

[Cite as *State v. Baldwin*, 2009-Ohio-5348.]

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-081237
	:	TRIAL NO. B-0806080
Plaintiff-Appellee,	:	
	:	<i>DECISION.</i>
vs.	:	
KENNETH BALDWIN,	:	
	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: October 9, 2009

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Scott M. Heenan*,
Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Elizabeth E. Agar, for Defendant-Appellant.

Please note: This case has been removed from the accelerated calendar.

DINKELACKER, Judge.

I. Facts and Procedure

{¶1} Defendant-appellant, Kenneth Baldwin, appeals convictions for two counts of felonious assault under R.C. 2903.11(A)(2), with accompanying firearm specifications, one count of discharge of a firearm on or near prohibited premises under R.C. 2923.162(A)(3), and one count of having weapons while under a disability under R.C. 2923.13(A)(3). We find no merit in his five assignments of error, and we affirm the trial court’s judgment.

{¶2} The record shows that a group of teenagers that included Ikasha Collins, Emily Ingram, Edward Thompson, and Jomar Lyles were “hanging out” on the Collins family’s porch, laughing and joking. Baldwin, whom the teenagers knew from the neighborhood, came up to them and joined them in the joking. But he became angry when the jokes focused on his mother. Baldwin and the teens exchanged insults and threats. At least one person threw a rock at him, and another tried to engage him in a fight.

{¶3} Eventually, Baldwin left the area, but he came back a few minutes later. He pulled out a gun and fired one or two shots in the direction of the porch. The crowd quickly scattered. A bullet grazed Thompson as he was trying to run to safety. Baldwin drove away from the scene with a family member.

II. Comment on the Defendant’s Silence

{¶4} In his first assignment of error, Baldwin contends that the trial court erred in permitting the state to refer to his silence in closing argument. He argues that the state’s argument that he did not deny being at the scene of the shooting was an

improper comment on his exercise of his right to remain silent under the United States and Ohio Constitutions. This assignment of error is not well taken.

{¶5} The state may not directly comment on a defendant's failure to testify in a criminal proceeding.¹ A comment may warrant reversal if it prejudices the defendant's substantial rights to a fair trial.² But the state may comment upon a defendant's failure to present evidence in support of his case, including the weight of the evidence that the defendant has presented in support of an exculpatory theory.³ A comment impinges on a defendant's right not to testify if it was "manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify."⁴

{¶6} Our review of the record shows that Baldwin failed to object to the comment of which he now complains. Consequently, we can only reverse upon a finding of plain error.⁵ An alleged error does not rise to the level of plain error unless, but for the error, the outcome of the trial clearly would have been otherwise.⁶

{¶7} The record further shows that at trial some discussion occurred about Baldwin's failure to file a notice of alibi.⁷ The trial court stated that his witness's testimony might be curtailed if he attempted to establish an alibi defense. Baldwin's counsel replied that he was not presenting an alibi defense, but claiming that the shooting never happened.

¹ *State v. Thompson* (1987), 33 Ohio St.3d 1, 4, 514 N.E.2d 407; *State v. Watson*, 1st Dist. No. C-010691, 2002-Ohio-4046, ¶25 (*Watson I*).

² *Watson I*, supra, at ¶25.

³ *State v. Collins*, 89 Ohio St.3d 524, 527-528, 2000-Ohio-231, 733 N.E.2d 1118; *State v. Watson* (1991), 61 Ohio St.3d 1, 9, 572 N.E.2d 97; *Watson I*, supra, at ¶25.

⁴ *State v. Webb*, 70 Ohio St.3d 325, 328-329, 1994-Ohio-425, 638 N.E.2d 1023; *Watson I*, supra, at ¶26; *State v. Heard* (Aug. 13, 1999), 1st Dist. No. C-980443.

⁵ *State v. Underwood* (1983), 3 Ohio St.3d 12, 13, 444 N.E.2d 1332; *State v. Hirsch* (1998), 129 Ohio App.3d 294, 309, 717 N.E.2d 789.

