[Cite as *State v. Reed*, 2010-Ohio-1866.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93346

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

SAMUEL REED, JR.

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-515567

BEFORE: Kilbane, P.J., Blackmon, J., and Cooney, J.

RELEASED: April 29, 2010

JOURNALIZED:

ATTORNEY FOR APPELLANT

Thomas A. Rein
Leader Building - Suite 940
526 Superior Avenue
Cleveland, Ohio 44114

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor
Gregory Mussman
Brian M. McDonough
Assistant Prosecuting Attorneys
The Justice Center - 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

MARY EILEEN KILBANE, P.J.:

{¶ 1} Appellant, Samuel Reed ("Reed"), appeals his convictions for two counts of aggravated murder with firearm specifications, in violation of R.C. 2903.01(B); one count of aggravated burglary, in violation of R.C. 2911.11(A)(1); two counts of aggravated burglary, in violation of R.C. 2911.11(A)(2); three counts of aggravated robbery, in violation of R.C. 2911.01; two counts of kidnapping, in violation of R.C. 2905.01(A)(2); and one count of having a weapon under disability, in violation of R.C. 2923.13(A)(3).

{¶ 2} Reed argues that the trial court erred in denying his motion for acquittal, his convictions are against the sufficiency and manifest weight of the evidence, his counsel was ineffective, and the trial court erred in failing to merge his aggravated murder and aggravated burglary convictions because they are allied offenses of similar import.

{¶ 3} After reviewing the facts and appropriate law, we affirm.

Procedural and Factual History

{¶ 4} On September 17, 2008, a Cuyahoga County Grand Jury charged Reed in a 12-count indictment with capital murder specifications. Count 1 charged aggravated murder, a first degree felony, in violation of R.C. 2903.01(A), with felony murder specifications. Count 2 charged aggravated murder, a first degree felony, in violation of R.C. 2903.01(B), with felony

murder specifications. Count 3 charged aggravated murder, a first degree felony, in violation of R.C. 2903.01(B), with felony murder specifications. Count 4 charged aggravated burglary, a first degree felony, in violation of R.C. 2911.11(A)(1). Counts 5 and 6 charged aggravated burglary, a first degree felony, in violation of R.C. 2911.11(A)(2). Count 7 charged aggravated robbery, a first degree felony, in violation of R.C. 2911.01(A)(1). Count 8 charged aggravated robbery, a first degree felony, in violation of R.C. 2911.01(A)(3). Count 9 charged aggravated robbery, a first degree felony, in violation of R.C. 2911.01(A)(1). Count 10 charged kidnapping, a first degree felony, in violation of R.C. 2905.01(A)(2) and/or (A)(3). Count 11 charged kidnapping, a first degree felony, in violation of R.C. 2905.01(A)(2) and/or (A)(3).

{¶ 5} Counts 1 through 11 each carried a three-year firearm specification, in violation of R.C. 2941.145.

{¶ 6} Count 12 charged Reed with having a weapon under disability, a third degree felony, in violation of R.C. 2923.13(A)(3).

{¶ 7} On March 23, 2009, a jury trial commenced with respect to Counts 1 through 11. Reed executed a jury waiver for Count 12, and this count was tried to the bench.

{¶ 8} On April 3, 2009, the jury found Reed not guilty of aggravated murder in Count 1, guilty of aggravated murder in Counts 2 and 3, with

firearm specifications, and not guilty of all felony murder specifications. The jury found Reed guilty of Counts 4 through 11, all with firearm specifications as charged in the indictment. The trial court found Reed guilty of Count 12 as charged in the indictment.

{¶ 9} On April 27, 2009, the trial court sentenced Reed to an aggregate term of incarceration ranging from 32 years to life imprisonment.

{¶ 10} On October 19, 2009, Reed filed his appellate brief, assigning four errors for our review.

Jury Trial

{¶ 11} The State presented the testimony of 25 witnesses. For purposes of this appeal, only a portion of the testimony of these witnesses is relevant. The following facts were adduced at trial.

