

IN THE SUPREME COURT OF OHIO

State of Ohio,	:	Case No. 14-2251
Appellant/Cross-Appellee,	:	On Appeal from the
v.	:	Franklin County Court
Mohamed Noor,	:	of Appeals, Tenth
Appellee/Cross-Appellant.	:	Appellate District
		Court of Appeals
		Case No. 13AP-165

**APPELLEE/ CROSS-APPELLANT'S COMBINED MEMORANDUM IN RESPONSE TO
APPELLANT/CROSS-APPELLEE'S MEMORANDUM AND IN SUPPORT OF
JURISDICTION FOR THE CROSS-APPEAL**

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THE STATE'S PROPOSITIONS OF LAW ARE MATTERS OF PUBLIC OR GREAT GENERAL INTEREST AND SHOULD BE ACCEPTED FOR REVIEW.

THE PROPOSITIONS OF LAW ADVANCED BY THE DEFENDANT (APPELLEE/CROSS-APPELLANT) INVOLVE CONSTITUTIONAL QUESTIONS AND ARE ALSO MATTERS OF PUBLIC OR GREAT GENERAL INTEREST

The defendant and Appellee/Cross-Appellant (hereinafter defendant) agrees with the state that the matter of whether or not the aggravated robberies and kidnappings are allied offenses is a matter of great general interest. The allied offense statute, which is the relatively simple codified concept of common law merger has given rise to very confusing and difficult jurisprudence, as recognized by this Court, itself, in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, ¶ 7.

A defense attorney should be able to advise a client of the potential consequences of a plea or a trial but is unable to in many situations because of existing confusion. Prosecutors want to limit the application of the allied offense statute because it gives them great leverage in plea and sentencing negotiations. Defense attorneys, on the other hand, are concerned with the injustice that results from such leverage. Innocent people will plead guilty to avoid the potential of overly harsh sentences and people who might be guilty of lesser offenses will be forced to plead guilty to overcharged offenses for the same reasons. Additionally, the goals of the criminal justice system seeking uniformity and proportionality in sentencing are defeated when people, who engaged in similar conduct, receive vastly different sentences based upon variances in interpretations of the allied offense statute.

For instance, in this case the prosecutor is arguing on appeal that the robbery took longer than necessary, therefore the conduct should be enough to support the additional kidnapping counts. However at trial it argued just the opposite. The prosecutor for the state, during closing,

responded to the defense claim that the incident could not have taken twenty to thirty minutes as some of state's witnesses had claimed by noting that there's 11 people on the floor that had to have their pockets cleaned out and that it would take a substantial time to do so. There were various estimates regarding how much time the incident took but the testimony was clear that during this entire time nothing else other than the ongoing robbery was taking place and the alleged victims were not held in restraint any longer than necessary for the robberies to be completed. Nevertheless, the state is now arguing that the robberies took longer than necessary and thus kidnapping charges are also warranted.

Apparently, under the state theory, if a person robs a convenience store at gunpoint, but, at the conclusion, apologizes to the clerk for his actions and indicates that he doing this only because his family is about to be evicted and his baby needs medication, this conduct warrants an additional kidnapping charge because the robbery took longer than necessary. Thus the robber who apologized would face sentences on both kidnapping and aggravated robbery and two firearm specifications for a total exposure of 28 years while the robber who did not pause to apologize, because he was merely feeding his drug addiction, would be facing only fourteen years (eleven years on the robbery and three years for the firearm specification).

The appellate court applied the allied offense law in a correct fashion. Generally, robbers will want to commit the offense as quickly as possible because the longer the robbery takes, the greater the chance there is for discovery, apprehension, or something else bad to happen. There is nothing in the instant record to suggest any other animus or motive except for the underlying robbery. However, if the state of the law is so murky and inconclusive that the state can argue that the kidnapping charges should also apply if the robbers did not complete their task in a rapid enough manner to suit the sensibilities of a particular prosecutor, then perhaps this matter is one

of great public interest and this Court should rule on this issue. Otherwise, judges, at the urgings of such prosecutors, will do grave injustices by sending people to prison on both robbery and kidnapping based upon a prosecutor's mere assertion that the robber could have completed his task with more efficiency.

The propositions of law advanced by the defendant herein involve constitutional questions and are also matters of public or great general interest. The most important issue deals with the requirement for the state to establish the requisite mental intent needed to prove accomplice liability. The trial prosecutor was laboring under the mistaken belief that one is guilty as an accomplice if he does anything that aids or abets the principal offender. As a result, he objected to the requested jury instructions of the defendant with respect to the required proof of criminal intent required by the accomplice. This was wrong. An accomplice must share in the criminal intent of the principal in order to be criminally liable as an accomplice.

For instance, if a taxi driver unwittingly drove a fare to a bank, and the fare then committed a robbery, the taxi driver is not guilty as an accomplice to robbery, even though he aided the robber, because he had no intent aid a robbery. The defendant herein asserted as his defense that he did not know what was happening inside the apartment. He was waiting outside and only went inside when he heard the gunshot. He was immediately beaten into unconsciousness by the occupants of the apartment. Because the jurors were not advised of the law regarding the mental state of an accomplice, the state was relieved of its burden of proving this vital element of guilt. Proof of the required intent is just as important as the proof of the underlying facts. One cannot remove proof of intent in a criminal case and still have anything remotely resembling a fair trial. The state must prove, and the jurors must find, that an accomplice had the culpable mental state required for the commission of the principal offense.

The defendant is also advancing the proposition that it is unfair to allow police officers to provide a personal opinion of whether they believe a robbery had occurred. Jurors are the finders of fact and they should make their own findings based upon the facts and the state should not be allowed to urge them to adopt the beliefs of police officers that a particular crime was committed. The defendant's other proposition of law asserts that courts should follow the law that mandates that all parts of a trial of a serious offense should be recorded. Obviously, a court reporter cannot transcribe portions of testimony given in a foreign language she does not know. In such situations, in order to abide by the law, the court must at least make an audio recording of such testimony, especially when employing interpreters who are not properly certified. Otherwise, there is no recording of what the witness actually said. There is only a recording of what the interpreter claims the witness said, which can be significantly different.

