[Cite as *State v. Duncan*, 2009-Ohio-5668.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- ROY DUNCAN Defendant-Appellant	JUDGES: Hon. W. Scott Gwin, P.J. Hon. William B. Hoffman, J. Hon. Patricia A. Delaney, J. Case No. 2009CA028 O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Richland County Court of Common Pleas, Case No. 2006-CR-0491D
JUDGMENT:	Affirmed, in part; Reversed in part and Remanded
DATE OF JUDGMENT ENTRY:	October 21, 2009

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JAMES J. MAYER, JR. PROSECUTING ATTORNEY RICHLAND COUNTY, OHIO BY: KIRSTEN L. PSHOLKA-GARTNER Assistant Richland County Prosecutor 38 South Park Street Mansfield, Ohio 44902	ROY DUNCAN, PRO SE North Central Correctional Institution Inmate #A533-354 670 Marion Willamsport Road East P.O. Box 1812 Marion, Ohio 43301-1812

Hoffman, J.

{¶1} Defendant-appellant Roy Duncan appeals his conviction and sentence entered by the Richland County Court of Common Pleas. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On May 19, 2006, at approximately 1:30 a.m., Appellant and Kathy Ward, an acquaintance, travelled in a Ford Taurus while leaving the parking lot of Hills Bar in Richland, County. The vehicle's headlights were not turned on when the car exited the bar parking lot.

{¶3} Trooper James Burkhart noticed the vehicle travelling without headlights, and also witnessed the vehicle cross the center line. As a result, Trooper Burkhart pulled up behind the vehicle, activating his cruiser lights. The vehicle failed to stop, and Trooper Burkhart then activated the cruiser siren. The Taurus increased in speed, exiting onto Main Street and striking a guard rail. Trooper Burkhart pursued the vehicle down Main Street, reaching speeds of eighty to ninety miles per hour through the downtown area. The vehicle passed a tractor trailer on the left and ran a red light.

{¶4} At one point, Trooper Burkhart lost sight of the vehicle for a short time. He then came upon a cloud of smoke and dirt, with chunks of concrete and other debris on the road. He observed the Taurus crashed into a Mansfield City Police cruiser driven by Officer Richard Miller.

{¶5} As Trooper Burkhart approached the vehicle, he saw Appellant unconscious in the driver's seat with his head lying on the window sill of the driver's side door. Kathy Ward was on her knees on the passenger side floorboard with her head

lying on the passenger seat. She appeared to be deceased. Officer Miller was unconscious and moaning in pain.

{¶6} At the scene of the accident, Appellant became very combative with emergency medical personnel. Once extracted from the vehicle, Appellant resisted the cervical collar and straps were used to immobilize him on the backboard. Further, Appellant was disruptive in the emergency room, cursing and spitting at healthcare providers, while attempting to remove the restraints and collar. Blood tests later revealed Appellant's blood alcohol level to be .153 at the time.

{¶7} The Richland County Grand Jury indicted Appellant on two counts of failure to comply with the order or signal of a police officer; two counts of driving while under the influence of alcohol, each with a specification of a previous conviction of five equivalent offenses within twenty years; one count of aggravated vehicular assault; and one count of vehicular assault.

{¶8} Following a jury trial, Appellant was convicted of all counts and specifications. The trial court sentenced Appellant to eighteen years incarceration.

{¶9} Appellant now appeals, assigning as error:

{¶10} "I. THE TRIAL COURT COMMITTED PREJUDICIAL PLAIN ERROR TO DEFENDANT/APPELLANT DEFENSE BY NOT ACCEPTING THE DEFENDANTS MOTION FOR ACQUITTAL O.CRIM.R.29(A) AT THE END OF THE STATES CASE ON ALL OF THE JURY'S CONVICTIONS COUNTS 1-6 DUE TO THE 'INSUFFICIENT EVIDENCE' OF THE STATE TO PROVE THE MAIN MOST ESSENTIAL ELEMENT OF 'IDENTITY OF THE OFFENDER'. THIS VIOLATED APPELLANTS FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS DUE PROCESS RIGHTS OF THE UNITED

STATES CONSTITUTION, & ARTICLE I, SECTION 10 & 16 OF THE OHIO CONSTITUTION BY O.CRIM.R.52(B); O.R.C. 2921.331(B)(5)(a)(i) & 2921.331(B)(5)(a)(ii); O.R.C. 4511.19(A)(1)(a) & 4511.19(A)(1)(b); O.R.C. 2903.08(A)(1)(a) & O.R.C. 2903.08(A)(2)(b); O.R.C.4507.