{¶ 12} On August 21, 2008, at 2:45 a.m., Michelle O'Brien ("O'Brien") testified that she returned to her home at 10317 Bernard Avenue in Cleveland, Ohio, after working the night shift at a local bar. She found her boyfriend, David Slapak ("Slapak"), sitting in the driver's side of his black Jeep Cherokee across the street from their home. She got into the passenger side of the car and sat beside him. She observed Slapak pull a plastic bag of powder cocaine from his pocket. From their conversation, and from a conversation Slapak had on his cell phone, O'Brien believed that Slapak was arranging the sale of cocaine to someone who would be arriving at their home

shortly. Approximately ten minutes later, a tan SUV pulled up behind their Jeep. O'Brien exited the Jeep and entered her home.

{¶ 13} A few minutes later, O'Brien observed four men and one woman walk into their home. While O'Brien did not recognize any of the men, she recognized the woman as Colleen Schade ("Schade"), a former coworker. As O'Brien and Schade stood in the kitchen and talked, Slapak, Reed, and three of the four men entered a back bedroom. O'Brien identified Reed as wearing a yellow tee-shirt and jean shorts. According to O'Brien, the fourth man remained in the kitchen. A short time later, they all emerged from the bedroom and the visitors started to leave.

{¶ 14} As the visitors left, Slapak negotiated with Reed about the sale of Slapak's furniture, as he and O'Brien were planning to move to Florida the next day. After agreeing on a price of $50, Slapak agreed to deliver the furniture to Reed before leaving for Florida.

{¶ 15} About an hour later, O'Brien heard Slapak on the phone. A short time after that, four people returned to their home — three of the same men who had been there earlier and another woman, not Colleen Schade.

{¶ 16} After the visitors left a second time, O'Brien noticed that a $50 bill she had placed on the kitchen table was missing. She and Slapak

suspected that one of the visitors had taken it. Slapak gave her a cell phone and told her to look up "Boy" and "deal with it." (Tr. 2038.)[1]

{¶ 17} O'Brien spoke to Reed, who admitted that one of them had mistakenly taken the money. According to O'Brien, Reed stated that they would be by shortly to return the money. After some time, Reed and the same two men returned a third time to the home. O'Brien identified Reed as still wearing a yellow tee-shirt and jean shorts. One of the men came into the bedroom where Slapak was lying down and turned on the bedroom light. At this, Slapak jumped out of bed and went into the kitchen to talk with the men.

{¶ 18} O'Brien had just gotten into bed when she heard Slapak say, "Oh no man, please don't do this." (Tr. 2051.) She immediately got out of bed and walked into the hallway that separated their bedroom from the kitchen. She peered into the kitchen and saw Slapak backed into a corner by the three men and heard them demanding money from him. She testified that one of the men was standing directly in front of Slapak and pointing a gun at him. She described him as tall and Hispanic-looking. O'Brien further testified that Reed was standing on Slapak's right side and another man, a short Hispanic-looking man with a red shirt and red hat, was standing on his left.

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[1]It was later revealed at trial that "Boy" is Reed's street name or nickname. (Tr. 1609.)

{¶ 19} Next, Reed punched Slapak in the face, and Slapak "buckled." (Tr. 2053.) After this, the man with the gun began hitting and kicking him. The men were demanding that Slapak "give it up," repeatedly asking for money. (Tr. 2055.) At this point, O'Brien began screaming, asking Slapak where they could find the money. Slapak responded that the money was in the bedroom. At one point, the gunman pointed the gun at O'Brien. The tall man with the gun followed O'Brien into the bedroom to retrieve the money, and the short man followed as well. They could not find the money. After returning from the bedroom, O'Brien observed Reed pick up a saucepan and repeatedly beat Slapak on the head, face, and arms with it, demanding that he give them money, while the other men beat him as well.

{¶ 20} O'Brien kept screaming that she and Slapak would give them money if only they would stop. She testified that "everything was kind of flowing. I was going into the living room because David [Slapak] was screaming at some point that the money was under the couch cushions." (Tr. 2061.) One of the men followed her into the living room as she searched for money between the couch cushions. At this point, O'Brien heard Slapak scream "please, stop it man, my neighbor, someone's going to hear," and then she heard the kitchen window break. (Tr. 2060.) Soon after, everyone came into the living room. As Slapak crossed the threshold of the living room, Reed punched him again, knocking him down. O'Brien stated that after

being punched again, Slapak "fell back and he made a real deep grunt noise like that one hurt and he was kind of done, you know." (Tr. 2062.) It was the last time she saw Slapak alive.