STATEMENT OF THE CASE AND FACTS

The defendant was convicted upon multiple charges arising from an incident where it was alleged that he and a co-defendant, both Somali, had entered into a home where eleven other Somalis had gathered for reasons that were in dispute. The co-defendant testified that he went there to buy khat, an illegal stimulant, and that he got into a fight with another man that resulted in a struggle for a gun, which accidentally discharged and wounded another man there. The co-defendant stated the defendant had been waiting just outside the door and entered when he heard the commotion and the gunshot. Both the co-defendant and the defendant were beaten into unconsciousness with a bat and other objects. The people in the residence told the police that the two had entered to rob them and, as a result, the defendant was convicted and sentenced to consecutive sentences of ten years for aggravated burglary, five years each on two felonious assault charges ($5 \times 2 = 10$), three years each on the aggravated robbery charges ($3 \times 11 = 33$), three

years on a weapons charge and three years on three of the firearm specifications (3 x 3 = 9). The court sentenced the defendant to three years each on the eleven kidnapping charges but ran them concurrent with the aggravated robbery charges for an aggregate total prison sentence of sixty-five years.

The appellate court upheld the convictions for both the defendant and his co-defendant but ruled that the kidnapping and aggravated robbery charges were allied offenses of similar import. However, the appellate court recently ruled in the co-defendant's case that he was entitled to a hearing on the merits on his post-conviction relief petition with respect to claims of certain witnesses. In *State v. Ibrahim*, 10th Dist. No. 14AP-355, 2014-Ohio-5307, 2014 WL 6725812, the court ruled that the co-defendant was entitled to a hearing on his claims contained in his post-conviction relief hearing with respect to averments that the co-defendant was a member of the Monnguer Somalian tribe and that the prosecution witnesses were members of the Somalilander tribe, between which, existed significant tension. The co-defendant had a number of witnesses willing to testify that some of the prosecuting witnesses had made statements to them that no robbery had occurred and that they made these claims as a cover up for what actually happened. Witnesses were also willing to testify that some of the prosecuting witnesses told them that the group would be willing to remain silent and make the case go away in exchange for \$10,000. The appellate court noted that these claims were corroborated in part by jail records that indicated that two of the prosecuting witnesses attempted to visit the co-defendant while he was being held in jail for trial and that the claims that the prosecuting witnesses had said that no robbery had occurred and that the alleged witnesses had attempted to extort money for their silence could have resulted in a different outcome at trial and the co-defendant was entitled to a hearing on his petition and affidavits. (Id. at ¶ 26-¶ 33)

At the trial below, the co-defendant, Mohamed Ibrahim, testified that he went to the apartment that night where the incident occurred. He stated that he had been there four or five times before. He knew Farheyo Abdugar, the lady that resided in the apartment because she was a friend of his uncle, who would buy khat from her. On occasion, he went to Farheyo's residence to buy khat for his uncle. On the night in question, Ibrahim was at the defendant's apartment when his uncle called and asked Ibrahim to buy some khat for him. Chewing khat within the Somali community was a pretty "common thing." Ibrahim and the defendant walked over to the apartment. The weather was cold out that night of January 21, 2012, and Ibrahim was wearing a knit hat commonly called a ski mask. When he arrived at Farheyo's, the knit mask was rolled up, revealing his face. Ibrahim removed his shoes when he entered Farheyo's apartment, as was the custom since it shows a form of respect.

Ibrahim testified that it seemed like there were fourteen or fifteen people scattered throughout the apartment chewing khat. They were all male except for Farheyo. Ibrahim talked to Farheyo about buying the khat and while she went to get it, Ibrahim engaged in conversation with another Somali. The conversation turned into an argument. Ibrahim had had some previous encounters with this person and this person did not like the way Ibrahim acted. He thought that Ibrahim acted too black as opposed to acting as a Somali. Ibrahim noted that older Somalis resented the younger Somalis who tended to embrace American or black culture.

The argument got heated and led to a fight. The other guy had a gun and Ibrahim started tussling for the gun. Items of furniture got broken and things got knocked over. The gun somehow discharged and then everyone jumped on Ibrahim. The defendant had been outside of the apartment, by the stairs, waiting for Ibrahim to come back out. Ibrahim testified that the defendant entered the apartment after he heard the gunshot. Meanwhile Ibrahim was getting beaten and also

was hit a few times in the face with the gun. When the defendant entered the apartment he was overcome by the people in the apartment. Ibrahim denied that the gun was his and also denied having the blue glove that was on his hand after he regained consciousness and first noticed it at the hospital.

Ibrahim further testified that Farheyo, the lady who lived at the apartment, was single and unemployed and sold drugs. He noted that it is generally known in the Somali community that khat is brought into town by truck drivers and that Friday is a good day for getting khat because the truck drivers are in town.

The defendant, who had prior convictions, did not testify but defense counsel, during closing argument, relied upon the co-defendant's testimony to argue his client's innocence. It was noted that the defendant was not guilty of anything because he entered the apartment after the gunshot and was jumped and beaten by the occupants as soon as he entered the apartment. The defense argued that the defendant had been unaware of anything going on in the apartment until he entered it and then was viciously attacked and beaten into submission by the occupants. He argued that he had no intent to commit any crime but the trial court refused to provide the correct instruction on this, allowing the jurors to find the defendant guilty just because he was there, as argued by the state.

Nine of the eleven Somalis alleged to have been in the apartment at the time testified for the state. Their testimony contradicted the defense assertions. According to all nine witnesses, two men entered the apartment. The men were noticeably different in body types and all the witnesses agreed that the smaller guy, or the co-defendant, had the pistol. Their testimony was that the co-defendant had the gun the entire time until he was subdued and it was taken away from him. The testimony never indicated that the defendant had the gun in his possession. The gist of

the testimony from all nine witnesses was that the two men entered the apartment and ordered everyone to the floor and then instructed them to give up their money and cellphones. Their testimony indicated that the men went around to the people individually and went through pockets during the course of this incident. The time this took varied according to the accounts from twenty to forty minutes, with thirty to forty minutes being the most common account.

