

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, : Case No. 2010-0897
 :
 Plaintiff-Appellant, : On Appeal from the Cuyahoga
 : County Court of Appeals,
 v. : Eighth Appellate District
 :
 JOSEPH WILSON, : C.A. Case No. 91971
 :
 Defendant-Appellee. :
 :

MERIT BRIEF OF APPELLEE JOSEPH WILSON

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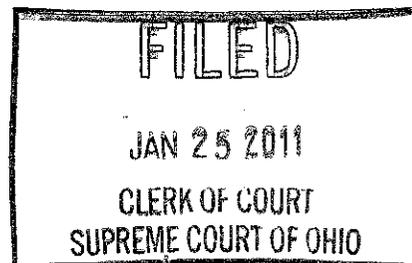


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STATEMENT OF THE CASE AND FACTS

Joseph Wilson was convicted in a jury trial of aggravated robbery, felonious assault, and kidnapping. The trial court sentenced Mr. Wilson to ten years for aggravated robbery, eight years for felonious assault, and seven years for kidnapping, all to be served consecutively for an aggregate prison term of twenty-five years.

On direct appeal, Mr. Wilson challenged his convictions and sentence. Mr. Wilson argued that the trial court erred by sentencing him to consecutive sentences for aggravated robbery, felonious assault, and kidnapping. He argued that these offenses were allied offenses of similar import, as they arose from the same conduct, and were committed simultaneously and with the same animus. Mr. Wilson contended that as such, he should only have been convicted and sentenced for one offense. Additionally, Mr. Wilson argued that his sentence was disproportionate to those of his similarly situated codefendants and that he was sentenced by a biased court, based on statements made by the trial court at sentencing.

The court of appeals affirmed Mr. Wilson's conviction, but found aggravated robbery and kidnapping to be allied offenses. The court of appeals held that Mr. Wilson may be found guilty of both offenses, but sentenced for only one. *State v. Wilson*, 8th Dist. No. 91971, 2010-Ohio-1196 at ¶¶98-102, citing *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2 at ¶17. The court of appeals also concluded that kidnapping and felonious assault are allied offenses and that no separate animus existed. Consequently, the court of appeals held that Mr. Wilson could be found guilty of both offenses, but sentenced for only one. *Id.*

The court of appeals, however, declined to address Mr. Wilson's fifth and sixth assignments of error, dealing with proportionality and judicial bias, respectively. The court of

appeals held that since Mr. Wilson's case would be remanded, 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.

Wilson at ¶¶98-102.

ARGUMENT

Proposition of Law: No. I

An appellate court's order of remand under *State v. Whitfield* for the State's election of allied offenses does not preclude a *de novo* sentencing hearing for issues unrelated to allied offenses.

The court of appeals properly relied on *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, in its analysis of *Wilson*. In *Whitfield*, this Court held:

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.

Whitfield at ¶5 and ¶25.

The State argues that because this Court in *Whitfield* did not give any direction on the scope and manner of remand on issues separate and apart from allied offenses, that this omission somehow limited the court of appeals' authority on remand. Although the State's analysis of *Whitfield* is correct as far as it goes, the State fails to take into account that *Whitfield* only dealt with how to handle allied offenses on remand—it did not address the situation where multiple sentencing errors occurred in the trial court. The *Wilson* court recognized this quandary in its analysis. The appellate court correctly recognized that *Wilson* presented some unique questions that were not present in *Whitfield*, and the *Wilson* court issued a decision that addressed those differences. If the *Wilson* court would have issued a decision that was based solely on this Court's holding in *Whitfield*, then the remand would have been confined to this Court's ruling thereto.

Mr. Wilson's fifth and sixth assignments of error dealt with sentence proportionality and judicial bias. The court of appeals correctly relied on *Breeden* and correctly concluded that sentence proportionality and judicial bias are more appropriately addressed at the trial court level. *Wilson* at ¶¶98-102. The court of appeals' authority to remand to inferior courts is firmly rooted in the Ohio Constitution. Article IV, Section 3(B)(1)(2), states in pertinent part:

The courts of appeals shall have original jurisdiction... as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district...

The State has allocated a substantial portion of its brief to the merits of the fifth and sixth assignments of error upon remand. Although Mr. Wilson challenges those propositions herein, this Court should note that the merits of Mr. Wilson's arguments before this Court should not be predicated on the likelihood of success of the respective assignments of error upon remand. The court of appeals has correctly held that sentence proportionality and judicial bias are more appropriately addressed at the trial level.

A. Precedent cited by the court of appeals supports the remedy of *de novo* sentencing on the issue of sentence proportionality.

In *Wilson*, the Eighth District cited *Breeden* in support of its instruction on remand that the trial court consider sentencing issues:

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 at ¶101.

In *Breeden*, the court held:

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.

Breeden at ¶81.

