. He told you that as a lawyer public defenders defend the rights of others, apparently believing in the cause to defend the innocent and to give everyone due process of law. Why would he jump out of his seat and put the finger on this young man over here. Okay?

"Don't you think that he has some recognition as far as what his responsibility is? Don't you think he has some sense of honor? If he wasn't sure, if he was mistaken that he would get here and tell you folks under oath? Very few times in your life are you called upon to do the right thing. Okay? *** Do you think he has an interest in coming in here and making a false accusation against a young guy; 19, 20-year-old man claiming that he had the knife that cut him? It doesn't fit into his character. It doesn't fit into what transpired that night."

Wilson further claims that the following final arguments by the prosecutor were also improper:

"Then we go to Mr. McDermott back here. All right? In talking about his character you're talking about this traumatic event. Quarterback. And I didn't go to St. Ignatius High School, but those Jesuits taught those students about a

VOL0701 PG0834

calling, about honor, about character, about responsibility. Do you think he would set aside his mission in life and his character and reputation in this community if he wasn't certain that this man was the man who had that knife?

"Would he as 7 years working in the public defender's office come in here and say that he is not the right person. If he wasn't sure he would tell you that, ladies and gentlemen, so you have to resolve that conflict."

In *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, the prosecutor had argued: "Do these people appear to you to be people that would come in here and identify the person as a murderer unless they were certain? You answer that." The Ohio Supreme Court held that the prosecutor's comments were not improper vouching. Id. at ¶235. It explained: "An attorney may not express a personal belief or opinion as to the credibility of a witness. *** Vouching occurs when the prosecutor implies knowledge of facts outside the record or places his or her personal credibility in issue. ***" (Citations omitted.) Id. at ¶232. But improper vouching does not occur when "the prosecutor did not express an opinion about the witnesses' credibility because he asked the jurors to decide for themselves whether these witnesses were being truthful." Id. at ¶235.

We find the prosecutor's comments to be similar to those made in *Davis*, and thus, were not improper vouching. The prosecutor was asking the jury to

VOL 0701 PG 0835

decide for themselves whether McDermott was being truthful. See, also, *State v. Anthony* (Sept. 20, 1996), 2d Dist. No. 95CA0018 (prosecutor stated the state's forensic expert "as a public servant, would not lie to the jury about his observations"; court held that this comment bolstered the witnesses' testimony by pointing to evidence in the record — the witness's years of public service — as a reason for the jury to believe the witness; it was not an improper reference to his own personal knowledge of the witness's integrity).

Wilson's second assignment of error is overruled.

Manifest Weight of the Evidence

In his third assignment of error, Wilson maintains that his convictions are against the manifest weight of the evidence. We disagree.

In determining whether a conviction is against the manifest weight of the evidence, the court of appeals functions as a "thirteenth juror," and, after "reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, 678 N.E.2d 541. Reversing a conviction as being against the manifest weight of the evidence and

ordering a new trial should be reserved for only the "exceptional case in which the evidence weighs heavily against the conviction." Id.

Wilson raises several arguments as to why he contends his convictions are against the manifest weight of the evidence. First, Wilson claims that the testimonies of Cole, Lang, and Edwards were highly suspect because (1) they were offered plea deals in exchange for their testimony; (2) they were members of the same gang and expressed loyalty to each other, but not to Wilson; and (3) they served time together in the juvenile detention center and therefore, could ensure their version of the events aligned against Wilson. Wilson further raises issues with each of Cole's, Lang's, and Edwards's credibility for various reasons, including Cole's prior record, Lang's intoxication level, and Edwards's inconsistent testimony at a prior hearing stating that it was Bray who had the knife, not Wilson.

When assessing witness credibility, "[t]he choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact." *State v. Awan* (1986), 22 Ohio St.3d 120, 123, 489 N.E.2d 277. "Indeed, the factfinder is free to believe all, part, or none of the testimony of each witness appearing before it." *Warren v. Simpson* (Mar. 17, 2000), 11th Dist. No. 98-T-0183. Furthermore, if the evidence is susceptible to more than one

interpretation; a reviewing court must interpret it in a manner consistent with the verdict. Id.

Although we may agree with Wilson that Cole, Lang, and Edwards do not appear to be the most credible witnesses, we cannot find Wilson's convictions were against the weight of the evidence unless we find that the jury lost its way in resolving these conflicts. We cannot do that in this case. The jury — as the factfinder — was aware of each of these witnesses' credibility issues as Wilson's defense counsel vigorously cross-examined them. The jury was free to believe Wilson's version of the events or their version. *Awan*, 22 Ohio St.3d at 123.

Wilson further argues that there were also "aspects of the victim's testimony which render it unreliable," including the fact that McDermott testified at a juvenile court proceeding that he did not know which male had the gun, but then testified at Wilson's trial that Cole had the gun; that McDermott was not able to identify Wilson before his trial as the person with the knife, nor was he able to even provide a description of the man who had the knife before trial; and that the circumstances surrounding the attack made it unlikely that McDermott could "notice which male was doing what to him or which male possessed a weapon (including low lighting conditions, the attack took place unexpectedly, and McDermott was continuously hit and kicked during the attack).

