

[Cite as *State v. Clark*, 2010-Ohio-5600.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

---

JOURNAL ENTRY AND OPINION  
**No. 94406**

---

**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**CHRISTOPHER CLARK**

DEFENDANT-APPELLANT

---

**JUDGMENT:  
AFFIRMED AND REMANDED**

---

Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-520221-B

**BEFORE:** Kilbane, J., Gallagher, A.J., and Jones, J.

**RELEASED AND JOURNALIZED:** November 18, 2010

## **ATTORNEY FOR APPELLANT**

Britta M. Barthol  
P.O. Box 218  
Northfield, Ohio 44067

## **ATTORNEYS FOR APPELLEE**

William D. Mason  
Cuyahoga County Prosecutor  
Vincent I. Pacetti  
Assistant County Prosecutor  
Justice Center - 8th Floor  
1200 Ontario Street  
Cleveland, Ohio 44113

MARY EILEEN KILBANE, J.:

{¶ 1} Appellant, Christopher Clark (“Clark”), appeals his verdict and sentence for one count of attempted murder, two counts of felonious assault, and two counts of aggravated robbery. He asserts five assignments of error, arguing that the trial court abused its discretion when it denied his pretrial motion to allow defendant’s expert to testify, the trial court erred in denying his pretrial motion to suppress identification testimony, the verdict is against the manifest weight of the evidence, the trial court erred in denying his Crim.R. 33 motion for new trial, and the trial court erred in sentencing him on all counts of aggravated robbery and felonious assault. After a careful review of the law and facts, we affirm Clark’s conviction, vacate his sentence, and remand for resentencing.

## **Factual and Procedural History**

{¶ 2} On February 2, 2009, a Cuyahoga County Grand Jury charged Clark with one count of attempted murder, in violation of R.C. 2923.02/R.C. 2903.02(A), a first degree felony; two counts of aggravated robbery, in violation of R.C. 2911.01(A)(1) and R.C. 2911.01(A)(3), both first degree felonies; and two counts of felonious assault, in violation of R.C. 2903.11(A)(1) and R.C. 2903.11(A)(3), both second degree felonies. Each count included a one-year firearm specification, in violation of R.C. 2941.141(A), and a three-year firearm specification, in violation of R.C. 2941.145(A).

{¶ 3} On June 1, 2009, Clark filed a motion to suppress identification testimony, which the trial court denied on September 23, 2009, after an oral hearing.

{¶ 4} On September 17, 2009, Clark filed a motion to allow expert testimony, which the trial court denied on September 22, 2009, after an oral hearing.

{¶ 5} On October 19, 2009, the case proceeded to jury trial. At the conclusion of the State's case-in-chief, the trial court denied Clark's Crim.R. 29 motion for acquittal. Clark renewed the motion at the close of the evidence, and the trial court denied the motion again.

{¶ 6} The following evidence was adduced at trial.

{¶ 7} The State produced three witnesses: Joseph Harris (“Harris”), Brenda Sanders (“Sanders”), and Detective Larry Russell (“Detective Russell”) of the Cleveland Police Department.

### **Joseph Harris**

{¶ 8} Harris, who was 48 years old and worked as a nurse’s assistant at Montefiore Nursing Home, testified that he was walking home from Gene’s Corner Store on E. 130th Street and Griffing Avenue in Cleveland, Ohio, after purchasing eggs and bread, when he noticed three males following him. As Harris walked toward his apartment, the males approached him from behind. One of the males drew astride of Harris and asked him if he wanted to buy an iPod. Harris declined and turned toward the gate that led to his apartment, at which time the three males surrounded him. Clark stood directly in front of Harris, pulled out a gun, and pointed it directly at Harris stating, “you know what this is.” Harris begged off, stating that he only had five dollars. Harris attempted to retrieve his wallet, but it dropped to the ground. Clark then shot Harris in the chest at point-blank range. All three males all ran in different directions. Harris, who ordinarily walks with a cane, struggled into the middle of the street. Sanders, who was a passing driver, found him where he collapsed in the street. He remained conscious while Sanders stayed with him until an ambulance arrived. (Tr. 252-264.)

{¶ 9} Two days after Harris was shot, Detective Russell visited him in the hospital with a photo lineup, later identified as State’s exhibit 2. The lineup

depicted six African-American men with short-cropped hair and slighter builds. Harris immediately identified Clark, circled Clark's picture, initialed it, and on the back of the photo lineup, wrote: "This is the guy who shot me. Joe Harris. 12-2-08." (Tr. 264.)