{¶ 21} While one of the men was flipping through the couch cushions looking for money, O'Brien realized that Reed and the man with the gun were "kind of preoccupied with Dave." (Tr. 2064.) She looked to her left, noticed her front door was open, and ran out. As O'Brien ran down the steps of the porch, she observed a silver Ford Taurus begin driving toward her. She ran up the next driveway, away from the car, and began frantically knocking on doors and hopping fences in order to find help. During her flight, she heard two gunshots. "After the first one, I heard David scream really loud and then I heard the second one and then I didn't hear anything." (Tr. 2068.) O'Brien jumped another fence and beat on the door until someone answered, at which point she called 911.

{¶ 22} After hearing sirens, she returned to her home on Bernard to find Slapak lying on the front porch with EMS workers "pumping on [Slapak's] chest and yelling at him, trying to get a response from him." (Tr. 2074.) Some police officers sat with her until the ambulance pulled away. A short time later, a police officer told her that Slapak had passed away.

{¶ 23} Colleen Schade testified that she and O'Brien had previously worked together at a local bar. On August 20, 2008, Schade received a phone

call from a man she identified as Reed, who goes by the street name "Boy," asking her to go for a ride with him. (Tr. 1609.) Reed arrived at her house at approximately midnight on August 21, 2008, driving a tan 2005 Chevrolet Tahoe SUV. Schade testified that Reed wore a yellow "Roca Wear" tee-shirt and jean shorts. There was a male with Reed who wore a red baseball cap and a red shirt. He was speaking on Reed's cell phone most of the time, and he spoke Spanish and English.

{¶ 24} After picking up Schade, they proceeded to several area bars and then to the Citgo gas station at the corner of West 117th Street and Bellaire Avenue. While at the Citgo station, Reed purchased a bottle of Smirnoff Ice for himself and a 24-ounce can of beer for Schade. They proceeded to the area of Archwood Drive and West 39th Street, where Reed and the other male passenger had a short meeting with some men in front of a house. At that time, they picked up a third male, whom Schade described as "Puerto Rican." (Tr. 1643.) After this, they drove to Slapak's home on Bernard Avenue.

{¶ 25} Unlike O'Brien, who testified that four men and Schade initially visited her house, Schade testified that she and only three other men initially visited Slapak and O'Brien's house.

{¶ 26} Schade testified that she recognized O'Brien from the bar. They all went into Slapak's home. Schade and O'Brien stood talking in the kitchen with one of the men, while Slapak, Reed, and another man went into

Slapak's and O'Brien's bedroom. Schade and O'Brien discussed O'Brien's pending move to Florida with Slapak. After the men emerged from the bedroom, they began to walk toward the front door and Slapak and Reed negotiated for the sale of Slapak's furniture.

{¶ 27} Schade testified that upon leaving, Reed and the other males dropped Schade off at her house at a little after 3:00 a.m. on the morning of August 21, 2008. Reed asked Schade if he could borrow her 2001 silver Ford Taurus, because the temporary tags on his tan 2005 Chevrolet Tahoe had expired at midnight the previous night. Schade agreed. After watching the men pull away in her car, Schade fell asleep on the couch. According to Schade, Reed woke her up at daybreak.

{¶ 28} On August 22, 2008, Schade was contacted by Cleveland Police Detective David Armelli (Detective Armelli), who advised Schade that her car had been involved in a capital murder. She gave a written statement to Detective Armelli that same day. Schade testified that on the evening of August 24, 2008, she received a call from Reed from inside the Cuyahoga County jail advising her that he was being held on a capital murder charge. During that conversation, Reed asked her to tell the police that they had been alone together on the night of the murder. Schade testified that she contacted the police and advised them of this conversation.

{¶ 29} Lisa Przepyszny ("Przepyszny") testified that she works as a forensic scientist in the Trace Evidence Department of the Cuyahoga County Coroner's Office, and that she was charged with creating a Trace Evidence Laboratory Examination Report in this case, which was completed on November 4, 2008.

{¶ 30} Przepyszny testified that photographs were taken of the body, and an external examination was conducted and documented. Upon examining the body, she noted apparent blood and injuries to Slapak's hands.