VOL 0701 PG 0838

Again, Wilson points to frailties in the state's case against him. But again, that does not make his convictions against the manifest weight of the evidence. Based on the evidence presented to the jury, it could find Wilson guilty of aggravated robbery, felonious assault, and kidnapping even if there had been no testimony that Wilson was the one with the knife. There was plenty of testimony presented that enabled the jury to conclude that Wilson was one of a group of six assailants who acted in concert together to rob and beat McDermott, using a knife, a wooden pole, and a nunchaku, and threatening him with a gun. It is irrelevant that Wilson may not have been the principal offender. See R.C. 2923.03(B). Several witnesses, including McDermott, Hannah Chelimsky (the young neighbor who witnessed the attack), Cole, Lang, and Edwards, all testified that each of the six young men took part in the attack. Chelimsky specifically stated that she did not see any of the young men stand back and watch, as Wilson claimed he did.

Thus, after reviewing the entire record, weighing the evidence and all reasonable inferences, we cannot say that this is the exceptional case where the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *Thompkins*, 78 Ohio St.3d at 387.

VOL0701 PG0839

Allied Offenses

In his fourth assignment of error, Wilson argues that the trial court erred by sentencing him to consecutive sentences for aggravated robbery, felonious assault, and kidnapping. He maintains that the offenses are allied offenses of similar import because they arose out of "the same conduct, were committed simultaneously, and were committed with the same animus," and therefore, he should have been convicted and sentenced for only one offense.

R.C. 2941.25 provides:

"(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

"(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same 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. Rance* (1999), 85 Ohio St.3d 632, 710 N.E.2d 699, the Ohio Supreme Court held that the first step for determining whether two offenses are allied offenses of similar import requires comparing the statutory elements in

the abstract, rather than comparing the offenses as charged in a particular indictment. In *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, however, the Supreme Court explained that the *Rance* test had been mistakenly applied in a narrow way by several courts: "'[N]owhere does *Rance* mandate that the elements of compared offenses must exactly align for the offenses 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 the offenses be considered allied offenses of similar import under R.C. 2941.25(A).' (Emphasis sic.)" *State v. Winn*, 121 Ohio St.3d 413, 2009-Ohio-1059, 905 N.E.2d 154, ¶11, quoting *Cabrales*, 118 Ohio St.3d at ¶22.

The *Cabrales* court went on to explain that the application of R.C. 2941.25 involves, as it always has, a two-tiered analysis. Id. at ¶14. In the first step, to determine "whether offenses are allied offenses of similar import under R.C. 2941.25(A), courts are required to compare the elements of offenses in the abstract without considering the evidence in the case, but are not required to find an exact alignment of the elements. Instead, if, in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in commission of the other, then the

VOL0701 PG0841

offenses are allied offenses of similar import." Id. at paragraph one of the syllabus.

"If the offenses are allied, then '[i]n the second step, the defendant's conduct is reviewed to determine whether the defendant can be convicted of both offenses. If the court finds either that the crimes were committed separately or that there was a separate animus for each crime, the defendant may be convicted of both offenses.'" *Cabrales* at ¶14, quoting *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117, 526 N.E.2d 816.

Aggravated Robbery and Kidnapping

Turning to the elements of the offenses in this case, aggravated robbery under R.C. 2911.01(A)(1) provides: "No person, in attempting or committing a theft offense, *** or in fleeing immediately after the attempt or offense, shall *** [h]ave a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it."

Kidnapping under R.C. 2905.01(A)(2) and (3) provides:

"(A) No person, by force, threat, or deception, *** shall remove another from the place where the other person is found or restrain the liberty of the other person, for any of the following purposes:

"***

"(2) To facilitate the commission of any felony or flight thereafter;

"(3) To terrorize, or to inflict serious physical harm on the victim or another."

In *Winn*, the Ohio Supreme Court held — "in keeping with 30 years of precedent" — that "[t]he crime of kidnapping, defined by R.C. 2905.01(A)(2), and the crime of aggravated robbery, defined by R.C. 2911.01(A)(1), are allied offenses of similar import pursuant to R.C. 2941.25." Id. at the syllabus, ¶22. The high court explained, "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 commission of the other.'" Id. at ¶21, quoting *Cabrales*, paragraph one of the syllabus.

But Wilson was also convicted of kidnapping under R.C. 2905.01(A)(3), which *Winn* did not address. With respect to comparing the elements of this subsection and aggravated robbery in the abstract, the elements are (1) restraint, by force, threat, or deception, of the liberty of another "to terrorize, or to inflict serious physical harm" (kidnapping, R.C. 2905.01(A)(2)) and (2) having "a deadly weapon on or about the offender's person or under the offender's control and either display[ing] the weapon, brandish[ing] it, indicat[ing] that the

offender possesses it, or us[ing] it" in attempting to commit or committing a theft offense (aggravated robbery, R.C. 2911.01(A)(1)).