{¶ 10} At trial, Harris identified Clark again, stating that he was 100 percent certain that Clark was the shooter, since Clark's face was burned into his memory. He testified that he remembered Clark's grey, hooded sweatshirt was pulled up around his head, but that he clearly saw his face. The other two assailants had their hoods down. Harris could also specifically identify what Sanders was wearing as she and a companion came to his aid in the street. Harris testified that he has been through five surgeries since the shooting, he suffers from nightmares and panic attacks, and can no longer physically work as a nurse's assistant. At the time of trial, additional surgeries were scheduled.

### **Brenda Sanders**

{¶ 11} Sanders testified that, on the day of the shooting, she was on her way to a church service with a friend when she saw some boys running and looked over and saw Harris lying on the ground. She backed up her car to see if she could be of assistance. Harris announced, "I been shot," and then collapsed beside her car. Harris stated that another car with people going to the church service arrived soon after, and someone called an ambulance. They all stayed with Harris and prayed over him until the ambulance took him away.

### **Detective Russell**

{¶ 12} The third and last witness the State called was Detective Russell. Detective Russell testified that he has been a Cleveland Police Officer for 13 years, the last ten of which have been with the Fourth District Detective Bureau. He further testified that he met Harris on December 2, 2008, at Metro Hospital in Cleveland, Ohio, when he arrived at his hospital room to interview him. According to the record, Harris was sitting in a chair, coherent, and able to hold a direct conversation with Detective Russell. Detective Russell presented Harris with one photo lineup depicting six individuals. Upon viewing the photo lineup, Harris immediately identified Clark as the shooter and even wrote a note identifying him on the back of the photo lineup.

{¶ 13} In June 2009, Detective Russell testified that he showed Harris two additional photo lineups, later identified as State's exhibits 8 and 9, containing six photos, each with the mug shots of six African-American males, all of whom were young in appearance with short-cropped hair and different builds. Within the respective lineups were the pictures of Raheem Colbert ("Colbert") and Dajon Wright ("Wright"), both juveniles, who were alleged to be the other two accomplices in the shooting and were picked up by nearby zone cars in the immediate aftermath of the shooting. Harris could not identify either individual in June 2009, although gunshot residue (GSR) tests performed on both of those individuals on the day of the shooting tested positive, meaning that they had either fired a gun or were in direct proximity to a gun when it was fired. Despite this, both individuals denied knowledge of the shooting. Detective Russell

testified that he was unsure of the outcome in juvenile court for either of the two juvenile assailants, and that no GSR test was performed on Clark because he remained at large until the police picked him up on a different case sometime in the summer of 2009. Thereafter, Clark was implicated in the shooting of Harris.

{¶ 14} The defense intended to call two witnesses, Carol Fahie (“Fahie”) and Donna Rose (“Rose”), but since Fahie failed to appear only Rose testified. Rose, who is employed by the Ohio Bureau of Criminal Identification (“BCI”) as a forensic scientist in the Trace Evidence Unit and qualified as an expert without objection from the State, summarized her report on the GSR analysis that she completed during the investigation of the case. GSR tests were performed on three individuals: Colbert, Wright, and Ae'vonte Gaddis (“Gaddis”), an individual who was also found near the shooting area. The tests were performed by swabbing the hands of the individuals in order to test for particles that are highly indicative of gunshot residue primer. The results came back positive for Colbert and Wright, but negative for Gaddis. Rose testified that while the absence of gunshot residue primer does not necessarily preclude the possibility that someone discharged a firearm or handled it immediately before or after it was fired, a positive test indicates that someone definitely came into contact with gunshot residue within two to four hours after the gun was fired. Her opinion, to a reasonable degree of forensic certainty, was that Colbert and Wright came into contact with a recently fired gun within two to four hours after it was fired. Rose also opined that gunshot residue is not confined to the person firing the weapon,

since it is released out of the barrel of the gun and disperses around the immediate area onto bystanders who would hypothetically be in close proximity of a firing gun.

{¶ 15} On October 23, 2009, a jury convicted Clark on Counts 2 through 5 of the indictment, including the firearm specifications. The jury could not reach a verdict on Count 1, attempted murder, so the trial court declared a mistrial on that count and eventually dismissed the charge without prejudice on November 23, 2009, when Clark was returned for sentencing. Thereafter, the trial court sentenced Clark to eight years each on Counts 2 and 3, aggravated robbery, which merged for sentencing, and six years each on Counts 4 and 5, felonious assault, which merged for sentencing. All counts were ordered to be served concurrently. The one- and three-year firearm specifications underlying each count merged, but were required to be served consecutively to the underlying sentence. The trial court thus sentenced Clark to a total of 11 years.

