

ORIGINAL

NO. 2010-0897

IN THE SUPREME COURT OF OHIO

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

RECEIVED  
DEC 06 2010  
CLERK OF COURT  
SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellant

-vs-

JOSEPH WILSON,

Defendant-Appellee

MERIT BRIEF OF APPELLANT, STATE OF OHIO

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## STATEMENT OF THE CASE AND FACTS

This appeal is limited to the Eighth District's order of remand insofar as it requires 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 and raised for the first time on appeal. The State is not challenging the Eighth District's order of remand requiring the trial court to conduct a sentencing hearing pursuant to *Whitfield* at which the State must elect which allied offense it will pursue against Wilson.

Wilson was convicted by a jury of aggravated robbery, felonious assault and kidnapping for his part in a brutal attack and beating of a local attorney by a group of young males. The trial court sentenced Wilson to a ten-year prison term for aggravated robbery, an eight-year prison term for felonious assault, and a seven-year prison term for kidnapping, to be served consecutively, for an aggregate prison term of twenty-five years.

On direct appeal, Wilson challenged his convictions and sentence. Wilson argued the trial court erred by sentencing him to consecutive sentences for aggravated robbery, felonious assault and kidnapping. Wilson claimed the offenses were allied offenses of similar import, as they arose from the same conduct, were committed simultaneously and with the same animus. Wilson argued that as such, he should only have been convicted and sentenced for one offense. Wilson also claimed, for the first time, 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 trial court at sentencing.

The Eighth District affirmed Wilson's convictions, but found aggravated robbery and kidnapping to be allied offenses. Citing *Whitfield*, the Eighth District found that

Wilson may be found guilty of both offenses, but sentenced for only one. The Eighth District further found kidnapping to be an allied offense of felonious assault 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.

The Eighth District, however, declined to address Wilson's assignments of error claiming sentence disproportionality and judicial bias, finding that since Wilson's case would 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.

This remand allows relitigation of a full sentence and sentencing issues, and is not narrowly tailored to the *Whitfield* decision or this Court's precedent in *State v. Saxon* (2006), 109 Ohio St.3d 176, 846 N.E.2d 824, 2006-Ohio-1245, and *State v. Hairston* (2008), 118 Ohio St.3d 289, 888 N.E.2d 1073, 2008-Ohio-2338.

### **LAW AND ARGUMENT**

#### **PROPOSITION OF LAW NO. 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 “provide[d] guidance on the proper manner in which the courts of appeal should remand cases after finding errors committed in sentencing on allied offenses. \*\*\*:

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 ¶15 and ¶25.

This narrow remedy does not allow for litigation of issues that were not raised at the sentencing hearing. The hearing consists of the State's election of the allied offense of its choosing. The Eighth District's expansion of *Whitfield* provides Wilson with something not authorized by *Whitfield* – a second opportunity to raise sentencing issues in the trial court despite the failure to raise the issues at sentencing; the proverbial “second bite of the apple.” This portion of the Eighth District's order of remand in which the Eighth District expanded the narrow remedy of *Whitfield* warrants summary reversal.

**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.**

If a trial court sentences for allied offenses, the defendant is entitled to have the case remanded for a hearing where the State elects which allied offense sentence shall be imposed. Now, the Eighth District has crafted a new rule of law that vacates separate sentences that are completely valid, and requires a *de novo* sentencing on all counts. Should completely valid sentences be vacated on appeal when a case is remanded for the State to elect which allied offense should be pursued?

Under the guise of this Court's precedent in *Whitfield*, defendants in Cuyahoga County may litigate sentencing issues on remand that are unrelated to allied offenses and were never raised at the sentencing hearing. The Eighth District's unauthorized expansion of *Whitfield* provides Wilson and other criminal defendants with a second appeal of issues relating to the first sentencing that were capable of resolution in the first appeal, ultimately defeating finality in judgment.

The Eighth District's opinion fails to cite authority on point to authorize its expansion of *Whitfield* to require litigation of sentencing issues on remand that were raised for the first time on appeal. The Eighth District's authority for ordering the trial court to provide Wilson the opportunity to raise sentencing issues does not support litigation on remand of sentencing proportionality or judicial bias. Moreover, the Eighth District's decision fails to apply this Court's applicable precedent in the area of sentencing, namely *State v. Saxon* and *State v. Hairston*.

**A. Precedent Cited by the Eighth District Does Not Support the Remedy Ordered.**

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 failed to raise at his sentencing hearing, 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 imposed 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* 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 this 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.