{¶ 31} Przepyszny examined two tee-shirts that belonged to Slapak. She noted blood on each shirt and two bullet holes. Przepyszny's examination, together with the autopsy, conclusively revealed that Slapak had been shot twice in the back.

{¶ 32} Przepyszny examined a black saucepan taken from the crime scene, which initially did not indicate the presence of blood. However, upon further examination, two swabs collected from the handle of the saucepan, one swab from the front of the saucepan, and one swab from the bottom of the saucepan, did indicate the presence of blood. She submitted the saucepan to the Cleveland Police Department for further fingerprint testing.

{¶ 33} Przepyszny examined a clear glass Smirnoff bottle taken from the kitchen, and she visually observed a speck of blood on the bottle. She collected two swabs from the bottle and submitted them to the DNA

department for further testing, together with two additional swabs of blood from the front porch of the residence.

{¶ 34} Aside from the bottle and the saucepan, Przepyszny identified several additional pieces of evidence, including shell casings, buccal swabs from Reed's cheek, and some clothing, which she submitted to the Coroner's Office DNA department for further testing.

{¶ 35} Carey Baucher ("Baucher") testified that she works as a DNA analyst for the Cuyahoga County Coroner's Office. She was given a number of items from the crime scene in order to test them for the presence of human DNA and other biological material. Among these items were swabs taken from the black saucepan and the Smirnoff bottle, swabs taken from Slapak's hands, buccal swabs from Reed's cheek, two swabs from the neck of the Smirnoff bottle, and some miscellaneous items from the crime scene that proved to be inconclusive.

{¶ 36} Baucher testified that the swab of blood from the Smirnoff bottle matched Slapak's DNA, and an additional swab from the opening of the Smirnoff bottle matched Reed's DNA. She further testified that the DNA swab from the saucepan matched the DNA of both Slapak and Reed. While she could not confirm the exact biological source of Reed's DNA, Baucher testified that it was likely Reed's saliva.

{¶ 37} Baucher also tested a swab from Slapak's left hand. The DNA on this swab came from different sources. One major component of the DNA from the swab matched Slapak's DNA. A minor component of the DNA on the swab did not match Reed's DNA exactly, but was consistent with it. DNA from an additional unknown male was also a minor contributor of DNA to this swab.

{¶ 38} Felicia Simington ("Simington") testified that she is a latent fingerprint examiner in the Cleveland Police Department's crime scene and records unit who examined latent fingerprints in this case. In doing so, Simington compared four latent fingerprint samples from the crime scene to an existing set of Reed's fingerprints, which were provided for comparison. The first latent print was a palm print from the black saucepan taken from the kitchen. Upon analyzing the print, Simington determined that it matched Reed's right palm; specifically, the top of Reed's palm underneath his fingers.

{¶ 39} The second latent print was a white powder print, also taken from the saucepan. This matched Reed's right "interdigital palm" and his right index finger. (Tr. 1591.)

{¶ 40} Simington determined that the third latent print, again lifted from the saucepan, did not contain enough characteristics to enable her to match the print to anyone.

{¶ 41} The fourth latent print was a white powder print lifted from the clear Smirnoff bottle taken from the kitchen. Simington determined that this print matched Reed's left index finger, based upon comparison with the sample in her possession.

{¶ 42} Simington also found a match between a latent right index finger print found in one of the vehicles examined in the case and Reed's sample. Upon cross-examination, Simington did not know which vehicle the print was taken from.

{¶ 43} Several neighbors on Bernard Avenue testified that they heard gunshots and the screams of the victim.

{¶ 44} Slapak's neighbor, Linda Rodriguez, testified that on August 21, 2008, she was asleep on her sofa when she awoke to the sound of shattering glass just after 5:00 a.m. She testified that after hearing the glass shatter, she thought perhaps someone was trying to enter her home and she was scared. She got up to call 911 and heard three gunshots and a man screaming. She looked out the window and saw her neighbor lying on his front porch.

