

NO.

IN THE SUPREME COURT OF OHIO

13-0976

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 98712

STATE OF OHIO,

Plaintiff-Appellant

-vs-

DAVID J. PISCURA,

Defendant-Appellee

**MEMORANDUM IN SUPPORT OF JURISDICTION OF
APPELLANT, STATE OF OHIO**

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

This case presents a substantial constitutional question and an issue of great public importance: whether the offenses of Possessing Criminal Tools and Unlawful Possession of Dangerous Ordnance merge when the same dangerous ordnance is identified in both counts and when the offense of Unlawful Possession of Dangerous Ordnance is completed prior to the defendant forming a criminal purpose under Possessing Criminal Tools.

This case is of great public interest because it directly impacts Ohio's merger test as set forth in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061. Currently, Ohio courts have struggled to apply a consistent definition of "conduct" under *Johnson*. This issue becomes prevalent when multiple offenses/acts are committed within a short period of time.

The *Piscura* court was presented with such a situation and applied a very generous definition of conduct. In doing so, the court merged the defendant's Unlawful Possession of Dangerous Ordnance and Possessing Criminal Tools counts, despite the fact that the possession of the incendiary device was completed prior to the defendant forming the intent to use the incendiary device to commit Aggravated Arson and Attempted Murder.¹ Although the defendant may have formed this intent close in time to the possession of the incendiary device, the defendant still completed his possession first.

Other courts have addressed similar issues and have properly recognized that "when one offense was complete before another offense occurred, the two offenses are committed separately for purposes of R.C. 2941.25(B), notwithstanding their proximity in

¹ To establish Possessing Criminal Tools, the defendant must form the intent to use the incendiary device criminally.

time and that one was committed in order to commit the other." *State v. Sludder*, 3rd Dist. No. 1-11-69, 2012-Ohio-4014, ¶ 14; *State v. Turner*, 2d Dist. No. 24421, 2011-Ohio-6714, ¶ 24; *State v. Ayers*, 12th Dist. Nos. CA2010-12-119, CA2010-12-120, 2011-Ohio-4719, ¶29. While the *Piscura* court may have recognized this important aspect of the *Johnson* merger analysis, it clearly did not understand how to apply it.

Lastly, the Eighth District Court of Appeals has already discussed the difficulties in applying the *Johnson* merger test:

Appellate courts across Ohio have struggled with application of the *Johnson* test. Determining how an offender's conduct should be evaluated in the first prong of the test has been inconsistent. In *Johnson*, Justice O'Connor's concurring opinion properly noted, "[T]he trial court's consideration of whether there should be merger is aided by a review of the evidence introduced at trial." *Id.* at ¶ 69, O'Connor, J., concurring. Despite this, *Johnson* gave no express model or formula to follow when looking at the offender's conduct to determine "[i]f the offenses correspond to such a degree that the conduct of the defendant constituting commission of one offense constitutes commission of the other." *Id.* at ¶ 48. Some courts, including the Supreme Court of Ohio, have remanded cases for further review to determine whether the offender's conduct is allied. See *State v. Damron*, 129 Ohio St.3d 86, 2011-Ohio-2268, 950 N.E.2d 512; *State v. Miller*, Portage App. No. 2009-P-0090, 2011-Ohio-1161, 2011 WL 861166. Nevertheless, despite remanding cases for review, without more clarity on the test process, inconsistent results in applying the first prong of *Johnson* will continue.

...

At some point, the Supreme Court of Ohio is going to have to revisit *Johnson* and devise a more formal test that encompasses factors like time, distance, harm, risk of harm, and purpose in determining merger of allied offenses.

State v. Thomas, 8th Dist. Nos. 96146, 96798, 197 Ohio App.3d 176, 966 N.E.2d 939, 2011 - Ohio- 6073 (Gallagher, J., dissenting).

To the extent that Ohio appellate courts, like the Eighth District in *Piscura*, are misapplying the *Johnson* merger test, this Court must extend jurisdiction and consider how courts should conduct the *Johnson* merger test for offenses requiring different conduct but both committed within a short period of time of each other.

STATEMENT OF FACTS

The Eighth District Court of Appeals summarized the facts of this case as follows:

Defendant-appellant, David Piscura, appeals multiple convictions for aggravated arson, attempted murder, unlawful possession of dangerous ordnance, and possessing criminal tools. We affirm in part and reverse in part.

In 2012, Piscura was indicted on several charges in relation to the fire bombing of a house on Russell Avenue in Parma. In Counts 1, 3, and 5, Piscura was charged with aggravated arson in violation of R.C. 2909.02(A)(1). In Counts 2, 4, and 6, he was charged with attempted murder in violation of R.C. 2923.02 and 2903.02(A). In Count 7, he was charged with aggravated arson in violation of R.C. 2909.02(A)(2). In Count 8, he was charged with unlawful possession of dangerous ordnance pursuant to R.C. 2923.17(A). In Count 9, Piscura was charged with possessing criminal tools in violation of R.C. 2923.24(A); the state alleged he possessed an incendiary device, rock, and/or 2004 Toyota with the purpose to use them criminally. Each of the counts contained a forfeiture specification.

In Counts 1 and 2, the named victim was Kimberly Stillman. In Counts 3 and 4, the named victim was Jason Hamila. Angeline Zimmerman was the named victim in Counts 5 and 6, and Ronald and Roxanne Churby were the named victims in Count 7. Piscura was indicted along with Anthony Veto. See *State v. Veto*, 8th Dist. No. 98770.