{¶11} "II. THE TRIAL COURT COMMITTED PREJUDICIAL PLAIN ERROR TO DEFENDANT/APPELLANT'S DEFENSE BY ALLOWING A CONVICTION AND SENTENCING DEFENDANT ON AN 'IMPLIED ACQUITTAL' IN COUNT ONE VERDICT, WHEREAS THE INDICTMENT DOES NOT CHARGE THE CONVICTION ALLEGED. VIOLATING APPELLANT'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS DUE PROCESS RIGHTS OF THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 10 & 16 OF THE OHIO CONSTITUTION BY O.CRIM.R.52(B); O.CRIM.R.29(A); O.R.C. 2921.331(B)(5)(a)(i) AND O.R.C. 2921.331(B)(5)(A)(ii).

{¶12} "III. THE TRIAL COURT COMMITTED PREJUDICIAL PLAIN ERROR TO DEFENDANT/APPELLANTS DEFENSE BY ACCEPTING JURY'S VERDICT COUNT SIX 'AGGRAVATED VEHICULAR ASSAULT' IS NOT CHARGED BY INDICTMENT COUNT SIX, IN ACCORDANCE WITH THE SUBSECTIONS USED IT SHOULD BE 'VEHICULAR ASSAULT' THIS VIOLATED APPELLANTS FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS DUE PROCESS RIGHTS OF THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 10 &16 OF THE OHIO CONSTITUTION BY O.CRIM.R.52(B); O.CRIM.R.29(A); O.R.C. 2903.08(A)(1)(a), 2903.08(A)(2)(b) & O.R.C. 2903.08(C)(1).

{¶13} "IV. THE TRIAL COURT COMMITTED PREJUDICIAL PLAIN ERROR TO DEFENDANT/APPELLANTS DEFENSE BY ACCEPTING THE JURY'S SEPARATE CONVICTION, THEN SEPARATELY SENTENCING ON COUNT FIVE 'AGGRAVATED VEHICULAR ASSAULT' WHEN THE JURY HAD ALREADY CONVICTED, AND THE COURT HAD ALREADY SENTENCED DEFENDANT ON THE 'LESSER INCLUDED OFFENSE' IN COUNT THREE 'DRIVING UNDER THE INFLUENCE.' THIS VIOLATED APPELLANTS FIFTH, SIXTH, FOURTEENTH AMENDMENTS DUE PROCESS RIGHT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 & 16 OF THE OHIO CONSTITUTION BY O.CRIM.R.52(B); O.CRIM.R.29(A); O.R.C. 2903.08(A)(1)(a); O.R.C. 4511.19(A) & (1)(a); O.R.C.45.07.

{¶14} "V. THE TRIAL COURT COMMITTED PREJUDICIAL PLAIN ERROR TO DEFENDANT/APPELLANTS DEFENSE BY ACCEPTING AN ISOLATED, INDEPENDENT, DOUBLE JEOPARDY BARRED FROM REVIEW, FINDING OF DRIVING SUSPENSION IN VERDICT COUNT SEVEN FOR ELEVATION PURPOSES, TO ENHANCE TWO OTHER SEPARATE ISOLATED, INDEPENDENT, DOUBLE JEOPARDY BARRED FROM REVIEW VERDICT COUNTS FIVE, AND SIX, APPELLANT IS NOT CHARGED WITH AN INDICTMENT COUNT SEVEN. THIS VIOLATED APPELLANTS FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS DUE PROCESS RIGHT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 & 16 OF THE OHIO CONSTITUTION BY O.CRIM.R.52(B); O.CRIM.R.29(A); O.R.C. 4507; O.R.C. 2903.08(A)(1)(a); 2903.08(A)(2)(b).