The State argues, and Mr. Wilson concedes, that the Eighth District rejected Breeden's claim of sentence disproportionality due to Breeden's failure to present supporting evidence to the trial court or appellate court. But Mr. Wilson presented an extensive amount of supporting evidence relating to sentence proportionality in his appellate brief. Appellant's Brief and Assignments of Error p. 41-46. Therefore, the State's assertion that Mr. Wilson only now, and for the first time in this Court, raises the issue of proportionality in sentencing is not accurate. As such, *Breeden* does support the Eighth District's remand in *Wilson* for a *de novo* sentencing hearing to address sentence proportionality.

Further, although Mr. Wilson did not raise the issue of sentence proportionality as it related to his codefendants in the trial court, "it is the trial court's responsibility to insure that it has the appropriate information before it when imposing sentence in order to comply with the purposes of felony sentencing." *State v. Lyons*, 8th Dist. No. 80220, 2002-Ohio-3424 at ¶30. Not all of the codefendants' sentencing information was available to Mr. Wilson at the time of his

sentencing. Of Mr. Wilson's five codefendants, three were convicted before Mr. Wilson's sentencing hearing.^{1, 2} The court of appeals recognized that the trial court should have availed itself of this information. And a *de novo* sentencing hearing will give the trial court the opportunity to properly review this information.

B. Precedent cited by the court of appeals does not preclude the remedy of *de novo* sentencing on the issue of judicial bias.

The court of appeals correctly held that an application of disqualification to this Court is the correct method in which to raise judicial bias. *Wilson* at ¶101. But the State misinterprets the importance of the court's language in *Wilson* as well as the court's ruling in *Watson v. Trivers*, 8th Dist. No. 91606, 2009-Ohio-2256. In *Watson* the court held:

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.

Watson at ¶7.

The *Wilson* court did not attempt to exercise jurisdiction on the issue of judicial bias or judicial disqualification, and did not order the trial court to address those issues on remand. On the contrary, in *Wilson*, the court mooted the sixth assignment of error. And the court correctly abstained from making any determinations as to whether a claim of judicial bias was correctly raised or whether a judge should be disqualified for bias. In accordance with the appellate

¹ Demetrius Lang pleaded guilty on July 7, 2008; Miles Cole pleaded guilty on July 14, 2008; Joseph Wilson was sentenced on July 21, 2008; Jerome Edwards pleaded guilty on July 21, 2008; Brandon Goodwin pleaded guilty on August 26, 2008.

² Jerome Edwards pleaded guilty on the same day that Mr. Wilson was convicted.

court's order, the trial court would have the authority on remand to determine whether recusal would be appropriate.

The State argues that Mr. Wilson failed to raise the issue of judicial bias at trial. But the State fails to acknowledge that the trial judge's bias did not become apparent until sentencing. TR. pp. 1182-1187. Additionally, a codefendant of Mr. Wilson filed an affidavit of disqualification based on the statements that the trial judge made during Mr. Wilson's sentencing. See A-34 and A-35. Ultimately, the trial judge recused himself from the codefendant's trial. See A-51. Although this Court has held that, "a party may be said to have waived the right to obtain disqualification where the alleged basis for disqualification was known for some time and the judge has participated in the proceedings," *In re Disqualification of Pepple* (1989), 47 Ohio St.3d 606. In Mr. Wilson's case, the statements that evidenced the trial judge's bias did not become evident until Mr. Wilson's sentencing. The judge's bias was further reaffirmed by the trial judge's subsequent recusal from the codefendant's trial.

But notwithstanding the underlying merits of Mr. Wilson's bias concerns, the crucial point is that the appellate court did not pass on whether the trial judge was actually biased and should be removed on remand. Instead, it properly saved that question for the trial court's consideration by way of recusal, and for this Court's consideration by way of an affidavit of prejudice. In short, the State's concerns on this point are simply an illusion.

Proposition of Law: No. II

This Court should dismiss a case as improvidently accepted when a court of appeals' order of remand is constitutionally permissible and consistent with precedent.

The court of appeals properly relied on *Whitfield*, in its analysis of *Wilson*. Ohio

Supreme Court Rule of Practice 12.1 states:

When a case has been accepted for determination on the merits pursuant to S.Ct. Prac. R. 3.6, the Supreme Court may later find that there is no substantial constitutional question or question of public or great general interest, or that the same question has been raised and passed upon in a prior appeal. Accordingly, the Supreme Court may sua sponte dismiss the case as having been improvidently accepted, or summarily reverse or affirm on the basis of precedent.

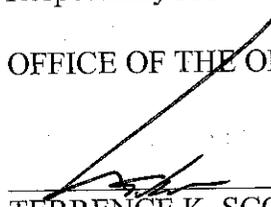
As stated above, the court of appeals' authority to remand the case is clearly established by the Ohio Constitution. Ohio Const. art. IV, §3(B)(1)(2). Further, *Whitfield* gave the court of appeals additional guidance on how to handle allied offenses remands. The appellee concedes that *Whitfield* did not address how to handle non-allied offenses sentencing issues on remand. But the court of appeals' authority to remand for as *de novo* sentencing hearing was not divested simply because *Whitfield* only dealt with allied offenses. The court of appeals properly relied on *Whitfield* and that reliance thereto did not preclude the court of appeals manner of remand. As such, the court of appeals order of remand was constitutionally permissible and consistent with precedent. And where the court of appeals clearly acted within its authority, this Court will dismiss an appeal as improvidently accepted. S.Ct. Prac. R. 12.1.