{¶ 16} On December 21, 2009, Clark appealed, asserting five assignments of error.

{¶ 17} Clark's first assignment of error states:

**“THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED APPELLANT’S MOTION TO ALLOW DEFENDANT’S EXPERT TO TESTIFY.”**

{¶ 18} Clark, who is indigent, contends that the trial court abused its discretion and violated his constitutional right to due process when it denied his



motion to allow expert testimony after a hearing on September 21 and 22, 2009. Clark sought to allow the expert testimony of Dr. Benjamin Wallace, a purported expert on the reliability of eyewitness identifications, on the grounds that he would be able to assist the jury in determining the methodology behind photo lineups. The trial court denied this request on the authority of *State v. Bradley*, 181 Ohio App.3d 40, 2009-Ohio-460, 907 N.E.2d 1205.

{¶ 19} “Due process, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Section 16, Article I of the Ohio Constitution, does not require the government to provide expert assistance to an indigent defendant in the absence of a particularized showing of need. Nor does it require the government to provide expert assistance to an indigent criminal defendant upon mere demand of the defendant.” *State v. Mason*, 82 Ohio St.3d 144, 1998-Ohio-370, 694 N.E.2d 932. Under the rule established by the Ohio Supreme Court in *Mason*, “due process \* \* \* requires that an indigent criminal defendant be provided funds to obtain expert assistance at state expense only where the trial court finds, in the exercise of a sound discretion, that the defendant has made a particularized showing (1) of a reasonable probability that the requested expert would aid in his defense, and (2) that denial of the requested expert assistance would result in an unfair trial.” *Id.* at 150.

{¶ 20} In order to establish a violation of due process as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, “a defendant must show more than a mere possibility of assistance from an expert.

Rather, a defendant must show a reasonable probability that an expert would aid in his defense, and that denial of expert assistance would result in an unfair trial.”

Id., quoting *State v. Broom* (1988), 40 Ohio St.3d 277, 283, 533 N.E.2d 682. In analyzing eyewitness identification issues, the court must consider the specific facts of the underlying case, the reliability of the eyewitness-identification, as well as any other corroborating evidence tying the defendant to the crime. See, e.g., *State v. Sargent*, 169 Ohio App.3d 679, 2006-Ohio-6823, 864 N.E.2d 155.

{¶ 21} At the outset, we note that this assignment of error does not center around the appointment of an expert, but rather whether that expert’s testimony would be helpful to Clark in receiving a fair trial. It is thus not a funding issue, but a relevancy issue. Here, the trial court determined that Clark failed to show that there was a reasonable probability that Dr. Wallace’s testimony would aid in his defense. In denying his motion, the trial court relied on this court’s recent holding in *Bradley*.

{¶ 22} In *Bradley*, an indigent defendant moved the court to appoint an expert on eyewitness identification, arguing that apart from the eyewitness identification, the State had no physical or other corroborating evidence. *Bradley* contended that an expert was necessary to explain the reliability of eyewitness identification, especially in cases involving cross-racial identification. In reversing the trial court, this court held that *Bradley* had a due process right to appointment, at the State’s expense, of an eyewitness-identification expert, because the State’s case was based primarily on the victim’s identification of the

defendant as the robber, that she had been traumatized by the robbery, she had never seen the perpetrator before the robbery, did not identify him until 30 days after the robbery, and the case involved cross-racial identification, i.e., the victim was white and defendant was African-American.

{¶ 23} In denying Clark's motion, the trial court engaged in a thorough analysis and took into consideration all the factors as related by *Mason* and *Broom*. In its analysis, the court clearly distinguished *Bradley*, stating:

**"It would be nice if the case law were on all fours in any instance. We have to analogize, as best we can, from imperfectly analogous cases. I have reviewed the cases cited by counsel, particularly the recent decision of *State v. Bradley*. It appears from [*Bradley*] that in the circumstances present in that particular case, the Court held that it was error for the trial court to not allow expert testimony; however, the circumstances of that case are sufficiently different from those in this case.**