ARGUMENT AGAINST THE STATE'S PROPOSITIONS OF LAW

Defendant's Response to State's Proposition of Law No. 1: When a robbery of eleven people is conducted with no other animus than that of robbery and the restraint is not prolonged, robbery and kidnapping offenses should merge as being allied offenses of similar import.

Defendant's Response to State's Proposition of Law No. 2: The analysis for determining whether an offense is an allied offense is controlled by the allied offense statute and it is the duty of the courts to give effect to the words used in the statute and not to delete words used or to insert words not used. *State ex rel. Moorehead v. Indus. Comm.*, 112 Ohio St. 3d 27, 2006-Ohio-6364, 857 N.E.2d 1203, followed.

There are two doctrines which guard against the infliction of unfair and onerous cumulative punishments. One, of course, is the Double Jeopardy Clause. This is a very narrow safeguard and applies only in limited cases where one offense is a lesser-included of another under the same-elements test or is an identical offense. The other doctrine, which provides far greater protection against cumulative punishment, is the doctrine of merger which was developed and applied as part of our Anglo-Saxon common law heritage.

The legislature has to paint with a very broad brush in order to prohibit all the different types of behavior it seeks to criminalize through the enactment of just a few statutes. Consequently, there are very few criminal acts that do not result in the violation of multiple statutes. Ohio codified the common law doctrine of merger when it enacted R.C. 2942.25, what is often called the allied offense or the multiple counts statute. The statute reads 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.

The legislature noted in its formal committee comments when it enacted this statute in 1974 that the basic thrust of the section is to prevent “shotgun” convictions. This legislative enactment is an effort to limit the amount of punishment that can be imposed for conduct that violates multiple statutes. Thus it is the function of the legislature to determine the range of punishment that can be imposed for a course of conduct and not the fertile mind of a creative prosecutor who sits down with a code book to determine how many other statutes were possibly violated by the defendant’s conduct.

This relatively simple codified concept of common law merger has given rise to very confusing and difficult jurisprudence, as recognized by this Court, itself, in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, ¶ 7. The reason this statute has been the cause of such “confusing and difficult jurisprudence” is due to the fact that prosecutors have made arguments similar to the ones made herein and the courts have responded to such arguments instead of to the plain language of the statute as the law rightfully requires.

Common law crime has been abolished in the state of Ohio for over a century and a half. See, R.C. 2901.03(A) & (B). What this means is that only the legislature is allowed to define what constitutes criminal conduct within the state of Ohio and the appropriate penalty or range of penalties that should attach to such conduct. The courts cannot create common law crime by

expanding or going outside of the limits of the definitions used by the legislature when defining the prohibitions regarding criminal conduct nor can they impose penalties that are not provided by the legislature. There are laws regarding the obligations of the courts to properly interpret statutes and they are designed to ensure that the courts stay within the limits set by the legislature when defining crime. R.C. 2901.04 provides that “sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused.”

In *State ex rel. Moorehead v. Indus. Comm.*, 112 Ohio St. 3d 27, 2006-Ohio-6364, 857 N.E.2d 1203, the Supreme Court held that a statute providing for workers' compensation benefits for loss of use of a body part does not require any specific duration of survival after the employee suffers the loss of use and that that a court or an administrative agency could not add a requirement that the worker survive for a particular duration of time to the statute. The Supreme Court stated:

{¶ 15} We have long recognized that neither administrative agencies nor this court “may legislate to add a requirement to a statute enacted by the General Assembly.” *Wheeling Steel Corp. v. Porterfield* (1970), 24 Ohio St.2d 24, 27-28, 53 O.O.2d 13, 263 N.E.2d 249. **Rather, in interpreting statutes “it is the duty of this court to give effect to the words used, not to delete words used or to insert words not used.”** *Columbus-Suburban Coach Lines, Inc. v. Pub. Util. Comm.* (1969), 20 Ohio St.2d 125, 127, 49 O.O.2d 445, 254 N.E.2d 8. We therefore cannot condone the commission's addition of a requirement that a worker survive for some extended period of time, left unspecified by the commission or the General Assembly, when considering the worker's entitlement to a scheduled loss benefit. [Bold emphasis added]

The reason that there has been so much confusion and so many difficulties in allied offense jurisprudence is due to the fact that the courts have abrogated their basic duty to give effect to the words in the statute and have, instead, at the urging of the state, inserted words not used in the statute. Essentially, courts have been judicially legislating amendments to the statute, at the behest of the state, causing the confusion and difficulties associated with allied offense jurisprudence.

In the instant case, the issues are simple. This court found that the kidnapping and robbery offenses were allied offenses because the restraint lasted no longer than necessary to complete the robberies of eleven victims. This was a correct finding under the facts presented. It is imperative that the Supreme Court's language in *Johnson*, overruling *Rance*, be heeded. The Supreme Court, after noting how difficult the jurisprudence on allied offenses had become, noted that it was overruling *Rance* and that "In doing so, we return to the mandate of R.C. 2941.25, which instructs courts to consider whether a defendant's conduct constituted two or more allied offenses of similar import. [Id. at ¶ 7-8] The Supreme Court noted that *Rance* produced inconsistent, unreasonable, and absurd results [¶ 29] and that by overruling *Rance*, "It is time to return our focus to the plain language and purposes of the merger statute. [Id. at ¶ 41] The Court then noted that R.C. 2941.25 itself instructs us to look at the defendant's conduct when evaluating whether his offenses are allied. [Id. ¶ 42] The Court then stated that:

{¶ 43} We have consistently recognized that the purpose of R.C. 2941.25 is to prevent shotgun convictions, that is, multiple findings of guilt and corresponding punishments heaped on a defendant for closely related offenses arising from the same occurrence. *Geiger*, 45 Ohio St.2d at 242, 74 O.O.2d 380, 344 N.E.2d 133. **This is a broad purpose and ought not to be watered down with artificial and academic equivocation regarding the similarities of the crimes.** When "in substance and effect but one offense has been committed," the defendant may be convicted of only one offense. *Botta*, 27 Ohio St.2d at 203, 56 O.O.2d 119, 271 N.E.2d 776. [Bold emphasis added]

This Court then determined that it was going to "decline the invitation of the state to parse Johnson's conduct into a blow-by-blow in order to sustain multiple convictions * * *." [Id at ¶ 56] The state is attempting to do herein what the Court cautioned against in *Johnson*. It is attempting to divert the court's focus from the conduct of the defendant by asking the court to ignore the commonsense mandate of the statute and to make subjective determinations "watered down with

artificial and academic equivocation” in an attempt to return to the allied-offense standard that the Supreme Court found in *Johnson* to be “so subjective and divorced from the language of R.C. 2941.25.” The focus of this review must be upon the conduct of the defendant and not the “artificial and academic equivocations” argued in the state’s brief.

However, even under the pre-*Johnson* standards, the state’s attempts to parse the conduct into separate courses of conduct must fail. The state relies upon the four tests set forth in *State v. Logan*, 60 Ohio St.3d 126, 397 N.E.2d 1345 (1979). *Logan* was decided shortly after *State v. Donald*, 57 Ohio St.2d 73, 386 N.E.2d 1391 (1979) in which the Supreme Court determined that rape and kidnapping were allied offenses in a situation where the defendant forced his way into the stockroom office of a hospital employee, threatened her, went through her purse, and asked for her money. He then forced the employee from the stockroom office into the back of the men’s locker room where he raped her. Then he forced the victim to lead him to a certain hospital exit. The Supreme Court stated that “both offenses, by their very nature, are committed for the same purpose.”

In *State v. Logan*, the Supreme Court again held that rape and kidnapping were allied offenses in a situation where the defendant accosted the complainant as she was walking down the street. He then produced a knife, held it to her throat, and forced her into an alley. They then went down the alley, around a corner, and down a flight of stairs, where he raped her at knifepoint. The Supreme Court noted that there were two offenses committed but that only a single animus was involved in the commission of the offenses. The Court stated that “[w]here an individual’s immediate motive involves the commission of one offense, but in the course of committing that crime he must, a priori, commit another, then he may well possess but a single animus. The court then noted that “In contradistinction, an individual who restrains his intended rape victim for

several days prior to perpetrating the rape, or who transports her out of the state or across the state while intermittently raping her, may well be considered to have a separate animus as to each of the offenses of kidnapping and rape, and convictions on multiple counts could reasonably be sustained.” Id. 60 Ohio St.2d at 132.

Unfortunately, the Supreme Court then adopted the guidelines set forth in the state’s memorandum and these have been engrafted onto the statute and expanded upon by other courts and have led to the legal morass recognized and discussed in *State v. Johnson*. The results have been such that using the guidelines set forth in *Logan*, courts have found separate animi in cases that are far less egregious than the facts under both *Logan* and *Donald*. Thankfully, *State v. Johnson*, has recognized how case law has engrafted words into the allied offense statute and the Supreme Court has now removed the definitions gratuitously added by the courts and is now relying upon the plain language of the statute itself.

Even though the *Logan* test is no longer applicable, the defendant will nonetheless respond to the state’s arguments in this regard. As noted by state, *Logan* held that where the restraint was merely incidental to the underlying crime, no separate animus exists but if the restraint is prolonged a separate animus can be found. The indictment charged eleven counts each of aggravated robbery and kidnapping. The facts indicated that the incident last 20 to 40 minutes, or an average of from less than two minutes to three and a half minutes per victim. This is not a prolonged restraint under any analysis. Nor is there any evidence of any other separate animus to commit a kidnapping. As noted in the case law almost every robbery necessarily results in the commission of the offense of kidnapping. However the evidence does not indicate that there was any prolonged restraint that had significance beyond that needed to commit the robberies. The defendants had no separate motive or purpose to commit kidnappings or to apply an extended restraint beyond that necessary

to commit the robbery. Generally, robbers will want to commit the offense as quickly as possible to avoid discovery or apprehension. There is nothing in the record to indicate that the defendants had any other animus or motive except for the underlying robbery offenses. This case indicates the perils of allowing the state to attempt to add words to the statute in the manner condemned in *Johnson*. In the instant case, there is no real significance to the kidnapping that is separate and distinct from the robbery. The restraint was incidental to the robberies. There was no animus to engage in a prolonged restraint separate and apart from the robberies and the evidence did not support the existence of such an animus or motive. This appellate court properly concluded that the robbery and the kidnapping offenses were committed with the same animus and were part of the same conduct.

ARGUMENT IN SUPPORT OF THE DEFENDANT'S PROPOSITIONS OF LAW

Defendant's Proposition of Law No. 1: An accused is denied his rights under the United States Constitution to a fair trial, due process of law, his right to a trial by a jury, and his rights to present a defense when a trial court refuses to instruct on required element of the intent of an accomplice when the state is prosecuting the accused as an accomplice, thereby allowing the jury to convict the defendant as an accomplice without any proof of criminal intent.

In order to be guilty as an accomplice, one must act with the same kind of culpability or intent that is required for the commission of the offense. This is a key component of accomplice liability under the law. The common law required that criminal liability had to be predicated upon a requisite act (the *actus reus*) or omission to act coupled with the requisite culpability or criminal intent to do the act (the *mens rea*). The *mens rea* and the *actus reus* must both concur and exist before a criminal offense can be established. Thus under common law, a person who unwittingly aided in the commission of an offense was not guilty of the offense.