CONCLUSION

At worst, the court of appeals was inartful in its language on remand. But that inartful language aside, the court of appeals did not exceed its authority in its order of remand. The court of appeals recognized that the issue of proportionate sentencing and judicial bias are properly handled, as an initial matter, at the trial court level. Additionally, the court of appeals order of remand is consistent with this Court's ruling in *Whitfield*. Mr. Wilson respectfully requests that this Court uphold the court of appeals' decision in *Wilson* and permit a *de novo* sentencing hearing on the issues of allied offenses, sentence proportionality and judicial bias. In the alternative, this Court should dismiss this case as improvidently accepted.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER



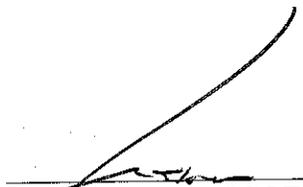
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I hereby certify that a copy of the foregoing **MERIT BRIEF OF APPELLEE JOSEPH WILSON** was forwarded by regular U.S. Mail this 25th day of January, 2011, to the office of Mary H. McGrath, Assistant Prosecuting Attorney, The Justice Center, 8th Floor, 1200 Ontario Street, Cleveland, Ohio 44113.



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APR 05 2010

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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

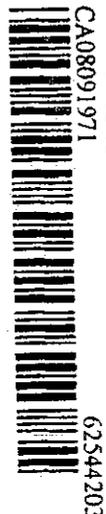
BEFORE: Boyle, J., McMonagle, P.J., and Blackmon, J.

RELEASED: March 25, 2010
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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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MAR 25 2010

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).

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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 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.

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.

¹Cole'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]

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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

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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).

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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

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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

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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:

“***

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“(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

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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.

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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).

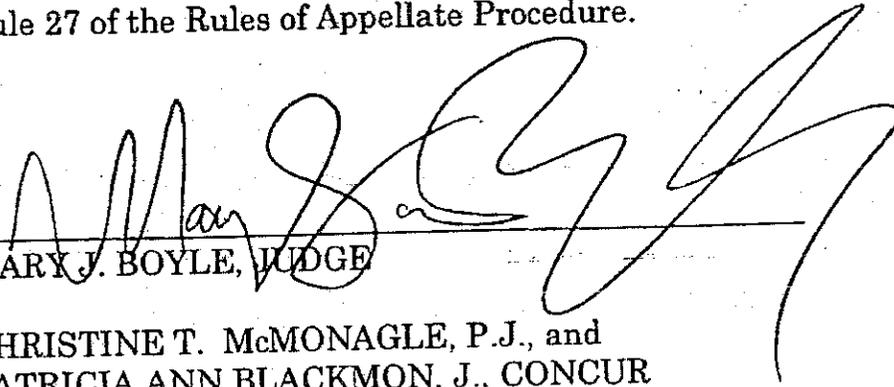
Wilson's convictions are affirmed; his sentence is reversed, vacated, and remanded to the lower court for further proceedings consistent with this opinion.

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 Supreme Court of Ohio

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CLERK OF THE COURT
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August 6, 2008

RECEIVED FOR FILING

AUG 08 2008

Mr. Gerald E. Fuerst
Clerk of Courts
1200 Ontario Street
Cleveland, Ohio 44113

Re: 08-AP-075; State of Ohio v. Joshua Bray;
Judge David T. Matia

CR 513162 &
509976

Dear Mr. Fuerst:

Pursuant to Section 2701.03 of the Revised Code, notice is hereby given that the enclosed affidavit of disqualification was filed with this office on August 6, 2008.

The affidavit relates to the above matter pending in your court. You are respectfully requested to notify any parties to the case, or their counsel, who have not been served by the affiant, that the affidavit has been filed.

This matter has been referred to the Ohio Supreme Court's Office of Legal Resources. If you have any questions, please contact James Bumbico in the Office of Legal Resources, at 614/387-9560. All future filings and questions regarding this matter should be directed to the Office of Legal Resources located at 65 S. Front Street - 8th Floor, Columbus, Ohio 43215.

Sincerely,


Justin T. Kudela
Case Management Counsel

/kmr
Enclosures

cc: James Bumbico
Russell W. Tye, Esq.
Honorable David T. Matia w/o encls.

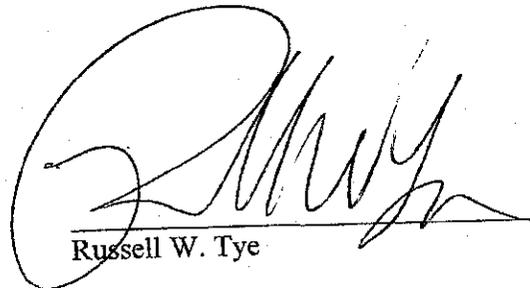
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was Hand Delivered this 6TH
day of August, 2008, to the following:

The Honorable Judge David T. Matia
Cuyahoga County Court of Common Pleas
Justice Center, Courts Tower
1200 Ontario Street, Courtroom 17-D
Cleveland, Ohio 44113

And

William D. Mason
Cuyahoga County Prosecutor's Office
Justice Center, Courts Tower
1200 Ontario Street
Cleveland, Ohio 44113



Russell W. Tye

motion to sever the trials due to an apparent *United States vs. Bruton* (1968), 391 U.S. 123 issue of which the State of Ohio acknowledged and did not oppose;

5. At trial, Wilson was convicted of Aggravated Robbery, in violation of Ohio Revised Code 2911.01; Felonious Assault, in violation of Ohio Revised Code 2903.11; and Kidnapping, in violation of Ohio Revised Code 2905.01. Joseph Wilson was acquitted of Attempted Murder and all accompanying firearm specifications;

6. Approximately two weeks ago on July 21, 2008, Judge Matia sentenced Wilson to a total of twenty-five years in prison;

7. Affiant states, on behalf of Mr. Bray, that Judge Matia demonstrated bias and/or prejudice against Wilson, Joshua Bray, their parents and the entire community of single-parent households. Specifically, Judge Matia made numerous prejudicial and demeaning remarks at Wilson's sentencing hearing which unquestionably adversely affect Joshua Bray's constitutional right to an impartial and fair judicial process and trial. As indicated in the following law and argument discussion, Judge Matia's extremely prejudicial remarks and demeanor at Wilson's sentencing unambiguously demonstrates that Joshua Bray simply will not receive a fair and impartial trial in Judge Matia's courtroom. Counsel has attached, as *Exhibit A*, a complete copy of Wilson's sentencing hearing;

8. Affiant immediately met with Joshua Bray and discussed his brother Wilson's sentencing hearing relating to Judge Matia's comments and demeanor. Joshua Bray had already learned of most of Judge Matia's comments due to the sentencing being highly publicized for the entire week of July 21, 2008 on all local television and newspaper media as well as throughout the internet;

9. Subsequently, Affiant met with Joshua Bray in the county jail on two more occasions concerning Judge Matia's remarks and demeanor at Wilson's hearing. Further, Affiant was approached, concerning Judge Matia's remarks, by numerous concerned members/organizations from the community at large including, but not limited to, members from the legal community, members from several churches, as well as representatives from the local news media. Additionally, Affiant met with Wilson's counsel, Robert Ferreri, and learned more details of Judge Matia's remarks and attitude at Wilson's hearing. Finally, Joshua Bray instructed Affiant to take the necessary steps in seeking to disqualify Judge Matia;

10. Affiant immediately contacted the court reporter to obtain an official copy of Mr. Wilson's sentencing hearing transcript and obtained a copy of the same this past week;

11. Affiant has made several inquiries to obtain copies of the actual television video recordings ("outtakes") of the entire sentencing hearing, but has yet to prevail in this endeavor.

12. Affiant states that he personally approached Judge Matia and requested that he recuse himself from Joshua Bray's case in light of his remarks and overall attitude harbored concerning this case. Judge Matia refused to recuse himself from Joshua Bray's case. *Joshua Bray is scheduled for trial on August 14, 2008;*

LAW AND ARGUMENT

13. Affiant respectfully states that Judge Matia's behavior and comments at Wilson's sentencing hearing reasonably and objectively questions his impartiality. As evidenced by Wilson's sentencing transcript attached as *Exhibit A*, Judge Matia's comments and demeanor have, undoubtedly, adversely affected the judiciary at large, and calls into *serious* question whether Wilson's brother, Joshua Bray, is capable of receiving a fair and impartial trial as

guaranteed by the Sixth Amendment of the United States Constitution and as guaranteed by the applicable Ohio constitutional provisions.

Code of Judicial Conduct, Canons 1, 3(E)(1)(a), and 4, provide, in relevant part:

“**Canon 1:** A judge shall uphold the integrity and independence of the judiciary.”

“**Canon 3(E)(1)(a):** A judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned, including where the judge has a personal bias or prejudice concerning a party or a party’s lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding.”

“**Canon 4:** A judge shall avoid impropriety and the appearance of impropriety in all of the judge’s activities.”