Just as the Ohio Supreme Court found in *Winn* regarding aggravated robbery and kidnapping under subsection (A)(2), we find aggravated robbery and kidnapping under subsection (A)(3) to be allied offenses as well under the *Cabrales* test. It is similarly difficult to imagine "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 restrain the liberty of the other person by terrorizing that person. The commission of one is wholly subsumed by the other.

Thus, we find aggravated robbery under R.C. 2911.01(A)(1) and kidnapping, under both subsections (R.C. 2905.01(A)(2) and (A)(3)), to be allied offenses.

Under the second prong, we find there was no evidence in this case to suggest that the kidnapping was anything but incidental to the aggravated robbery. Therefore, there was no separate animus and Wilson may be found guilty of both offenses but sentenced for only one. See *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, ¶17.

VOL0701 PG0844

Felonious Assault and Kidnapping

Wilson was also convicted of felonious assault pursuant to R.C. 2901.11(A)(1), which provides: "No person shall knowingly *** [c]ause serious physical harm to another ***."

Comparing the elements of felonious assault to kidnapping in the abstract — but cognizant of the fact that under *Cabrales*, we "are not required to find an exact alignment of the elements" — we find these offenses are allied as well. *Cabrales* at paragraph one of the syllabus. One cannot "knowingly cause serious physical harm to another" without also restraining the liberty of the other person — either by terrorizing that person or "inflicting serious physical harm" to that person. Under *Cabrales* then, "the offenses are so similar that the commission of one offense will necessarily result in commission of the other." Id.

We further find under the second prong that there was no separate animus for the kidnapping under the facts of this case. Again, the kidnapping was merely incidental to the felonious assault. Thus, Wilson may be found guilty of both offenses but sentenced for only one. See *State v. Whitfield*, 124 Ohio St.3d at ¶17.

Felonious Assault and Aggravated Robbery

Comparing the elements of felonious assault and aggravated robbery, however, we find that they are not allied offenses of similar import. Under no

VOL0701 PG0845

circumstances can we imagine where the elements of "attempting to or committing a theft offense while displaying or brandishing a deadly weapon" will ever align with "knowingly causing serious physical harm to another." Accordingly, Wilson could be found guilty of both felonious assault and aggravated robbery and be sentenced for both. Id.

Upon Remand

Pursuant to the recent Ohio Supreme Court case, *Whitfield*, this court "must reverse the judgment of conviction and remand for a new sentencing hearing at which the state must elect which allied offense it will pursue against the defendant." Id. at paragraph two of the syllabus. Accordingly, Wilson's sentence is vacated, and he is entitled to a de novo sentencing hearing upon remand.

Wilson's fourth assignment of error is sustained in part and overruled in part.

Wilson's fifth and sixth assignments of error challenge other aspects of his sentence. But our disposition of his fourth assignment of error, vacating his sentence and remanding for a de novo sentencing hearing, renders his fifth and sixth assignments moot. We therefore need not address them.

We note, however, that upon remand, Wilson's case will again be pending in the trial court. Wilson's fifth and sixth assignments of error dealing with

sentence proportionality and judicial bias will more appropriately be addressed at the trial court level. See *State v. Breeden*, 8th Dist. No. 84663, 2005-Ohio-510 (a defendant must raise the issue of disproportionate sentences at the trial court and present some evidence to preserve the issue for appeal); and R.C. 2701.03 (exclusive means by which allegations of judicial bias should be raised in an affidavit of disqualification to the Ohio Supreme Court for cases pending in the common pleas court).

Wilson's convictions are affirmed; his sentence is reversed, vacated, and remanded to the lower court for further proceedings consistent with this opinion.

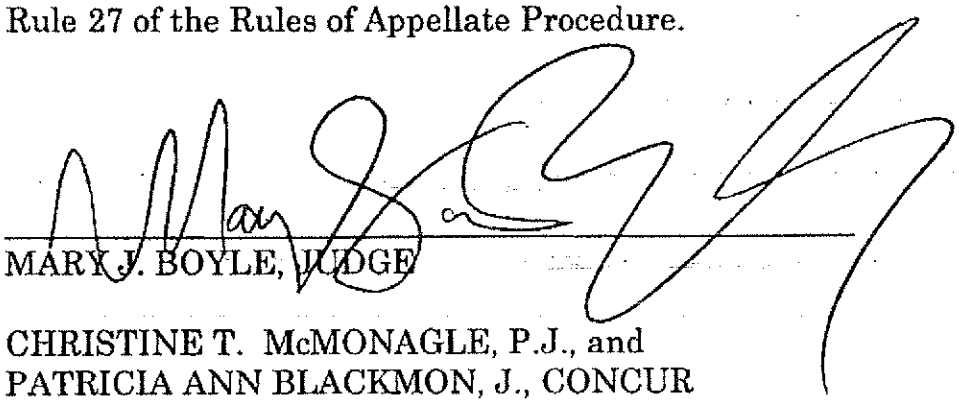
It is ordered that appellant and appellee share equally in the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

VOL 0701 PG 0847

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



MARY J. BOYLE, JUDGE

CHRISTINE T. McMONAGLE, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR