ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Appellant,

v.

BOBBY NOLAN

Appellee.

Case No. 13-1290

On Appeal From the Portage County Court of Appeals, Eleventh Appellate District

Court of Appeals Case No. 2012-P-0047

MERIT BRIEF OF THE STATE OF OHIO

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STATEMENT OF THE CASE AND FACTS

STATEMENT OF FACTS

The morning of November 15, 2011, was a lucky morning for Travis McPeak (hereinafter "Travis"). Lucky because he had been shot that morning and survived. Travis spent the morning with a friend, Tiffany Burns, at her apartment in Kent, Ohio. (Transcript of Proceedings from February 28, 2012, hereinafter "T.p. book 2", 20). The two watched *Beverly Hills Cops* and made casual conversation while Tiffany folded her clothes. (T.p. book 2, 20). Eventually, four people came to Tiffany's apartment. (T.p. book 2, 21). Of the four people, three were black, one was white, all four were male and Travis knew only one of them: Nolan. (T.p. book 2, 21-22). Travis knew Nolan from being in jail with him in Portage County. (T.p. book 2, 22). As the morning progressed, Nolan called Travis a racist and ordered him to strip off his clothing. (T.p. book 2, 23). Travis's clothing and phone were searched by these men. (T.p. book 2, 23).

The strip search made Travis very uncomfortable so he decided to leave the apartment. (T.p. book 2, 24-25). He was followed by Nolan. (T.p. book 2, 25). Out of the corner of his eye Travis noticed the shadow of Nolan trying to punch him, so he ducked. (T.p. book 2, 26). Travis turned around, pushed Nolan, squared up to fight him and saw a big flash, realizing that he had been shot. (T.p. book 2, 28). A witness saw Nolan stand up and shoot Travis at a downward angle. (T.p. book 2, 94). Scared by what happened, Travis ran from the apartment area, waited under a tree and eventually went to Circle K for help. (T.p. book 2, 30-31).

At Circle K, Travis bummed a cigarette from the cashier and asked if he could use the phone to call the police because he had just been shot in the leg. (T.p. book 1, 223). The cashier called the police on her cell phone and gave Travis the store phone so he could call his brother. (T.p. book 1, 224). The responding officer noticed blood coming from Travis's left leg and accompanied Travis to the hospital to photograph his wounds and his clothing for evidence. (T.p. book 1, 158 and 163).

PROCEDURAL HISTORY

On November 23, 2011, the Portage County Grand Jury indicted Bobby Nolan on two counts of attempted murder with firearms specifications under R.C. 2903.02, R.C. 2923.02(B), R.C. 2929.02 and R.C. 2941.123. He was also indicted for felonious assault with a firearm specification pursuant to R.C. 2903.11(A)(2) and having a weapon under disability pursuant to R.C. 2923.12(A)(3)(C). (Transcript of the docket, journal entries and original papers hereinafter "T.d." 1).

On November 29, 2011, Nolan was arraigned on these charges and entered a plea of not guilty. (T.d. 8). On December 1, 2011, the Portage County Grand Jury returned a supplemental indictment on Nolan. (T.d. 11). On December 15, 2011, Nolan entered a plea of not guilty on the supplemental indictment. (T.d. 21). A jury trial commenced on February 27, 2012. The jury returned verdicts of guilty for count two attempted felony murder, the specification to count two, count three felonious assault, the specification to count three, and having a weapon while under disability. (T.d. 50-54). The jury found Nolan not guilty of count one attempted murder. (T.d. 49).

On April 9, 2012, the State elected to have Nolan sentenced on the attempted felony murder charge. The trial court sentenced Nolan to seven years for the attempted felony murder charge to be served consecutively to a mandatory three year term for the gun specification charge. (T.d. 66). Nolan received two years for the weapon under disability charged to be served concurrent to the other charges. (T.d. 66).

On May 11, 2012, a timely notice of appeal was filed with the Eleventh District Court of Appeals. (T.d. 70). Nolan raised three assignments of error including an evidentiary challenge to medical records and testimony, an ineffective assistance of counsel claim and a challenge to the manifest weight of the evidence. *Nolan*, 2013-Ohio-2829, at ¶ 23-25. The appellate court found no merit with Nolan's assigned errors, but did find merit with an issue it raised sua sponte after the case was submitted on the briefs. *Id.*, at ¶ 64. Specifically, the appellate court held because attempted felony murder was not a viable criminal offense in Ohio, the trial court committed plain error in allowing the state to proceed to trial on that charge. *Id.*, at ¶ 53. The Eleventh District relied on an earlier decision of the court, opinions from 14 other states and "[T]he lack of any conflicting authority in Ohio," to invalidate the attempted felony murder charge. *Id.*, at ¶ 52. It is from this decision that the State filed a notice of appeal with this Court.

ARGUMENT

State of Ohio's Proposition of Law: An appellate district court errs in finding attempted felony murder by means of a deadly weapon is not a viable criminal offense in Ohio because that decision is in conflict with *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147, 922 N.E.2d 937.

State v. Williams

After a dice game in East Cleveland, Williams fired two shots. One of the two bullets struck McKinney in the back resulting in instant paralysis. A jury found Williams guilty of one count of felonious assault and one count of attempted murder for each bullet fired at McKinney. *Williams*, 2010-Ohio-147, at ¶ 6. The trial court sentenced Williams separately for each count. *Id.* The Eighth District reversed the trial court finding the felonious assault and attempted murder for the bullet that paralyzed McKinney were allied offenses of similar import that should have merged for purposes of sentencing. *Id.*, at ¶ 8. The state moved for reconsideration arguing that the deadly weapon element contained in the felonious assault count was not present in the attempted murder under R.C. 2903.02(B). On reconsideration, the appellate court found Williams committed the attempted murders and felonious assaults with a single purpose causing merger and the elements of R.C. 2903.02(A) and (B) so aligned that one could not commit one form without committing the other, also requiring merger. *Id.*, at ¶ 10.

The state's appeal to this Court was accepted for review. This Court began its allied offenses of similar import analysis by stating it required a determination, "[W]hether the legislature intended to permit the imposition of multiple punishments for conduct that constitutes multiple crimes." *Williams*, 2010-Ohio-147, at ¶ 12. Applying *Cabrales*, this Court first considered whether the attempted murder and felonious assault charges related to each gunshot were allied offenses of similar import. Comparing the elements of R.C. 2903.02(B) and 2903.11(A) in the abstract, this Court found the offenses as defined were allied offenses. *Id.*, at ¶ 23.

Next, the analysis reviewed whether the two offenses related to the bullet that struck and paralyzed McKinney were committed separately or with a separate animus. When Williams knowingly fired a gun at McKinney and paralyzed McKinney with one bullet, Williams, "[K]nowingly engaged in conduct that, if successful, would have resulted in the death of another as a proximate result of committing felonious assault." *Id.*, at ¶ 24. This Court concluded, "Thus, he committed the offenses of attempted murder [R.C. 2903.02(B)] and felonious assault with a single act and animus. Accordingly, while he may be found guilty of both offenses, he may be sentenced for only one." *Id.* This Court then found when Williams knowingly fired the bullet that missed McKinney, the felonious assault and attempted murder (R.C. 2903.02(A)) were also allied offenses of similar import allowing a sentence for only one at the state's selection. *Id.*, at ¶ 26-27.

Accordingly, *Williams* supports the proposition that even gunshots separated by a small interval can establish a separate animus for purposes of establishing distinct offenses to preclude the application of the merger doctrine. *Id.*, at ¶ 24.

<u>*Nolan* in Conflict with *Williams* Case</u>

The Eleventh District erroneously limited *Williams* to an allied offenses of similar import decision where, "[T]he Supreme Court never addressed the question of whether attempted felony murder is a viable criminal offense in Ohio." *Nolan*, 2013-Ohio-2829, at ¶ 49. The appellate court noted that there was no indication that the defendant in *Williams* ever challenged the legal propriety of the attempted felony murder charge. *Id.* The same is true here, as the viability of the attempted felony murder charge was raised not by Nolan but sua sponte by the panel. *Id.*, at 38.

As the above case review of *Williams* demonstrates, this Court expressly found a defendant may be found guilty of attempted felony murder and felonious assault by means of a deadly weapon when the victim lives despite injuries sustained by the gunshot, "[W]hile [the defendant] may be found guilty of both offenses, he may be sentenced for only one." *Williams*, 2010-Ohio-147, at ¶ 24.

