[Cite as *State v. Mitchell*, 2011-Ohio-973.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

State of Ohio — Court of Appeals No. E-09-064

Appellee — Trial Court No. 2006-CR-380

v.

Chad Mitchell — **DECISION AND JUDGMENT**

Appellant — Decided: March 4, 2011

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, and
Mary Ann Barylski, Assistant Prosecuting Attorney, for appellee.

Robert E. Searfoss, III, for appellant.

* * * * *

OSOWIK, P.J.

{¶ 1} This is an appeal from a judgment of the Erie County Court of Common Pleas, which found appellant guilty of three counts of complicity to felonious assault, a second degree felony, in violation of R.C. 2903.11(A)(2) and R.C. 2923.03(A)(2) (Counts 1, 3 and 4), complicity to improperly discharging a firearm at or into a

habitation, a second degree felony, in violation of R.C. 2923.161(A)(1) and 2923.03(A)(2) (Count 2), complicity to improperly handling firearms in a motor vehicle, a fourth degree felony, in violation of R.C. 2923.16(A) and 2923.03(A)(2) (Count 5), complicity to having a weapon while under disability, a third degree felony, in violation of R.C. 2923.13(A)(3) and R.C. 2923.03(A)(2) (Count 6), and complicity to carrying a concealed weapon, a fourth degree felony, in violation 2923.12(A)(2) and R.C. 2923.03(A)(2) (Count 7). For the reasons set forth below, this court affirms the judgment of the trial court in part, reverses in part, and remands for resentencing in accordance with this ruling.

{¶ 2} Appellant, Chad Mitchell, sets forth the following three assignments of error:

{¶ 3} "First Assignment of Error: Appellant's convictions on all counts are against the manifest weight of the evidence and Appellant is entitled to a new trial.

{¶ 4} "Second Assignment of Error: The trial court erred by not merging Appellant's convictions for Counts 1 and 3 through 6, along with their firearm specifications, into Count 2 with its single five-year specification.

{¶ 5} "Third Assignment of Error: The trial court erred entering conviction and sentence for Count 7 and the second firearm specification connected to Count 6 because those convictions and sentences are contrary to law."

{¶ 6} The following undisputed facts are relevant to the issues raised on appeal. On July 3, 2006, Denero Aaron ("Denero") approached a woman he knew to be

appellant's girlfriend while walking in downtown Sandusky. Denero told her that he wanted to talk to appellant about a prior physical altercation between appellant and Denero's father.

{¶ 7} Later that evening, appellant was socializing with Shandance Sullivan ("Sullivan"), Jackie McElroy ("McElroy"), and several others at Sullivan's cousin's house. Significantly, both Sullivan and McElroy witnessed appellant displaying a black nine millimeter handgun. Subsequent to this observation, appellant left, accompanied by Michael Brandon ("Brandon"), Dale Johnson ("Johnson"), and several other acquaintances, in Sullivan's silver Honda CRV.

{¶ 8} Later that same night, Joy Gray ("Gray"), Denero's cousin, was patronizing DJ's Sports Bar in Sandusky. Gray observed Sullivan's CRV in the parking lot with four black males inside. The bar was located in close proximity to the residence of Angela Aaron ("Angela") where Denero was known to have also resided.

{¶ 9} Shortly thereafter, Gray walked back to the apartment complex with her cousins. While saying goodbye to her cousins in the parking lot, Gray witnessed the CRV going down the street in one direction, turn around in a parking lot, and proceed down the street in the direction of Angela's residence. Moments later, as Gray was entering her apartment, she heard gunfire. Gray ran to the window and observed the CRV speeding away.

{¶ 10} Late that same night as Gray's CRV observations, Angela was awakened by gunfire. Angela got up and rushed into the living room to check on her daughter and

granddaughter, who were sleeping on the living room floor underneath the window. Upon entering the living room, Angela saw a bullet hole in this same window. After checking on the well-being of the girls, Angela called the police.

{¶ 11} Upon arrival at the scene, the responding officer, Officer Desalle, observed glass and debris on the floor of the living room, observed the corresponding bullet hole in the window, and observed where the bullet had entered the ceiling. Gray, who lived in an adjacent apartment, told the officer that she saw Sullivan's CRV speeding off immediately after the gunfire. She also relayed that appellant was looking for Denero in relation to the previous incident with Denero's father.