Based on the above, R.C. 2701.03 does not support the Eighth District's remand for a *de novo* sentencing hearing to allow *Wilson* to raise judicial bias.

***B. The Eighth District's Decision in Wilson Ignores This Court's Precedent Regarding Sentencing.***

**i. Application of State v. Saxon Should Not Allow For Relitigation of Sentencing Issues That Were Not Raised In the Trial Court and Does Not Allow For a Resentencing on Counts That Have a Valid Sentence.**

In *State v. Saxon*, this Court emphatically rejected the sentencing package doctrine. But a reading of *Wilson* breathes life into the idea that in Ohio, there is a sentencing packaging doctrine. In *Saxon*, this Court was confronted with a defendant who had multiple criminal offenses. One sentence for one crime was improper—three years for a fourth-degree felony. The Eighth District held that *Saxon* was entitled to a resentencing for all counts. This Court disagreed and held that *Saxon* was only to be resented on the one improper count. This Court held that each criminal sentence is independent and is not based on sentences issued on other counts.

Applying *Saxon* and the *Whitfield* analysis to this case, the only inappropriate sentence is for either kidnapping or aggravated robbery. And that sentence is only improper because it should merge. Once the State elects which offense to pursue, there will be no error relating to any other sentence. Assume the State elects to pursue aggravated robbery and asks that kidnapping merge with that offense. The previously imposed sentence for aggravated robbery is valid. There is no legal basis to require a resentencing on the aggravated robbery, or to allow *Wilson* to argue any issue he failed to raise in the first sentencing hearing.<sup>1</sup>

The Eighth District did not cite to *Saxon* in its analysis. Application of *Wilson* essentially overrules the remedy provided in *Saxon* and creates the legal basis to argue that all sentences are interdependent, and an error in one sentence permeates each

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<sup>1</sup> The State believes that once kidnapping merges with aggravated robbery, there is no legal basis to claim that felonious assault merges with the kidnapping offense—thus, *Wilson* should have a sentence for aggravated robbery and felonious assault.

other individual sentence, permitting relitigation of issues not raised when capable of being raised—the first sentencing hearing. This is not the law in Ohio and why the State’s Proposition provides a sound rule of law.

**ii. *Application of State v. Saxon and State v. Hairston Should Not Allow Relitigation of Sentence Proportionally When that Issue Was Not Raised at the First Hearing and Could Have Been Resolved in the First Appeal.***

This Court’s precedent already provides guidance that each of Wilson’s sentences was independent. Thus, any issue relating to proportionality could have been litigated at the original sentencing hearing. Moreover, this new precedent ignores this Court’s recent decision in *State v. Hairston*. In *Hairston*, the defendant argued that his total sentence of 134 years for multiple criminal offenses was disproportionate and created a cruel and unusual sentence. This Court disagreed, and held that “where none of the individual sentences imposed on an offender are grossly disproportionate to their respective offenses” the sentence is not cruel and unusual. *Hairston*, 118 Ohio St.3d 289, 294. This court relied on *Saxon* in coming to that decision.

When Wilson’s appeal is applied to the rule of law from *Saxon* and *Hairston*, the answer becomes that the Eighth District was required to address whether each individual sentence was proportionate, and not remand the entire case for a proportionality review. That issue could have been decided in the first appeal and should be barred from further litigation in a hearing only aimed at allowing the State to pursue a particular allied offense. Taking *Saxon* and *Hairston* together, the State’s proposition is a sound rule of law that fairly applies this Court’s applicable precedent to this case and provides an easy to apply rule of law for courts to follow. The Eighth District’s expansion of *Whitfield* to require *de novo* sentencing hearings at which

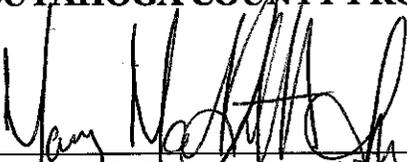
defendants must be given a second opportunity to raise sentencing issues raised for the first time on appeal is contrary to this Court's clear manner of remand, and established precedent. As such, the State respectfully requests that this portion of the Eighth District's opinion in *Wilson* be reversed.

**CONCLUSION**

The only sentencing error properly before the Eighth District was the trial court's imposition of multiple sentences for allied offenses. *Whitfield* provides a clear and narrow remedy for this error – remand for a sentencing hearing at which the State must elect which allied offense to pursue. The Eighth District's order of remand is an unauthorized expansion of *Whitfield's* remedy, warranting summary reversal. In the alternative, the State respectfully requests that this Court reverse *Wilson*, and hold as law that an appellate court's remand pursuant to *Whitfield* is limited to the State's election of allied offenses and does not permit a *de novo* sentencing hearing to include litigation of unrelated sentencing issues raised for the first time on appeal.