**The circumstances in which the offense took place; that it was daytime; that the identification took place not 30 days but within a couple days after the crime; that is, unlike *Bradley*, is not a cross racial identification. The existence of other evidence, at least according to the State's assertions here, all point to the fact that it would not be mandatory for the Court to allow expert testimony \* \* \* I think under the circumstances here, and despite what appears to be impeccable credentials of Dr. Wallace that it is unnecessary and I believe inappropriate to allow the testimony, and accordingly the defense motion will be overruled." (Tr. 37.)**

{¶ 24} In its analysis, the trial court explained all of the indicia of reliability in Clark's identification. This was not a case where Clark was convicted solely on eyewitness testimony; Clark was not picked out of a photo lineup one month after the crime, as in *Bradley*. Upon review of the record, we cannot say that the trial

court abused its discretion in denying Clark's motion to allow expert testimony. The trial court clearly took into consideration the specific facts in the instant case, the timing of the identity, and the additional evidence in the record. Clark's first assignment of error is overruled.

{¶ 25} Clark's second assignment of error states:

**“THE TRIAL COURT ERRED WHEN IT OVERRULED APPELLANT'S MOTION TO SUPPRESS IDENTIFICATION TESTIMONY.”**

{¶ 26} Appellate review of a motion to suppress presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶8. In deciding a motion to suppress, the trial court assumes the role of trier of fact. *Id.* A reviewing court is bound to accept those findings of fact if they are supported by competent, credible evidence. *Id.* But with respect to the trial court's conclusion of law, we apply a de novo standard of review and decide whether the facts satisfy the applicable legal standard. *Id.*, citing *State v. McNamara* (1997), 124 Ohio App.3d 706, 707 N.E.2d 539.

{¶ 27} The United States Supreme Court approved the use of photo lineups in initial identifications as “used widely and effectively in criminal law enforcement, from the standpoint both of apprehending offenders and of sparing innocent suspects the ignominy of arrest by allowing eyewitnesses to exonerate them through scrutiny of photographs.” *Simmons v. United States* (1968), 390 U.S. 377, 384, 88 S.Ct. 967, 19 L.Ed.2d 1247. The court held that “each case must be considered on its own facts, and that convictions based on eyewitness

identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.” Id.

{¶ 28} In *Neil v. Biggers* (1972), 409 U.S. 188, 199-200, 93 S.Ct. 375, 34 L.Ed.2d 401, the United States Supreme Court stated that when reviewing suggestive identification procedures, the crucial inquiry is “whether under the ‘totality of the circumstances’ the identification was reliable even though the confrontation procedure was suggestive. \* \* \* The factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of the witness’ prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.” See, also, *State v. Williams*, 73 Ohio St.3d 153, 163, 1995-Ohio-275, 652 N.E.2d 721.

{¶ 29} Clark argues that the trial court erred in denying his motion to suppress his identification because the photo lineups shown to Harris are irreparably tainted and suggestive. Clark alleges that he is clearly the youngest person in the photo lineup; therefore any identification of him cannot be trusted. We disagree. From the record, it is clear that Harris’s identification of Clark was from his own memory, and it came within two days of the shooting. Harris stated at trial that Clark’s face was burned into his memory. Further, Harris was not

privity to Sander's description of the assailants as "boys"; he therefore could not have formed any opinion of Clark's age relative to any other individual in the photo lineup.

{¶ 30} During his interviews with Detective Russell, Harris not only accurately described Clark's height and clothing, but also his physical characteristics. He recalled with specific detail what Sanders wore and what she did for him, as well as other events surrounding the shooting. Harris related that his focus during the encounter was solely on the man with the gun, and not the other assailants, and that he was 100 percent certain of his identification.

{¶ 31} Clark's contention that the photo lineup was impermissibly suggestive is unfounded. Harris identified Clark solely based upon their encounter — the photo lineup lent no preconceived suggestions about his relative age that would give rise to a very substantial likelihood of irreparable misidentification.

{¶ 32} Even if we agreed that the photo lineup was suggestive, this alone does not require a trial court to suppress an eyewitness's identification. "An unnecessarily suggestive identification process does not violate due process if the identification possesses sufficient indicia of reliability." *State v. Keith*, 79 Ohio St.3d 514, 526, 1997-Ohio-367, 684 N.E.2d 47. To suppress the identification, Clark must produce evidence that the identification was unreliable under the totality of the circumstances. See *State v. Sims* (1984), 13 Ohio App.3d 287, 288, 469 N.E.2d 554. Thus, a suggestive identification process

does not preclude the admission of identification testimony when the challenged identification is determined to be reliable. *State v. Price*, 8th Dist. No. 90308, 2008-Ohio-3454; *State v. Carey*, 8th Dist. No. 88487, 2007-Ohio-3073; *State v. Morrison*, 8th Dist. No. 86967, 2006-Ohio-3352, ¶23, citing *State v. Bates*, 8th Dist. No. 84654, 2005-Ohio-3411.