Piscura eventually pleaded guilty to the indictment. The trial court ordered a presentence investigation. In July 2012, the court held the sentencing hearing. Piscura argued that all counts should merge into one count of aggravated arson. The state conceded that Counts 1 and 2, Counts 3 and 4, and Counts 5 and 6 merged for the purposes of sentencing. The state elected to have the court sentence Piscura on Counts 2, 4, and 6, attempted murder.

The state gave a recitation of the facts to the court. Ronald and Roxanne Churby owned a rental house on Russell Avenue. Jason Hamila and Angeline Zimmerman lived in the house. Kimberly Stillman, who had dated Anthony Veto, was temporarily staying with Hamila and Zimmerman.

In the early morning of January 13, 2012, Piscura and Veto began texting each other. Veto texted Piscura and told him, "I can make three firebombs, and I know one place that needs it. * * * Got all the tools. Just need a ride." Piscura agreed to pick him up. Veto constructed two Molotov cocktails out of glass bottles filled with gasoline. Piscura got Veto and drove to Russell Avenue. Veto had a sledgehammer, rock, and the two Molotov cocktails.

Piscura drove up and down Russell Avenue, eventually parking down the street from the target home. Neighbors told police that they saw Piscura's car driving up and down the street [with its lights off] and also saw a hooded person approach the Churbys' house. Veto used the rock to break the front window of the house and threw both firebombs into the house. The house instantly went up in flames. Zimmerman and Hamila were awake at the time and were able to rouse Stillman, grab the dog, and escape. The house was a total loss and the three victims lost all of their personal property.

At the sentencing hearing, the trial court heard from the defendant, his mother, the victims, and a state fire investigator. The fire investigator explained how a Molotov cocktail is manufactured and the quick speed with which the house burned.

The trial court sentenced Piscura to a concurrent sentence of 6 years in prison on Counts 2, 4, 6, and 7, concurrent to 6 months in prison on Counts 8 and 9.

State v. Piscura, 8th Dist. No. 98712, 2013-Ohio- 1793, ¶ 1-9.

STATEMENT OF THE CASE

Defendant David Piscura appealed to the Eighth District Court of Appeals. In his one assignment of error, Piscura argued that the trial court should have merged all nine of his offenses pursuant to R.C. 2941.25. This included:

Counts 1, 3 and 5 - Aggravated Arson in violation of R.C. 2909.02(A)(1)

Counts 2, 4 and 6 - Attempted Murder in violation of 2903.02(A)

Count 8 - Unlawful Possession of Dangerous Ordnance in violation of 2923.17(A)

Count 9 - Possessing Criminal Tools in violation of 2923.24(A)

In addressing the merger of Counts 8 and 9, the Eighth District Court of Appeals determined that:

Looking at the conduct and animus of the defendant, the instrumentalities involved, the time frame under which this occurred, the matter in which the charges were indicted, and the state's theory of the case, Count 8, possession of a dangerous ordnance and Court 9, possessing criminal tools are allied offenses and merge for sentencing purposes.

...

We reverse and vacate Piscura's sentence as to Counts 8 and 9 only, and remand for a new sentencing hearing on the offense that remains after the state selects which allied offense to pursue. *Fairfield*, 8th Dist. No. 97466, 2012-Ohio-5060 at ¶ 29, citing *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, 951 N.E.2d 381.

Piscura, 8th Dist. No. 98712, 2013-Ohio- 1793, ¶ 28, 39. The State of Ohio now seeks further review by this Honorable Court.

LAW AND ARGUMENT

Proposition of Law No. 1: Under R.C. 2941.25 and State v. Johnson, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, Possessing Criminal Tools and Unlawful Possession of Dangerous Ordnance do not merge when the defendant's possession of the dangerous ordnance occurs prior to the defendant forming the intent to use the dangerous ordnance criminally.

The State of Ohio respectfully requests that this Court grant jurisdiction over the Eighth District Court of Appeals decision in *State v. Piscura*, 8th Dist. No. 98712, 2013-Ohio-1793, adopt the State's proposition of law and find that Possessing Criminal Tools and Unlawful Possession of Dangerous Ordnance do not always merge under *Johnson*.

In *Piscura*, the Eighth District failed to recognize the separate and distinct conduct and animus supporting the defendant's Unlawful Possession of Dangerous Ordnance and Possessing Criminal Tools convictions. Ohio's Unlawful Possession of Dangerous Ordnance statute states, "[n]o person shall knowingly acquire, have, carry, or use any dangerous ordnance." R.C. 2923.17(A). Furthermore, Ohio's Possessing Criminal Tools statute states, "[n]o person shall possess or have under the person's control any substance, device, instrument, or article, with purpose to use it criminally." R.C. 2923.24(A).

Ohio courts analyze merger issues pursuant to *State v. Johnson*, 128 Ohio St.3d 153, 942 N.E.2d 1061, 2010-Ohio-6314:

The Ohio Supreme Court set forth the analysis for determining whether offenses are allied offenses subject to merger in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061. In *Johnson*, the court overruled *State v. Rance*, 85 Ohio St.3d 632, 1999-Ohio-291, 710 N.E.2d 699, and held that "[w]hen determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25, the conduct of the accused must be considered." *Id.* at the syllabus. It explained the test as follows:

"In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), the question is whether it is possible to commit one offense and commit the other with the same conduct, not whether it is possible to commit one without committing the other. * * * If the offenses correspond to such a degree that the conduct of the defendant constituting commission of one offense constitutes commission of the other, then the offenses are of similar import.