In the present case, the predicate felony offense of violence was felonious assault with a deadly weapon pursuant to R.C. 2903.11(A)(2), "[n]o person shall knowingly * * * cause or attempt to cause physical harm to another * * * by means of a deadly weapon." A person acts knowingly, regardless of purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist. R.C. 2901.22(B).

Under the felony murder statute, the state was <u>not</u> required to prove that Nolan intended to cause Travis to die, only that Nolan knew that physical harm to Travis was probable. When Nolan placed a loaded firearm within close proximity to Travis's body and shot Travis, he was aware that his conduct would probably cause a certain result; harm to Travis. In an effort to injure Travis, it was luck, not skill or aim that prevented the bullet from shattering Travis's femur or puncturing his femoral artery. Travis survived the shooting. Based on eyewitness testimony, it is reasonable to believe that this was not an accidental shooting. (T.p. book 2, 28, 94).

Trial evidence demonstrated that Nolan's shooting of Travis was more than a felonious assault with a deadly weapon. Medical testimony established that the bullet narrowly missed the femoral artery and femur. (T.p. book 2, 169-170). Had the

bullet struck his femur or femoral artery, Travis would have rapidly bled to death. (T.p. book 2, 169-170). Therefore, Nolan knowingly engaged in conduct that, if successful, would have resulted in the death of another as a proximate result of committing the offense of felonious assault. R.C. 2903.02(B), 2923.02(A).

CONCLUSION

A reversal of the Eleventh District's decision invalidating the criminal offense of attempted felony murder is warranted. In *Williams,* this Court expressly found a defendant may be found guilty of attempted felony murder and felonious assault by means of a deadly weapon when the victim lives despite injuries sustained by the gunshot. Therefore, *Nolan* is in conflict with this Court's decision in *Williams*.

Limiting *Williams* to an allied offenses of similar import decision, the Eleventh District invalidated an attempted strict liability offense creating an analysis that could be easily applied to any other attempted strict liability offense found in the criminal code. The Appellant, State of Ohio, respectfully moves this Court to sustain its proposition of law, reverse the decision of the Eleventh District Court of Appeals and affirm the judgment of the Portage County Court of Common Pleas.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit brief of the State of Ohio has been sent by ordinary U.S. mail to Richard E. Hackerd at 2000 Standard Building, 1370 Ontario Street, Cleveland, Ohio 44113-1726, this 21st day of January 2014.

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Assistant Prosecuting Attorney

APPENDIX

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Appellant,

v.

BOBBY NOLAN

Appellee.

CASE NO. 13-1290

On Appeal From the Portage County Court of Appeals, Eleventh Appellate District

Court of Appeals Case No. 2012-P-0047

NOTICE OF APPEAL OF STATE OF OHIO

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NOTICE OF APPEAL

Appellant State of Ohio hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Portage County Court of Appeals, Eleventh Appellate District, entered in Court of Appeals Case No. 2012-P-0047 on June 28, 2013.

This case raises a substantial constitutional question and is one of public or great general interest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal has been sent regular U.S. mail to Patricia Smith at 9442 State Route 43, Streetsboro, Ohio 44241, this 9th day of August 2013.

PAMELA J. HOLDER
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IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

FILED
COURT OF APPEALS
JUN 28 2013
LINDA K FANKHAUSER, CLERK
PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2012-P-0047
BOBBY D. NOLAN,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Court of Common Pleas, Case No. 2011 CR 0727.

Judgment: Affirmed in part; reversed in part and remanded.

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Patricia J. Smith, 9442 State Route 43, Streetsboro, OH 44241 (For Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} This appeal is from the final judgment in a criminal proceeding before the Potage County Court of Common Pleas. After a jury trial, appellant, Bobby D. Nolan, was found guilty of attempted felony murder, felonious assault, and possessing a firearm while under a disability. He maintains that his conviction must be reversed because he was denied proper discovery and the jury verdict was against the weight of the evidence.

{¶2} The subject matter of this case concerns an altercation between appellant and the victim, Travis McPeak. The altercation happened in the yard of an apartment complex in Kent, Ohio, during the early morning hours of November 15, 2011. Prior to the incident, appellant and McPeak had met on only one occasion, approximately two years earlier when both men were incarcerated at the Portage County Jail.

{¶3} Tiffany Burns was a resident of the apartment complex where the incident occurred. Prior to November 15, 2011, Tiffany had shared her apartment with Nicole David, who was appellant's girlfriend. Recently, Nicole had moved from the apartment and started to live with appellant. At that time, appellant was living with another friend, Joshua Tipton, in Stow, Ohio.

{¶4} A few hours before the altercation, McPeak met Tiffany at a restaurant in Ravenna, Ohio. McPeak drove his own truck to the restaurant; however, at some point in the evening, he decided to "loan" his vehicle to Herschel Hill in exchange for illegal drugs.

{¶5} After their initial rendezvous at the restaurant, McPeak and Tiffany went to the home of a female friend in Ravenna, where they used illegal drugs. Eventually, they decided to go to Tiffany's apartment in Kent. The female friend agreed to drive McPeak and Tiffany to Kent, and they arrived at the apartment at approximately 12:00 a.m.

{¶6} Over the next two hours, McPeak and Tiffany watched a movie together. During this period, they had been alone in her apartment. At some point after the end of the movie, though, appellant came to the apartment. He was accompanied by Joshua Tipton and two other men. Prior to going to Tiffany's apartment, the four men had been at a local bar, where appellant had also engaged in illegal drug use.

{¶7} Almost instantly after entering the apartment, appellant began to verbally harass McPeak, claiming that McPeak was a racist. At one point during the "harassing" stage of the altercation, appellant ordered McPeak to totally disrobe so that his clothes could be checked. Upon putting his garments back on, McPeak decided to leave and went out the sole outside door to Tiffany's apartment. He then proceeded to go toward the sidewalk that was located near the adjacent roadway. At that juncture, Tipton was seated in the vehicle he had used to drive appellant to the apartment. Tipton's vehicle was not parked directly in front of Tiffany's door, but instead was located a few yards down the roadway.

{¶8} As McPeak got to the sidewalk and began to turn right, he saw a shadow coming toward him from behind. As McPeak turned to look, appellant attempted to hit him. However, McPeak was able to duck and avoid the intended blow. He then pushed appellant to the ground.

{¶9} As appellant was standing up, he removed a firearm from the front pocket of his sweatshirt and immediately fired it in the general direction of McPeak. The bullet entered the outside edge of McPeak's left thigh, went across the entire width of the left thigh, and exited the inside edge of the thigh. The bullet did not hit the femur bone in the left thigh; nor did it hit the main artery for McPeak's left leg.

{¶10} According to McPeak, he never saw appellant point the firearm at him, but only saw a flash of light. According to Joshua Tipton, who saw the altercation through the rearview mirror of his vehicle, appellant pointed the firearm downward, rather than at McPeak's torso or head. Pursuant to appellant's version of the events, he pointed the firearm downward because he was only attempting to intimidate McPeak.

{¶11} Upon being shot, McPeak ran away from the apartment complex. While appellant yelled at McPeak as he was running, appellant did not fire the gun again and did not chase after him. Over the next thirty minutes, McPeak hid in two different locations and tried to contact Tiffany and his brother on his cell phone. When he was convinced that he was not being followed, McPeak walked into a local convenient store and asked to use the store phone. While he again tried to contact his brother, the store clerk called the police on her cell phone. After the police arrived and noticed McPeak's injury, he was transported to a local hospital.

{¶12} When the Kent police tried to question McPeak about the shooting, he was initially evasive. In fact, at one point, he told an officer that he thought his truck had been stolen that night. However, after he was treated at the hospital, he explained the entire incident to the police and executed a written statement. In addition, McPeak was able to pick appellant out in a photo array.

{¶13} The Kent police were never able to recover the firearm that appellant used in the shooting. In testifying for the state at trial, Joshua Tipton indicated that appellant threw the firearm into a local lake.

{¶14} Within one week of the incident, the Portage County Grand jury returned a three-count indictment, charging appellant with two counts of attempted murder and one count of felonious assault. Each of the three counts had a firearm specification. While these charges were pending, the grand jury returned a supplemental indictment, under which appellant was charged with having a firearm while under a disability.

{¶15} Pursuant to the first count of attempted murder, appellant was charged under R.C. 2923.02 and 2903.02(A), and essentially asserted that appellant purposely

attempted to cause McPeak's death. The second attempted murder count was brought under R.C. 2923.02 and 2903.02(B), and asserted that appellant knowingly engaged in behavior that, if successful, would have caused McPeak's death as a proximate cause of his commission of the underlying offense of felonious assault.