14. Judge Matia’s initial conduct at Wilson’s sentencing hearing involved questioning Wilson concerning Wilson’s behavior relating to the charged offenses. In doing so, Judge Matia read aloud, in open court, portions of his brother Joshua Bray’s statement given to the Shaker Heights Police Department (which suggests that Joshua Bray implicated his Wilson); *Wilson’s Transcript at pages 12-13 (hereinafter “T.p.”)*; *Copy of Joshua Bray’s statement is attached as Exhibit B.*

15. Wilson’s counsel attempted to prohibit Judge Matia from considering Joshua Bray’s statement by pointing out that the statement was not introduced or admitted into evidence nor did Joshua Bray testify at Wilson’s trial. *T.p. at 13-14.*

16. Judge Matia informed Wilson and his counsel that “But I have it” (referring to Joshua’s statement—*T.p. at 13*). Joshua Bray’s statement, however, was never used, in any fashion, in Wilson’s trial. In fact, *Bruton* expressly prohibits such use of a co-defendant’s

statement in that it violates the accused right to confrontation. Yet, Judge Matia read Joshua Bray's statement into the record in an apparent attempt to question and/or undermine Wilson's credibility. Affiant now questions whether Judge Matia may have access to additional co-defendant statements or other evidence for his review prior to Joshua Bray's trial.

17. Judge Matia additionally notes that Miss Chilemski testified "And the little girl didn't identify you, but she identified six people, not four; six people beating Mr. McDermott so badly that when she came out and saw him, she described him as looking like a grape." *T.p. at 13.*

18. Affiant states that by reading and using Joshua Bray's statement, which was not in evidence, was improper in and of itself. Moreover, Affiant is perplexed at how and under what circumstances that Judge Matia received Joshua's statement (considering that Affiant's motion for severance of the trials was uncontested). Joshua's statement could not be used in Joseph Wilson's trial against him, and Joshua's statement should not have been considered, let alone, read aloud in open court in front of television cameras and the public at large prior to Joshua Bray's trial. The only proper use of Joshua Bray's statement is where the prosecuting attorney uses it at Joshua Bray's trial assuming the statement has not been suppressed in a pretrial motion hearing. Judge Matia's arbitrary actions in obtaining Joshua Bray's statement prior to his trial, reviewing it, and improperly using it against his brother Wilson strongly reflect the kind of interest or bias Judge Matia developed in this case. This is tantamount to a jury, as a trier of the facts, reviewing material during deliberations that was not admitted into evidence, but was obtained by some outside means. Certainly, a mistrial would be warranted. In this case, however, Judge Matia's actions warrant his disqualification from Joshua Bray's case;

19. In essence, Affiant states that Joshua Bray is now precluded from having a fair and impartial trial in light of Judge Matia's conduct. Joshua Bray cannot, if desires, exercise his constitutional right to waive a jury of his peers and have his case tried before Judge Matia at a bench trial. Judge Matia used Joshua Bray's typed-written statement as if it was Joshua Bray's words under oath. Should Judge Matia remain on this case, Joshua Bray is now compelled, due to Judge Matia's conduct, to forego his constitutional right to challenge his statement. Moreover, Judge Matia's use of Joshua Bray's statement adversely impacts on Joshua Bray's constitutional right to take the stand in his defense in that the Judge has, prior to trial, presumed that Joshua's statement is constitutionally sound and obviously void of any errors.

20. Evidence that Judge Matia cannot preside impartially and fairly in the proceedings against Joshua Bray is equally depicted by the following discussion at Wilson's sentencing hearing:

"It is hard to even begin to understand the viciousness of the attack. And this is for someone like me who's been a judge for ten years, who deals with crime in this community on a daily basis." *T.p. at 16*. Judge Matia's statement is especially troubling, as demonstrated later in this affidavit, where Judge Matia makes comments that "group" all six defendants together, including Joshua Bray, and categorize them all as "parentless punks" and "idiots."

21. Consequently, pursuant to Canon 3(E)(1)(a), Judge Matia was duty bound to "disqualify himself in a proceeding in which the judge's impartiality might reasonably be questioned, including where the judge has a personal bias or prejudice. . . or personal knowledge of disputed evidentiary facts concerning the proceeding."

22. **Canon 3(B)(4) which states:** "A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials, and others subject to the judge's direction and control."

23. Judge Matia's improperly used his position as a judge, in open court, to mock, and show his disdain for Wilson, Joshua Bray, and their mother. For example, the following discussion depicts the judge's temperament (*T.p. at 14-15*):

"The Court: Can your client sing? Does he have any talent in that regard?"

"Mr. Ferreri: Does he sing?"

"The Court: Does he sing?"

"Mr. Ferreri: I've never asked him, Judge. We've only discussed the matters about this case."

"The Court: Because if he can sing, with the performance he put on here last week, he's got first dibs on the lead in the Lucasville musical next year." (*Referring to Lucasville Penal Institution*) *emphasis added.*

"Mr. Ferreri: Your Honor, I think that characterization is inappropriate for sentencing."

"The Court: Well, Mr. Ferreri, claim what you want, but characterization of your client—your client's characterization of the crime you put on the stand does not reflect reality."