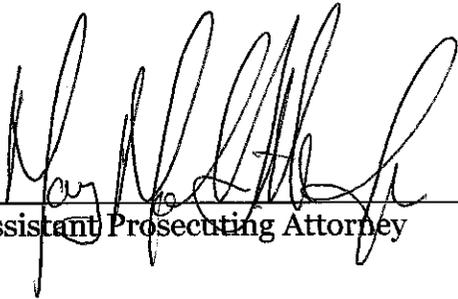
Respectfully submitted,

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**CERTIFICATE OF SERVICE**

A copy of foregoing Brief of Appellant has been sent by regular U.S. Mail this 3<sup>rd</sup> day of December, 2010, to Terrence K. Scott, Assistant State Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215.

  
Assistant Prosecuting Attorney

NO. 10-0897

ORIGINAL

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

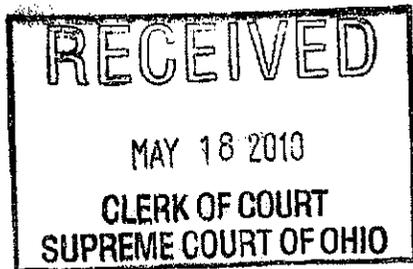
Defendant-Appellee

NOTICE OF APPEAL OF APPELLANT STATE OF OHIO

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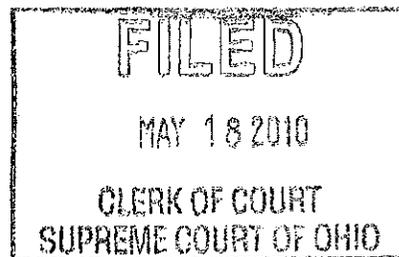
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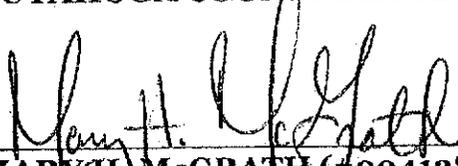
**NOTICE OF APPEAL OF APPELLANT STATE OF OHIO**

Now comes the State of Ohio and hereby gives Notice of Appeal to the Supreme Court of Ohio from a judgment and final order of the Court of Appeals for Cuyahoga County, Ohio, Eighth Judicial District, journalized in Court of Appeals Case No. CA 91971 on April 5, 2010.

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

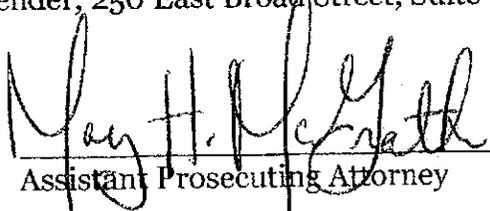
Respectfully submitted,

**WILLIAM D. MASON  
CUYAHOGA COUNTY PROSECUTOR**

  
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**CERTIFICATE OF SERVICE**

A copy of the foregoing Notice of Appeal has been sent by regular U.S. Mail this 17<sup>th</sup> 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

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 91971

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**JOSEPH WILSON**

DEFENDANT-APPELLANT

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

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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 05 2010

**JOURNALIZED:**



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FILED AND JOURNALIZED  
PER APP.R. 22(C)  
APR 05 2010

GERALD E. FUERST  
CLERK OF THE COURT OF APPEALS  
BY [Signature] DEP.

ANNOUNCEMENT OF DECISION  
PER APP.R. 22(B) AND 26(A)  
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GERALD E. FUERST  
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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).

Y000701 250817

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.”

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.

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 Chelinsky’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.

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.<sup>1</sup> 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.

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<sup>1</sup>Cole's case was handled by the same judge; Lang's and Edwards's cases were handled by a different judge.

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.

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.'"

*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]

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.

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“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

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

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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).

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.

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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

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.

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

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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).