{¶16} After appellant entered a plea of not guilty to all four charges, the parties went forward with discovery. In response to appellant's request for all medical records stemming from McPeak's hospital visit, the state only provided a three-page report.

{¶17} A three-day jury was held in February 2012. As part of its case-in-chief, the state called Dr. Amy Swegan, a surgeon who treated McPeak at the hospital on the morning of the incident. In anticipation of the doctor's testimony, on the first day of the trial, the state and the defense received from the hospital a packet of records regarding McPeak which was substantially larger than the three-page report. These new records contained some discussion concerning where the bullet had entered McPeak's thigh and where it had exited.

{¶18} At the outset of the second day of the trial, appellant's trial counsel moved the trial court to exclude the packet of hospital records from evidence on the basis that the defense had been denied timely discovery. The trial court granted this motion in part, specifically holding that the state would not be allowed to introduce the packet of hospital records into evidence. However, the court also held that Dr. Swegan would be permitted to review the packet for purposes of her testimony.

{¶19} In addition to Dr. Swegan, the state relied primarily upon the testimony of McPeak and Joshua Tipton. In response, appellant testified on his own behalf. As part of his testimony, appellant stated that he did not point the gun directly at McPeak, and

that he was only trying to scare McPeak by firing the gun at the ground.

{¶20} At the conclusion of the trial, the jury found appellant not guilty on the first count of attempted murder. However, the jury returned a guilty verdict on the remaining three counts. At the subsequent sentencing hearing, the trial court held that the second attempted murder count and the felonious assault count would be merged because they were allied offenses of similar import. Based upon this, the state elected to sentence appellant solely on the second attempted murder count.

{¶21} In relation to the attempted murder count and the accompanying firearm specification, the trial court imposed consecutive terms of seven years and three years. As to the separate count of having a weapon while under a disability, the court ordered a three-year term, to run concurrently with the ten-year term.

{¶22} In appealing his conviction, appellant has asserted three assignments of error for review:

{¶23} "[1.] The trial court erred when it failed to preclude the state from using medical records and testimonial evidence that were provided to defense counsel on the day of trial in violation of Criminal Rule 16. In the alternative the trial court erred when it failed to grant a continuance of the trial for the appellant to review the surprise evidence. The appellant was denied the right to a fair and impartial trial and due process of law.

{¶24} "[2.] Trial counsel was ineffective for failing to move for a continuance when presented with Criminal Rule 16 materials on the day of trial that were detrimental to and material to the appellant's defense.

{¶25} "[3.] The jury verdict was against the manifest weight of the evidence

where the evidence did not support a finding that the appellant acted with purposeful intent to commit murder when the evidence was apparent by all witness accounts that the appellant fired the weapon downward negligently and recklessly."

{¶26} Under his first assignment, appellant challenges the trial court's ruling on his motion to exclude the packet of medical records which were not provided to his trial counsel until the first day of the trial. While acknowledging that the state was denied the ability to introduce the packet into evidence, appellant still contends that the trial court erred in allowing Dr. Swegan to review the entire packet before she testified. According to appellant, by permitting the doctor to base her testimony on those records, the court indirectly allowed the jury to hear the substance of the "new" records.

{¶27} The focus of defense counsel's objection to the packet of records was the presence of materials that discussed the nature of the wounds on McPeak's left thigh. Specifically, the packet contained two documents indicating that hospital employees had made a determination concerning where the bullet had entered McPeak's thigh and exited the thigh. That is, the documents stated that the bullet entered through the outer edge of the thigh and exited via the inside edge.

{¶28} The foregoing analysis of the wounds appears to have directly conflicted with defense counsel's theory of the case. Appellant asserted that his counsel intended to show that the bullet had actually entered through the interior of the thigh. In light of this, his counsel would then argued that the evidence supported the factual finding that appellant did not act purposefully in firing the gun toward McPeak, but only recklessly or negligently.

{¶29} When the failure to disclose relevant information is discovered during the

course of a criminal trial, it is governed by Crim.R. 16. *State v. Summers*, 11th Dist. No. 2011-A-0040, 2012-Ohio-4457, ¶28. Pursuant to Crim.R. 16(B)(3), the state is required to provide to the defense copies of all hospital records that are reasonably available. If the state fails to abide by the foregoing rule, a three-part test is employed to determine the effect of a violation:

{¶30} "'Prosecutorial violations of Crim.R. 16 are reversible only when there is a showing that (1) the prosecution's failure to disclose was a willful violation of the rule, (2) foreknowledge of the information would have benefitted the accused in the preparation of his defense, and (3) the accused suffered some prejudicial effect.'" *Summers*, at ¶28, quoting *State v. Joseph*, 73 Ohio St.3d 450, 458 (1995).

{¶31} As to the first prong of the foregoing test, there is nothing in the record of this case to indicate that the state intentionally withheld the packet of hospital records from the defense in order to obtain a tactical advantage. Rather, the record supports the conclusion that the state had not been aware of those particular records until they were disclosed by the hospital on the first day of the trial.

{¶32} Regarding the second and third prong, this court would reiterate that the primary aim of the defense case was to establish that appellant did not act purposefully during the altercation. Of the four charges against appellant, only one, the first count of attempted murder, alleged that he had acted purposefully. As noted above, appellant was specifically found not guilty of that charge. Thus, since the defense was able to prevail on the "purposeful" question, the trial record does not support the conclusion that the defense was harmed in its preparation of the case, or that appellant was otherwise denied a fair trial.

{¶33} While the record does show that Dr. Swegan was permitted to testify in a manner that was consistent with the disputed materials in the packet of records, it also establishes that appellant was not prejudiced by the violation of Crim.R. 16. Therefore, appellant's first assignment is without merit.

{¶34} Under his second assignment, appellant submits that, once the trial court indicated that Dr. Swegan would be permitted to review the records packet, his counsel should have moved for a continuance. Appellant claims his trial counsel should have requested more time in which to obtain a medical expert who could have contradicted the doctor's testimony as to where the bullet had entered McPeak's thigh. Based upon this, appellant argues that he was denied effective assistance of trial counsel.

{¶35} In relation to this argument, this court would again note that, pursuant to trial counsel's theory of the underlying case, the question of where the bullet entered McPeak's thigh was only pertinent to the issue of whether appellant purposefully fired the gun at him. That is, trial counsel never tried to tie the "entry" question to the issue of whether appellant acted "knowingly" in firing the gun, as is required for felony murder under R.C. 2903.02(B) and felonious assault under R.C. 2903.11(A)(2). Hence, given that the jury never found that appellant acted intentionally, the granting of a continuance would not have had any effect upon the outcome of appellant's trial.

{¶36} To demonstrate a claim of ineffective assistance, the criminal defendant must show, *inter alia*, that the result of his trial would have been different in the absence of the alleged inadequate representation. *State v. Kovacic*, 11th Dist. No. 2010-L-065, 2012-Ohio-219, ¶45. In this case, appellant cannot carry this burden because the trial record does not support the conclusion that the lack of a continuance deprived appellant

of a fair trial. For this reason, his second assignment is without merit.

{¶37} Under his final assignment, appellant maintains his conviction should be reversed as being against the manifest weight of the evidence. As with his previous two assignments, appellant's argument focuses upon whether the facts of this case justified a finding that he acted purposefully when he fired the gun toward McPeak. According to him, the evidence could only be interpreted to demonstrate that he acted recklessly or negligently.

{¶38} In relation to the infliction of the wound to McPeak's thigh, appellant was only found guilty of attempted felony murder and felonious assault. Prior to discussing the substance of appellant's evidentiary challenge, this court is compelled to address a separate question pertaining solely to the validity of his conviction for attempted felony murder. After oral arguments, we ordered the parties to submit supplemental briefing on the legal issue of whether attempted felony murder is a viable criminal offense under Ohio law. Specifically, the parties were instructed to consider our prior analysis on the issue in *State v. Hendrix*, 11th Dist. No. 2011-L-043, 2012-Ohio-2832. In conjunction with his new submission, appellant has asserted a supplemental assignment of error for review:

{¶39} "Whether as a matter of law, the appellant can be convicted of attempted felony murder when there was no resultant death."