{¶ 33} Even in cases where only one or two photographs were presented as part of a pretrial identification, this court has repeatedly held that a motion to suppress would have been futile when the totality of the circumstances revealed that the challenged identification was reliable. See, e.g., *Price*; *State v. Keck*, 8th Dist. No. 89637, 2008-Ohio-3794; *Morrison*.

{¶ 34} The trial court did not err in denying Clark's motion to suppress. Clark's second assignment of error is overruled.

{¶ 35} Clark's third assignment of error states:

**“THE APPELLANT’S CONVICTIONS FOR AGGRAVATED ROBBERY AND FELONIOUS ASSAULT WERE AGAINST THE WEIGHT OF THE EVIDENCE.”**

{¶ 36} In reviewing a claim challenging the manifest weight of the evidence, the question to be answered is whether “there is substantial evidence upon which a jury could reasonably conclude that all the elements have been proved beyond a reasonable doubt. In conducting this review, we must examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether

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. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶81. (Internal citations and quotations omitted.)

{¶ 37} In this matter, we cannot say that the jury clearly lost its way and created a manifest miscarriage of justice in convicting Clark of the offenses. After reviewing Clark’s arguments, we are not persuaded that the evidence in this matter weighs heavily against conviction.

{¶ 38} Clark argues that his convictions are against the manifest weight of the evidence because Harris’s eyewitness testimony and identification of Clark is not reliable. Clark also argues that no physical evidence links him to the robbery.

{¶ 39} Although we consider the credibility of the witnesses in a manifest weight challenge, we are mindful that the determination regarding witness credibility rests primarily with the trier of fact. *State v. Hill* (1996), 75 Ohio St.3d 195, 205, 661 N.E.2d 1068. The trier of fact is in the best position to view the witnesses and observe their demeanor, gestures, and voice inflections. Those observations are critical to a resolution of each witness’s credibility. *State v. Antill* (1964), 176 Ohio St. 61, 66, 197 N.E.2d 548.



{¶ 40} When assessing witness credibility “the choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for the finder of fact.” *State v. Awan* (1986), 22 Ohio St.3d 120, 123, 489 N.E.2d 547. The factfinder is free to believe all, part, or none of the testimony of each witness appearing before it. *Hill v. Briggs* (1996), 111 Ohio App.3d 405, 412, 676 N.E.2d 547. Indeed, the court below is in a much better position than an appellate court “to view the witnesses, to observe their demeanor, gestures and voice inflections, and to weigh their credibility.” *Briggs*, citing *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273.

{¶ 41} Here, the jury, as the trier of fact, weighed the evidence, considered the facts and the credibility of the witnesses, and found Clark guilty.

{¶ 42} Although no physical evidence linked Clark to the shooting, the jury heard testimony that Clark was not arrested for his role in the shooting until several months later and received other circumstantial evidence linking him to the shooting — most notably, Harris’s eyewitness identification of him. Since the evidence does not weigh heavily against conviction, we will not order a new trial. Clark’s third assignment of error is overruled.

{¶ 43} Clark’s fourth assignment of error states:

**“THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT DEFENDANT’S MOTION FOR A NEW TRIAL.”**

{¶ 44} The decision to grant or deny a motion for new trial is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *State v. Schiebel* (1990), 55 Ohio St. 3d 71, 564 N.E.2d 54.

After his conviction, Clark's trial counsel filed a motion for new trial, arguing that the failure of defense witness Fahie to appear and testify on his behalf materially affected the outcome of the trial and deprived him of his constitutional right to due process. Both in the trial court and on appeal, Clark argues that the trial court denied him due process by failing to issue a bench warrant for Fahie when she did not appear in court.