If the multiple offenses can be committed by the same conduct, then the court must determine whether the offenses were committed by the same conduct, *i.e.*, 'a single act, committed with a single state of mind.'

If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged.”

Conversely, if the court determines that the commission of one offense will never result in the commission of the other, or if the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge. (Internal citations omitted.)

State v. Patterson, 8th Dist. No. 98127, 2012-Ohio-5511, ¶ 34 quoting *Johnson* at ¶ 48-51.

In this case, the Eighth District Court of Appeals merged Piscura’s Possessing Criminal Tools and Unlawful Possession of Dangerous Ordnance convictions. In doing so, the court interpreted the meaning of “conduct” under *Johnson* too broadly and ignored the defendant’s conduct supporting his *intent* to use the incendiary device criminally. Under the Eighth District Court of Appeals’ logic, Unlawful Possession of Dangerous Ordnance and Possessing Criminal Tools will always merge when the same item is listed under both counts and the offenses occur within a short period of time of each other. In fact, the Eighth District Court of Appeals apparently concluded that Unlawful Possession of a Dangerous Ordnance and Possessing Criminal Tools were the “same” offense:

Piscura's conduct of possessing the firebomb is sufficient to support a charge and conviction of both possession of a dangerous ordnance and possessing criminal tools. See *State v. Adkins*, 80 Ohio App.3d 211, 222-223, 608 N.E.2d 1152 (4th Dist.1992) (Grey, J., dissenting) (offenses are the “same” when they are the same in type, place, time, and number); *State v. Houston*, 26 Ohio App.3d 26, 498 N.E.2d 188 (8th Dist.1985) (possession of a dangerous ordnance and possessing criminal tools are allied offenses, when the sawed-off shotgun was both the dangerous ordnance and criminal tool.).

Piscura, at ¶ 25.

The *Piscura* Court's decision to merge the offenses was improper. First, the *Piscura* Court failed to recognize that the offense of Possessing Criminal Tools includes an additional element - the intent to use the dangerous ordnance criminally. Although the holding in *Johnson* overruled *State v. Rance*, 85 Ohio St.3d 632, 1999-Ohio-291, 710 N.E.2d 699 and the comparison of the offenses' statutory elements in the abstract, the *Johnson* merger test still requires lower courts to review the conduct necessary to establish each of the offenses' elements. As such, the *Piscura* Court should have reviewed the "conduct" necessary to support the defendant's intent to use the incendiary device criminally and asked whether it was the same conduct (*i.e.*, "single act" and "single state of mind") necessary to support the Unlawful Possession of Dangerous Ordnance conviction. *Johnson*, at ¶ 48-49. Additionally, the Eighth District missed a very important aspect of the *Jonson* merger test. "[W]hen one offense was complete before another offense occurred, the two offenses are committed separately for purposes of R.C. 2941.25(B), notwithstanding their proximity in time and that one was committed in order to commit the other." *State v. Sludder*, 3rd Dist. No. 1-11-69, 2012-Ohio-4014, ¶ 14; *State v. Turner*, 2d Dist. No. 24421, 2011-Ohio-6714, ¶ 24; *State v. Ayers*, 12th Dist. Nos. CA2010-12-119, CA2010-12-120, 2011-Ohio-4719, ¶29. Lastly, the *Piscura* court failed to review the animus for the merged offenses.

In this case, the element of criminal purpose under Possessing Criminal Tools was established by conduct separate and distinct from the conduct supporting *Piscura*'s Unlawful Possession of Dangerous Ordnance conviction. In proving these counts, the State set forth two different theories. First, to prove Possessing Criminal Tools, the State focused on the fact that *Piscura* drove *Veto* to the target home with the incendiary device, scouted

the home by driving up and down the street with his lights off, parked the vehicle a block away, and waited while Veto threw a rock through a window and firebombed the house in an attempt to murder his ex-girlfriend. The State included the vehicle, rock and incendiary device in Count 9, Possessing Criminal Tools of the indictment. The indictment further noted that these criminal tools were intended for use in the commission of Attempted Murder and/or Aggravated Arson. Thus, the State's theory for establishing Piscura's possession of the incendiary device for a criminal purpose required evidence of the defendants' acts of Attempted Murder and/or Aggravated Arson.

On the other hand, the State's theory for proving Dangerous Ordnance focused on the manufacturing of the incendiary device. Immediately after Veto created the incendiary device, possession was established and the State had fulfilled the elements of Unlawful Possession of Dangerous Ordnance. However, at that moment, Piscura's criminal purpose was not fully established. Therefore, Piscura's possession of the dangerous ordnance was prior to and separate from Piscura's acts supporting his intent to commit Attempted Murder and Aggravated Arson. The State made this argument at sentencing:

[I]t takes a separate action, a separate animus to possess and create the incendiary device, and it's an entirely different act to then go forward and use it by throwing it into a person's home.

(Tr. 79).