{¶40} Appellant now contends that his conviction for attempted felony murder must be declared void because, since the death of another person is a required element for felony murder, the offense has no application in situations where the victim survives the incident. In response, the state argues that attempted felony murder is a recognized

criminal offense because the Supreme Court of Ohio has expressly upheld convictions for this crime.

{¶41} The basic offense of felony murder is defined in R.C. 2903.02(B):

{¶42} "(B) No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree * * *."

{¶43} Under the plain and unambiguous elements for felony murder, the state is not required to prove that the perpetrator acted with a specific mens rea in regard to causing the death of another person. Instead, the state is only obligated to show that the perpetrator had the necessary mens rea to commit the underlying violent offense. In contrast, Ohio's "attempt" statute, R.C. 2923.02(A), contains an express mens rea requirement: "No person, purposely or knowingly, * * *shall engage in conduct that, if successful, would constitute or result in the offense."

{¶44} In light of the respective elements under R.C. 2903.02(B) and 2923.02(A), a charge of "attempted felony murder" creates a purported offense that has conflicting elements. Although an accused must act purposely or knowingly in order to be found guilty of an "attempted" offense, such a state of mind is not needed in causing the death of another under felony murder. The import of this obvious conflict was addressed by this court in *Hendrix*, 2012-Ohio-2832, at ¶70-71:

{¶45} "An 'attempt' is typically referred to as an inchoate crime. *See e.g. In re Phillips*, 5th Dist. No. CT2001-0051, 2002-Ohio-1581, 2002 Ohio App. LEXIS 1624, *7 citing Black's Law Dictionary (6th ed. 1991) 761. In other words, the crime of 'attempt' is committed prior to and in preparation for an additional offense. An attempt requires

the specific intent to bring about a criminal result as well as a significant overt act in furtherance of that intent. *See State v. Williams*, 8th Dist. No. 72659, 1999 Ohio App. LEXIS 1446, *19 (Apr.1, 1999). Although an attempt is a complete offense in itself, it presumes the underlying crime for which the offender has prepared has not been completed.

{¶46} "Felony murder, alternatively, involves an inadvertent homicide resulting from the commission of a felony of violence. *See e.g. State v. Mays*, 2d Dist. No. 24168, 2012-Ohio-838, ¶6. By definition, therefore, a felony murder charge requires both a felony of violence *and* an unintended death. The victim, in this case, however, survived. Not only is it impossible to attempt to cause an unintended result, one cannot specifically intend to commit a crime that statutorily requires a homicide where no death occurs. We therefore hold the trial court should have dismissed the counts of attempted felony murder and complicity to attempted felony murder as both counts charge crimes which are logically impossible." (Emphasis sic.)

{¶47} In responding to appellant's supplemental assignment in this case, the state has not tried to directly refute this court's legal analysis in *Hendrix*. Instead, the state argues that *Hendrix* conflicts with the Ohio Supreme Court's decision in *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147. According to the state, *Williams* stands for the proposition that a criminal defendant can be charged and convicted of attempted felony murder in Ohio.

{¶48} In *Williams*, the defendant fired two gunshots in the general vicinity of the victim. Although one of the bullets struck the victim's spine and paralyzed him, he did not die from his injuries. The *Williams* defendant was then indicted on two counts of

felonious assault and two counts of attempted murder, including one count of attempted felony murder under R.C. 2903.02(B). After the jury found the defendant guilty on all four counts, the trial court imposed a separate sentence for each offense. *Id.* at ¶6. On appeal, the Eighth Appellate District held that the two counts of felonious assault should have been merged into the two counts of attempted murder, and that the two attempted murders should have then been merged for a single conviction and sentence. *Id.* at ¶10.

{¶49} In accepting the state's appeal in *Williams*, the Ohio Supreme Court only reviewed two issues: (1) are attempted felony murder and felonious assault under R.C. 2903.11(A)(1) allied offenses of similar import; and (2) are attempted "purposeful" murder and felonious assault under R.C. 2903.11(A)(2) allied offenses of similar import? *Id.* at ¶2. In resolving the first issue, the Supreme Court never addressed the question of whether attempted felony murder is a viable criminal offense in Ohio. In fact, there is no indication in the *Williams* opinion that the legal propriety of the attempted felony murder charge was ever challenged by the defendant. Hence, even though the Supreme Court implicitly assumed for the purposes of its limited discussion that the conviction for attempted felony murder was proper, the *Williams* decision is not dispositive of whether attempted felony murder constitutes a valid crime for which a defendant can be tried and convicted.

{¶50} To the foregoing extent, the state has failed to demonstrate that our *Hendrix* holding is inconsistent with any prior Ohio Supreme Court decision. In addition, the state has not cited any other Ohio appellate opinion reaching a different conclusion on the issue. *Cf., State v. Holley*, 2d Dist. Nos. CA 8195 and CA 8224, 1983 Ohio App.

LEXIS 12089 (Nov. 28, 1983). Moreover, our review of various decisions in other states establishes that *Hendrix* is consistent with the majority view. This point was recently discussed by an Arizona state appellate court in *State v. Moore*, 218 Ariz. 534, 189 P.3d 1107, 1110 (App.Div.1, 2008):

{¶51} "Finally, the overwhelming majority of state courts that have addressed whether attempted felony murder is a cognizable crime have reached the same conclusion. *See* [*People v.*] *Patterson*, 257 Cal. Rptr. at 409; *State v. Gray*, 654 So. 2d 552 (Fla. 1995); *State v. Pratt*, 125 Idaho 546, 873 P.2d 800, 812 (Idaho 1993) ('*Attempted* felony murder is not a crime in Idaho. Instead, there is either the crime of murder, or the crime of attempt to commit a crime, in which case the state bears the burden of proving that the defendant *intended* to commit the crime.'); *People v. Viser*, 62 Ill. 2d 568, 343 N.E.2d 903, 910 (Ill. 1975) ('(T)he offense of attempt requires an "intent to commit a specific offense", while the distinct characteristic of felony murder is that it does not involve an intention to kill. There is no such criminal offense as an attempt to achieve an unintended result.') (citations omitted); *Head* [*v. State*], 443 N.E.2d at 50 [(Ind. 1982)]; [*State v.*] *Robinson*, 883 P.2d at 767 [(Kan. 1994)]; *Bruce v. State*, 317 Md. 642, 566 A.2d 103, 105 (Md. 1989) ('Because a conviction for felony murder requires no specific intent to kill, it follows that because a criminal attempt is a specific intent crime, attempted felony murder is not a crime in Maryland.') *State v. Dahlstrom*, 276 Minn. 301, 150 N.W.2d 53 (Minn. 1967); *State v. Darby*, 200 N.J. Super. 327, 491 A.2d 733, 736 (N.J. Super. Ct. App. Div. 1984) ('"Attempted felony murder" is a self-contradiction, for one does not "attempt" an unintended result.'); *State v. Price*, 104 N.M. 703, 726 P.2d 857, 860 (N.M. Ct. App. 1986) ('Thus, the result-

oriented nature of the doctrine and the unpopularity of felony murder are among the concerns which persuade us not to recognize the crime of attempted felony murder.'); *State v. Kimbrough*, 924 S.W.2d 888 (Tenn. 1996); *Goodson v. Virginia*, 467 S.E.2d 848, 853-56, 22 Va. App. 61 (Va. Ct. App. 1996) ('We join the majority of states and hold that, in order for a felony murder analysis to be applicable, a homicide must occur.'); *In re Richey*, 175 P.3d 585, 587, 162 Wn.2d 865 (Wash. 2008). *But see White v. State*, 266 Ark. 499, 585 S.W.2d 952 (Ark. 1979) (finding that attempted felony murder is a cognizable offense in Arkansas)."

{¶52} Given the lack of any conflicting authority in Ohio and the nature of the analysis followed by the vast majority of courts in other states, this court concludes that the *Hendrix* holding shall continue to be binding authority in this jurisdiction. That is, attempted felony murder is not a viable criminal offense. When the victim of a violent felony offense does not die as a result of his injuries, the defendant can be charged with attempted murder only if he purposely intended to cause the victim's death. If such a mens rea cannot be proven, the defendant can only be indicted on whatever underlying "assault" offense is applicable under the facts of the case.

{¶53} In this case, McPeak was able to survive the injury to his thigh. As a result, the jury should have only been allowed to consider the "purposeful" attempted murder count under R.C. 2903.02(A). Because attempted felony murder constitutes a logical impossibility which cannot be charged as a criminal offense, it was plain error for the trial court to permit the state to go forward on that count. As the count of attempted felony murder should have been dismissed, appellant's supplemental assignment has merit.