{¶ 45} Another neighbor, Mary Dufner ("Dufner"), testified that on August 21, 2008, just after 5:00 a.m., she had just let her cats outside and was doing housework when she heard three or four sounds like firecrackers. Dufner went out her front door to check on her cats and saw three men

running down the street toward a car parked two houses away from hers. Though it was still dark outside that morning, Dufner was able to describe the car as a Ford Taurus, either light blue, light green, or gray in color. Dufner saw one of the men was lagging behind the others. He was short, stocky, and dressed in a yellow dressy tee-shirt because it had no pocket. She could not tell his age, but she described his race as "black." (Tr. 1328.)

{¶ 46} An additional neighbor, Nancy Wright-Coreno, testified that on August 21, 2008, she had just opened her front door, at approximately 5:00 a.m., when she heard what sounded like three to five firecrackers and saw three males running toward a car in front of her neighbor's house. One of the males, who was lagging behind the other two, was dressed in a mustard-colored shirt and wore a gold chain. All three males appeared to be dark skinned, and they got into what appeared to be a silver 4-door Ford Taurus.

Analysis

{¶ 47} Reed's first assignment of error states:

> **"The trial court erred in denying appellant's motion for acquittal as to the charges when the state failed to present sufficient evidence against appellant."**

{¶ 48} The standard of review for a challenge to the sufficiency of the evidence was set forth in *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 381 N.E.2d 184. "Pursuant to Crim.R. 29(A), a court shall not order an entry of

judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt." Id. at syllabus.

{¶ 49} In *State v. Bradley*, 8th Dist. No. 87024, 2006-Ohio-4589, we stated:

> **"*Bridgeman* must be interpreted in light of the sufficiency test outlined in *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus, in which 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.'" *Bradley* at ¶12, quoting *Jenks*, at paragraph two of the syllabus, citing *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560.**

{¶ 50} Reed argues that the evidence presented at trial was insufficient to convict him. He argues that O'Brien gave conflicting testimony and was unable to pick him out of a photo array. He further argues that there was no direct evidence linking him to the shooting and, because Slapak was alleged to have worked as a confidential informant (CI), there are other unnamed individuals who could have committed these crimes. His arguments are unavailing.

{¶ 51} O'Brien testified that Reed was present three times in the home that night. Schade testified that Reed's street name was "Boy." (Tr. 1609.) O'Brien specifically testified that Slapak told her to look up "Boy" from the contacts listed in the cell phone they shared, and that when she dialed the number, Reed answered. (Tr. 2038.) Further, DNA and fingerprint evidence linked Reed to the saucepan that was used to beat Slapak and to the Smirnoff Ice bottle Reed purchased at the Citgo Station that was found in the kitchen with Slapak's blood on it.

{¶ 52} O'Brien testified that while Reed and one of the other men were more or less "preoccupied" with Slapak, and as the third man rifled through the couch cushions, she ran from the home. (Tr. 2064.) Shortly thereafter, she heard two gunshots and heard Slapak scream. Although O'Brien did not actually see this event, it is reasonable to conclude from this testimony and the testimony of the neighbors, that Slapak was shot in Reed's presence. The testimony of all the witnesses was consistent with respect to the sequence of events, including the time of day, Reed's physical description, and his clothing.

{¶ 53} Further, the State never alleged that Reed was the shooter in this case, only that he was present and participated in the robbery, kidnapping, and burglary, and aided and abetted in Slapak's murder along with the other two males. Nothing in the record contradicts these facts. The evidence of

these crimes was legally sufficient to support the jury's verdict on Counts 2 through 11 and the court's verdict with respect to Count 12. When we view the evidence in a light most favorable to the prosecution as the law requires, it is clear that the State met its burden of proof with respect to the essential elements of the charged crimes. Reed's first assignment of error is overruled.

{¶ 54} Reed's second assignment of error states:

> **"Appellant's convictions are against the manifest weight of the evidence."**

{¶ 55} According to *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541, the standard of review for challenges to the manifest weight of the evidence is both qualitatively and quantitatively different from challenges to the sufficiency of the evidence. The *Thompkins* court described this difference as follows:

> **"Weight of the evidence concerns 'the inclination of the *greater amount of credible evidence*, offered at trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the *greater amount of credible evidence* sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its *effect in inducing belief*.'" Id. at 387, quoting Black's Law Dictionary (6 Ed. 1990) at 1594. (Emphasis in original.)**
>
> *** ***

> **"The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the witnesses and determines whether in 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." Id., quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 485 N.E.2d 717.**

{¶ 56} The court, reviewing the entire record, essentially sits as a "thirteenth juror," weighing the evidence and all reasonable inferences. *Martin* at 175. In determining whether the jury lost its way and created a manifest miscarriage of justice, we consider the credibility of witnesses and determine whether "in 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." Id. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. Id.