In *State v. Ayers*, 12th Dist. Nos. CA2010-12-119, CA2010-12-120, 2011-Ohio-4719, the defendant acquired a dangerous ordnance, a sawed-off shotgun, prior to using the shotgun in a robbery. The *Ayers* court held that the Unlawful Possession of Dangerous Ordnance offense was complete prior to the Robbery offense and thus "undoubtedly committed with separate and distinct conduct." *Id.* at ¶ 32. Similarly, here, Piscura

possessed the dangerous ordnance prior to formulating the intent to commit Aggravated Arson and Attempted Murder. Thus, the two offenses required separate and distinct conduct and should not have merged.

Also in *Ayer's*, the court held that because the possession occurred prior to the robbery, the two offenses did not occur with a "single act." *Id.* This case presented the same issue. The possession of the dangerous ordnance and the criminal purpose were not established by "a single act." Possession of the dangerous ordnance was established at the same time the incendiary device was manufactured. On the other hand, Possessing Criminal Tools required the following acts - Piscura drove Veto to the target home with the incendiary device, scouted the home by driving up and down the street, parked the vehicle a block away, and waited as Veto attempted to murder his ex-girlfriend. Clearly, this was not "a single act."

Instead of conducting the above analysis, the *Piscura* Court simply relied on the holding in *State v. Fairfield*, 8th Dist. No. 97466, 2012-Ohio-5060 in determining that the two offenses merged. In *Fairfield*, the defendant was charged with multiple counts of Unlawful Possession of Dangerous Ordnance, Possessing Criminal Tools, and Receiving Stolen Property. Defendant stole and possessed shock tubes, detonation cords, blasting caps, and an actuator, all of which were explosive devices. The court held that the offenses merged because the defendant's receiving of stolen property, "also resulted in him unlawfully possessing a dangerous ordnance and possessing a criminal tool." *Id.* at ¶ 26. The defendant in *Fairfield* simultaneously received the stolen goods, which were both criminal tools and dangerous ordnances. This was clearly "a single act." Here, *Piscura* possessed the incendiary device and then engaged in a number of different activities before

Veto set the target home on fire. By relying on the *Fairfield* holding for authority to merge Unlawful Possession of Dangerous Ordnance and Possessing Criminal Tools, the *Piscura* court ignored *Johnson's* "single act" requirement.

The *Piscura* Court further failed to note that these offenses were not committed with a "single state of mind." At first, *Piscura* and Veto's intent was to manufacture the incendiary device. Once completed, the Unlawful Possession of Dangerous Ordnance offense was also completed. *Piscura* then engaged in numerous other acts before the attempted murder of Veto's ex-girlfriend. The latter conduct required a different mind state from manufacturing the incendiary device.

Lastly, *Piscura* did not commit both offenses with the same animus. Under R.C. 2941.25(B), "animus" is defined as "purpose or, more properly, immediate motive." *State v. Logan*, 60 Ohio St.2d 126, 131, 397 N.E.2d 1345 (1979). In *State v. Garay*, 8th Dist. No. 57704, 1990 WL 210227, *3, the Eighth District Court of Appeals noted that Possessing Criminal Tools and Unlawful Possession of Dangerous Ordnance require "different animus." See also, *State v. Lane*, 8th Dist. No. 56707, 1990 WL 82308, *2 ("A person could have a dangerous ordnance without any criminal purpose. Likewise, one could possess an item other than a dangerous ordnance with the purpose to use it criminally."). *Piscura* and Veto's immediate motive included the possession of an incendiary device. Once accomplished, the defendants committed Unlawful Possession of Dangerous Ordnance. Thereafter, *Piscura* formed another animus - to firebomb the house. This act required separate and distinct animus.

CONCLUSION

In *Piscura*, the Eighth District Court of Appeals improperly applied the *Johnson* merger test by failing to review whether the elements of both offenses were committed by the same conduct, *i.e.*, one act and one state of mind. The *Piscura* court further failed to recognize that once an offense is complete, it can no longer merge with a separate ongoing offense. Lastly, the *Piscura* Court did not properly review the animus required under the separate offenses. Therefore, the State of Ohio respectfully requests that this Honorable Court grant jurisdiction and adopt the State's proposition of law that Possessing Criminal Tools and Possession of Dangerous Ordnance do not merge when the defendant's possession of a dangerous ordnance occurs prior to the defendant forming the intent to use the dangerous ordnance criminally.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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[Cite as *State v. Piscura*, 2013-Ohio-1793.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 98712

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DAVID J. PISCURA

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND VACATED IN PART;
REMANDED FOR RESENTENCING

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-559232

BEFORE: Jones, P.J., Keough, J., and Kilbane, J.

RELEASED AND JOURNALIZED: May 2, 2013

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LARRY A. JONES, SR., P.J.:

{¶1} Defendant-appellant, David Piscura, appeals multiple convictions for aggravated arson, attempted murder, unlawful possession of dangerous ordnance, and possessing criminal tools. We affirm in part and reverse in part.

{¶2} In 2012, Piscura was indicted on several charges in relation to the fire bombing of a house on Russell Avenue in Parma. In Counts 1, 3, and 5, Piscura was charged with aggravated arson in violation of R.C. 2909.02(A)(1). In Counts 2, 4, and 6, he was charged with attempted murder in violation of R.C. 2923.02 and 2903.02(A). In Count 7, he was charged with aggravated arson in violation of R.C. 2909.02(A)(2). In Count 8, he was charged with unlawful possession of dangerous ordnance pursuant to R.C. 2923.17(A). In Count 9, Piscura was charged with possessing criminal tools in violation of R.C. 2923.24(A); the state alleged he possessed an incendiary device, rock, and/or 2004 Toyota with the purpose to use them criminally. Each of the counts contained a forfeiture specification.