{¶54} In light of the foregoing, it is only necessary to consider appellant's "manifest weight" argument in regard to his conviction for felonious assault. As to that offense, appellant was charged under R.C. 2903.11(A)(2):

{¶55} "(A) No person shall knowingly do either of the following:

{¶56} "* * *

{¶57} "(2) Cause or attempt to cause physical harm to another * * * by means of a deadly weapon or dangerous ordinance."

{¶58} The mens rea for felonious assault is "knowingly." Therefore, the state was required to demonstrate that appellant acted knowingly in firing the gun. There was no burden to show that appellant committed an intentional act.

{¶59} The term "knowingly" is defined in R.C. 2901.22(B):

{¶60} "(B) A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature."

{¶61} There is no dispute that when appellant grabbed the firearm from his sweatshirt pocket and pointed it at McPeak, they were only standing a few feet apart. Furthermore, although appellant and Joshua Tipton both testified that appellant pointed the gun in a downward fashion, there was also no dispute that the gun was pointed toward McPeak. Thus, this was not a situation in which appellant fired the gun into the air or in the opposite direction. Even though appellant did not shoot at McPeak's head or torso, he did fire in the general direction of McPeak's legs.

{¶62} Based upon these facts, the jury could readily find that appellant had been aware that, by firing the gun in this manner, it was probable that the bullet would hit

McPeak and impose physical harm to him. Therefore, the "mens rea" element for felonious assault was satisfied.

{¶63} As a general proposition, a conviction will not be reversed as against the manifest weight of the evidence unless the record shows that the jury lost its way in its consideration of the evidence. *Kovacic*, 2012-Ohio-219, at ¶37. In this case, there was substantial evidence upon which the jury could logically find that, even though appellant did not act intentionally, he did act knowingly. Accordingly, since the conviction for felonious assault was supported by the evidence, appellant's third assignment is without merit.

{¶64} Consistent with the foregoing analysis, appellant's supplemental assignment of error is well-taken. Therefore, the judgment of the Portage County Court of Common Pleas is reversed in part, and the case is hereby remanded for further proceedings, in which the trial court shall dismiss the count of attempted felony murder and re-sentence appellant on the two remaining counts and firearm specification. In all other respects, the judgment of the trial court is affirmed.

TIMOTHY P. CANNON, P.J.,

DIANE V. GRENDELL, J.,

concur.

STATE OF OHIO)
) SS.
COUNTY OF PORTAGE)

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

STATE OF OHIO,

Plaintiff-Appellee,

- vs -

BOBBY D. NOLAN,

Defendant-Appellant.

JUDGMENT ENTRY

CASE NO. 2012-P-0047

FILED
COURT OF APPEALS
JUN 28 2013
LINDA K FANKHAUSER, CLERK
PORTAGE COUNTY, OHIO

For the reasons stated in the opinion of this court, it is the judgment and order of this court that the judgment of the Portage County Court of Common Pleas is affirmed in part and reversed in part; and this case is remanded for further proceedings consistent with the opinion.

Thomas R Wright
JUDGE THOMAS R. WRIGHT

FOR THE COURT

FILED
COURT OF COMMON PLEAS
APR 11 2012
LINDA K. FANKHAUSER, CLERK,
PORTAGE COUNTY, OHIO

IN THE COURT OF COMMON PLEAS
PORTAGE COUNTY, OHIO

STATE OF OHIO,	)	**CASE NO. 2011 CR 0727**
Plaintiff	)	
	)	**JUDGE JOHN A. ENLOW**
-vs-	)	
	)	
BOBBY D. NOLAN,	)	
	)	**ORDER AND JOURNAL ENTRY**
Defendant	)	**Prison Imposed**

On Monday, April 9, 2012, Defendant's Sentencing hearing was held pursuant to Ohio Revised Code Section 2929.19.

Defense Attorney, Dennis Lager, the Assistant Prosecuting Attorney, Eric Finnegan and the Adult Probation Department were present as was the Defendant who was afforded all rights pursuant to Crim. R. 32.

The Court considered the purpose of felony sentencing which is to protect the public from future crimes by the Defendant and to punish the Defendant using the minimum sanctions that the Court determines to accomplish those purposes without imposing an unnecessary burden on state or local government resources.

The Court also considered the need for incapacitating the Defendant, deterring the defendant and others from future crime, rehabilitating the Defendant, making restitution to the victim of the offense, the public or both.

The Court also considered the evidence presented by counsel, oral statements, any victim impact statements, the Pre-Sentence Report and the defendant's statement.

The Court further finds that the Defendant was found Guilty by a jury to Count Two of the Indictment, said charge being "Attempted Murder", with a Firearm Specification, a felony of the first degree, in violation R.C. 2923.02, 2923.02(B) and 2929.02; 2929.14(D) and 2941.123, Count Three of

the Indictment, said charge being "Felonious Assault", with a Firearm Specification, a felony of the second degree, in violation of R.C. 2903.11(A)(2); 2929.14(D) and 2941.123, Count Four of the Indictment, said charge being "Having a Weapon While Under Disability", a felony of the third degree, in violation of R.C. 2923.13(A)(3)(C).

The Court finds Count Two "Attempted Murder" and Count Three "Felonious Assault" are separate allied offenses of similar import.

The Court further finds the State of Ohio elects to sentence the Defendant on Count Two, "Attempted Murder."

The Court finds that the consecutive sentences are mandated for these offenses.

IT IS THEREFORE ORDERED that the Defendant is sentenced to the Ohio Department of Rehabilitation and Correction, Grafton, Ohio to a mandatory term of imprisonment of Three (3) years to be served for the Firearm Specification and a mandatory term of imprisonment of Seven (7) years to be served for the offense of "Attempted Murder", of which shall run consecutive to one another and a definite term of Two (2) years to be served for the offense of "Having a Weapon While Under Disability" of which shall run concurrent to the aforementioned sentences, or until such time as he is otherwise legally released.

The Court thereupon notified the Defendant that after release from prison, the Defendant will be supervised under **mandatory** post release control R.C. 2967.28 for five years and that if the Defendant violates the terms of the post-release control the Defendant could receive an additional prison term not to exceed 50 percent of his original prison term.

IT IS FURTHER ORDERED that Defendant pay restitution to Robinson Memorial Hospital of $3,549.53.

The Court notified the Defendant that Defendant may be eligible to earn days of credit under circumstances specified in Revised Code §2967.193, however, those days of credit are not automatically awarded under that section, but they must be earned in a manner specified in that section.

The Court notified Defendant under federal law persons convicted of felonies can never lawfully possess a firearm and that if you are ever found with a firearm, even one belonging to someone else, you may be prosecuted by federal authorities and subject to imprisonment.

IT IS FURTHER ORDERED Defendant shall receive credit for the one hundred forty-five (145) days he has spent in the Portage County Jail in the above styled offenses. This credit includes jail time up to the date of sentencing and does not include any subsequent time awaiting conveyance to the reception facility. That time is to be calculated by the reception facility.

The Court notified Defendant of his right to appeal this matter. Further, Defendant remains indigent and hereby appoints Patricia Smith to represent the Defendant for appellate purposes.

IT IS FURTHER ORDERED the bond previously fixed herein is discharged.

IT IS FURTHER ORDERED that the pre-sentence investigation report and any victim impact statements that may have been proved to the Court are made part of the record and sealed.

IT IS FURTHER ORDERED that the Defendant is indigent and costs are suspended and filing fee is waived.

IT IS FURTHER ORDERED that the Clerk of this Court prepare a warrant to issue to the Sheriff of Portage County commanding him to convey this Defendant as hereinabove directed, and that the Defendant be remanded into the custody of the Portage County Sheriff to be so conveyed.

IT IS SO ORDERED.

JUDGE JOHN A. ENLOW
COURT OF COMMON PLEAS

cc: Eric Finnegan, Assistant Prosecuting Attorney
Dennis Lager, Attorney for Defendant
Patricia Smith, Attorney
Adult Probation Department
Sheriff

THE STATE OF OHIO, APPELLANT, *v.* WILLIAMS, APPELLEE.

[Cite as *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147.]

Criminal law — Allied offenses of similar import — Attempted murder and felonious assault.

(No. 2008-2037 — Submitted September 16, 2009 — Decided January 27, 2010.)

APPEAL from the Court of Appeals for Cuyahoga County, No. 89726, 2008-Ohio-5286.