{¶ 57} Reed argues simply that the jury lost its way in convicting him. He does not point to the lack of evidence regarding a specific element of any of the offenses of which he was convicted, but instead states only that the jury somehow felt compelled to convict him because he was the only individual on trial for Slapak's murder.

{¶ 58} Ample direct and circumstantial evidence, particularly testimony from O'Brien, implicated Reed by placing him at the scene repeatedly.

Fingerprints and DNA confirmed Reed was at the house and implicated him in the crimes. Reed's fingerprints were found on the saucepan used to beat Slapak and in one of the vehicles connected to the crimes. O'Brien's testimony was independently corroborated by the DNA evidence linking Reed to the crimes. Reed's DNA was found on swabs taken from the saucepan and the Smirnoff bottle.

{¶ 59} In this matter, we cannot say that the jury clearly lost its way and created a manifest miscarriage of justice in convicting Reed. After reviewing Reed's arguments within the context of the entire record, we are not persuaded that the evidence in this matter weighs heavily against conviction. Reed's second assignment of error is overruled.

{¶ 60} Reed's third assignment of error states:

> **"Appellant was denied effective assistance of counsel as guaranteed by Section 10, Article I of the Ohio Constitution and the Sixth and Fourteenth Amendments when defense counsel characterized appellant as a drug dealer for no justifiable reason."**

{¶ 61} Reed argues his counsel was ineffective because he repeatedly acknowledged to the jury that Reed was a drug dealer in his opening statement, when there was no evidence at trial that he was a drug dealer. This assignment of error lacks merit.

{¶ 62} In order to substantiate a claim for ineffective assistance of counsel, Reed must show that (1) counsel's performance was deficient and (2)

the deficient performance prejudiced the defendant so as to deprive him of a fair trial. *State v. Trimble,* 122 Ohio St.3d 297, 311, 2009-Ohio-2961, 911 N.E.2d 242, citing *Strickland v. Washington* (1984) 468 U.S. 668, 669, 104 S.Ct. 2052, 80 L.Ed.2d 674. Judicial scrutiny of defense counsel's performance must be highly deferential. Id. at 669. In a claim of ineffective assistance of counsel, the burden is on the defendant to establish that counsel's performance fell below an objective standard of reasonable representation and prejudiced the defense. Id. In Ohio, there is a presumption that a properly licensed attorney is competent. *State v. Calhoun,* 86 Ohio St.3d 279, 1999-Ohio-102, 714 N.E.2d 905.

{¶ 63} Nothing in the record causes us to presume Reed's counsel acted deficiently in this case for acknowledging Reed was a drug dealer in his opening statement. As Reed argues, the admission came during counsel's opening statement; however, it is well settled that opening statements are not evidence and should not be considered as such. See *State v. Turner,* (1993) 91 Ohio App.3d 153, 631 N.E.2d 1117; *State v. Frazier* (1995), 73 Ohio St.3d 323, 338, 652 N.E.2d 1000. Reed was afforded three attorneys who vigorously defended the case and cross-examined witnesses when appropriate. This statement did not, by itself, fall below an objective standard of reasonableness, or somehow make the performance of Reed's counsel deficient under *Strickland*.

{¶ 64} Further, even assuming arguendo that the performance of Reed's counsel was deficient in making this statement, it was not so deficient as to deprive Reed of a fair trial, since the amount of evidence presented, particularly with respect to the drug transactions and drug use preceding the murder, was sufficient for the jury to infer that Reed was in fact a drug dealer. This evidence was inevitably going to be presented to the jury even without Reed's counsel acknowledging his status as a drug dealer. There was ample evidence, including the testimony of multiple witnesses, stating that Reed was a known drug dealer and that the burglary, robbery, kidnapping, and murder all arose out of a drug transaction or series of drug transactions. Reed therefore suffered no prejudice by this admission during counsel's opening statement. "Debatable trial tactics do not establish ineffective assistance of counsel." *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶146. Reed's third assignment of error is overruled.