Ohio has abolished common law offenses and no conduct constitutes a criminal offense unless it is defined as an offense in the Revised Code. See, R.C. 2901.03. In Ohio, the offense of complicity has been defined in R.C. 2923.03(A) as follows:

(A) No person, **acting with the kind of culpability required for the commission of an offense**, shall do any of the following:

- (1) Solicit or procure another to commit the offense;
- (2) Aid or abet another in committing the offense;
- (3) Conspire with another to commit the offense in violation of section 2923.01 of the Revised Code;
- (4) Cause an innocent or irresponsible person to commit the offense. [Emphasis added]

Another statute, R.C. 2901.21(A), further provides that:

(A) Except as provided in division (B) of this section, a person is not guilty of an offense unless both of the following apply:

- (1) The person's liability is based on conduct that includes either a voluntary act, or an omission to perform an act or duty that the person is capable of performing;
- (2) The person **has the requisite degree of culpability for each element as to which a culpable mental state is specified by the section defining the offense.** [Emphasis added]

Under the law of complicity, it is clear that if one has no criminal intent he cannot be liable as an aider or abettor. The jury herein was improperly instructed with respect to the required intent of an accomplice. The defendant submitted a proposed written jury instruction that an accomplice had to share the intent of the principal before he could be liable as an accomplice for the acts of the principal. The prosecutor, who prepared the jury instructions, opposed this request and told the court that their instructions adequately lets the jurors know what needs to be proven in this case.

The prosecutor told the court that the requested instruction regarding the mental intent of the accomplice would be confusing to the jurors. The prosecutor stated that the state was claiming that “under the theory of aiding and abetting they’re both principal.” The court rejected the requested instruction. The court then instructed the jury regarding accomplice liability according to the instructions prepared by the state as follows:

Either Defendant may be convicted of aggravated burglary in Count One as an aider and abettor. An aider or abettor is one who aids or assists, or encourages another to commit a crime and participates in the commission of the offense by some act, word, or gesture. Aid means to help, assist, or strengthen. Abet means to encourage, counsel, incite, or assist. The mere presence of either Defendant at the scene of the crime and guilty knowledge of the crime are not enough to convict him of aiding and abetting. (Tr. Vol. 4, 828)

These instructions were further referred to when instructing the jury on the other charges in the indictment and on the firearm specifications. Thus the jurors were instructed that they could find the defendant guilty as an aider or abettor if he did anything to aid, assist, or encourage, the principal offender and were not instructed on the fact that the law required the state to prove beyond a reasonable doubt that he also acted with the same culpability required of the principal offender. These instructions were infirm because they did not address the requisite mental intent required before a person can be convicted as an accomplice as required by R.C. 2923.03(A) and as set forth in the Ohio Jury Instructions. See, 2 CR O.J.I. 523.03, Complicity. These provisions require the jurors to find that the accused had the culpable mental state required for the commission of the offense before he can be found guilty as an accomplice. Thus the defendant was convicted as an accomplice on the charges set forth in the indictment without any instructions on the necessary intent or mental culpability as required by statute and as set forth in the standard jury

instructions in O.J.I. These instructions allowed the jury to convict the defendant without any consideration of the required legal culpability.

Under the instructions given, no mental intent was required to be proven or considered before the defendant could be found guilty as an aider or abettor. All the state had to do was show that he did an act that assisted in the commission of crime without regard to any culpable mental state. This is not the law in Ohio. The state must prove, and the jurors must find, that an accomplice had the culpable mental state required for the commission of the principal offense. This Court held in *State v. Johnson*, 93 Ohio St.3d 240, 2001-Ohio-1336, 754 N.E2d 796, in the syllabus as follows:

To support a conviction for complicity by aiding and abetting pursuant to R.C. 2923.03(A)(2), the evidence must show that the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime, and that the defendant shared the criminal intent of the principal. Such intent may be inferred from the circumstances surrounding the crime.

The law clearly establishes that an accomplice must share in the intent of the principal before liability can attach to the accomplice for the acts of the principal. This is true in the common law and as set forth in the statute. It is also true at the federal level.

The state prosecuted the defendant on a complicity theory and the judge instructed the jurors in this regard. However, the jurors were misled on the application of the law of complicity because of the required mental elements were entirely omitted. The net result of the court's instructions to the jury was that it deprived the defendant of his right to a trial on the critical element of intent. Based upon the state of the evidence, the judge's instructions had the same effect as if the judge had directed a verdict against the defendant on all the elements of mental intent. This is something that cannot be done in a criminal case. The defendant has a right to a

jury trial on all the elements of the offense. The court cannot relieve the state of its burden of proving criminal intent by removing this issue from the jury's consideration.

The prosecutors submitted improper jury instructions that omitted any need to find criminal intent on behalf of an alleged accomplice. Defense counsel attempted to correct this mistake through a requested jury instruction, which the court denied. Under Ohio law, judges are obligated to instruct the jurors on "all matters of law necessary for the information of the jury in giving its verdict." R.C. 2945.11.

It is also important to note the admonition set forth by the Sixth Circuit in *Clark v. Jago*, *supra*, as follows:

It should be clearly understood that a review of the constitutional adequacy of jury instructions is far different from a review of the sufficiency of the evidence. Whether there is sufficient evidence to support a conviction for aggravated murder is a question that we need not answer. Rather simply stated, our query is whether the jury charge considered as a whole advised a reasonable juror that the prosecution had the burden of proof of the essential elements of the crime of aggravated murder according to Ohio law. If the charge could have been interpreted by a reasonable juror to relieve the state of its burden to prove each of the essential elements, then Clark was denied the process that the constitution makes due. *Sandstrom v. Montana*, 442 U.S. 510, 517, 99 S.Ct. 2450, 2455, 61 L.Ed.2d 39 (1978); *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *Burton v. Bergman*, 649 F.2d 428 (6th Cir. 1981).

[*Id.* 676 F.2d at 1102, footnote omitted]

In *Brotherhood of Carpenters v. United States*, 330 U.S. 395, 410, (1947), the Supreme Court dealt with a situation in which the jury had been incorrectly charged. The convictions were reversed and the Court held that no matter how clear the evidence was with respect to guilt, such guilt must be determined by the jury in accordance with the standards of the law and not by the appellate court.