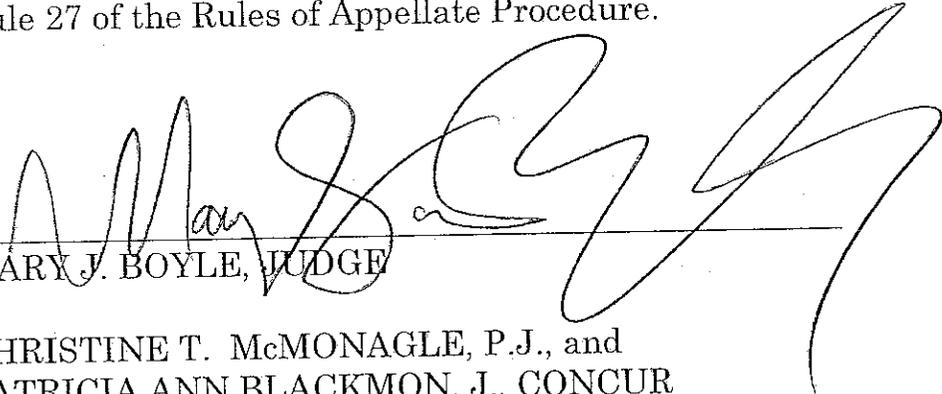
Wilson's convictions are affirmed; his sentence is reversed, vacated, and remanded to the lower court for further proceedings consistent with this opinion.

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.

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

The State of Ohio, }  
Cuyahoga County. } ss.

I, GERALD E. FUERST, Clerk of the Court of

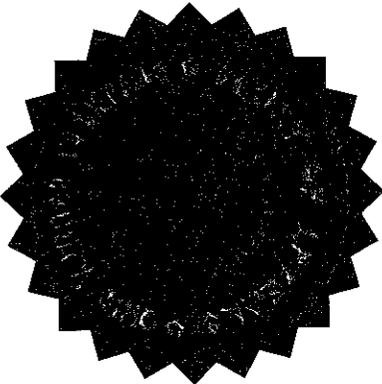
Appeals within and for said County, and in whose custody the files, Journals and records of said Court are required by the laws of the State of Ohio, to be, kept, hereby certify that the foregoing is taken and copied from the Journal Entry, Vol. 701 Page 816 Dated: ~~4-5-105~~, 201CA 91971

of the proceedings of the Court of Appeals within and for said Cuyahoga County, and that the said foregoing copy has been compared by me with the original entry on said Journal Entry, Vol. 701 Pg 816 Dated: April 5, 2010 and that the same is correct transcript thereof.

**In Testimony Whereof**, I do hereunto subscribe my name officially, and affix the seal of said court, at the Court House in the City of Cleveland, in said County, this 3rd day of December A.D. 20 10

**GERALD E. FUERST**, Clerk of Courts

By [Signature] Deputy Clerk





Baldwin's Ohio Revised Code Annotated Currentness

Title XXVII. Courts--General Provisions--Special Remedies

Chapter 2701. Courts of Record--General Provisions

→ **2701.03 Affidavit of disqualification of judge of common pleas court for prejudice; procedure; replacement**

(A) If a judge of the court of common pleas allegedly is interested in a proceeding pending before the court, allegedly is related to or has a bias or prejudice for or against a party to a proceeding pending before the court or a party's counsel, or allegedly otherwise is disqualified to preside in a proceeding pending before the court, any party to the proceeding or the party's counsel may file an affidavit of disqualification with the clerk of the supreme court in accordance with division (B) of this section.

(B) An affidavit of disqualification filed under section 2101.39 or 2501.13 of the Revised Code or division (A) of this section shall be filed with the clerk of the supreme court not less than seven calendar days before the day on which the next hearing in the proceeding is scheduled and shall include all of the following:

(1) The specific allegations on which the claim of interest, bias, prejudice, or disqualification is based and the facts to support each of those allegations or, in relation to an affidavit filed against a judge of a court of appeals, a specific allegation that the judge presided in the lower court in the same proceeding and the facts to support that allegation;

(2) The jurat of a notary public or another person authorized to administer oaths or affirmations;

(3) A certificate indicating that a copy of the affidavit has been served on the probate judge, judge of a court of appeals, or judge of a court of common pleas against whom the affidavit is filed and on all other parties or their counsel;

(4) The date of the next scheduled hearing in the proceeding or, if there is no hearing scheduled, a statement that there is no hearing scheduled.

(C)(1) Except as provided in division (C)(2) of this section, when an affidavit of disqualification is presented to the clerk of the supreme court for filing under division (B) of this section, all of the following apply:

(a) The clerk of the supreme court shall accept the affidavit for filing and shall forward the affidavit to the chief justice of the supreme court.

(b) The supreme court shall send notice of the filing of the affidavit to the probate court served by the judge if the affidavit is filed against a probate court judge, to the clerk of the court of appeals served by the judge if the affidavit is filed against a judge of a court of appeals, or to the clerk of the court of common pleas served by the judge if the affidavit is filed against a judge of a court of common pleas.