{¶15} "VI. THE TRIAL COURT COMMITTED PREJUDICIAL PLAIN ERROR TO DEFENDANT/APPELLANTS DEFENSE BY SEPARATELY SENTENCING

APPELLANT TO CONSECUTIVE TERMS ON THE SAME SERIOUS PHYSICAL HARM AGAINST THE SAME PERSON, ARISING FROM THE SAME COURSE OF CONDUCT. THIS VIOLATED APPELLANTS FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS DUE PROCESS RIGHTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 & 16 OF THE OHIO CONSTITUTION BY O.CRIM.R.52(B); O.CRIM.R.29(A); O.R.C. 2921.331(B)(5)(a)(i); O.R.C. 2903.08(A)(1)(a).

{¶16} "VII. THE TRIAL COURT COMMITTED PREJUDICIAL PLAIN ERROR TO DEFENDANT/APPELLANTS DEFENSE BY ACCEPTING JURY'S CONVICTIONS COUNTS ONE THROUGH SIX. THE VERDICTS SHOW THAT THE JURY NEVER FOUND OR DETERMINED NONE OF THE ESSENTIAL ELEMENTS, OR ALL OF THE WRONG ESSENTIAL ELEMENTS NEEDED FOR THE CONVICTIONS. THIS VIOLATED APPELLANTS FIFTH, SIX, AND FOURTEENTH AMENDMENTS DUE PROCESS RIGHTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 & 16 OF THE OHIO CONSTITUTION BY O.CRIM.R.52(B): O.CRIM.R.29(A); O.R.C. 2921.331(B)(5)(a)(i), 2921.331(B)(5)(a)(ii); O.R.C. 4511.19(A)(1)(a), 4511.19(A)(1)(b); 2903.08(A)(1)(a), 2903.08(A)(2)(b); O.R.C. 4507.

{¶17} "VIII. THE TRIAL COURT COMMITTED PREJUDICIAL PLAIN ERROR TO DEFENDANT/APPELLANTS DEFENSE BY HOLDING TWO AMENDED SENTENCING HEARINGS WITHOUT APPELLANTS PRESENCE, BOTH OF WHICH AN ADDITIONAL PUNISHMENT WAS ADDED, WITHOUT AFFORDING APPELLANT AN OPPORTUNITY TO MAKE PRESERVATION OBJECTIONS. THIS VIOLATED APPELLANT [SIC] FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS DUE

PROCESS RIGHTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 & 16 OF THE OHIO CONSTITUTION BY O.CRIM.R.52(B); O.CRIM.R.29(A); O.CRIM.R.32(C); O.CRIM.R.32(A); O.CRIM.R.43(A)(1) O.R.C. 2921.331(B)(5)(a)(i) & 2921.331(B)(5)(a)(ii); O.R.C. 4511.19(A)(1)(a) & 4511.19(A)(1)(b); O.R.C. 2903.08(A)(1)(a) & 2903.08(A)(2)(b); O.R.C. 4507.; O.R.C. 2941.1413.

{¶18} "VIV[SIC]. THE TRIAL COURT COMMITTED PREJUDICIAL PLAIN ERROR TO DEFENDANT/APPELLANTS DEFENSE BY EXPOSING TO THE JURY DEFENDANTS HOLE [SIC] DRIVERS SUSPENSION RECORD RATHER THAN ACCEPT DEFENDANTS STIPULATION TO THE ACTIVE SUSPENSION NEEDED TO ELEVATE. THE VIOLATED APPELLANTS FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS DUE PROCESS RIGHTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 & 16 OF THE OHIO CONSTITUTION BY O.CRIM.R.52(B); O.R.C. 4507.; O.R.C. 2903.08(A)(1)(a), & 2903.08(A)(2)(b); O.EVID.R.401-0403(A)(B).