⁶ *State v. Wickline* (1990), 50 Ohio St.3d 114, 119-120, 552 N.E.2d 913; *State v. Burrell*, 1st Dist. No. C-030803, 2005-Ohio-34, ¶15.

⁷ See Crim.R. 12.1.

{¶8} Baldwin’s witness, Robert Caldwell, essentially presented an alibi defense, testifying about what Baldwin had done on the night in question and commenting upon his general demeanor. The trial court allowed the testimony.

{¶9} During closing argument, the prosecutor told the jury that Baldwin had not even alleged an alibi and that an alibi defense was not involved in this case. She stated, “This is not a case * * * with the defense saying, wait a minute, you have the wrong person. I wasn’t there at that date, time, place and location.” She added that Baldwin was trying to establish an alibi with Caldwell’s testimony. She then stated, “I don’t want you to think that that’s what Robert Caldwell was about. Okay? Because there is no alibi in this case.” She went on to state that Caldwell’s testimony was irrelevant.

{¶10} These comments were not of such a character that the jury would necessarily have taken them to be a comment on Baldwin’s failure to testify. They were only a comment on the nature of Baldwin’s defense and the strength of his evidence. Further, the court instructed the jury that it could not consider Baldwin’s failure to testify for any purpose, and we must presume that the jury followed that instruction.⁸ We cannot hold that the prosecutor’s remark unfairly prejudiced Baldwin, much less that it rose to the level of plain error. Consequently, we overrule his first assignment of error.

III. Confrontation Clause

{¶11} In his second assignment of error, Baldwin contends that the trial court violated his right to confront the witnesses against him. He argues that the trial court admitted into evidence hearsay testimony regarding a witness’s

⁸ *State v. Ferguson* (1983), 5 Ohio St.3d 160, 163, 450 N.E.2d 265; *Heard*, supra.

identification of him when that witness could not be cross-examined. This assignment of error is not well taken.

{¶12} The Sixth Amendment to the United States Constitution states, “In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him[.]” In *Crawford v. Washington*,⁹ the United States Supreme Court held that the Confrontation Clause bars “testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination.”¹⁰

{¶13} In this case, a police detective testified that Jomar Lyles had identified Baldwin as the shooter in a photographic lineup. Lyles did not testify, and Baldwin never had an opportunity to cross-examine him. The state acknowledges that this testimony was hearsay, and we agree with Baldwin that its admission into evidence violated the Confrontation Clause.

{¶14} Nevertheless, Baldwin did not object. Consequently, we may only reverse upon a finding of plain error. The evidence against Baldwin was overwhelming.¹¹ Five witnesses had already testified that Baldwin, whom most of them knew from the neighborhood, was the shooter. The detective testified that Lyles had come to the police station with Thompson and that Thompson had also identified Baldwin. We cannot hold that, but for the error, the outcome of the proceedings would have been different. Therefore, the error did not rise to the level of plain error,¹² and we overrule Baldwin’s second assignment of error.

⁹ (2004), 541 U.S. 36, 124 S.Ct. 1354.

¹⁰ *Id.* at 53-54; *State v. Robinson*, 1st Dist. No. C-060434, 2007-Ohio-2388, ¶12.

¹¹ See *Robinson*, *supra*, at ¶16; *Hirsch*, *supra*, at 310.

¹² See *Wickliffe*, *supra*, at 119-120; *Burrell*, *supra*, at ¶15.

IV. Sentencing

{¶15} In his third assignment of error, Baldwin contends that the trial court erred in imposing separate, consecutive sentences on counts it should have merged. He argues that discharge of a firearm near prohibited premises and felonious assault were allied offenses of similar import. He also argues that he should only have been convicted of one count of felonious assault because he only fired a single shot and hit only one victim. This assignment of error is not well taken.