"Mr. Ferreri: It doesn't give the Court license to make fun of my client in open court. I think it's wrong, Judge."

"The Court: I'm sorry if I hurt his feelings"

"Mr. Ferreri: It's not his feelings, it's the feeling of the decorum of this courtroom, and the majesty of the bench, your Honor."

"The Court: You would know a little bit about that, Mr. Ferrari. Thank you very much for the lesson."

24. Moreover, Judge Matia continues the mockery and humiliation by stating "Mr. Wilson, your own mother probably doesn't believe that story. I don't know anybody who would believe that story." *T.p. at 12.*

Compare. *Disciplinary Counsel v. Parker (2007), 116 Ohio State3d 64* (where the Court upheld a suspension of Judge Parker for, among other violations, making rude and humiliating comments toward defendants, counsel and victims in his courtroom. The Court further noted that "a litigant who is subject to rude and insensitive treatment is left without recourse. Whether the litigant wins or loses, the end result is an irreparable loss of respect for the system that tolerates such behavior". *Id at 70*).

25. "Canon 3: A Judge shall perform the duties of judicial office impartially and diligently".

"Canon 3(B)(5): A judge shall perform judicial duties without bias or prejudice. A shall not, in the performance of judicial duties, **by words or conduct** manifest bias or prejudice, including but not limited to bias or prejudice based on race, gender, religion, national origin, disability, age, sexual orientation, **or socioeconomic status. . .**"

26. Judge Matia's words and conduct clearly manifest prejudice or bias against Wilson, his brother, Joshua Bray, and he groups every defendant "together" as if indistinguishable and equally culpable. More troubling is that Judge Matia began a series of comments showing prejudice against Joshua Bray, Wilson and their parents due to their **socioeconomic** status. For instance, Judge Matia commented:

"Why did this happen, is for many years, *people of the community* have been having children and not raising them. If you're not married, you don't have a high school diploma, and you don't have a job that would support a family, don't have one (children—emphasis added)..."

T.p. 15-16

"This is what happens when kids are raised on the streets without parents. They have little concern for themselves and their future, and they have no concern for anyone else." *T.p. 16*

27. The comment strongly sets forth Judge Matia's personal belief as to why **this** crime occurred and shows prejudice against Joshua Bray, Wilson, their mother, and inappropriately attacks underprivileged youth and single parents. Moreover, Judge Matia has absolutely no concrete proof that Joshua Bray and Wilson were not loved and cared for by their parents, that the parents were unemployed, that Joshua Bray and Wilson were raised on the streets without parents, or that either parent ever obtained a high school diploma.

28. Judge Matia mandates a standard for when, whom and under what circumstances a person should bear children. None of which, however, is even remotely relevant to why these offenses occurred. Judge Matia used Wilson and Joshua Bray's unfortunate life circumstances of being impoverished and raised by a single-mother, as a measuring rod for imposing a harsher sentence as opposed to considering the circumstances as mitigatory factors. Noteworthy, it is Affiant's understanding that Judge Matia did not order or nor did he have the benefit of a pre-sentence investigative report. Equally noteworthy is the fact that Wilson received a twenty-five year prison sentence despite the fact that he had no prior juvenile or adult record. *T.p. at 7.*

29. Affiant takes great exception to this comment because it wrongly concludes that parenting children out of marriage and children raised in single-parent homes are the causes for random crime such as the instant case. Affiant himself was raised in a single-parent household and knows that generalizations of this magnitude are unfounded and must not be uttered by one belonging to our esteemed judiciary.

30. One thing that is certainly true, no child can ever be held responsible for their parents mistakes or life circumstances. In other words, NO CHILD HAS A CHOICE AS TO WHO HIS OR HER PARENTS ARE NOR HOW THE PARENTS WILL TURN OUT. Finally, even those who are raised in single-parent homes are not the sole responsible parties for our neighborhood crime. God has unquestionably blessed countless members of our society who WERE raised in very loving and nurturing single-parent households.

31. Judge Matia's above comments are very analogous to Judge Cleary's comments and conduct in *Cleveland Bar Association v. Cleary* (2001) 93 Ohio St.3d 191. In *Cleary*, the judge offered probation to a pregnant defendant on the condition that she have her baby as opposed to terminating her pregnancy through an abortion. The Court ruled that the judge erred by offering quid pro quo probation if the defendant had a baby, and that the judge violated the requirement to perform her duties without bias or prejudice, and, as a result, **should have disqualified herself from ruling on a post-sentencing motion for appellate bond in that the judge's impartiality was reasonably questioned.** *Cleary*, supra at 204.

32. Judge Matia's harsh feelings and attitudes toward Joshua Bray and his brother Wilson, due to their socioeconomic status, as in *Cleary*, is similar to Judge Cleary's anti-abortion beliefs. Consistent with this Court's ruling that Judge Cleary should have disqualified herself from the post-sentence appellate bond motion due to her personal (anti-abortion) beliefs, Judge Matia should have recused himself from all future proceedings, on his own, or at Affiant's request since he harbors such deeply rooted convictions. Affiant simply cannot comprehend how Judge Matia can remain neutral, detached, fair and impartial in light of his oral, in court, manifestations.