{¶19} "X. THE TRIAL COURT COMMITTED PREJUDICIAL PLAIN ERROR TO DEFENDANT/APPELLANTS DEFENSE BY ACCEPTING JURY'S VERDICT CONVICTION COUNT SIX, WHEREAS THE MAIN MOST ESSENTIAL ELEMENT OF SERIOUS PHYSICAL HARM WAS NEVER PROVEN BY REQUIREMENTS OF THE STATUE [SIC]. THIS VIOLATED APPELLANTS FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS DUE PROCESS RIGHT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 & 16 OF THE OHIO CONSTITUTION BY

O.CRIM.R.52(B); O.CRIM.R.29(A); O.R.C. 2903.08(A)(2)(B); O.R.C. 2901.01(E)(2); O.R.C. 4507."

I.

{¶20} In the first assignment of error, Appellant maintains the trial court erred in denying his motion for acquittal as the State failed to establish Appellant's identity as the driver of the vehicle beyond a reasonable doubt.

{¶21} Criminal Rule 29(A) reads:

{¶22} "The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses. The court may not reserve ruling on a motion for judgment of acquittal made at the close of the state's case."

{¶23} "[T]he relevant inquiry ***is, after viewing the evidence in the light most favorable to the prosecution, whether any reasonable trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1981), 61 Ohio St.3d 259. Thus, a trial court, when ruling on a motion brought pursuant to Crim. R. 29(A), must view the probative evidence in a light most favorable to the state and determine whether the state presented sufficient evidence on each of the essential elements of the offense charged." *State v. Martin* (1983), 20 Ohio App.3d 172.

{¶24} Upon review of the record, we find the evidence presented at trial, when viewed in a light most favorable to the prosecution, is sufficient to establish Appellant's

identity as the driver of the vehicle at the time of the incident. Witnesses testified they observed Appellant get into the driver's side of the vehicle with the keys, and drive the vehicle out of the bar's parking lot. The testimony establishes Appellant would not have had time to change positions with Kathy Ward prior to the pursuit. Further, Trooper Burkhart observed the vehicle during the pursuit, and testified it would not have been possible for Appellant to change positions with Ward during the pursuit. Following the crash, Appellant was found on the driver's side of the vehicle with his head lying on the driver's side window. In contrast, Ward was on her knees on the passenger side floorboard with her face on the seat. Additionally, an emergency medical technician, Justin Hartson, testified he found Appellant in the driver's seat with his head halfway out of the window. Accordingly, the trier of fact could have found Appellant was the driver of the vehicle beyond a reasonable doubt.

{¶25} Appellant's first assignment of error is overruled.

II, III

{¶26} Appellant's second and third assignments of error raise common and interrelated issues; therefore, we will address the arguments together.

{¶27} Initially, we note, Appellant did not object at trial to either alleged error in the trial court; thereby waiving all but plain error. In order to find plain error under Crim. R. 52(B), it must be determined, but for the error, the outcome of the trial clearly would have been otherwise. See *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph two of the syllabus. Even if the defendant satisfies this burden, an appellate court has discretion to disregard the error and should correct it only to "prevent a

manifest miscarriage of justice." *State v. Barnes* (2002), 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (citations omitted).

{¶28} As to Count 1 of the indictment, Appellant argues the indictment alleged Appellant failed to comply with the order or signal of a police officer and his operation of the motor vehicle "was a proximate cause of serious physical harm to persons or property," whereas the verdict form for Counts 1 and 2 find Appellant guilty of failure to comply with the order or signal of a police officer and find Appellant's operation of the motor vehicle "caused a substantial risk of serious physical harm to persons or property."

{¶29} Upon review of the record, both victims in fact suffered serious physical harm; therefore, the discrepancy between the language of the indictment and the language in the verdict form for Count 1 did not amount to plain error. Further, the jury's finding Appellant created a substantial risk of serious physical harm, as opposed to causing serious physical harm as a proximate result of the operation of the motor vehicle, does not change the degree of the offense under R.C. 2945.75(A). Therefore, we find any alleged error to be harmless.

{¶30} With regard to Count 6 of the indictment, Appellant argues the verdict form and sentencing entry refer to the charge as "aggravated vehicular assault"; rather than, vehicular assault as charged in the indictment.