A. Allied Offenses of Similar Import

{¶16} In *State v. Cabrales*,¹³ the Ohio Supreme Court stated that the determination of whether two offenses are allied offenses of similar import involves a two-step analysis. The first step requires a comparison of the elements of the offenses. If the elements correspond to such a degree that the commission of one crime will result in the commission of the other, the crimes are allied offenses of similar import.¹⁴ This step requires a comparison of the elements in the abstract without reference to the facts of the case, but does not require an exact alignment of the elements.¹⁵

{¶17} If the court determines that the offenses are allied offenses of similar import, it must proceed to the second step, which involves a review of the defendant's conduct to determine whether the offenses were committed separately or with a separate animus as to each. If the court determines that the offenses were committed separately, the defendant may be convicted of both offenses.¹⁶

{¶18} First, Baldwin contends that felonious assault under R.C. 2903.11(A)(2) and discharge of a firearm near prohibited premises under R.C.

¹³ 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181.

¹⁴ Id. at ¶14; *State v. Klein*, 1st Dist. No. C-080470, 2009-Ohio-2886, ¶21.

¹⁵ *Cabrales*, supra, at ¶27; *Klein*, supra, at ¶21.

¹⁶ *Cabrales*, supra, at ¶14; *Klein*, supra, at ¶22.

2923.162(A)(3) are allied offenses of similar import. R.C. 2903.11(A)(2) provides that “[n]o person shall cause or attempt to cause physical harm to another * * * by means of a deadly weapon or dangerous ordnance.” R.C. 2923.162(A)(3) provides that “[n]o person shall * * * discharge a firearm upon a public road or highway.”

{¶19} A person can discharge a firearm over or on a public road or highway without causing or attempting to cause physical harm to another, and the converse is also true. The elements of these two offenses do not correspond to such a degree that that commission of one results in the commission of the other. Therefore, they are not allied offenses of similar import, and we need not proceed to the second part of the test.

{¶20} Additionally, in *State v. Brown*,¹⁷ the supreme court expanded the allied-offense analysis.¹⁸ It developed a preemptive exception, holding that resort to the two-tiered test is unnecessary when the legislature’s intent is clear from the statutory language.¹⁹ Even if the offenses would be allied offenses of similar import under the two-part *Cabrales* test, the court must still determine whether the societal interests protected by the statutes are the same or distinct. Where the legislature has manifested an intent to protect separate and distinct societal interests in enacting two statutes, a defendant may be punished for both offenses.²⁰

{¶21} Felonious assault and discharge of a firearm on or near prohibited premises obviously protect distinct societal interests, and we hold that the legislature intended them to be separately punishable.²¹ Consequently, they are not allied offenses of similar import under the *Brown* test.

¹⁷ 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149.

¹⁸ *State v. Love*, 1st Dist. Nos. C-070782 and C-080078, 2009-Ohio-1079, ¶21.

¹⁹ *Klein*, supra, at ¶23.

²⁰ *Brown*, supra, at ¶35-40; *Klein*, supra, at ¶23.

²¹ See *Brown*, supra, at ¶40.

B. Multiple Victims

{¶22} Next, Baldwin argues that he should only have been convicted of one count of felonious assault because he fired a single shot and hit only one victim. Most of the witnesses testified that they had heard one shot. Two of the witnesses equivocated somewhat and said that they might have heard two. Therefore, the state presented evidence from which the jury could have concluded that Baldwin had fired two shots, thus justifying two convictions for felonious assault.

{¶23} But even if he had only fired a single shot, Baldwin could still have been convicted of more than one count of felonious assault. He is incorrect in asserting that there was only one victim. He was charged under R.C. 2903.11(A)(2), which prohibits not only causing physical harm, but also attempting to cause physical harm. While he injured only one person, he attempted to cause physical harm to a number of people who were standing together, and, therefore, multiple victims existed.²²

{¶24} Prior to *Cabrales* and *Brown*, courts, including this one, had held that when a defendant commits the same offense against separate victims during the same course of conduct, a separate animus exists for each offense.²³ We do not believe that *Cabrales* and *Brown* change that result.