{¶ 12} On the afternoon of July 4, Denero called the police to convey his belief that appellant had been involved in the shooting. At that time, Denero played a voicemail message that had been left on his phone by appellant. Interestingly, appellant had threatened to shoot Denero in the message.

{¶ 13} On July 4, Sullivan voluntarily took her CRV to the police station and reported her concern that it had been involved in the above-described shooting the previous night. In conjunction with this, Sullivan disclosed that on the morning of July 4, she had observed Brandon throw an object, later established via direct testimony by Brandon to be a shell casing, out of Sullivan's CRV. Brandon revealed to Sullivan that he and appellant had taken part in the shooting. Consistently, Sullivan also told police that appellant had stated to her the previous day that he had a "beef" with Denero.

{¶ 14} Brandon testified at trial that he was in the CRV with appellant, Johnson, and two other men on the night of the shooting. He stated that the vehicle stopped in the middle of the street in front of Angela's house, and that appellant and Johnson fired four or five shots at the house.

{¶ 15} The case was further bolstered by McElroy's testimony at trial that appellant told him the morning following the shooting that he had "shot up" Denero's residence.

{¶ 16} On July 13, 2006, appellant was indicted for acting in complicity to the following offenses: Three counts of felonious assault, one count of improperly discharging a firearm at or into a habitation, one count of improperly handling firearms in a motor vehicle, one count of having a weapon under disability, with all of the above counts carrying a firearms specification, and one count of carrying a concealed weapon.

{¶ 17} A joint jury trial was commenced on October 30, 2007, for appellant and Johnson. At the close of the trial, Johnson was acquitted of all charges. Appellant was found guilty of all charges and sentenced to a total term of incarceration of 21 years. On December 21, 2009, this court granted appellant's motion for delayed appeal.

{¶ 18} In appellant's first assignment of error he argues that his convictions on all counts were against the manifest weight of the evidence. In support, he contends that the acquittal of appellant's codefendant somehow legally establishes that the jury "clearly lost its way."

{¶ 19} When reviewing the decision of a trial court to determine if a verdict is against the weight of the evidence, this court sits as a "thirteenth juror." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. All evidence and reasonable inferences are weighed, the credibility of witnesses is considered, and a determination is made "whether resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶ 20} In the present case, we find appellant's argument to be without merit. Several eyewitnesses stated appellant was both carrying a gun just prior to the incident and was disclosing to multiple people that he harbored ill will towards Denero. Appellant brazenly left a voicemail message on Denero's phone threatening to shoot him prior to the incident. Eyewitnesses placed the CRV at the scene of the crime and appellant inside it. Eyewitness testimony affirmed that appellant had fired shots from the CRV at Angela's apartment. Furthermore, McElroy testified that appellant told him the morning after the shooting that he had committed the crime. The record clearly contains ample evidence in support of the verdict.

{¶ 21} Appellant's argument, that inconsistent verdicts between him and his codefendant, show that the jury lost its way, is likewise without merit. "It is not the province of the court to inquire by what course of reasoning the jury may have reached seemingly inconsistent verdicts." *U.S. v. Lester* (C.A.6, 1966), 363 F.2d 68, 74. That the jury weighed the evidence against Johnson and found him not guilty did not then require

them to also weigh the evidence in favor of appellant. See *State v. Morris* (1975), 42 Ohio St.2d 307, 325.

{¶ 22} After reviewing the record of evidence, we find no evidence that a manifest miscarriage of justice transpired. Appellant's first assignment of error is found not well-taken.

{¶ 23} Appellant's second assignment of error asserts that all of the offenses that he was convicted of arose from the same conduct. As such, he argues, the convictions on Counts 1 and 3 through 6 should have merged with Count 2 as allied offenses of similar import.

{¶ 24} In support of appellant's argument, he cites R.C. 2941.25. R.C. 2941.25 states:

{¶ 25} "(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.

{¶ 26} "(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."