{¶31} Count 6 of the indictment charges Appellant with violating R.C. 2903.08(A)(2)(b), which reads:

{¶32} "(A) No person, while operating or participating in the operation of a motor vehicle, motorcycle, snowmobile, locomotive, watercraft, or aircraft, shall cause serious physical harm to another person or another's unborn in any of the following ways:

{¶33} "***

{¶34} "(2) In one of the following ways:

{¶35} "(b) Recklessly.

{¶36} Subsection (C) of the statute states:

{¶37} "(C)(1) Whoever violates division (A)(2) or (3) of this section is guilty of vehicular assault and shall be punished as provided in divisions (C)(2) and (3) of this section."

{¶38} While the trial court incorrectly referred to the offense in Count 6 as "aggravated vehicular assault" in the verdict form, on the sentencing entry and in its instructions, the trial court properly instructed the jury as to the elements of the offense of vehicular assault. Therefore, the error did not impact the result of Appellant's trial, as Appellant was properly convicted of vehicular assault against Officer Miller as charged in the indictment.

{¶39} The trial court instructed the jury:

{¶40} "Now there is a second charge of vehicular assault against Officer Richard Miller which is slightly different. Before you can find him guilty of the aggravated vehicular assault against Officer Richard Miller, you must find beyond a reasonable

doubt that on or about May 19, 2006, here in Richland County, Mr. Duncan while operating a motor vehicle caused the serious physical harm to Officer Miller recklessly. So that is a new term, "recklessly."

{¶41} "A person acts 'recklessly' when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct in operating the motor vehicle is likely to cause serious physical injury to another.

{¶42} " 'Risk,' as I said before, means a significant possibility, as contrasted with a remote possibility, that a certain result may occur.

{¶43} "Now, If you do find that the state did prove beyond a reasonable doubt all the essential elements of either one or both of these charges of aggravated vehicular assault as I defined them for you, your verdict would be 'guilty' of one or both of the charges according to your findings. If, on the other hand, you find that the prosecutor failed to prove beyond a reasonable doubt any one or more of the essential elements of either one or both of these charges of aggravated vehicular assault, your verdict would have to be 'not guilty' of that charge or those charges according to your findings."

{¶44} Tr. at 1184-1185.

{¶45} We find the trial court's incorrect reference to the charged crime of vehicular assault as aggravated vehicular assault did not constitute plain error nor result in prejudice to the Appellant.

{¶46} Accordingly, Appellant's second and third assignments of error are overruled.

IV, VI

{¶47} Appellant's fourth and sixth assignments of error raise common and interrelated issues; therefore, we will address the arguments together.

{¶48} Appellant maintains the trial court erred in imposing sentences for both Count 3, driving under the influence, in violation of R.C. 4511.19(A)(1(a) and Count 5, aggravated vehicular assault, in violation of R.C. 2903.08(A)(1)(a).

{¶49} R.C. 4511.19(A)(1)(a) reads:

{¶50} "(A)(1) No person shall operate any vehicle, streetcar, or trackless trolley within this state, if, at the time of the operation, any of the following apply:

{¶51} "(a) The person is under the influence of alcohol, a drug of abuse, or a combination of them."

{¶52} R.C. 2903.08(A)(1)(a) reads:

{¶53} (A) No person, while operating or participating in the operation of a motor vehicle, motorcycle, snowmobile, locomotive, watercraft, or aircraft, shall cause serious physical harm to another person or another's unborn in any of the following ways:

{¶54} "(1)(a) As the proximate result of committing a violation of division (A) of section 4511.19 of the Revised Code or of a substantially equivalent municipal ordinance;"

{¶55} In *State v. Rance,* 85 Ohio St.3d 632, 710 N.E.2d 699, 1999-Ohio-291, the Ohio Supreme Court held offenses are of similar import if the offenses "correspond to such a degree that the commission of one crime will result in the commission of the

other." *Id.* The *Rance* court further held courts should compare the statutory elements in the abstract. *Id.* at 636.

{¶56} In clarifying *Rance,* the Court, in *State v. Cabrales,* 118 Ohio St.3d 54, 886 N.E.2d 181, 2008-Ohio-1625, syllabus, instructed as follows:

{¶57} "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 the commission of the other, then the offenses are allied offenses of similar import."