{¶ 65} Reed's fourth assignment of error states:

> **"The trial court erred by ordering convictions and consecutive sentences for separate counts of aggravated murder and the aggravated burglary counts because the offenses are allied offenses pursuant to R.C. 2941.25 and**

they are part of the same transaction under R.C. 2929.14."

{¶ 66} Reed argues that the trial court committed reversible error in failing to merge his convictions for aggravated robbery with his convictions for aggravated murder because they were committed as part of the same transaction. Reed further argues that the sentences for Counts 3, 4, and 5 were consecutively imposed and that they should merge for sentencing purposes because aggravated burglary and aggravated murder are allied offenses of similar import. We disagree.

{¶ 67} R.C. 2941.25, Ohio's multiple count statute, states:

> **"(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."**

{¶ 68} In support of his arguments, Reed cites *Newark v. Vaszirani* (1990), 48 Ohio St.3d 81, 549 N.E.2d 520. Reed's reliance on *Vaszirani* is misplaced. This case was expressly overruled by *State v. Rance*, 85 Ohio St.3d 632, 1999-Ohio-291, 710 N.E.2d 699, in which the Ohio Supreme Court

held that 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 that courts should compare the statutory elements in the abstract. Id. at 636.

{¶ 69} The *Rance* test as set forth by the Supreme Court states that in order to convict a criminal defendant of multiple charges, the offenses must be (1) of dissimilar import or (2) if they are of similar import, must be conducted with separate animus. Id. at 636. The test for determining whether two offenses are of similar import is whether the offenses "correspond to such a degree that the commission of one crime will result in the commission of the other." Id., citing *State v. Jones*, 78 Ohio St.3d 12, 13, 1997-Ohio-38, 676 N.E.2d 80.

{¶ 70} In *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, the court clarified its holding in *Rance* as follows:

> **"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."** ***Cabrales*** **at syllabus.**

{¶ 71} According to *Cabrales*, if the sentencing court has initially determined that two crimes are allied offenses of similar import, then it

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, 526 N.E.2d 816.

{¶ 72} In *State v. Sutton*, 8th Dist. No. 90172, 2008-Ohio-3677, we applied the *Cabrales* test with approval.

A. Whether the Aggravated Burglary and Aggravated Murder are Allied Offenses of Similar Import

{¶ 73} In this case, Reed was convicted of aggravated murder in Counts 2 and 3 of the indictment, in violation of R.C. 2903.01(B), which states in relevant part as follows: "No person shall purposely cause the death of another * * * while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit * * * aggravated burglary * * *."

{¶ 74} In Count 4 of the indictment, Reed was also convicted of aggravated burglary, in violation of R.C. 2911.11(A)(1), which states in relevant part:

> **"No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if * * * [t]he offender inflicts, or attempts or threatens to inflict physical harm on another."**

{¶ 75} In Count 5, Reed was convicted of aggravated burglary under R.C. 2911.11(A)(2), which states in relevant part:

> **(A) No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if * * * [t]he offender has a deadly weapon or dangerous ordnance on or about the offender's person or under the offender's control."**

{¶ 76} In comparing the elements of aggravated murder under R.C. 2903.01(B) with the elements of aggravated burglary under R.C. 2911.11(A)(1) and (2) under *Cabrales*, we find that Reed was convicted of aggravated murder based upon the predicate offense of aggravated burglary — that is, he trespassed in the home to commit a criminal offense or offenses, and in the course of committing those offenses, he participated in Slapak's murder. Therefore, according to the analysis in *Cabrales*, the aggravated murder could not have been committed without the aggravated burglary first being committed. See *State v. Cutts*, 5th Dist. No. 2008 CA 000079, 2009-Ohio-3563.