SYLLABUS OF THE COURT

1. Felonious assault as defined in R.C. 2903.11(A)(1) is an allied offense of attempted murder as defined in R.C. 2903.02(B) and 2923.02.
2. Felonious assault as defined in R.C. 2903.11(A)(2) is an allied offense of attempted murder as defined in R.C. 2903.02(A) and 2923.02.
3. The state retains the right to elect which allied offense to pursue on sentencing on a remand to the trial court after appeal. *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, paragraph one of the syllabus, followed.

O'DONNELL, J.

{¶ 1} The state of Ohio appeals a decision of the Eighth District Court of Appeals that merged Kevin Williams's convictions and sentences on two counts of felonious assault and two counts of attempted murder into a single count of attempted murder. The charges arise from an incident in which Williams fired two shots at LayShawn McKinney, striking him once in the back and paralyzing him. The state contends that Williams may be separately convicted and sentenced for both counts of felonious assault and one count of attempted murder.

{¶ 2} The issue presented on this appeal is whether felonious assault and attempted murder are allied offenses of similar import. We hold that (1) felonious assault as defined in R.C. 2903.11(A)(1) and attempted murder as defined in R.C. 2903.02(B) and 2923.02 are allied offenses of similar import, and (2) felonious assault as defined in R.C. 2903.11(A)(2) and attempted murder as defined in R.C. 2903.02(A) and 2923.02 are allied offenses of similar import. Accordingly, we reverse the judgment of the Eighth District Court of Appeals holding that Williams could be convicted of only one count of attempted murder in this case and, in accordance with our decision in *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, remand this cause to the trial court for further proceedings consistent with this opinion.

Facts and Procedural History

{¶ 3} On July 8, 2006, Kevin Williams and his friend Duce drove up to a dice game on Gainsboro Avenue in East Cleveland. Williams joined in the game, but began to argue with Bralynn Randall about who owed the other money. As they continued to argue, McKinney and his girlfriend pulled into the driveway of her grandmother's house, noticed the dice game, and overheard the argument. Randall told McKinney that the argument was nothing, and McKinney then decided to join the game.

{¶ 4} Shortly after McKinney arrived, the argument between Williams and Randall escalated. Williams pulled a gun and fired two shots. As McKinney ran, a bullet struck him from behind, fractured his fifth thoracic vertebra, and instantly paralyzed him.

{¶ 5} While recuperating at his home in September 2006, McKinney viewed a photo array compiled by the East Cleveland Police Department and identified Kevin Williams as the shooter. As a result, a Cuyahoga County grand jury indicted Williams on two counts of felonious assault, two counts of

attempted murder with firearm specifications, and one count of having a weapon while under disability.

{¶ 6} Following trial, a jury returned guilty verdicts on all counts. The court imposed concurrent sentences of six years for each felonious assault, consecutive to a three-year term for the gun specifications. It also imposed concurrent sentences of seven years for each attempted murder, consecutive to a four-year term on the weapon conviction, for an aggregate sentence of 20 years.

{¶ 7} On appeal to the Eighth District Court of Appeals, Williams contended that his convictions on two counts of felonious assault and two counts of attempted murder arose from the same conduct and therefore constituted allied offenses of similar import so that he could be convicted of and sentenced for only one count of attempted murder.

{¶ 8} The appellate court ruled that felonious assault as charged in count two of the indictment, knowingly causing or attempting to cause physical harm by means of a deadly weapon, should have merged with the attempted-murder charge in count four of the indictment, attempted murder as a proximate result of committing or attempting to commit an offense of violence. *State v. Williams*, Cuyahoga App. No. 89726, 2008-Ohio-5149, ¶ 37.

{¶ 9} The state moved for reconsideration, asserting that because felonious assault as defined in R.C. 2903.11(A)(2) contains a deadly-weapon element not present in attempted murder, the greater offense of attempted murder could be committed without committing the offense of felonious assault. The state urged that felonious assault was not an allied offense of attempted murder as defined in R.C. 2903.02(B) and the attempt section, R.C. 2923.02.

{¶ 10} The appellate court concluded that the specific intent to kill, inferred from Williams's use of a weapon, subsumed his intent to cause serious physical harm to McKinney. *State v. Williams*, Cuyahoga App. No. 89726, 2008-Ohio-5286 at ¶ 33. Therefore, it ruled that "the separate counts of felonious

assault as conceptually grouped by the state are offenses of similar import to the separate charges of attempted murder." Id. The court then determined that Williams committed the attempted murders and felonious assaults with a single "purpose, intent and motive," id. at ¶ 38, and it ruled that the two felonious-assault counts merged into the two attempted-murder counts. Id. After comparing the elements of murder as defined by R.C. 2903.02(A) and (B) and concluding that the elements are so aligned that one could not have committed one form of murder without committing the other, id. at ¶ 40, and having determined that the offenses were committed with a single animus and a single intent to kill, the court concluded that the two counts of attempted murder merged into a single count. Therefore, the court held that Williams could be convicted of only a single count of attempted murder in violation of R.C. 2903.02(B) and 2923.02. Id. at ¶ 40-41.

{¶ 11} The state appealed, and this court agreed to consider whether the two counts of felonious assault are allied offenses of the two counts of attempted murder. The state submitted the following proposition of law for our review: "R.C. §2923.02/2903.02, *Attempted Murder*, is not an allied offense of similar import with R.C. §2903.11(A)(1), *Felonious Assault.* Further, R.C. §2923.02/2903.02, *Attempted Murder*, is not an allied offense of similar import with the offense of R.C. §2903.11(A)(2), *Felonious Assault.* Therefore, a defendant may be found guilty and sentenced separately for these Felonious Assaults in addition to Attempted Murder."

{¶ 12} Our analysis of allied offenses originates in the prohibition against cumulative punishments embodied in the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, and Section 10, Article I of the Ohio Constitution. *United States v. Halper* (1989), 490 U.S. 435, 440, 109 S.Ct. 1892, 104 L.Ed.2d 487, citing *North Carolina v. Pearce* (1969), 395 U.S. 711, 717, 89 S.Ct. 2072, 23

L.Ed.2d 656. However, both this court and the Supreme Court of the United States have recognized that the Double Jeopardy Clause does not entirely prevent sentencing courts from imposing multiple punishments for the same offense, but rather " 'prevent[s] the sentencing court from prescribing greater punishment than the legislature intended.' " *State v. Rance* (1999), 85 Ohio St.3d 632, 635, 710 N.E.2d 699, quoting *Missouri v. Hunter* (1983), 459 U.S. 359, 366, 103 S.Ct. 673, 74 L.Ed.2d 535, and citing *State v. Moss* (1982), 69 Ohio St.2d 515, 518, 23 O.O.3d 447, 433 N.E.2d 181. Thus, in determining whether offenses are allied offenses of similar import, a sentencing court determines whether the legislature intended to permit the imposition of multiple punishments for conduct that constitutes multiple criminal offenses.

{¶ 13} Ohio's multiple-count statute, R.C. 2941.25, provides:

{¶ 14} "(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.

{¶ 15} "(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."

{¶ 16} A two-step analysis is required to determine whether two crimes are allied offenses of similar import. See, e.g., *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117, 526 N.E.2d 816; *Rance*, 85 Ohio St.3d at 636, 710 N.E.2d 699. Recently, in *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, we stated: "In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), courts are required to compare the elements of offenses in the abstract without considering the evidence in the case,

but are not required to find an exact alignment of the elements. Instead, if, in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in commission of the other, then the offenses are allied offenses of similar import." Id. at paragraph one of the syllabus. If the offenses are allied, the court proceeds to the second step and considers whether the offenses were committed separately or with a separate animus. Id. at ¶ 31.

{¶ 17} The state contends that the appellate court considered the specific facts of the case rather than analyzing the elements of the offenses in the abstract. A proper application of *Cabrales*, it argues, would reveal that neither statutory definition of felonious assault is an allied offense of attempted murder. Further, the state argues that even if these offenses are allied offenses, they remain separately punishable because Williams did not commit them with a single act or animus.

{¶ 18} Williams contends not only that the two felonious assault counts merge but also that the two attempted-murder counts merge. He maintains that he can be convicted of only one count of attempted murder in violation of R.C. 2903.02, because, he asserts, when felonious assault is the felony of violence underlying a charge of attempted murder pursuant to R.C. 2903.02(B), the elements of the felonious assault are necessarily part of the attempted murder. Therefore, he argues that the attempted murder cannot be committed without committing the underlying felonious assault.