{¶58} According to *Cabrales,* the sentencing court, if it has initially determined two crimes are allied offenses of similar import, then proceeds to the second part of the two-tiered test and determines whether the two crimes were committed separately or with a separate animus. *Id.* at 57, citing *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117.

{¶59} The Ohio Supreme Court revisited the issue of allied offenses of similar import in *State v. Brown,* 119 Ohio St .3d 447, 895 N.E.2d 149, 2008-Ohio-4569. noting the tests for allied offenses of similar import are rules of statutory construction designed to determine legislative intent. *Id.* at 454. The Court concluded that while the two-tiered test for determining whether offenses constitute allied offenses of similar import is helpful in construing legislative intent, it is not necessary to resort to that test when the intent of the legislature is clear from the language of the statute. *Id.*

{¶60} More recently, the Ohio Supreme Court addressed the issue in *State v. Winn,* 121 Ohio St.3d 413, 2009-Ohio-1059. In *Winn,* the Court considered whether kidnapping and aggravated robbery are allied offenses of similar import. In ultimately finding such offenses to be of similar import under the *Cabrales* test, the Ohio Supreme Court in *Winn* did not consider the societal interests underlying the statutes to determine legislative intent, and determined legislative intent solely by applying R.C. 2941.25. The *Winn* court stated that, in Ohio, we discern legislative intent on this issue by applying R.C. 2941.25, as the statute is a "clear indication of the General Assembly's intent to permit cumulative sentencing for the commission of certain offenses." *Id.* at ¶ 6. We noted in *Varney,* supra, that the Ohio Supreme Court in *Brown* expanded the first step of the allied offense analysis by adding the additional factor of societal interests protected by the statutes. *Varney,* at ¶ 16, citing *State v. Boldin,* Geauga App. No.2007-G-2808, 2008-Ohio-6408. In light of the Supreme Court's analysis in *Winn,* societal interest may be a tool to be used in some circumstances in determining if the intent of the legislature is clear from the criminal statutes being compared. See *State v. Mills,* Tuscarawas App.No.2007AP070039, 2009-Ohio-1849, ¶ 212.

{¶61} In the case sub judice, we find the charges of DUI, in violation of R.C. 4511.19(A)(1)(a), and aggravated vehicular assault, in violation of R.C. 2903.08(A)(1)(a), to be allied offenses of similar import.

{¶62} R.C. 2903.08(A)(1)(a) specifically requires the State to prove a violation of R.C. 4511.19 or a substantially equivalent municipal ordinance as an element of the offense. Accordingly, the commission of aggravated vehicular assault will necessarily result in the commission of driving under the influence as charged.

{¶63} Appellant further maintains the trial court erred in imposing consecutive sentences for Counts 1 and 5, as the offenses are allied offenses of similar import.

{¶64} In Count 1, Appellant was convicted of failure to comply with the order of a police officer, in violation of R.C. 2921.331, in relation to Kathy Ward. The statute reads,

{¶65} "(B) No person shall operate a motor vehicle so as willfully to elude or flee a police officer after receiving a visible or audible signal from a police officer to bring the person's motor vehicle to a stop.

{¶66} "(C)(1) Whoever violates this section is guilty of failure to comply with an order or signal of a police officer.

{¶67} "* * *

{¶68} "(5)(a) A violation of division (B) of this section is a felony of the third degree if the jury or judge as trier of fact finds any of the following by proof beyond a reasonable doubt:

{¶69} "(i) The operation of the motor vehicle by the offender was a proximate cause of serious physical harm to persons or property. * * *"

{¶70} Appellant was further convicted in Count 5 of aggravated vehicular assault, in violation of RC. 2903.08(A)(1)(a), relating to Kathy Ward. The statute reads:

{¶71} "(A) No person, while operating or participating in the operation of a motor vehicle, motorcycle, snowmobile, locomotive, watercraft, or aircraft, shall cause serious physical harm to another person or another's unborn in any of the following ways:

{¶72} "(1)(a) As the proximate result of committing a violation of division (A) of section 4511.19 of the Revised Code or of a substantially equivalent municipal ordinance;"

{¶73} Upon review, we find the charges of failure to comply and aggravated vehicular assault are not allied offenses of similar import. Accordingly, the trial court did not err in sentencing Appellant to consecutive sentences on those charges.