{¶ 27} In enacting R.C. 2941.25, the General Assembly intended to codify the judicial doctrine of merger. *State v. Logan* (1979), 60 Ohio St.2d 126, 131. However,

the statute has proven difficult to apply in practice. *State v. Johnson*, __ Ohio St.3d__, 2010-Ohio-6314 ¶ 59 (O'Connor, J. concurring in judgment). Specifically, courts have struggled with the statutory language "allied offenses of similar import." Id. at ¶ 63.

{¶ 28} Until 1999, the analysis used to determine whether or not offenses are allied was essentially the same one the Ohio Supreme Court used in *State v. Blankenship* (1988), 38 Ohio St.3d 116. There, the court indicated that a two-step approach should be used in determining whether or not two or more offenses were allied.

{¶ 29} In the first step, courts determined whether the elements of the crimes "correspond[ed] to such a degree that the commission of one crime [would] result in the commission of the other." Id. at 117. If they did, then the court would consider the crimes to be "allied offenses of similar import." Id.

{¶ 30} Once this determination was made, the second step required courts to consider the defendant's conduct to "determine whether the defendant [could] be convicted of both offenses." Id. If the crimes were committed separately or there was separate animus for the offenses, then the offenses would not merge and a defendant could be convicted for both of them. Id.

{¶ 31} This test required courts to consider whether both crimes could be committed by the same conduct, and then whether or not they were, in fact, committed by the same conduct in the particular case. Id. at 119 (Whiteside, J. concurring). Central to this was the idea that, when comparing the elements of the crimes, they should be

compared "as applied to [the] facts of the case." *Newark v. Vazirani* (1990), 48 Ohio St.3d 81, 83.

{¶ 32} In 1999, the test was reviewed in *State v. Rance* (1999), 85 Ohio St.3d 632. There, the court determined that, while the *Blankenship* test was still applicable, courts should no longer look at the particular facts of the case in step one. Instead, the Supreme Court instructed courts to view the elements of the offenses in the abstract. Id. at 636.

{¶ 33} Although *Rance* was intended to create "clear legal lines capable of application in particular cases," id., difficulties in applying the abstract principle have persisted. See *State v. Johnson*, __ Ohio St.3d __, 2010-Ohio-6314, ¶ 28. In an effort to prevent the "absurd result" that could come from a strict adherence to the *Rance* standard, the court has repeatedly manipulated and found exceptions to it. Id. at ¶ 40. In a recent review of the cases since *Rance*, the Ohio Supreme Court found that the post-*Rance* allied-offenses jurisprudence was as follows:

{¶ 34} It "(1) require[d] that a trial court align the elements of the offenses in the abstract-but not too exactly, (2) permit[ed] trial courts to make subjective determinations about the probability that two crimes will occur from the same conduct, (3) instruct[ed] trial courts to determine preemptively the intent of the General Assembly outside the method provided by R.C. 2941.25, and (4) require[ed] that courts ignore the commonsense mandate of the statute to determine whether the same conduct of the defendant can be construed to constitute two or more offenses." Id.

{¶ 35} In effect, the multiple guidelines and exceptions to the *Rance* doctrine created a standard "so subjective and divorced from the language of R.C. 2941.25 that it provide[d] virtually no guidance to trial courts and require[d] constant ad hoc review by [the Supreme Court]." In light of this, the Supreme Court recently overruled *Rance* in *State v. Johnson* stating that "When determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25, the conduct of the accused must be considered." *State v. Johnson*, __ Ohio St.3d__, 2010-Ohio-6314, syllabus.

{¶ 36} Under this new standard, courts still employ a two-part test to determine whether or not offenses should be merged. In step one of the test, "the question is whether it is possible to commit one offense and commit the other with the same conduct, not whether it is possible to commit one without committing the other." Id at ¶ 48 (citing *Blankenship*, 38 Ohio St.3d at 119 (Whiteside, J. concurring)). Where "the offenses correspond to such a degree that the conduct of the defendant constituting commission of one offense constitutes commission of the other, then the offenses are of similar import." Id. Courts will no longer make abstract comparisons of the offenses when considering whether offenses merge. Id. at ¶ 47.

{¶ 37} If the court determines that "multiple offenses can be committed by the same conduct, then, in the second step, the court must determine whether the offenses were committed by the same conduct, i.e., 'a single act, committed with a single state of mind.'" Id. at ¶ 49 (quoting *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, ¶ 50 (Lanzinger, J. dissenting).