{¶25} The supreme court recently held that “[f]elonious assault defined in R.C. 2903.11(A)(1) and felonious assault defined in R.C. 2903.11(A)(2) are allied offenses of similar import, and therefore a defendant cannot be convicted of both offenses when both are committed with the same animus *against the same victim*.”²⁴ Thus, the supreme court seems to indicate that more than one victim means a

²² See *State v. Murray*, 156 Ohio App.3d 219, 2004-Ohio-654, 805 N.E.2d 156, ¶24.

²³ *State v. Johnson*, 7th Dist. No. 04 MA 193, 2007-Ohio-3332, ¶33-37; *Murray*, supra, at ¶20-25.

²⁴ *State v. Harris*, 122 Ohio St.3d 373, 2009-Ohio-3323, 911 N.E.2d 882, paragraph two of the syllabus. (Emphasis added.)

separate animus for each victim. Further, other courts have held after *Cabrales* that multiple victims justify multiple convictions.²⁵ We agree with those cases. Consequently, we hold that the trial court properly sentenced Baldwin on the two counts of felonious assault, and we overrule his third assignment of error.

V. Ineffective Assistance of Counsel

{¶26} In his fourth assignment of error, Baldwin contends that he was denied the effective assistance of counsel. He argues that his counsel was ineffective for failing to object to the state’s alleged comment on his post-arrest silence, for failing to object to hearsay testimony, and for failing to argue for merger of allied offenses of similar import.

{¶27} Baldwin has not demonstrated that his counsel’s representation fell below an objective standard of reasonableness or that, but for counsel’s unprofessional errors, the result of the proceeding would have been otherwise. Therefore, he has failed to meet his burden to show ineffective assistance of counsel.²⁶ A defendant is not deprived of the effective assistance of counsel when counsel chooses, for strategic reasons, not to pursue every possible trial tactic.²⁷ Consequently, we overrule his fourth assignment of error.

VI. Weight and Sufficiency

{¶28} In his fifth assignment of error, Baldwin contends that the evidence was insufficient to support his convictions. Our review of the record shows that a rational trier of fact, after viewing the evidence in a light most favorable to the

²⁵ *State v. Cutts*, 5th Dist. No. 2008CA00079, 2009-Ohio-3563, ¶241; *State v. Jordan*, 8th Dist. No. 91869, 2009-Ohio-3078, ¶11-14.

²⁶ *Strickland v. Washington* (1984), 466 U.S. 668, 687-689, 104 S.Ct. 2052; *Hirsch*, supra, at 314-315.

²⁷ *State v. Brown* (1988), 38 Ohio St.3d 305, 319, 528 N.E.2d 523; *State v. Matthews*, 1st Dist. Nos. C-060669 and C-060692, 2007-Ohio-4881, ¶20.

prosecution, could have found that the state had proved beyond a reasonable doubt all the elements of felonious assault under R.C. 2903.11(A)(2), having weapons while under a disability under R.C. 2923.13(A)(3) and discharge of a firearm on or near prohibited premises under R.C. 2923.162(A)(3). Therefore, the evidence was sufficient to support those convictions.²⁸ Baldwin argues that the testimony of the state's witnesses was not credible. But matters as to the credibility of evidence are for the trier of fact to decide.²⁹

{¶29} Baldwin also argues that his convictions were against the manifest weight of the evidence. After reviewing the record, we cannot say that the jury lost its way and created such a manifest miscarriage of justice that we must reverse Baldwin's convictions and order a new trial. Therefore, the convictions were not against the manifest weight of the evidence.³⁰ We overrule his fifth assignment of error and affirm his convictions.

Judgment affirmed.

HENDON, P.J., and MALLORY, J., concur.

Please Note:

The court has recorded its own entry this date.

²⁸ See *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus; *State v. Johnson*, 1st Dist. Nos. C-080156 and C-080158, 2009-Ohio-2568, ¶67; *Murray*, supra, at ¶2-3.

²⁹ *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, 804 N.E.2d 433, ¶116; *State v. McCrary*, 1st Dist. No. C-080860, 2009-Ohio-4390, ¶22.

³⁰ See *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541; *Johnson*, supra, at ¶67.