{¶3} In Counts 1 and 2, the named victim was Kimberly Stillman. In Counts 3 and 4, the named victim was Jason Hamila. Angeline Zimmerman was the named victim in Counts 5 and 6, and Ronald and Roxanne Churby were the named victims in Count 7. Piscura was indicted along with Anthony Veto. *See State v. Veto*, 8th Dist. No. 98770.

{¶4} Piscura eventually pleaded guilty to the indictment. The trial court ordered a

presentence investigation. In July 2012, the court held the sentencing hearing. Piscura argued that all counts should merge into one count of aggravated arson. The state conceded that Counts 1 and 2, Counts 3 and 4, and Counts 5 and 6 merged for the purposes of sentencing. The state elected to have the court sentence Piscura on Counts 2, 4, and 6, attempted murder.

{¶5} The state gave a recitation of the facts to the court. Ronald and Roxanne Churby owned a rental house on Russell Avenue. Jason Hamila and Angeline Zimmerman lived in the house. Kimberly Stillman, who had dated Anthony Veto, was temporarily staying with Hamila and Zimmerman.

{¶6} In the early morning of January 13, 2012, Piscura and Veto began texting each other. Veto texted Piscura and told him, "I can make three firebombs, and I know one place that needs it. * * * Got all the tools. Just need a ride." Piscura agreed to pick him up. Veto constructed two Molotov cocktails out of glass bottles filled with gasoline. Piscura got Veto and drove to Russell Avenue. Veto had a sledgehammer, rock, and the two Molotov cocktails.

{¶7} Piscura drove up and down Russell Avenue, eventually parking down the street from the target home. Neighbors told police that they saw Piscura's car driving up and down the street and also saw a hooded person approach the Churbys' house. Veto used the rock to break the front window of the house and threw both firebombs into the house. The house instantly went up in flames. Zimmerman and Hamila were awake at the time and were able to rouse Stillman, grab the dog, and escape. The house was a

total loss and the three victims lost all of their personal property.

{¶8} At the sentencing hearing, the trial court heard from the defendant, his mother, the victims, and a state fire investigator. The fire investigator explained how a Molotov cocktail is manufactured and the quick speed with which the house burned.

{¶9} The trial court sentenced Piscura to a concurrent sentence of 6 years in prison on Counts 2, 4, 6, and 7, concurrent to 6 months in prison on Counts 8 and 9.

{¶10} Piscura now appeals, raising one assignment of error for our review:

The court committed plain error in failing to merge all counts as allied offenses of similar import.

{¶11} Piscura argues that all nine of his offenses should merge into a single offense because they were committed with the same animus.

{¶12} The merger statute, R.C. 2941.25, provides as follows:

(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.

{¶13} In *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, ¶ 42, the Ohio Supreme Court clarified that the allied offenses statute “instructs us to look

at the defendant's conduct when evaluating whether his offenses are allied." First, courts must determine "whether it is possible to commit one offense and commit the other with the same conduct * * *." *Id.* at ¶ 48. Second, "[i]f multiple offenses can be committed by the same conduct, then the court must determine whether the offenses were committed by the same conduct, i.e., 'a single act, committed with a single state of mind.'" *Id.* at ¶ 49, quoting *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, ¶ 50 (Lanzinger, J., dissenting). "If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged." *Johnson* at ¶ 50. However, if the commission of one offense will never result in the commission of the other, "or if the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge." *Id.* at ¶ 51.

{¶14} Accordingly, we determine whether the multiple offenses can be committed with the same conduct, and, if so, whether the offenses were in fact committed by a single act, or performed with a single state of mind. *See id.* at ¶ 49.

{¶15} It is with these concepts in mind that we review the assigned error.

Attempted Murder and Aggravated Arson — Multiple Victims

{¶16} Piscura argues that Counts 2, 4, 6, and 7 should merge because his conduct was a single act even though the counts involved separate victims. We disagree.

{¶17} It is well-settled in this district that when an offense is defined in terms of conduct towards another, then there is dissimilar import for each person affected by the

conduct. See *State v. Patterson*, 8th Dist. No. 98127, 2012-Ohio-5511, ¶ 35, citing *State v. Poole*, 8th Dist. No. 94759, 2011-Ohio-716; *State v. Phillips*, 75 Ohio App.3d 785, 790, 600 N.E.2d 825 (2d Dist.1991), citing *State v. Jones*, 18 Ohio St.3d 116, 118, 480 N.E.2d 408 (1985). In other words, where a defendant commits the same offense against different victims during the same course of conduct, a separate animus exists for each victim such that the offenses are not allied, and the defendant can properly be convicted of and sentenced on multiple counts. *State v. Chaney*, 8th Dist. No. 97872, 2012-Ohio-4933, ¶ 26, citing *State v. Gregory*, 90 Ohio App.3d 124, 129, 628 N.E.2d 86 (12th Dist. 1993).