(c) Upon receipt of the notice under division (C)(1)(b) of this section, the probate court, the clerk of the court of appeals, or the clerk of the court of common pleas shall enter the fact of the filing of the affidavit on the docket of the probate court, the docket of the court of appeals, or the docket in the proceeding in the court of common pleas.

(2) The clerk of the supreme court shall not accept an affidavit of disqualification presented for filing under division (B) of this section if it is not timely presented for filing or does not satisfy the requirements of divisions (B)(2), (3), and (4) of this section.

(D)(1) Except as provided in divisions (D)(2) to (4) of this section, if the clerk of the supreme court accepts an affidavit of disqualification for filing under divisions (B) and (C) of this section, the affidavit deprives the judge against whom the affidavit was filed of any authority to preside in the proceeding until the chief justice of the supreme court, or a justice of the supreme court designated by the chief justice, rules on the affidavit pursuant to division (E) of this section.

(2) A judge against whom an affidavit of disqualification has been filed under divisions (B) and (C) of this section may do any of the following that is applicable:

(a) If, based on the scheduled hearing date, the affidavit was not timely filed, the judge may preside in the proceeding.

(b) If the proceeding is a domestic relations proceeding, the judge may issue any temporary order relating to spousal support pendente lite and the support, maintenance, and allocation of parental rights and responsibilities for the care of children.

(c) If the proceeding pertains to a complaint brought pursuant to Chapter 2151. or 2152. of the Revised Code, the judge may issue any temporary order pertaining to the relation and conduct of any other person toward a child who is the subject of a complaint as the interest and welfare of the child may require.

(3) A judge against whom an affidavit of disqualification has been filed under divisions (B) and (C) of this section may determine a matter that does not affect a substantive right of any of the parties.

(4) If the clerk of the supreme court accepts an affidavit of disqualification for filing under divisions (B) and (C) of this section, if the chief justice of the supreme court, or a justice of the supreme court designated by the chief justice, denies the affidavit of disqualification pursuant to division (E) of this section, and if, after the denial, a

second or subsequent affidavit of disqualification regarding the same judge and the same proceeding is filed by the same party who filed or on whose behalf was filed the affidavit that was denied or by counsel for the same party who filed or on whose behalf was filed the affidavit that was denied, the judge against whom the second or subsequent affidavit is filed may preside in the proceeding prior to the ruling of the chief justice of the supreme court, or a justice designated by the chief justice, on the second or subsequent affidavit.

(E) If the clerk of the supreme court accepts an affidavit of disqualification for filing under divisions (B) and (C) of this section and if the chief justice of the supreme court, or any justice of the supreme court designated by the chief justice, determines that the interest, bias, prejudice, or disqualification alleged in the affidavit does not exist, the chief justice or the designated justice shall issue an entry denying the affidavit of disqualification. If the chief justice of the supreme court, or any justice of the supreme court designated by the chief justice, determines that the interest, bias, prejudice, or disqualification alleged in the affidavit exists, the chief justice or the designated justice shall issue an entry that disqualifies that judge from presiding in the proceeding and either order that the proceeding be assigned to another judge of the court of which the disqualified judge is a member, to a judge of another court, or to a retired judge.

#### CREDIT(S)

(2000 S 179, § 3, eff. 1-1-02; 1996 S 263, eff. 11-20-96; 1984 H 426, eff. 4-4-85; 1980 S 332; 130 v S 197; 1953 H 1; GC 1687)

#### UNCODIFIED LAW

1996 S 263, § 3, eff. 11-20-96, reads: The amendments to sections 2101.39, 2501.13, 2701.03, and 2937.20 (2701.031) of the Revised Code that are made by this act shall apply to each affidavit of disqualification that is filed on or after the effective date of this act regarding a judge of a court of appeals, court of common pleas, probate court, municipal court, or county court.

#### HISTORICAL AND STATUTORY NOTES

**Ed. Note:** Guidelines for Assignment of Judges were announced by the Chief Justice of the Ohio Supreme Court on 5-24-88, and revised 2-25-94 and 3-25-94, but not adopted as rules pursuant to O Const Art IV §5. For the full text, see 37 OS(3d) xxxix, 61 OBar A-2 (6-13-88) and 69 OS(3d) XCIX, 67 OBar xiii (4-18-94).

**Pre-1953 H 1 Amendments:** 103 v 417; RS 550

**Amendment Note:** 2000 S 179, § 3, eff. 1-1-02, inserted "or 2152." in division (D)(2)(c).

**Amendment Note:** 1996 S 263 rewrote this section, which prior thereto read:

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