{¶74} Based upon the above, we find Counts 3 and 5 to be allied offenses of similar import. Therefore, the trial court erred in sentencing Appellant on both charges.

{¶75} Appellant's fourth assignment of error is sustained, and the sixth assignment of error is overruled.

V.

{¶76} In the fifth assignment of error Appellant asserts the trial court erred in accepting the jury's verdict as to Count 7.

{¶77} Revised Code Section 2945.75(A) states:

{¶78} "(A) When the presence of one or more additional elements makes an offense one of more serious degree:

{¶79} "(1) The affidavit, complaint, indictment, or information either shall state the degree of the offense which the accused is alleged to have committed, or shall allege such additional element or elements. Otherwise, such affidavit, complaint, indictment, or information is effective to charge only the least degree of the offense.

{¶80} "(2) A guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional element or elements are present. Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged."

{¶81} Appellant maintains Count 7 of the verdict form finds the State proved Appellant operated a motor vehicle with a suspended license. Appellant argues he was not indicted on that charge; therefore, the trial court erred in accepting the verdict.

{¶82} Count 7 of the jury verdict form reads, "If we find the defendant Roy Duncan guilty of either one or both of the charges of aggravated vehicular assault, then we further find that***the prosecutor did prove that Mr. Duncan operated the motor vehicle on May 19, 2006 with a suspended driver's license."

{¶83} Pursuant to R.C. 2945.75(A) the additional finding is necessary to convict Appellant of aggravated vehicular assault in Count 5 of the indictment as a felony of the second degree, and vehicular assault in Count 6 as a felony of the third degree. Accordingly, Appellant was not convicted of an offense for which he was not indicted.

{¶84} Appellant's fifth assignment of error is overruled.

VII.

{¶85} Appellant's seventh assignment of error asserts the trial court erred in accepting the jury's verdict as to Counts 1 through 6 when the verdict forms did not contain all of the essential elements of each offense.

{¶86} Ohio Criminal Rule 31(A) regarding jury verdicts does not require the verdict form to contain all the elements of the offense. Appellant has not established a deviation from a legal rule, and we have found nothing which requires or suggests that an affirmative defense be set forth on the verdict form. See, *State v. Hobbs,* 2008-Ohio-4658. Accordingly, we find the trial court's omission of the elements in the verdict form was not error.

{¶87} Appellant's seventh assignment of error is overruled.

VIII.

{¶88} In the eighth assignment of error, Appellant asserts the trial court committed plain error in amending sentencing entries without Appellant's presence.

{¶89} Once a valid sentence has been executed, a trial court no longer has the power to modify the sentence except as provided by the General Assembly. See *State v. Hayes* (1993), 86 Ohio App.3d 110; *State v. Addison* (1987), 40 Ohio App.3d 7. However, one exception to the rule is the trial court has jurisdiction to correct clerical errors in its judgments. See *State ex rel. Cruzado v. Zaleski,* 111 Ohio St.3d 353, 356, 2006-Ohio-5795, ¶ 19, citing Crim.R. 36. A *nunc pro tunc* order can be used to supply information which existed but was not recorded, and to correct typographical or clerical

errors. *Jacks v. Adamson* (1897), 56 Ohio St. 397, 47 N.E. 48. "However, *nunc pro tunc* entries are limited in proper use to reflecting what the court actually decided, not what the court might or should have decided or what the court intended to decide." *State ex rel. Fogle v. Steiner* (1995), 74 Ohio St.3d 158, 164, 656 N.E.2d 1288.

{¶90} On September 5, 2007, the trial court, via Judgment Entry, sentenced Appellant to five years as to Count 1, four years as to Count 2, six months as to Count 3, eight years as to Count 5, and five years as to Count 6. The trial court ordered the sentences be served consecutively on Counts 1, 2, 5 and 6 for a total of 22 years, and concurrently on Count 3. The trial court further suspended Appellant's driver's license, leaving the total number of months blank.