{¶18} In *State v. Collins*, 8th Dist. No. 95415, 2011-Ohio-3241, this court found that

while the aggravated arson and felony murder counts merge, the separate counts as to each victim remain. Although Collins set one fire, he created a substantial risk of harm or injury to four children. See also *State v. Franklin*, 97 Ohio St.3d 1, 2002-Ohio-5304, 776 N.E.2d 26, ¶ 48 (rejecting defendant's argument that he set only one fire and therefore committed only one arson; court held that defendant committed six counts of aggravated arson because defendant knowingly set a fire that created a substantial risk of serious harm or injury to six people).

Id. at ¶ 21.

{¶19} In this case, the facts as they are set forth in the record show that there were three people in the house at the time of the fire; each victim corresponds to one count of attempted murder. As to Count 7, aggravated arson, Piscura's conviction under that count for knowingly causing physical harm to the Churbys' house was separate and apart from attempting to cause the death of Stillman, Hamila, and Zimmerman.

{¶20} Therefore, Piscura’s convictions on Counts 2, 4, 6, and 7 do not merge.

Possessing Criminal Tools and Possession of Dangerous Ordnance

{¶21} Piscura argues that his convictions for possessing criminal tools and possession of dangerous ordnance should merge into each other and into the other counts, because his possession of the firebombs, rock, and motor vehicle “concern nothing more than implements needed to perform the firebombing act. They had no independent criminal purpose.”

{¶22} R.C. 2923.24, possession of criminal tools, provides that no person shall possess or have under his control any substance, device, instrument or article with the purpose to use it criminally. R.C. 2923.17(A), the statute governing unlawful possession of dangerous ordnance, provides that no person shall knowingly acquire, have, carry or use any dangerous ordnance.

{¶23} Historically, this court has declined to find that possessing criminal tools and possessing a dangerous ordnance merge as allied offenses of similar import. See *State v. Garay*, 8th Dist. No. 57704, 1990 Ohio App. LEXIS 5656 (Dec. 20, 1990); *State v. Lane*, 8th Dist. No. 56707, 1990 Ohio App. LEXIS 2433 (June 14, 1990). However, *Johnson* now requires courts to focus on the particular conduct of the specific defendant at issue. *Id.* at syllabus. The analysis must be driven by the record and the evidence and theories the state actually introduced, not retrospective hypothecating about what charges a defendant’s conduct could have supported. *Id.* at ¶ 56-57; 69-70 (O’Connor, J., concurring).

{¶24} Recently, in *State v. Fairfield*, 8th Dist. No. 97466, 2012-Ohio-5060, ¶ 29, this court found that, post-*Johnson*, possession of a dangerous ordnance, possession of criminal tools, and receiving stolen property were allied offenses of similar import that merge. The defendant was charged with 75 counts that concerned the possession of two shock tubes, two spools of detonation cord, four wrapped blasting caps, four unwrapped blasting caps, eight booby traps, five igniters, an actuator, and a jar of napalm.

This court noted that

[p]rior to the *Johnson* case, the offenses of possession of criminal tools, receiving stolen property, and possession of a dangerous ordnance would not merge, because the statutory elements of each requires a different element. However, that is no longer our focus in determining the merging of allied offenses. Our focus is now whether it is possible for the offenses to be committed by the same conduct. Fairfield's receiving the stolen property in the instant case, also results in him * * * unlawfully possessing a dangerous ordnance and possessing a criminal tool.

Id. at ¶ 26.

{¶25} Likewise, in this case, Piscura's conduct of possessing the firebomb is sufficient to support a charge and conviction of both possession of a dangerous ordnance and possessing criminal tools. See *State v. Adkins*, 80 Ohio App.3d 211, 222-223, 608 N.E.2d 1152 (4th Dist.1992) (Grey, J., dissenting) (offenses are the "same" when they are the same in type, place, time, and number); *State v. Houston*, 26 Ohio App.3d 26, 498 N.E.2d 188 (8th Dist.1985) (possession of a dangerous ordnance and possessing criminal tools are allied offenses, when the sawed-off shotgun was both the dangerous ordnance and criminal tool.)

{¶26} We are cognizant that the state indicted the possession of criminal tools

charge to indicate that Piscura possessed the firebomb, rock, and/or motor vehicle; rather than delineating each “tool” under a separate charge, the state chose to combine the items under one charge. When the state chooses to do this, then for sentencing purposes, we must construe the statute governing allied offenses in favor of the defendant. *See* R.C. 2901.04(A) (statutes “defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused.”) Accordingly, because the state identified under the indictment that the firebomb was both the dangerous ordnance and a criminal tool, the result is that Count 8 possession of a dangerous ordnance and Count 9 possessing criminal tools are allied offenses.

{¶27} Perhaps if Piscura had been indicted under R.C. 2923.17(B) for illegally manufacturing the firebombs instead of the subsection prohibiting possession (R.C. 2923.17(A)), we could consider the manufacture of the firebombs separate and distinct from possessing criminal tools. *See, e.g., State v. Ballard*, 8th Dist. No. 98355, 2013-Ohio-373, ¶ 14, citing *State v. Sludder*, 3d Dist. No. 1-11-69, 2012-Ohio-4014 (“[w]hen one offense was complete before another offense occurred, the two offenses are committed separately for purposes of R.C. 2941.25(B), notwithstanding their proximity in time and that one was committed in order to commit the other.”)