33. "Canon 2: The Judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

34. Assuming, for argument sake, that this Honorable Court does not find actual prejudice, bias, or special interest deriving from Judge Matia's comments and sentiments, the Court can still find that such behavior and statements suggest to a reasonable person the appearance of prejudice or impropriety. *In re Disqualification of Sheward v. Dublin Local School District et al.*, (1996) 77 Ohio St.3d 1258. In *Sheward*, the affiant claimed, among other things, that Judge Sheward harbored racially motivated bias and prejudice toward affiant that affected his ability to remain impartial in the case and compromised the appearance of fairness and justice. Affiant's contention centered around the judge's response to his *Batson v. Kentucky* (1986). 476 U.S. 79, challenge-- claiming that the adverse part's counsel was systematically excluding minority jurors from the jury pool. *Id* Judge Sheward disagreed with affiant and expressed his difficulty in applying the holding of *the Batson* case and directly addressed affiant as both a legislator and an African-American.

This Court held that the remarks of Judge Sheward did not amount to bias or prejudice against affiant, his clients, or African-Americans in general. *Id.* at 1258-1260. The Court held, however, that the Court was "concerned that his [Judge Sheward] statements could suggest to a reasonable person the appearance of prejudice or impropriety." *Id.* Further, the Court held that "to avoid the appearance of impropriety and to ensure the parties' absolute confidence in the fairness of these proceedings, I conclude that Judge Sheward should be disqualified from this case." *Id.* At 1260.

35. Judge Matia continually referred to and grouped Wilson, Joshua Bray, and his co-defendants together. For instance, "*This is what happens when kids are raised on the streets.*" T.p. 16. Another example of Judge Matia's indiscriminately grouping Joshua Bray with everyone else and showing Judge Matia's predisposition is when the judge commented "Mr. McDermott has been given a life sentence by *you and your comrades*. . . He's going to have less time with his wife, less time with his Kids, and less time with his grandkids, **because of you and your buddies' just heartless and senseless attack.**" T.p. at 17. "You don't rob a guy by running up to him, punching him in the nose, and then beating him severely **with five of your other comrades.**" T.p. 18 "*You and your friends were just idiots* out to inflict violence upon another human being." "**A community has been changed forever by what you and your buddies did.**" T.p. 18. Without question, Judge Matia has already "ruled," in his mind, that Joshua Bray is guilty as charged!

36. More importantly, the following exchange evidences Judge Matia's prejudicial and unprofessional remarks in this case toward all the named defendants, including Joshua, and his total disdain for them and others similarly situated:

"Because I want this sentence to send a message to all the **other little punks** out there in our county, and in this area of the state, the goonies, the guys that shoot policemen, all the *other heartless, young, parentless punks* like you who might consider doing this to somebody else. ."

T.p. 18-19

37. Affiant respectfully states that such characterizations were unnecessary, unfounded, and presumptuous about Wilson, Joshua Bray, and their single parent mother. The fact that these comments were so brutally harsh and publicized in open court and repeatedly televised,

unquestionably adversely affects Joshua Bray's potential jury pool and demonstrates an appearance of impropriety and prejudice. To repeatedly classify, group and characterize Joshua Bray prior to his trial or, for argument sake only, prior to a plea of guilty in open court, was erroneous, prejudicial and irreparable. Under no circumstances can Joshua Bray have a fair and impartial trial before Judge Matia who has clearly breached his duty to appear impartial.

38. The judge's comments certainly, at a minimum, demonstrate his appearance of prejudice or bias against Joshua Bray. These remarks in Court clearly shed a glimpse of light on Judge Matia's true feelings and such feelings cannot and will not be erased at Joshua Bray's trial. Again, these comments coupled with Judge Matia's reviewing evidence presumably against Joshua Bray prior to his trial (his statement), and the treatment of Wilson and his counsel at the sentencing hearing ("can your client sing..."), unambiguously undermines the confidence of the Court as a whole, and manifest more than just an appearance of impropriety. The mere appearance of prejudice or impropriety at Wilson's sentencing hearing, as in *In re Disqualification of Sheward*, supra, warrants Judge Matia's disqualification from Joshua Bray's case.

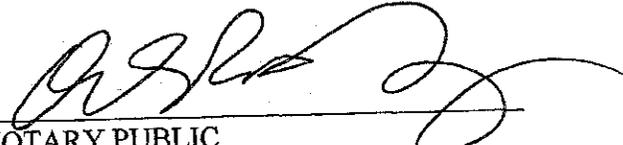
WHEREFORE, it is respectfully requested that an Order issue disqualifying Judge David T. Matia from issuing any and all further orders and disqualifying him from presiding over any and all future evidentiary hearings and trial of Joshua Bray in Case Nos. CR-513162 and 509976, Cuyahoga County Court of Common Pleas, and that another judge be appointed to consider all future motions, evidentiary hearings and trial.