{¶ 45} Clark argues that the trial court's errors run afoul of Crim.R. 33(A)(1) and (A)(3), which provide in pertinent part:

**“(A) Grounds**

**A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights:**

**(1) Irregularity in the proceedings, or in any order or ruling of the court, or abuse of discretion by the court, because of which the defendant was prevented from having a fair trial;**

‘\* \* \*

**(3) Accident or surprise which ordinary prudence could not have guarded against \* \* \*.” Crim.R. 33.**

{¶ 46} On appeal, Clark admits that the court granted him an extended recess in order to locate Fahie, and even allowed defense counsel to send an investigator to her home. Ironically, the investigator discovered from one of her

neighbors that Fahie was at traffic court that day. For the following reasons, we cannot agree with Clark's contention that the trial court's failure to issue a bench warrant for Fahie deprived him of constitutional due process and negatively impacted the result of the trial.

{¶ 47} In an affidavit attached to Clark's motion for new trial, Fahie outlined her proposed testimony, including the fact that she owned Gene's Corner Store at 12914 Griffing Avenue, Cleveland, Ohio, where Harris shopped just prior to the shooting. Fahie averred that she saw three young males lurking in the store and that she chased them away, but none of the males was Clark, and that in fact she never saw Clark that day.

{¶ 48} With respect to the subpoena to testify in Clark's defense, Fahie averred that she failed to check her mail and her voicemail, which left multiple notices and messages for her by Clark's counsel reminding her of Clark's trial, and so she failed to appear on that basis.

{¶ 49} First, based upon the purported testimony laid out in the affidavit, we fail to see how compelling Fahie's presence via a bench warrant would have changed the outcome of Clark's trial. Fahie's purported testimony only covers the time period before the shooting; the fact that she did not see Clark that day in no way infers that Clark was not involved in the shooting.

{¶ 50} The trial court did not abuse its discretion in failing to issue a bench warrant for Fahie in this case. Based upon our reading of Fahie's affidavit in Clark's motion, the trial court's failure was not an "irregularity in the proceedings

or abuse of discretion” that prevented Clark from having a fair trial under under Crim.R. 33, since Fahie’s purported testimony did not establish any new facts with respect to Clark’s guilt or innocence; indeed, it made no definitive mention that Clark was, or was not, involved in the crime.

{¶ 51} Fahie’s failure to check her messages and read her mail was not “an accident or surprise which ordinary prudence could not have guarded against.” Ordinary prudence dictates that people ordinarily check their mail and voice messages. In fact, Fahie was sufficiently apprised of her own affairs to be at traffic court in another matter that same day.

{¶ 52} Clark’s fourth assignment of error is overruled.

{¶ 53} Clark’s fifth assignment of error states:

**“THE TRIAL COURT ERRED IN SENTENCING APPELLANT ON ALL COUNTS AS THE APPELLANT MAY ONLY BE CONVICTED OF ONE FORM OF AGGRAVATED ROBBERY AND ONE FORM OF FELONIOUS ASSAULT.”**

{¶ 54} Clark argues, and the State concedes, that although he was convicted of two different forms of aggravated robbery and two different forms of felonious assault, Clark may be sentenced to only one form of each offense.

{¶ 55} R.C. 2941.25(A) states, “[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].”

{¶ 56} This court recently held that where, as here, a defendant is convicted and sentenced to two counts of aggravated robbery and two counts

of felonious assault, where the offenses were a series of continuous acts with a single objective and were also part of the same criminal adventure, with a logical relationship to one another held together by space, time, and purpose, a defendant may only be convicted of one of them. *State v. Woodson*, 8th Dist. No. 92315, 2009-Ohio-5558.

{¶ 57} Clark's convictions are affirmed, his sentence is vacated and we remand the case to the trial court for resentencing, at which time the State will elect which of the allied offenses it wishes to pursue at sentencing for which Clark should be punished. See *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182.

It is ordered that appellee and appellant share the 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 convictions 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, JUDGE

LARRY A. JONES, J., CONCURS;

SEAN C. GALLAGHER, A.J., CONCURS IN JUDGMENT ONLY (SEE SEPARATE CONCURRING OPINION)

SEAN C. GALLAGHER, A.J., CONCURRING IN JUDGMENT ONLY:

{¶ 58} I concur in judgment only. While the majority opinion distinguishes the facts in this case from that of *State v. Bradley*, 181 Ohio App.3d 40, 2009-Ohio-460, 907 N.E.2d 1205, I have reservations about the holding in *Bradley*.

{¶ 59} While *Bradley* is good law in this district and I am constrained to follow its precedent, I am not convinced the science behind so-called “expert identification analysis” is any more or less reliable than the identifications themselves. I believe the admissibility of this type of evidence needs greater vetting and analysis of factual circumstances to better determine when, or if, it should be admitted.