In *Bollenbach v. United States*, 362 U.S. 607, 614-615, (1946), the Supreme Court dealt with another case in which the jury had not been properly and fully instructed on the law. The government argued that the error did not matter since the evidence against the defendant was overwhelming. The Supreme Court pointed out that “the question is not whether guilt may be spelt out of a record but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials * * *.” The court further held:

In view of the place of importance that trial by jury has in our Bill of Rights, it is not supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be. *Id.* 327 U.S. at 615.

In the instant case, the jury was misinformed on the law regarding accomplice liability in a manner that denied the defendant his right to a trial on all the mental elements needed to establish guilt as an accomplice. As a result, all the convictions returned by the jury, including the firearm specifications, must be reversed since they all were based upon accomplice liability.

The appellate court noted that the requested instruction was consistent with the Ohio Jury Instructions and that it was a correct statement of the law. The appellate also noted that it was not redundant. (*Id.* at ¶ 37- ¶39) The appellate court held that the trial court erred in not giving the proper instructions on accomplice intent. (*Id.* at ¶ 46) However, the appellate court then engaged in an analysis that counsel still cannot properly fathom. The appellate court held that since the defendant did not object to instructions requiring the jury to consider whether he was a principal offender, he cannot now credibly argue that he was not an aider or an abettor. (*Id.* at ¶ 52) Since the failure to object to the instructions with respect to principal offender liability prevented him from maintaining that he was not an aider and abettor, the appellate court reasoned that the

erroneous instructions were harmless because they did not “impair appellant’s theory of the case.”
(Id. at ¶ 53)

The appellant’s theory of the case was that he had no knowledge whatsoever of any criminal activity and that he entered the home after hearing a gun fired. He then was assaulted by the occupants and beaten into unconsciousness. He was found by the police unconscious and by the door. The appellate court’s reasoning that the defendant was precluded from claiming that he was not an aider and abettor because he failed to object to the instructions with respect to principal offender liability is without any legal foundation whatsoever. Any such objection would be meaningless and without any legal support for the simple fact that the state is entitled to instructions with respect to both principal offender liability and liability as an aider and abettor. This is pursuant to long established case law. The defendant has no power to make the state choose upon which theory it wishes to prosecute him upon because the state is entitled to prosecute him under both theories. Otherwise, if the state could prosecute only upon one theory, a person guilty as an accomplice could escape punishment and vice versa.

There is not a single criminal case standing for the proposition that a person has a legal basis to object to an instruction of liability as principal offender before he can argue that he is not guilty as an accomplice. The appellate court has adopted a legal reasoning to avoid the application of the proper law that has no legal foundation whatsoever. The gist of this case is that the defendant denied a trial on his theory of the case.

Defendant’s Proposition of Law No. 2: The law and the constitutional guarantees of the right to a fair trial, due process of law, and effective appellate review require trial courts to ensure that the testimony of witnesses are recorded.

Several witnesses testified in the Somali language which required the use of an interpreter. During the testimony of the very first such witness, it became apparent to both the defendant and

the co-defendant that the interpreter was not translating properly or accurately. This caused an interruption in the proceedings where counsel for the defendant noted that he had earlier asked the interpreter if he had been qualified by the Supreme Court and that the interpreter indicated that he had been. However, later the interpreter told defense counsel that he was not certified by the Supreme Court.

The court questioned the interpreter and the interpreter indicated that when defense counsel asked him about his certification, he did not hear the Supreme Court part of the question and thought that counsel was asking if he was “certified to the court.” Since “they” [without stating who “they” might be] gave him “letters that have been in a lot of cases in this court, federal court and municipal and general, all of them.” He assumed he had been certified but then admitted that he did not have a Ohio Supreme Court certification. He then offered to get the letter he was talking about and he produced it for the court and the court indicated that it would be made part of the record.

This Court is well aware of the problems the trial courts have had with interpreters. In order to deal with these issues, the Court has promulgated Rule 88(D) of the Rules of Superintendence for the Courts of Ohio, which deals with the certification requirement for foreign language interpreters. The trial court did not comply with any of these requirements even though it was apparent that the interpreter was not properly functioning at his job. He could not even understand the basic question directed to him by defense counsel regarding his certification by the Ohio Supreme Court. If he cannot respond to and effectively answer such a simple and reasonable question, how can he be expected to properly interpret the fairly complex legal proceedings of a trial? It was noted on the record that the interpreter was paraphrasing and omitting words during his translation. Even though it became apparent that the interpreter was not certified by the Ohio

Supreme Court, the trial court failed to comply with its obligations under the above rule and under R.C. 2311.14(A)(1) to appoint a qualified interpreter.

This omission was greatly compounded by the failure to comply with law requiring that all of the proceedings in a trial of a serious offense must be recorded. Crim.R. 22 provides that “[i]n serious offense cases all proceedings shall be recorded.” The rule does not say that only the English-speaking part of the proceedings shall be recorded but clearly states that “all proceedings” shall be recorded. Crim.R. 22 further provides that “[p]roceedings may be recorded in shorthand, or stenotype, or by any other adequate mechanical, electronic or video recording device.” The issue presented herein regards the duty of the court to ensure that all of the proceedings are recorded as required by law. Obviously if a court-reporter or stenographer does not understand Somali, he or she will not be able to record it. In such situations, the court is obligated to seek other means in order to satisfy the requirements of the law to record the entire proceeding such as the use of audio recordings.

The requirement for recording all of the proceedings preserves fundamentally important constitutional rights. Where an appeal is an integral part of a state's system for adjudicating guilt or innocence, the procedures for review must not violate a defendant's due process rights. *Evitts v. Lucey*, 469 U.S. 387, (1985). Thus, the Fourteenth Amendment (and, as a matter of Ohio law, the due course of law provision of Section 16, Article I of the Ohio Constitution) guarantees a criminal appellant pursuing a first appeal as of right certain minimum safeguards necessary to make that appeal is "adequate and effective" See *Griffin v. Illinois*, 351 U.S. 12, 20, (1956). In order to review the merits of an appeal, a transcript of the trial proceedings and a complete record are required. *Evitts v. Lucey, supra*, 469 U.S. at 393 citing *Griffin v. Illinois*, 351 U.S. at 13-14.