{¶28} Looking at the conduct and animus of the defendant, the instrumentalities involved, the time frame under which this occurred, the matter in which the charges were indicted, and the state’s theory of the case, Count 8, possession of a dangerous ordnance and Court 9, possessing criminal tools are allied offenses and merge for sentencing

purposes.

Additional Merger Not Warranted

{¶29} Next, we consider whether Counts 8 and 9 merge into the other counts.

We find that they do not.

{¶30} Piscura was convicted of attempted murder in violation of R.C. 2903.02 and 2923.02(A), which, when read together, provide that no person shall purposely or knowingly attempt to cause the death of another. Piscura was also convicted of aggravated arson in violation of R.C. 2909.02(A)(2), which states that “[n]o person, by means of fire or explosion, shall knowingly cause physical harm to any occupied structure.”

{¶31} In determining whether a separate animus exists for two offenses, a court may examine “case-specific factors such as whether the defendant at some point broke ‘a temporal continuum started by his initial act,’ [or] whether facts appear in the record that ‘distinguish the circumstances or draw a line of distinction that enables a trier of fact to reasonably conclude separate and distinct crimes were committed.’” *State v. Roberts*, 180 Ohio App.3d 666, 2009-Ohio-298, 906 N.E.2d 1177, ¶ 14 (3d Dist.), citing *State v. Williams*, 8th Dist. No. 89726, 2008-Ohio-5286.

{¶32} Here, the Molotov cocktails used to firebomb the house had to be constructed. The arson investigator stated that one firebomb was made from a liquor bottle and the other fashioned from a canning jar. Both devices contained wicks and were designed to have an ignitable liquid in the interior. The text messages sent

between Piscura and Veto showed that Veto constructed the firebombs while Piscura was on his way to pick him up. Specifically, Veto texted to Piscura: “I can make three firebombs, and I know one place that needs it. * * * Got all the tools. Just need a ride.” And later Veto texted: “We have got to prepare. Are you on your way? Got rags and a bottle and a sledgehammer ready. I’m going to gas them up as soon as you get here.” Piscura picked Veto up and the two men took the newly manufactured firebombs, a rock, and a sledgehammer. They drove to the Churbys’ house where Veto used the rock to break the window and throw the firebombs into the home.

{¶33} Although we consider the acts of this particular defendant, we look to prior cases for illustration and guidance purposes. In *State v. Ayers*, 12th Dist. Nos. CA2010-12-119 and CA2010-12-120, 2011-Ohio-4719, the court found that although it is possible to commit aggravated robbery and unlawfully possession of a dangerous ordnance with the same conduct, the defendant did not commit the offenses with the same animus. The court noted: “As the record clearly indicates, appellant had the sawed-off shotgun prior to entering the Speedway store. In turn, by acquiring the unlawful dangerous ordnance prior to robbing the Speedway store, the offenses were undoubtedly committed with separate and distinct conduct, and not * * * in a single act committed with a single state of mind.” *Id.* at ¶ 32.

{¶34} To illustrate our analysis in this case, it is helpful to consider rape and kidnapping cases where the perpetrator moves the victim from one location to another. Whether the offenses are considered allied depends on whether the restraint or movement

was incidental to the crime or was “substantial so as to demonstrate a significance independent of the other offense.” *State v. Logan*, 60 Ohio St.2d 126, 397 N.E.2d 1345 (1979), syllabus. Even though the defendant’s ultimate purpose of moving the victim was to perpetrate the rape, courts have repeatedly held that rape and kidnapping are not allied when the asportation of the victim is substantial so as to be independent of the rape.

See, e.g., State v. Rose, 12 Dist. No. CA2011-11-214, 2012-Ohio-5607 (holding that the rape and kidnapping were not allied offenses subject to merger because defendant forcefully moved victim from tavern across parking lot to car and then committed the rape.)

{¶35} In *State v. Sludder*, 3d Dist. No. 1-11-69, 2012-Ohio-4014, ¶ 14, the court determined that breaking and entering and theft were not allied offenses even though the two offenses were committed close in time. “Because one offense was complete before the other offense occurred, the two offenses were committed separately for purposes of R.C. 2941.25(B), notwithstanding their proximity in time and that one was committed in order to commit the other.” *Id.*, citing *State v. Turner*, 2d Dist. No. 24421, 2011-Ohio-6714, ¶ 24.

To conclude otherwise would encourage those who break into buildings to steal to proceed with the theft since the offenses would merge for purposes of conviction and sentence. The law ought to encourage criminals to stop their course of criminal conduct and to demand punishment for their further criminal acts.

Sludder at id.

{¶36} The same is equally true in this case. Piscura’s conduct of possessing the

firebomb was separate and distinct from the crimes of attempted murder and aggravated arson because transporting the firebombs to the residence and the subsequent act of throwing them the residence was done with a separate animus and conduct. There is a distinction and break in the continuum of events that allowed the trial court to reasonably conclude that separate and distinct crimes were committed.

{¶37} Therefore, possessing the criminal tools and dangerous ordnance was separate and distinct from the subsequent act of transporting and throwing them into the residence and committing the crimes of attempted murder as charged in Counts 2, 4, and 6, and aggravated arson as charged in Count 7.

{¶38} Again, pursuant to *Johnson*, we are called to review this defendant's specific conduct in this case; each case requires a individual and thoughtful analysis by first the trial court and then the reviewing court.