{¶ 77} However, when comparing the elements of each offense in the abstract, we find these offenses are not sufficiently similar that the commission of one offense would result in the commission of the other. In short, an aggravated burglary can be committed without also committing aggravated murder, while an aggravated murder cannot be committed without the commission of an underlying predicate offense under the statute,

in this case, aggravated robbery. Aggravated murder and aggravated robbery are not allied offenses. What is more, there is no evidence in the record to support the proposition that Reed committed these crimes with the same animus under R.C. 2941.25(A). He may therefore be separately convicted of these offenses. Finally, the Ohio Supreme Court has repeatedly held that aggravated murder and aggravated burglary are not allied offenses of similar import. See *State v. Reynolds*, 80 Ohio St.3d 670, 681, 1998-Ohio-171, 687 N.E.2d 1358, 1371; *State v. Frazier* (1979), 58 Ohio St.2d 253, 256, 389 N.E.2d 1118, 1120.

B. Whether Aggravated Burglary and Aggravated Murder Merge for Sentencing Purposes

{¶ 78} R.C. 2925.14(D) states in relevant part that "[a] court shall not impose more than one additional prison term on an offender under this division for felonies committed as part of the same act or transaction." The term "transaction" has been defined as "a series of continuous acts bound together by time, space and purpose, and directed toward a single objective." *State v. Wills*, 69 Ohio St.3d 690, 696, 1994-Ohio-417, 635 N.E.2d 370. Reed argues that the acts in this case are close in time and are part of one single transaction, and thus merge for sentencing. We disagree.

{¶ 79} In *State v. Marshall*, 8th Dist. No. 87334, 2006-Ohio-6271, we held that where, as here, a defendant is sentenced in a multi-count indictment containing firearm specifications, the sentencing court is required to follow the *Rance* test in determining whether the "base" charges are allied offenses of similar import.[2] Id. Although, under *Marshall*, firearm

[2] In this case, the base charges at issue are aggravated burglary and

specifications merge at sentencing, this does not mean that the charges themselves are allied offenses of similar import. Id. at ¶36. In this case, we have already determined that the instant offenses are not allied offenses of similar import. They therefore do not merge for sentencing. Reed's fourth assignment of error is overruled.

Pro Se Supplemental Response Brief

{¶ 80} On February 3, 2010, Reed filed a pro se supplemental response brief arguing an additional assignment of error; namely, that Count 12 of the indictment, having a weapon under disability, in violation of R.C. 2923.13(A)(3), was structurally defective under *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917, because it did not contain the requisite mens rea. Reed argues first that there was no evidence that he shot Slapak, and thus, he could not be convicted of having a weapon under disability. This argument is not well founded, as Reed was never alleged by the State to be the shooter, but rather, an active participant in the crimes.

{¶ 81} He argues further that under *Colon*, this error permeated the whole trial, thus mandating reversal of his conviction. In support of his argument, Reed cites *State v. Clay*, 120 Ohio St.3d 528, 2008-Ohio-6325, 900 N.E.2d 1000, and *State v. Johnson*, 8th Dist. No. 91701, 2009-Ohio-3101.

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aggravated murder.

{¶ 82} In *Clay*, the Supreme Court held that for the purpose of proving the offense of having a weapon under disability pursuant to R.C. 2923.13(A)(3), the State had to show that the defendant acted recklessly with regard to his awareness that he was under indictment. *Clay* at syllabus.

{¶ 83} In *Johnson*, this court applied *Clay* to reverse a defendant's conviction for having a weapon under disability in violation of R.C. 2923.13(A)(3). Id. at ¶31, 34.

{¶ 84} Unlike *Johnson*, Reed's charge of having a weapon under disability was tried to the court, not to the jury, so his "structural error" under the *Colon* decision is not applicable because the jury was not instructed on this count and never decided it. It therefore had no impact on the trial or the jury's finding of guilt with respect to the other ten counts. Reed's reliance on *Johnson* is therefore misplaced.

{¶ 85} Here, the body of the indictment charged Reed in Count 12 with acquiring, carrying, or using a dangerous firearm while being under indictment or for having a prior conviction. In this case, the reference in Count 12 was to a prior conviction. No notice is needed when the disability is a conviction because the conviction itself puts the defendant on notice. See *State v. White*, 8th Dist. No. 90839, 2009-Ohio-4034. (Internal citations

omitted.) *Clay* is therefore distinguishable. Reed's additional arguments are not well taken.

{¶ 86} Accordingly, we affirm Reed's conviction and sentence.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, PRESIDING JUDGE

PATRICIA A. BLACKMON, J., and
COLLEEN CONWAY COONEY, J., CONCUR