Constitutional rights are not limited to only English-speaking participants of the justice system. See, *State v. Pina* (1975), 49 Ohio App.2d 394, 361 N.E.2d 262. These requirements are essential, not only to have a record as required by law, but to guarantee fundamental rights. In the instant case, all of the Somali-speaking witnesses are essentially immune from prosecution for perjury. As it stands now, there would be absolutely no evidence that could be used against them. The interpreter's words, as transcribed, would be hearsay and the witnesses could argue that they were wrongly interpreted in any event. A prosecutor or a court can never grant immunity for perjury yet the failure of the court to record the testimony of the witnesses effectively did so. However, more importantly, without a recording there is just too much chance for error that could never be detected otherwise.

Formal concerns regarding interpreter qualifications, policies, and training were initially identified by the Ohio Commission on Racial Fairness. In 1993, the Supreme Court of Ohio and the Ohio State Bar Association created the commission to examine the issue of racial bias in the justice system. The commission's findings identified several problems with the use of court interpreters in Ohio:

- Inaccurate interpretations
- Failure to interpret the entire message
- Interpreters adding, deleting or putting their own "spin" on testimony
- Lack of understanding by interpreters of their professional responsibilities.

It was also noted that courts reported problems with interpreters advocating for or against certain witnesses, victims, or defendants. See, The Supreme Court of Ohio, Interpreter Services Program, Report on the Use of Interpreters in Ohio Courts, February, 2006, pages 3, 15.¹

¹ http://www.supremecourt.ohio.gov/Publications/interpreter_services/interpreter_use_report.pdf

These problems can also exist amongst properly certified translators. The only safeguard that exists against such abuses is to insist that the trial courts follow the rules regarding the recording of all testimony. This obligation is not met by recording just the hearsay translation of the testimony of a witness. It is met by the actual recording of the statements of the witness. That way a record will exist and, if the translator made a serious error or added to the testimony, deleted important parts thereof, or put a spin upon the testimony, it can be corrected. In some instances it could be very crucial.

One can only imagine being on trial in a foreign country where the trier of facts and the appellate judges do not get to hear what you actually said but only what some translator claims you said. The law provides that the testimony of the witnesses should have been recorded. The trial court did not comply with this obligation and this matter should be addressed by this Court to ensure that our obligation to ensure “justice for all” is met.

Defendant’s Proposition of Law No. 3: Police officers cannot properly testify that they believe that certain witnesses testifying for the state were truthful or to give their personal opinions that they believe a robbery had occurred without violating the accused’s federal constitutional rights to a fair trial and due process of law.

The co-defendant testified that he entered the apartment to buy khat for his uncle while the defendant waited outside. He got into a fight with another individual in the apartment and the other person produced a gun. In the struggle for the gun, it discharged. The defendant then entered the apartment where he was immediately set upon and beaten by the occupants. Both were severely beaten into unconsciousness and had to be hospitalized. Circumstantial evidence presented at the trial bolstered this testimony.

The co-defendant, like the other occupants, had removed his shoes upon entering the apartment as custom required. He was found unconscious and shoeless and none of the state’s

witnesses could account for the co-defendant's shoes. A robber would be highly unlikely to respect tradition enough to remove his shoes while committing a robbery.

The resident of the apartment was unemployed yet there were eleven male guests present in her apartment whom she provided with food and beverage. She also had a laptop and access to special satellite-computer connections that allowed her to receive television shows from Somalia that her guests did not have. This all occurred after midnight and several of the visitors were truck drivers, whom the co-defendant testified often brought khat into Columbus from their trips out of state. While all the witnesses for the state testified that they had no knowledge of any khat, Muktar Hersi, who never appeared to testify, told a police officer that he had been sitting with the others, relaxing and chewing khat, when the incident occurred.

Thus there was very strong circumstantial evidence that this was a place where people gathered for more than just watching television. All the state's witnesses denied that khat was there but they also could not provide any specific names for the person or persons who allegedly used the bat against the suspects. Thus the occupants did not want to testify to anything that would get themselves or their friends into any trouble.

The defendant was found unconscious on the floor right by the front door, which is consistent with the co-defendant's testimony that the defendant was attacked and beaten by the occupants when he entered through the door after hearing the gunshot. The blood swab obtained from the handgun contained DNA that matched the co-defendant, indicating that he had been beaten with it. There was no testimony of any other blood DNA on the gun, which was inconsistent with the claim that Abdi Aden had been beaten on the head with it. The baseball bat, on the other hand, had two blood DNA sources on it. One belonged to the defendant, which indicates that he was beaten with it. The other DNA source did not match the sample provided by the co-defendant

and came from an unknown contributor. The only other person who was bleeding that night besides Hirsi Hirsi, and the two defendants, was Abdi Aden. Thus this is strong circumstantial evidence that Aden was accidentally hit in the head while the bat was being swung during the beating of the defendants. It should be noted that the crime lab only had the known DNA of the two defendants to compare the blood with.

The occupants of the apartment had plenty of time to get their simple story together and could have confirmed it even further after the police arrived since they were speaking Somali and none of the officers understood it.

On the other hand, the state's case rested mostly upon the testimony of the nine witnesses. However, it was apparent that they would lie to protect their own interests since one could be skeptical of their claims that no khat was present and that no one knew the identities of the people wielding the bat. The most that can be said about the two different theories presented is that the state had more witnesses than the defense. However, one thing that counsel has noted throughout the years is that the sides generally remain the same throughout a controversy. Thus if one is outnumbered in a fight in the community, he will be outnumbered later in court. However, the side with the greater numbers in a fight is not always in the right and the matter must still be fairly examined by the triers of fact in a fair and impartial manner.