{¶ 19} Alternatively, Williams urges us to reconsider our allied-offense analysis, suggesting that if the statutory elements of multiple offenses *can* be satisfied by the same conduct, we should hold that those offenses are allied offenses of similar import. Such an analysis would create an irrebuttable presumption that the legislature intended an offender to receive a single

punishment when a prohibited act constitutes more than one offense. We do not presume that intent, and we reject this position.

{¶ 20} Our analysis of this case requires us to apply *Cabrales*. In our application of that test to this case, we recognize that the indictment charged Williams with two counts of attempted murder and two counts of felonious assault arising out of two separate gunshots he fired at McKinney. Counts two and three correlate to the bullet that did not strike McKinney and charge Williams with knowingly attempting to cause physical harm to McKinney and engaging in conduct that, if successful, would result in purposely causing the death of another. Counts one and four correlate to the bullet that paralyzed McKinney and charge Williams with causing physical harm to another by means of a deadly weapon and engaging in conduct that, if successful, would result in causing the death of another as a proximate result of committing or attempting to commit felonious assault.

{¶ 21} Thus, for each bullet Williams fired at McKinney, he was found guilty of one count of felonious assault and one count of attempted murder. Accordingly, we consider whether the attempted-murder and felonious-assault charges relating to each gunshot are allied offenses of similar import.

Allied Offenses

{¶ 22} *Cabrales* requires a comparison of the elements of the offense in the abstract, without considering the evidence in the case, but does not require an exact alignment of those elements.

{¶ 23} In order to commit the offense of attempted murder as defined in R.C. 2903.02(B), one must purposely or knowingly engage in conduct that, if successful, would result in the death of another as a proximate result of committing or attempting to commit an offense of violence. Since felonious assault is an offense of violence, R.C. 2901.01(A)(9), the commission of attempted murder, as statutorily defined, necessarily results from the commission

of an offense of violence, here, felonious assault. Accordingly, felonious assault as defined in R.C. 2903.11(A)(1) is an allied offense of attempted murder as defined by R.C. 2903.02(B) and 2923.02.

{¶ 24} The next step in the *Cabrales* analysis requires a determination of whether the offenses were committed separately or with a separate animus. Williams knowingly engaged in conduct that, if successful, would have resulted in the death of another as a proximate result of committing felonious assault. He did so by knowingly firing a gun at McKinney and paralyzing him with one bullet. Thus, he committed the offenses of attempted murder and felonious assault with a single act and animus. Accordingly, while he may be found guilty of both offenses, he may be sentenced for only one. See *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, at ¶ 17.

{¶ 25} In order to commit the offense of attempted murder as defined in R.C. 2903.02(A), one must engage in conduct that, if successful, would result in purposely causing the death of another; to commit felonious assault as defined in R.C. 2903.11(A)(2), one must cause or attempt to cause physical harm to another by means of a deadly weapon.

{¶ 26} Considering these elements in the abstract, although they do not align exactly, when Williams attempted to cause harm by means of a deadly weapon, he also engaged in conduct which, if successful, would have resulted in the death of the victim. Here, felonious assault as defined by R.C. 2903.11(A)(2) is an allied offense of attempted murder as defined in R.C. 2903.02(A) and 2923.02.

{¶ 27} Next we must determine whether Williams committed these offenses separately or with a separate animus. Williams knowingly engaged in conduct that, if successful, would have purposely caused the death of another by knowingly firing a bullet that missed McKinney; thus, these offenses were both committed with the same animus. Therefore, while Williams may be found guilty

of both offenses, he may be sentenced for only one. See *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, at ¶ 17.

Conclusion

{¶ 28} Based upon the foregoing, felonious assault as defined in R.C. 2903.11(A)(1) is an allied offense of attempted murder as defined in R.C. 2903.02(B) and 2923.02; and felonious assault as defined in R.C. 2903.11(A)(2) is an allied offense of attempted murder as defined in R.C. 2903.02(A) and 2923.02. Pursuant to our holding in *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, at paragraph one of the syllabus, "[t]he state retains the right to elect which allied offense to pursue on sentencing on a remand to the trial court after appeal." Accordingly, we reverse the judgment of the Eighth District Court of Appeals finding that Williams could be convicted of only one count of attempted murder in this case and, in accordance with our decision in *Whitfield*, remand this cause to the trial court for further proceedings consistent with this opinion.

Judgment accordingly.

MOYER, C.J., and LUNDBERG STRATTON and O'CONNOR, JJ., concur.

CUPP, J., concurs in judgment only.

LANZINGER, J., concurs in part and dissents in part.

PFEIFER, J., dissents.

LANZINGER, J., concurring in part and dissenting in part.

{¶ 29} This convoluted case is an example of how difficult our jurisprudence on allied offenses has become. Simply stated, the jury heard evidence that Williams fired two shots in succession and that one bullet struck and paralyzed the victim, LayShawn McKinney. Williams was found guilty of all offenses for which he was indicted: two counts of felonious assault, two counts of

attempted murder with firearm specifications, and one count of having a weapon while under disability. Williams was sentenced to a total prison term of 20 years.

{¶ 30} As is explained in the majority opinion, this court agreed to consider whether the two counts of felonious assault are allied offenses of the two counts of attempted murder. In other words, are the offenses of attempting to purposely cause the death of another pursuant to R.C. 2923.02 and 2903.02(A) and of attempted felony murder pursuant to R.C. 2923.02 and 2903.02(B) allied offenses of similar import with the two forms of felonious assault pursuant to R.C. 2903.11(A)(1) (causing serious physical harm) and (2) (attempting or causing physical harm by means of a deadly weapon)?

{¶ 31} The General Assembly has expressed its intent to permit multiple punishments for the same conduct under certain circumstances. R.C. 2941.25 provides:

{¶ 32} "(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.

{¶ 33} "(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." (Emphasis added.)

{¶ 34} In spite of the foregoing language emphasizing the importance of the defendant's conduct, our current cases analyzing allied offenses instruct us to jump immediately to the abstract comparison of offenses charged without first considering the defendant's actual conduct as established by the evidence. See *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181; *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149; *State v. Winn*, 121

Ohio St.3d 413, 2009-Ohio-1059, 905 N.E.2d 154; and *State v. Harris*, 122 Ohio St.3d 373, 2009-Ohio-3323, 911 N.E.2d 882.

{¶ 35} This "abstract comparison" of offenses identifies offenses as allied offenses of similar import "if * * * the offenses are so similar that the commission of one offense will necessarily result in commission of the other." *Cabrales* at paragraph one of the syllabus. Whether the commission of one offense necessarily resulted in commission of the other is best resolved when the actual evidence adduced at trial is allowed to be considered. I realize that in *Cabrales* this court "clarified" the test set forth in *State v. Rance* (1999), 85 Ohio St.3d 632, 710 N.E.2d 699, but I would go further to frankly reverse *Rance*. For omitting consideration of the evidence at trial is contrary to the statute, which states that the defendant's conduct must be considered in comparing the offenses: Did the commission of the one offense *in this case* necessarily result in the commission of the other? If so, the offenses are allied and of similar import.

{¶ 36} A defendant can be convicted and sentenced on more than one offense if the evidence shows that the defendant's conduct satisfies the elements of two or more disparate offenses. But if the conduct satisfies elements of offenses of similar import, then a defendant can be convicted and sentenced on only one, unless they were committed with separate intent.

{¶ 37} Thus, in this case, by shooting a weapon at McKinney twice in succession, Williams knowingly caused him serious physical harm, and this conduct satisfied both felonious assault sections, R.C. 2903.11(A)(1) (causing serious physical harm to another) and (A)(2) (causing or attempting to cause physical harm to another by means of a deadly weapon or dangerous ordnance). When the attempt section, R.C. 2923.02, is added to the murder and felony-murder statutes, R.C. 2903.02(A) ("purposely cause the death of another") and 2903.02(B) ("cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence"), it is apparent that

Williams's conduct (shooting twice at McKinney) also necessarily satisfies the elements of attempted murder and attempted felony murder. In other words, pursuant to R.C. 2941.25(A), Williams may be convicted of only one of the four offenses for which he was indicted, unless the state proved that he committed them separately or with separate animus. R.C. 2941.25(B).

{¶ 38} I would affirm the court of appeals' holdings that Williams committed the attempted murders and felonious assaults with a single "purpose, intent and motive," 2008-Ohio-5286, ¶ 38, and that the two counts of attempted murder and two counts of felonious assault should be merged into a single count for sentencing. Furthermore I agree that this case should be remanded to the trial court for the state to elect which of the four allied offenses Williams will be sentenced on, but I would limit the election to a single crime.