{¶39} Accordingly, based on the specific facts of this case and the conduct of this defendant, Counts 8 and 9 merge into each other but do not merge into any other count. We reverse and vacate Piscura's sentence as to Counts 8 and 9 only, and remand for a new sentencing hearing on the offense that remains after the state selects which allied offense to pursue. *Fairfield*, 8th Dist. No. 97466, 2012-Ohio-5060 at ¶ 29, citing *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, 951 N.E.2d 381.

{¶40} The sole assignment of error is overruled in part and sustained in part.

It is ordered that appellant and appellee split 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.

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

LARRY A. JONES, SR., PRESIDING JUDGE

KATHLEEN ANN KEOUGH, J., CONCURS;
MARY EILEEN KILBANE, J., CONCURS IN
PART AND DISSENTS IN PART WITH
SEPARATE OPINION

MARY EILEEN KILBANE, J., CONCURRING IN PART AND DISSENTING IN PART:

{¶41} I concur with the majority's decision with respect to its disposition of Counts 1-7, but respectfully dissent on Count 8 (unlawful possession of a dangerous ordnance) and Count 9 (possessing criminal tools). I would find that these counts are not allied offenses, and thus, they do not merge for purposes of sentencing.

{¶42} As the majority noted, when evaluating offenses of similar import, the offenses will not merge if the offenses are committed separately, or if the defendant has a separate animus for each offense. *Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, at ¶ 50. The *Johnson* court recognized that the analysis of allied offenses

may be sometimes difficult to perform and may result in varying results for the same set of offenses in different cases. But different results are permissible, given that the statute instructs courts to examine a defendant's conduct — an inherently subjective determination. Thus, a scenario might

arise * * * in which one court finds that an aggravated robbery can be and was committed without also committing a kidnapping, if, for instance, “a pickpocket points a gun at the victim, but the victim does not know it, and therefore suffers no restraint of his liberty,” while in another case, the court may determine that the commission of an aggravated robbery in that case would also constitute a kidnapping, because “a weapon that has been shown * * * during the commission of a theft offense * * * forcibly restrain[ed] the liberty of another.”

Id. at ¶ 52, quoting *State v. Winn*, 121 Ohio St.3d 413, 2009-Ohio-1059, 905 N.E.2d 154, ¶ 21, 29 (Moyer, C.J., dissenting).

{¶43} In *Johnson*, the Ohio Supreme Court found the crimes of felony murder and child endangering were based upon the same conduct for purposes of R.C. 2941.25. Thus, the court concluded that defendant’s conduct of beating the victim qualified as the commission of child abuse, which resulted in the victim’s death, thereby qualifying as the commission of felony murder. *Id.* at ¶ 56-57.

{¶44} In the instant case, I would find that unlawful possession of a dangerous ordnance and possession of criminal tools are not allied offenses. While the state identified the firebomb as both the criminal tool and the dangerous ordnance, the state also identified a rock and/or motor vehicle as the criminal tool. The possessing criminal tools charge, as indicted, states that Piscura

did possess or have under the person’s control any substance, device, instrument, or article, to wit: an Incendiary Device(s) and/or a Rock and/or a 2004 Toyota Camry Solara Automobile, with purpose to use it criminally.

FURTHERMORE the An (*sic.*) Incendiary Device(s) and/or a Rock and/or a 2004 Toyota Camry Solara Automobile, involved in the offense were intended for use in the commission of a felony, to wit: [Attempted Murder and/or Aggravated Arson.]

{¶45} The offenses were based upon the following conduct. Veto was at home when he constructed the firebombs with glass bottles, rags, and gasoline. He then intended to use the firebombs on the Churby home where his ex-girlfriend was living. He enlisted Piscura's assistance with his plan. He texted to Piscura: "Just need a ride. Got rags and a bottle and a sledgehammer ready. I'm going to gas them up as soon as you get here." Piscura agreed to pick Veto up and drive him to the Churbys' home. He responded to Veto: "Sweet. * * * [I'm in] your driveway." Piscura then drove Veto to the Churbys' house, where Veto first used a rock to break the front window and then threw both firebombs into the house. When the firebombs hit the home, the home exploded.

{¶46} The conduct of acquiring the firebombs constituted unlawful possession of a dangerous ordnance under R.C. 2923.17(A).¹ This act was committed at a separate time and place, and with a separate animus from the conduct of then driving to the Churbys' home and first using the rock to break the front window and then using the firebombs to set the house on fire. The indictment before us lists, and Piscura pled guilty to, the possession of the firebombs and/or the rock and/or the motor vehicle. The charge lists the criminal tools in the conjunctive and disjunctive, therefore, I would find that the rock and motor vehicle constitute the possession of criminal tools under R.C. 2923.24(A).²

¹R.C. 2923.17(A) provides: "[n]o person shall knowingly acquire, have, carry, or use any dangerous ordnance."

²R.C. 2923.24(A) provides: "[n]o person shall possess or have under the person's control any substance, device, instrument, or article, with purpose to use it criminally."

Thus, when looking at the conduct and animus of the defendant, the different instrumentalities involved, the charges as indicted, and the charges Piscura pled guilty to, I would find that Count 8 (unlawful possession of a dangerous ordnance) and Count 9 (possessing criminal tools) are not allied offenses and do not merge for sentencing purposes.

{¶47} Accordingly, I would overrule the sole assignment of error in its entirety.