{¶ 38} If both of these inquiries are answered in the affirmative, then "the offenses are allied offenses of similar import and [they] will be merged." Id. at ¶ 51. However, if "the commission of one offense will never result in the commission of the other, or if the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25 (B), the offenses will not merge."

{¶ 39} Applying the *Johnson* standard, we now examine appellant's merger argument.

{¶ 40} Appellant argues that the three counts of assault should merge into the discharging a firearm into a residence offense. We agree that it is possible to commit assault while firing into a residence, and that, in the present case, appellant's singular conduct resulted in the commission of both crimes. However, while we think that the *Johnson* test calls for merging Count 2 with the assault, we cannot say that the three assault charges should merge.

{¶ 41} "Where a defendant commits the same offense against different victims during the same course of conduct, a separate animus exists for each offense." *State v. Gregory* (1993), 90 Ohio App.3d 124, 129. See, also, *State v. Franklin*, 97 Ohio St.3d 1, 2002-Ohio-5304, ¶ 48. In addition, this state has long held that there is a dissimilar import towards each person affected by a singular conduct where the "offense is defined in terms of conduct towards another." *State v. Jones* (1985), 18 Ohio St.3d 116, 118. See, also, *State v. Murray* (2004), 156 Ohio App.3d 219, 2004-Ohio-654, ¶ 23.

{¶ 42} In the present case, appellant's conduct put three separate people at risk of serious harm. Relevant precedent clearly supports a finding that the crimes against each victim are of dissimilar import with separate animus. Therefore, appellant's convictions on complicity to felonious assault fall within the statutory language of R.C. 2941.25 (B) and do not merge.

{¶ 43} Appellant also argues that Count 6, complicity to having a weapon while under disability, should also merge with Counts 1 through 5. This argument is similarly unconvincing. The record clearly shows that appellant's conviction on Count 6 was based on his conduct at Sullivan's cousin's house. Because this conviction was based on separate conduct from the first five counts, it is not an allied offense of similar import.

{¶ 44} Lastly, appellant argues that Count 5, complicity to improperly handling firearms in a motor vehicle, should also merge. On this count, we concur. In light of *Johnson*, it is possible to commit both the assaults and the discharging a firearm into a habitation offense while committing this offense. Likewise, the record shows that it was the same conduct that led to his conviction on this charge and the others. Accordingly, this offense should merge into the assault convictions.

{¶ 45} In sum, we find that the convictions for Count 2 and Count 5 should be merged into Counts 1, 3, and 4. We also find that Counts 1, 3, 4 and 6 are not allied offenses of similar import, and do not merge. Appellant's second assignment of error is well-taken in part and not well-taken in part.

{¶ 46} Appellant's final assignment of error is that his convictions on Counts 6 and 7 are contrary to law. Specifically, he argues that the verdict form for Count 7 does not specify any basis for enhancement of the penalty from a first degree misdemeanor and that there was no evidence to support the firearms specification of Count 6.

{¶ 47} We need not evaluate appellant's arguments pertaining to Count 7. Appellee has conceded that appellant's conviction for this offense could only be for the lesser first degree misdemeanor. Accordingly, we hold that appellant's conviction on complicity to carrying a concealed weapon be reduced from a fourth degree felony to a first degree misdemeanor.

{¶ 48} However, we find no support for appellant's conclusions regarding Count 6. Appellant argues that there is no evidence showing that less than five years had passed since his release from prison or postrelease control. This ignores the fact that appellant stipulated to his prior convictions during trial. Stipulations waive the necessity to produce evidence or the authentication of evidence. *Meyer v. Meyer*, 5th Dist. No. 06-CA-145, 2008-Ohio-436. We find that appellant's conviction and sentence for the firearms specification is well-supported.

{¶ 49} Based on the foregoing, appellant's third assignment of error is well-taken in part and not well-taken in part.

{¶ 50} On consideration whereof, the judgment of the Erie County Court of Common Pleas is affirmed in part and reversed in part. The case is remanded to the trial

court for resentencing consistent with this decision. Appellant and appellee are ordered to each pay one-half of the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED, IN PART,
AND REVERSED, IN PART.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.