There was circumstantial evidence in support of both claims. The state had a ski mask and a bandanna that had been worn by the co-defendant and the defendant. While a police officer testified that wearing a ski mask was not unusual in such inclement weather, the state can still use this evidence as circumstantial evidence. The co-defendant testified that the mask portion was rolled up when he entered the home, which is very likely since one would not take off one's shoes when entering a home and still wear a mask.

The defendant called two police officers to the stand in his case in chief to demonstrate that khat usage had been mentioned on the night of the incident and to present evidence of statements made at the scene that were inconsistent with the testimony of some of the witnesses. In an attempt to rehabilitate the damage these inconsistencies did to its case, the state impermissibly asked the two officers questions that allowed them to render opinions that they believed the witnesses in question were telling the truth and that the officers believed a robbery had occurred.

The prosecutor asked Detective Hughes, on cross-examination, if there was anything in his conversation with Hirsi Hirsi that indicated to him that the robbery had not occurred. The Detective answered, "No." The prosecutor asked this same question to Detective Cress regarding his conversation with Mr. Ali and obtained the same response. This improper question allowed the state to establish both that the two detectives believed the witnesses with respect to the robbery and also elicited an opinion from the detectives regarding their beliefs that a robbery had occurred.

A witness is not allowed to testify as to whether or not he or she believes another witness is telling the truth. Law enforcement officers and all witnesses in general are prohibited from expressing personal opinions or beliefs regarding whether or not another witness is telling the truth. The law is extremely solicitous of the function of the jury. Jurors are expected to decide the cases based upon the facts presented and not upon some other person's personal opinion or belief with respect to whether a witness is testifying truthfully or with respect to any personal opinion regarding the guilt or innocence of the accused.

Allowing witnesses to express personal beliefs regarding the truthfulness of a witness abrogates the critical role of jurors. Jurors often have to make difficult factual decisions. If they are allowed to merely adopt or rubber-stamp the opinions of others regarding the credibility of witnesses, there is a real danger that jurors will not make the necessary and difficult factual

decisions but will adopt or rely upon the opinions of others regarding the ultimate issue of credibility.

When law enforcement officers or prosecutors are allowed to express their opinions and personal beliefs on the credibility of witnesses and, consequently, of the guilt of the accused, the danger of the jurors abandoning their key function as fact-finders and adopting the opinions of the officers is manifest. Jurors are apt to improperly rely upon such opinions and give them great weight since the officers are known to be heavily involved in the investigation of the case. Jurors are therefore likely to accord great weight to the officer's opinion by virtue of his total and greater knowledge of the facts of the case and because of the officer's experience in such matters.

The only people who know what really happened are the ones who were there at the time and it is the testimony of these people that is in issue. The state improperly attempted to bolster its case by presenting the opinion of the officer that certain witnesses were telling the truth and that the two officers believed that the robberies had occurred. This is a function for the jury and not the officer to decide.

The Court in *Cooper v. Sowders* , 837 F.2d 284, 287, (6th Cir. 1988), reversed a conviction when a police officer was improperly allowed to testify that he found no evidence to link anyone else to the crime and that the only evidence they found linked the defendant to the crime. The court held:

As the dissenting opinion of Kentucky Supreme Court Justice Liebson correctly noted, “[t]he police officer was permitted to testify to his own personal opinion that such evidence as there was against other suspects was insufficient to justify their arrest * * *. This opinion suggests to the jury the guilt of the accused and the innocence of other suspects.”

Witnesses, both expert and lay, are strictly prohibited from expressing opinions on the

credibility of the testimony of other witnesses. In *State v. David*, 10th Dist. No. 92AP-99, (Sept. 15, 1992), the court reversed convictions for kidnapping, rape, and felonious sexual penetration where a mandatory life sentence had been imposed. This court held:

In the present case, the prosecution was allowed to question Mary Recinella, a social worker, about whether she thought the alleged victim was telling the truth. Recinella said: "Based upon my experience and working with alleged child victims of sexual abuse, my conclusion was that Latisha was being very honest and provided a consistent history of the details of what happened to her while she was being sexually abused. It was my decision to substantiate the abuse based on her history at the conclusion of our interview." (Tr. 151-152.) Hence, Recinella rendered an expert opinion concerning the veracity of Latisha, who was nearly a teenager at the time of the alleged rape and was a teenager at the time of trial. Defense counsel did not object, even though this entire case essentially turned upon the credibility of Latisha's story of abuse. [*Id.* at 7-8]

This court held that it was plain error requiring a reversal to admit this opinion testimony since it affected a substantial right of the accused. It also held that the defendant's attorney was ineffective for failing to object to the admission of this opinion testimony as well as to other improperly admitted testimony. See also, *State v. Boston*, 46 Ohio St.3d 108, 545 N.E.2d 1220, (1989); *State v. Davis*, 64 Ohio App.3d 334, 581 N.E.2d 604, (1989), (allowing expert to effectively testify that the victim was credible as a witness invaded the province of the jury and was reversible error)

Thus the state's attempt to bolster its case with police officer testimony indicating that the officers believed, from the statements made to them by certain witnesses, that the robberies had occurred was totally impermissible. By introducing such testimony, the state substantially changed the rules of the game. Instead of weighing the credibility of the case based upon witnesses, on both sides, with their fallible credibility issues, the state got to add to its side of the scale, the fact that the officers believed that certain witnesses for the state were telling the truth

and that the officers believed that the robberies had occurred. This is impermissible and the convictions must be reversed.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest and substantial constitutional questions with respect to the defendant's propositions of law and the appellee/cross-appellant requests that this Court accept jurisdiction in the matters raised in the cross-appeal so that the important issues presented will be reviewed on the merits.

Respectfully submitted,

By: / John W. Keeling
John W. Keeling, Counsel of Record for
Appellee/Cross-Appellant

CERTIFICATE OF SERVICE

I certify that a copy of this document was sent by e-mail to Barbara A. Farnbacher, Assistant Franklin County Prosecutor, 373 South High Street, 13th Floor, Columbus, Ohio 43215, on Wednesday, January 28, 2015.

 / John W. Keeling
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