AFFIANT FURTHER SAYETH NAUGHT.



Russell W. Tye

Sworn to and subscribed in my presence this 6th day of August, 2008.



NOTARY PUBLIC

OSCAR E. RODRIGUEZ, APPL.
NOTARY PUBLIC - ST. CUYA
My commission expires 08/31/2011
Section 147.03 O.R.C.



53899782

IN THE COURT OF COMMON PLEAS CUYAHOGA COUNTY, OHIO

THE STATE OF OHIO
Plaintiff

JOSHUA BRAY
Defendant

Case No: CR-08-513162-B

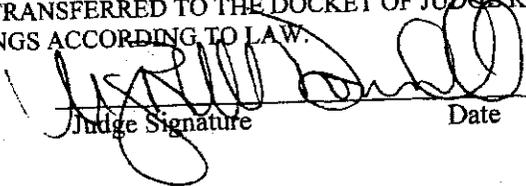
Judge: DAVID T MATIA

INDICT: 2903.02 ATTEMPTED, MURDER /FRM1 /FRM3
2911.01 AGGRAVATED ROBBERY /FRM1 /FRM3
2911.01 AGGRAVATED ROBBERY /FRM1 /FRM3
ADDITIONAL COUNTS...

JOURNAL ENTRY

CAPTIONED CASE BEING ORIGINALLY ASSIGNED TO JUDGE DAVID T MATIA (329) AND FOR GOOD CAUSE SHOWN, THIS MATTER IS HEREBY REASSIGNED AND TRANSFERRED TO THE DOCKET OF JUDGE KENNETH R CALLAHAN (313) (MANUAL) FOR FURTHER PROCEEDINGS ACCORDING TO LAW.

ADMINISTRATIVE JUDGE
NANCY R MCDONNELL

 10.7.08

Judge Signature Date

WALDE FURST
CLERK OF COURTS
CUYAHOGA COUNTY

2008 OCT -7 P 2:14

FILED

CONSTITUTION OF THE STATE OF OHIO

ARTICLE IV: JUDICIAL

§ 3 Court of Appeals.

(A) The state shall be divided by law into compact appellate districts in each of which there shall be a court of appeals consisting of three judges. Laws may be passed increasing the number of judges in any district wherein the volume of business may require such additional judge or judges. In districts having additional judges, three judges shall participate in the hearing and disposition of each case. The court shall hold sessions in each county of the district as the necessity arises. The county commissioners of each county shall provide a proper and convenient place for the court of appeals to hold court.

(B) (1) The courts of appeals shall have original jurisdiction in the following:

- (a) Quo warranto;
- (b) Mandamus;
- (c) Habeas corpus;
- (d) Prohibition;
- (e) Procedendo;

(f) In any cause on review as may be necessary to its complete determination.

(2) Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district, except that courts of appeals shall not have jurisdiction to review on direct appeal a judgment that imposes a sentence of death. Courts of appeals shall have such appellate jurisdiction as may be provided by law to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies.

(3) A majority of the judges hearing the cause shall be necessary to render a judgment. Judgments of the courts of appeals are final except as provided in section 2 (B) (2) of this article. No judgment resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all three judges hearing the cause.

(4) Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination.

(C) Laws may be passed providing for the reporting of cases in the courts of appeals.

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OHIO RULES OF COURT SERVICE
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*** RULES CURRENT THROUGH JANUARY 1, 2011 ***
*** ANNOTATIONS CURRENT THROUGH JULY 1, 2010 ***

Rules Of Practice Of The Supreme Court Of Ohio

Ohio S. Ct. Prac. SECTION 12 (2011)

Review Court Orders which may amend this Rule.

SECTION 12. DISPOSITION OF APPEALS IMPROVIDENTLY ACCEPTED OR CERTIFIED; SUMMARY DISPOSITION OF APPEALS

S.Ct. Prac. R. 12.1. Improvidently Accepted Appeals.

When a case has been accepted for determination on the merits pursuant to *S.Ct. Prac. R. 3.6*, the Supreme Court may later find that there is no substantial constitutional question or question of public or great general interest, or that the same question has been raised and passed upon in a prior appeal. Accordingly, the Supreme Court may sua sponte dismiss the case as having been improvidently accepted, or summarily reverse or affirm on the basis of precedent.

S.Ct. Prac. R. 12.2. Improvidently Certified Conflicts.

When the Supreme Court finds a conflict pursuant to *S.Ct. Prac. R. 4.2*, it may later find that there is no conflict or that the same question has been raised and passed upon in a prior appeal. Accordingly, the Supreme Court may sua sponte dismiss the case as having been improvidently certified, or summarily reverse or affirm on the basis of precedent.

HISTORY: Amended, eff 4-1-96; 7-1-04; 1-1-08; 1-1-10.