William D. Mason, Cuyahoga County Prosecuting Attorney, and Kristen L. Sobieski, Assistant Prosecuting Attorney, for appellant.

Robert L. Tobik, Cuyahoga County Public Defender, and Robert M. Ingersoll, Assistant Public Defender, for appellee.

R.C. 2901.22 Culpable mental states

(A) A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature.

(B) A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.

(C) A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist.

(D) A person acts negligently when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that his conduct may cause a certain result or may be of a certain nature. A person is negligent with respect to circumstances when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that such circumstances may exist.

(E) When the section defining an offense provides that negligence suffices to establish an element thereof, then recklessness, knowledge, or purpose is also sufficient culpability for such element. When recklessness suffices to establish an element of an offense, then knowledge or purpose is also sufficient culpability for such element. When knowledge suffices to establish an element of an offense, then purpose is also sufficient culpability for such element.

CREDIT(S)

(1972 H 511, eff. 1-1-74)

R.C. 2903.02 Murder

(A) No person shall purposely cause the death of another or the unlawful termination of another's pregnancy.

(B) No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree and that is not a violation of section 2903.03 or 2903.04 of the Revised Code.

(C) Division (B) of this section does not apply to an offense that becomes a felony of the first or second degree only if the offender previously has been convicted of that offense or another specified offense.

(D) Whoever violates this section is guilty of murder, and shall be punished as provided in section 2929.02 of the Revised Code.

CREDIT(S)

(1998 H 5, eff. 6-30-98; 1996 S 239, eff. 9-6-96; 1972 H 511, eff. 1-1-74)

R.C. 2903.11 Felonious assault

(A) No person shall knowingly do either of the following:

(1) Cause serious physical harm to another or to another's unborn;

(2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance.

(B) No person, with knowledge that the person has tested positive as a carrier of a virus that causes acquired immunodeficiency syndrome, shall knowingly do any of the following:

(1) Engage in sexual conduct with another person without disclosing that knowledge to the other person prior to engaging in the sexual conduct;

(2) Engage in sexual conduct with a person whom the offender knows or has reasonable cause to believe lacks the mental capacity to appreciate the significance of the knowledge that the offender has tested positive as a carrier of a virus that causes acquired immunodeficiency syndrome;

(3) Engage in sexual conduct with a person under eighteen years of age who is not the spouse of the offender.

(C) The prosecution of a person under this section does not preclude prosecution of that person under section 2907.02 of the Revised Code.

(D)(1)(a) Whoever violates this section is guilty of felonious assault. Except as otherwise provided in this division or division (D)(1)(b) of this section, felonious assault is a felony of the second degree. If the victim of a violation of division (A) of this section is a peace officer or an investigator of the bureau of criminal identification and investigation, felonious assault is a felony of the first degree.

(b) Regardless of whether the felonious assault is a felony of the first or second degree under division (D)(1)(a) of this section, if the offender also is convicted of or pleads guilty to a specification as described in section 2941.1423 of the Revised Code that was included in the indictment, count in the indictment, or information charging the offense, except as otherwise provided in this division or unless a longer prison term is required under any other provision of law, the court shall sentence the offender to a mandatory prison term as provided in division (D)(8) of section 2929.14 of the Revised Code. If the victim of the offense is a peace officer or an investigator of the bureau of criminal identification and investigation, and if the victim suffered serious physical harm as a result of the commission of the offense, felonious assault is a felony of the first degree, and the court, pursuant to division (F) of section 2929.13 of the Revised Code, shall

impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(2) In addition to any other sanctions imposed pursuant to division (D)(1) of this section for felonious assault committed in violation of division (A)(2) of this section, if the deadly weapon used in the commission of the violation is a motor vehicle, the court shall impose upon the offender a class two suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege as specified in division (A)(2) of section 4510.02 of the Revised Code.

(E) As used in this section:

(1) "Deadly weapon" and "dangerous ordnance" have the same meanings as in section 2923.11 of the Revised Code.

(2) "Motor vehicle" has the same meaning as in section 4501.01 of the Revised Code.

(3) "Peace officer" has the same meaning as in section 2935.01 of the Revised Code.

(4) "Sexual conduct" has the same meaning as in section 2907.01 of the Revised Code, except that, as used in this section, it does not include the insertion of an instrument, apparatus, or other object that is not a part of the body into the vaginal or anal opening of another, unless the offender knew at the time of the insertion that the instrument, apparatus, or other object carried the offender's bodily fluid.

(5) "Investigator of the bureau of criminal identification and investigation" means an investigator of the bureau of criminal identification and investigation who is commissioned by the superintendent of the bureau as a special agent for the purpose of assisting law enforcement officers or providing emergency assistance to peace officers pursuant to authority granted under section 109.541 of the Revised Code.

(6) "Investigator" has the same meaning as in section 109.541 of the Revised Code.

CREDIT(S)

(2008 H 280, eff. 4-7-09; 2006 H 461, eff. 4-4-07; 2006 H 347, eff. 3-14-07; 2006 H 95, eff. 8-3-06; 1999 H 100, eff. 3-23-00; 1999 S 142, eff. 2-3-00; 1996 S 239, eff. 9-6-96; 1995 S 2, eff. 7-1-96; 1983 S 210, eff. 7-1-83; 1982 H 269, S 199; 1972 H 511)

R.C. 2923.02 Attempt

(A) No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense.

(B) It is no defense to a charge under this section that, in retrospect, commission of the offense that was the object of the attempt was either factually or legally impossible under the attendant circumstances, if that offense could have been committed had the attendant circumstances been as the actor believed them to be.

(C) No person who is convicted of committing a specific offense, of complicity in the commission of an offense, or of conspiracy to commit an offense shall be convicted of an attempt to commit the same offense in violation of this section.

(D) It is an affirmative defense to a charge under this section that the actor abandoned the actor's effort to commit the offense or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of the actor's criminal purpose.

(E)(1) Whoever violates this section is guilty of an attempt to commit an offense. An attempt to commit aggravated murder, murder, or an offense for which the maximum penalty is imprisonment for life is a felony of the first degree. An attempt to commit a drug abuse offense for which the penalty is determined by the amount or number of unit doses of the controlled substance involved in the drug abuse offense is an offense of the same degree as the drug abuse offense attempted would be if that drug abuse offense had been committed and had involved an amount or number of unit doses of the controlled substance that is within the next lower range of controlled substance amounts than was involved in the attempt. An attempt to commit any other offense is an offense of the next lesser degree than the offense attempted. In the case of an attempt to commit an offense other than a violation of Chapter 3734. of the Revised Code that is not specifically classified, an attempt is a misdemeanor of the first degree if the offense attempted is a felony, and a misdemeanor of the fourth degree if the offense attempted is a misdemeanor. In the case of an attempt to commit a violation of any provision of Chapter 3734. of the Revised Code, other than section 3734.18 of the Revised Code, that relates to hazardous wastes, an attempt is a felony punishable by a fine of not more than twenty-five thousand dollars or imprisonment for not more than eighteen months, or both. An attempt to commit a minor misdemeanor, or to engage in conspiracy, is not an offense under this section.

(2) If a person is convicted of or pleads guilty to attempted rape and also is convicted of or pleads guilty to a specification of the type described in section 2941.1418, 2941.1419, or 2941.1420 of the Revised Code, the offender shall be sentenced to a prison term or term of life imprisonment pursuant to section 2971.03 of the Revised

Code.

(3) In addition to any other sanctions imposed pursuant to division (E)(1) of this section for an attempt to commit aggravated murder or murder in violation of division (A) of this section, if the offender used a motor vehicle as the means to attempt to commit the offense, the court shall impose upon the offender a class two suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege as specified in division (A)(2) of section 4510.02 of the Revised Code.

(F) As used in this section:

(1) "Drug abuse offense" has the same meaning as in section 2925.01 of the Revised Code.

(2) "Motor vehicle" has the same meaning as in section 4501.01 of the Revised Code.

CREDIT(S)

(2006 H 461, eff. 4-4-07; 2006 S 260, eff. 1-2-07; 1999 S 107, eff. 3-23-00; 1995 S 2, eff. 7-1-96; 1991 H 225, eff. 10-23-91; 1984 H 651; 1983 S 210; 1972 H 511)