{¶91} On September 17, 2007, the trial court issued an Amended Sentencing Entry indicating, "This entry is amended because the court is now convinced the counts 1 and 2 must be merged."

{¶92} The trial court's entry amended the sentence to impose five years as to Count 1, merged Count 2 with Count 1, imposed six months on Count 3, merged Count 4 with Count 3, imposed eight years on Count 5 and five years on Count 6. The trial court ordered the sentences be served consecutively as to Counts 1, 5 and 6 for a total of 18 years, and concurrently on Count 3. Further, the trial court suspended Appellant's driver's license indicating the suspension was for life.

{¶93} On February 18, 2009 the trial court issued a nunc pro tunc entry to clarify Appellant was convicted by jury trial.

{¶94} Upon review, we find the trial court's amendments to the original sentencing entry were not merely typographical or clerical corrections. Accordingly, the trial court erred in amending the sentencing entries without Appellant being present. Appellant's eighth assignment of error is sustained.

IX.

{¶95} In the ninth assignment of error, Appellant maintains the trial court erred in admitting his driving record into evidence.

{¶96} Initially, we note, the admission or exclusion of evidence lies in the trial court's sound discretion. *State v. Sage* (1987), 31 Ohio St.3d 173. In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217.

{¶97} Upon review of the record, the State introduced Appellant's driving record in order to demonstrate Appellant's license was suspended at the time of the incident at issue. The factor elevated Count 5 of the indictment from a felony of the third degree to a felony of the second degree, and the offense in Count 6 from a felony of the fourth degree to a felony of the third degree. Driving under suspension was not merely a sentencing enhancement, but an element of the crime(s) required to be proven beyond a reasonable doubt.

{¶98} Further, the trial court properly instructed the jury the evidence was solely admitted for the purpose of establishing Appellant was driving under a suspended license, and to not consider the same as bad character evidence.

{¶99} Appellant's ninth assignment of error is overruled.

X

{¶100} In the tenth assignment of error, Appellant argues there is insufficient evidence to support his conviction for vehicular assault. Specifically, Appellant asserts the State failed to present evidence of serious physical harm to Officer Miller as to Count 6 of the indictment.

{¶101} In *State v. Jenks* (1981), 61 Ohio St.3d 259, 574 N.E.2d 492, superseded by constitutional amendment on other grounds in *State v. Smith,* 80 Ohio St.3d 89, 1997-Ohio-355, 684 N.E.2d 668, the Ohio Supreme Court set forth the standard of review when a claim of insufficiency of the evidence is made. The Ohio Supreme Court held: "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *Id.* at paragraph two of the syllabus.

{¶102} Ohio Revised Code Section 2901.01(A)(5) defines "serious physical harm" as:

{¶103} "(5) "Serious physical harm to persons" means any of the following:

{¶104} "(a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;

{¶105} "(b) Any physical harm that carries a substantial risk of death;

{¶106} "(c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;

{¶107} "(d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement;

{¶108} "(e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain."

{¶109} Upon review of the record, the evidence presented at trial established Officer Miller suffered a brief loss of consciousness, and suffered injuries to his neck and back causing him to miss several days of work and requiring ongoing physical therapy. Accordingly, viewing the evidence in a light most favorable to the prosecution, the jury could reasonably find the essential elements of vehicular assault proven beyond a reasonable doubt.

{¶110} Appellant's tenth assignment of error is overruled.

By: Hoffman, J.

Gwin, P.J. and

Delaney, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ W. Scott Gwin
HON. W. SCOTT GWIN

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
ROY DUNCAN	:	
	:	
Defendant-Appellant	:	Case No. 2009CA028

For the reasons stated in our accompanying Opinion, the judgment of the Richland County Court of Common Pleas is affirmed in part, reversed in part and remanded for further proceedings in accordance with our Opinion and the law. Costs waived.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ W. Scott Gwin
HON. W. SCOTT GWIN

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY