[Cite as *State v. Sanchez*, 2010-Ohio-6153.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 93569 and 93570

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOSE SANCHEZ

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-515338 and CR-507055

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

RELEASED AND JOURNALIZED: December 16, 2010

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COLLEEN CONWAY COONEY, J.:

{¶ 1} Defendant-appellant, Jose Sanchez ("Sanchez"), appeals his convictions following trial on four counts of felonious assault and one count of domestic violence including two specifications relating to prior domestic violence convictions. We find some merit to the appeal and affirm in part and reverse in part.

{¶ 2} This consolidated appeal arises from two separate criminal cases that were consolidated for trial. In CR-507055, Sanchez was charged with one

count of felonious assault and one count of felonious assault with a deadly weapon involving Raven Rodriguez ("Rodriguez"). In CR-515338, Sanchez was charged with one count of felonious assault and one count of felonious assault with a deadly weapon involving Judy Garcia ("Garcia"). The indictment also alleged one count of domestic violence including two furthermore clauses relating to prior domestic violence convictions involving Judy Garcia, and one count of grand theft motor vehicle. Over defense objection, these two cases were joined for trial, at which the following facts were presented:

{¶ 3} During opening statements, the State explained that Sanchez was on trial for two separate cases and that the evidence in each case should be kept separate from the other. In its instructions to the jury, the trial court informed the jury that, "[t]he charges set forth in each count of the indictments constitute separate and distinct matters. You must consider each count and the evidence applicable to each count separately."

{¶ 4} In CR-507055, Rodriguez testified that on December 14, 2007, she and her friends Ashley Adkins ("Adkins") and Licenia Laboy ("Laboy") had been drinking at a bar before going to Sanchez's house. She admitted that they were highly intoxicated. Rodriguez and Laboy started arguing and went outside to fight. As they argued, Sanchez struck Rodriguez's face with a bottle. Rodriguez saw Sanchez holding a broken bottle with jagged edges in his hand.

She began to bleed heavily, and when she put her hand to her cheek, she could feel her cheek bone through the cut on her face.

{¶ 5} Adkins, who is Sanchez's cousin, testified that she witnessed Sanchez strike Rodriguez in the face with a Corona bottle and that the bottle shattered when it hit Rodriguez. Upon further questioning, Adkins stated that Sanchez was the only one who could have hit Rodriguez.

{¶ 6} In CR-515338, Dr. Gerald Maloney ("Dr. Maloney") testified that he was the physician who attended to Judy Garcia ("Garcia"), when she came to MetroHealth complaining of pain in her rib cage, knee, and right hand. Dr. Maloney testified that Garcia told him she was injured when Sanchez, her ex-boyfriend, attempted to steal her car. She explained to Dr. Maloney that as she attempted to prevent the theft, Sanchez drove away, dragging her for a period of time before she fell from the car. Dr. Maloney further testified that it is customary to ask questions regarding how the injuries occurred and who the perpetrator was in order to adequately treat the patient and ensure a safe environment for recovery.

{¶ 7} Sgt. Robert Bartos ("Sgt. Bartos") testified that on March 8, 2008, he was dispatched to Garcia's home where he observed Garcia crying, yelling, and gesturing in an "animated" fashion. She told Sgt. Bartos that her boyfriend, Sanchez, had taken her car and caused her injuries.

{¶ 8} At the close of the State's case, Sanchez moved for acquittal pursuant to Crim.R. 29, which the court denied. At the conclusion of the trial, the jury found Sanchez guilty of both counts of felonious assault involving Raven Rodriguez in CR-507055. In CR-515338, the jury found Sanchez guilty on both counts of felonious assault involving Garcia. They also found him guilty of domestic violence and guilty of the two specifications relating to two prior domestic violence convictions, but not guilty of grand theft of a motor vehicle.

{¶ 9} The court proceeded immediately to sentence Sanchez to eight years in prison on each of the felonious assault convictions in CR-507055, to run concurrently. In CR-515338, the court sentenced Sanchez to eight years in prison on each of the felonious assault convictions and five years for the domestic violence conviction. The court ordered these sentences to run concurrently with each other and consecutive to the term of incarceration imposed in CR-507055. Sanchez was sentenced to an aggregate sixteen-year prison term. He now appeals, raising five assignments of error.

Out-of-Court Statements

{¶ 10} We begin our discussion with the third assignment of error, which concerns the admissibility of an out-of-court statement, because evidence of this out-of-court statement is relevant to our analysis of the first and second assignments of error. In the third assignment of error, Sanchez argues he was denied due process of law when the trial court allowed a non-hearsay statement

of identification and unreliable hearsay into evidence. Specifically, Sanchez challenges the admissibility of Garcia's out-of-court statement to Sgt. Bartos identifying Sanchez as her assailant.[1]

{¶ 11} Generally, out-of-court statements offered to prove the truth of the matter asserted are inadmissible hearsay. Evid.R. 801(C) and 802. The trial court allowed Garcia's statement to Sgt. Bartos into evidence under the excited utterance exception to the hearsay rule contained in Evid.R. 803(2). Evid.R. 803(2) defines an "excited utterance" as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

{¶ 12} For a statement to be admissible as an excited utterance, four prerequisites must be satisfied: (1) the occurrence of an event startling enough to produce a nervous excitement in the declarant; (2) a statement made while still under the stress of excitement caused by the event; (3) a statement related to the startling event; and (4) the declarant's personal observation of the startling event. *State v. Taylor* (1993), 66 Ohio St.3d 295, 300-301, 612 N.E.2d 316. There is no specific time limit to determine whether a victim of violence is making a statement under the stress of a startling occurrence; these statements must "be analyzed in light of the particular facts and circumstances in which [they were]

[1] In this assignment of error, Sanchez does not challenge the admissibility of Garcia's statement to Dr. Maloney in which she also identified Sanchez as her attacker.

made." *State v. Justice* (1994), 92 Ohio App.3d 740, 746, 637 N.E.2d 85. The admission of a statement as an excited utterance under the Evid.R. 803(2) exception is a matter within the discretion of the trial court and is reviewed under Evid.R. 803(2) for an abuse of discretion. *State v. Duncan* (1978) 53 Ohio St.2d 215, 219, 373 N.E.2d 1234.

{¶ 13} Further, in *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177, the United States Supreme Court found that the Confrontation Clause of the Sixth Amendment bars the admission of "testimonial hearsay" unless the declarant is unavailable and the accused has had a prior opportunity to cross-examine the declarant. Id. at 68. Although the Supreme Court did not provide a comprehensive definition of the term "testimonial," the Court indicated that the term "testimonial" applies, at a minimum, to prior testimony at a preliminary hearing, before a grand jury, or at a former trial, and responses to police interrogations. Id.; *State v. Fry*, 125 Ohio St.3d 163, 2010-Ohio-1017, 926 N.E.2d 1239, ¶101. The threshold determination, therefore, is whether the statements in question are classified as testimonial. Id.

{¶ 14} In determining whether a statement constitutes "testimonial hearsay," the consolidated cases of *Davis v. Washington* and *Hammon v. Indiana* (2006), 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 are instructive. In *Davis*, the United States Supreme Court held that statements made during police

"interrogations" are nontestimonial when they are made "under circumstances objectively indicating that the primary purpose of interrogation is to enable police assistance to meet an ongoing emergency." Id. at paragraph one of the syllabus. Such statements are testimonial when "the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." Id. at 822.

{¶ 15} In *Hammon*, the hearsay statements at issue were made to police officers

{¶ 16} responding to a domestic-violence complaint after they had secured the scene. Id. at 817-821. The Supreme Court held that these statements were testimonial and were barred by the Sixth Amendment because the police questioned the victim about possibly criminal past conduct. Id. at 829-832. The court explained that "there was no immediate threat" to the victim and "no emergency in progress," because the police had separated the abusive husband from his wife. Id. at 829-830. The court further explained that when the officer questioned the victim, he was "not seeking to determine 'what is happening,' but rather 'what happened.'" Id. at 830. In fact, the interrogating police officer testified that there was no emergency in progress, the victim told police she was fine and the police interrogation of the victim occurred some time after the events had passed. Id. at 829-830. Accordingly, the court concluded that "[o]bjectively

viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime * * *." Id.

{¶ 17} Sanchez contends Garcia's statement to Sgt. Bartos was not admissible under Evid.R. 803(2) because there was no foundation established to show that Garcia made the statement about a startling event or that she was still under the influence of the event when she made the statement. He also claims Garcia's statement is inadmissible under *Crawford* because it is testimonial in nature. We disagree.

{¶ 18} During Sgt. Bartos's testimony, the following exchange took place:

"Q: When you did arrive, what did you observe?

"A: Um, the person that was the victim was upset. Actually, don't [sic] think she had shoes on that day, as well, which was kind of strange for me, being that it was three feet of snow, give or take.

"She was just upset, crying, that kind of thing.

"Q: Could you, again, describe in more detail, her state of anxiety that you just described?

"A: In terms of her physical behavior?

"Q: Yes. And her emotional behavior. How she was explaining to you.

"A: Like I said, she was upset. She was waving her hands, yelling, just carrying on in an upset manner.

"THE COURT: Officer, listen carefully, because on the next questions that he asks you, you can only answer those questions if she was in an excited state. If it didn't happen in the condition that you just described, then you need to indicate it to me Okay?

"THE WITNESS: Okay.

"Q: * * * Did she identify the person who caused her injuries, while she was in that excited state?

"MR. MAGEE: Objection.

"THE COURT: Only answer the question if she said it when she was excited.

"A: Yes, she did.

"THE COURT: Objection overruled.

* * *

"Q: Now, she identified her assailant or the person who caused her injuries. What was the name of the person that she gave you?

"A: Jose Sanchez.

"Q: And did she give you this name when she was still feeling the — or exhibiting the emotions that you described?

"A: Yes.

"Q: What else did she tell you while she was still exhibiting those emotional signs?

"A: That he was her boyfriend, and that he took her car."

{¶ 19} Clearly, the prosecutor laid a foundation by inquiring about Garcia's demeanor and her emotional state as expressed by her behavior. All of the foundational requirements for admission of Garcia's statement as an excited utterance were satisfied: the existence of a startling or shocking event, the declarant's possessing firsthand knowledge of that event and being under the

stress or excitement caused by the event when her statement was made, and the declarant's statement that relates to that startling event.

{¶ 20} Further, we do not find Garcia's statements were testimonial in nature. Although Sanchez was no longer at the scene when the police arrived, the emergency was still in progress. In contrast to *Hammon* where the police questioned the victim some time after the events occurred and the witness told police she was fine, the events in the instant case occurred just moments before police arrived, and Garcia exhibited signs of distress. The perpetrator had not yet been apprehended, and Garcia was injured and crying. In *Cleveland v. Colon*, Cuyahoga App. No. 87824, 2007-Ohio 269, ¶20, this court found that such circumstances "objectively indicate that the primary purpose of the interrogation was to enable the police to assist the victim in an ongoing emergency." Therefore, Garcia's statement does not constitute "testimonial hearsay."

{¶ 21} Sanchez also claims, "[s]uch an identification statement is non-hearsay and is admissible pursuant to 501(D) Ohio Rules of Evidence, if the Declarant testifies at the Hearing and is subject to cross-examination." Sanchez suggests that because Garcia was not available to testify at trial, her statement identifying Sanchez as the perpetrator was not admissible under Evid.R. 501(D). However, Evid.R. 501 governs "[t]he privilege of a witness, person, state or political subdivision," and we find it inapplicable to the instant case.

{¶ 22} Therefore, we find Sanchez's argument lacks merit. The court properly admitted Garcia's out-of-court statement identifying Sanchez as the person who assaulted her pursuant to Evid.R. 803(2). Even if ruled inadmissible, however, the outcome would be the same in light of Dr. Maloney's testimony that Garcia told him Sanchez caused her injuries. Accordingly, the third assignment of error is overruled.

Consolidated Cases

{¶ 23} In the first assignment of error, Sanchez claims the trial court violated his due process rights by compelling him to stand trial before a jury on two unrelated cases. Sanchez argues that the evidence of unrelated crimes, including prior domestic violence convictions applicable to CR-515338, unfairly prejudiced his defense against allegations of felonious assault in CR-507055. He also claims his defense was prejudiced by being forced to defend two unrelated cases in a single trial.

{¶ 24} We initially note that because Sanchez failed to renew his objection to the joinder of the indictments at the close of the State's evidence or at the conclusion of all the evidence, he has waived this issue on appeal except for plain error. *State v. Owens* (1975), 51 Ohio App.2d 132, 146, 366 N.E.2d 1367; see, also, *State v. Saade*, Cuyahoga App. Nos. 80705 and 80706, 2002-Ohio-5564; *State v. Hill*, Cuyahoga App. No. 80582, 2002-Ohio-4585; *State v. Fortson* (Aug. 2, 2001), Cuyahoga App. No. 78240. Under Crim.R. 52(B),

notice of plain error is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice. *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph three of the syllabus. In order to find plain error under Crim.R. 52(B), it must be determined that, but for the error, the outcome of the trial clearly would have been otherwise. Id. at paragraph two of the syllabus.

{¶ 25} Crim.R. 8(A) provides:

> "Joinder of offenses. Two or more offenses may be charged in the same indictment, information or complaint in a separate count for each offense if the offenses charged * * * are of the same or similar character, or are based on the same act or transaction, or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct."

{¶ 26} Crim.R. 13 provides in pertinent part:

> "The court may order two or more indictments or informations or both to be tried together, if the offenses or the defendants could have been joined in a single indictment or information."

{¶ 27} Thus, pursuant to Crim.R. 8(A) and 13, two or more offenses can be tried together if the offenses are of the same character, based on connected transactions, or are part of a course of conduct. Generally, the law favors joining multiple offenses in a single trial under Crim.R. 8(A) if the offenses charged are of the same or similar character. *State v. Lott* (1990), 51 Ohio St.3d 160, 163, 555 N.E.2d 293.

{¶ 28} However, if joinder would prejudice a defendant, the trial court is required to order separate trials. Crim.R. 14. It is the defendant who bears the burden of demonstrating prejudice and that the trial court abused its discretion in denying severance. *Hill* at ¶7, citing *State v. Coley* (2001), 93 Ohio St.3d 253, 754 N.E.2d 1129. A defendant's claim of prejudice is negated when: (1) evidence of the other crimes would have been admissible as "other acts" evidence under Evid.R. 404(B); or (2) the evidence of each crime joined at trial is simple and direct. *Lott* at 163; see, also, *State v. Schaim* (1992), 65 Ohio St.3d 51, 59, 600 N.E.2d 661; *State v. Franklin* (1991), 62 Ohio St.3d 118, 122, 580 N.E.2d 1.

{¶ 29} In the instant case, the two cases are separate and distinct. They are similar in that they both involve allegations of felonious assault, but they are not based on connected transactions, nor do they form a course of conduct. Further, evidence of Sanchez's domestic violence convictions would not have been admissible in CR-507055 to prove the two counts of felonious assault involving Rodriguez. Hence, there was undoubtedly some prejudice caused by the joinder of the two cases. However, the evidence in each case was simple and direct.

{¶ 30} Moreover, the joinder of the two cases did not affect their outcome. In CR-507055, there was direct evidence from two eyewitnesses who testified that Sanchez struck Rodriguez in the face with a bottle. Rodriguez testified that

she saw Sanchez holding the broken bottle in his hand immediately after the assault occurred. Adkins, a third party observer, testified that she saw Sanchez strike Rodriguez in the face and that he was the only person present who could have done it. Because evidence of Sanchez's guilt was so overwhelming, it cannot be said that the joinder of the two cases caused Sanchez to be convicted in CR-507055.

{¶ 31} There was substantial evidence of Sanchez's guilt in CR-515338. Although Garcia did not testify at trial, Officer Bartos testified that he responded to the scene immediately after the assault occurred. As previously discussed, he described Garcia as being in an excited state when she told him that Sanchez stole her car, dragging her until she fell. Dr. Maloney also testified that Garcia told him that Sanchez dragged her with her car. Sanchez's prior domestic violence convictions were also properly admitted into evidence to prove the domestic violence specifications that enhanced the penalty for domestic violence. It is important to note that the jury found Sanchez not guilty of grand theft of the motor vehicle, thus demonstrating its ability to separately analyze each of the two cases. See *State v. Reuschling*, 11th App. No. 2007-A-0006, 2007-Ohio-6726.

{¶ 32} Therefore, although the joinder of the two cases was arguably improper under Crim.R. 8(A), the outcome of the trial was not affected by the joinder. Accordingly, the first assignment of error is overruled.

Sufficiency of Evidence

{¶ 33} In the second assignment of error, Sanchez argues the trial court erred in denying his Crim.R. 29 motion for acquittal in CR-515338. Sanchez contends that because Garcia did not testify and no one else witnessed the assault, there was insufficient evidence to support Sanchez's convictions in CR-515338. In this assignment of error, Sanchez also argues that the admission of Garcia's out-of-court statements to Dr. Maloney and Sgt. Bartos violated his Sixth Amendment right to confront witnesses against him.

{¶ 34} Pursuant to Crim.R. 29(A), a court "shall order the entry of a judgment of acquittal of one or more offenses * * * if the evidence is insufficient to sustain a conviction of such offense or offenses." Since the analysis of the evidence for purposes of a Crim.R. 29(A) motion looks at the sufficiency of the evidence, a Crim.R. 29(A) motion and a review for sufficiency-of-the-evidence involve the same analysis. *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, 847 N.E.2d 386,¶37.

{¶ 35} A challenge to the sufficiency of the evidence supporting a conviction requires a court to determine whether the State has met its burden of production at trial. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390, 678 N.E.2d 541. On review for sufficiency, courts are to assess not whether the State's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. Id. 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. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶ 36} Sanchez argues that, because Garcia did not testify, the admission of her out-of-court statements violated the Confrontation Clause of the Sixth Amendment, which guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." Sixth Amendment, United States Constitution; *Lee v. Illinois* (1986), 476 U.S. 530, 540, 106 S.Ct. 2056, 90 L.Ed.2d 514. Accordingly, the Confrontation Clause prohibits the admission of some evidence that would otherwise be admissible under a hearsay exception. *Idaho v. Wright* (1990), 497 U.S. 805, 814, 110 S.Ct. 3139, 111 L.Ed.2d 638. Sanchez claims his right of confrontation was violated because Garcia was not available at trial and was not subject to cross-examination.

{¶ 37} As set forth above, Garcia's statement to Sgt. Bartos accusing Sanchez of assaulting her with her car was admissible as nontestimonial hearsay pursuant to Evid.R. 803(2). Garcia's statements to Dr. Maloney were admitted pursuant to Evid.R. 803(4), which provides that an out-of-court statement made for the purpose of medical diagnosis or treatment is admissible as an exception to the hearsay rule. Evid.R. 803(2) and (4) establishes that the availability of the declarant is immaterial. Therefore, the admission of Garcia's statements

through Dr. Maloney and Sgt. Bartos did not violate Sanchez's rights under the Confrontation Clause.

{¶ 38} Sanchez suggests that the circumstantial nature of these out-of-court statements renders this evidence too tenuous to support his convictions. However, in *Jenks*, the Ohio Supreme Court explained that "[c]ircumstantial evidence and direct evidence inherently possess the same probative value." Id. at 272. Further, "[i]n some instances certain facts can only be established by circumstantial evidence." Id. The credibility and weight of the out-of-court statements are, of course, still to be judged by the factfinder. Nevertheless, in reviewing the sufficiency of the evidence, we view the evidence in a light most favorable to the prosecution. If the out-of-court statements are believed, then any rational trier of fact could have found the essential elements of felonious assault and domestic violence involving Judy Garcia proven beyond a reasonable doubt.

{¶ 39} Accordingly, the second assignment of error is overruled.

Prosecutorial Misconduct

{¶ 40} In the fourth assignment of error, Sanchez argues he was denied due process of law when the prosecuting attorney engaged in misconduct during his final closing argument. Specifically, Sanchez claims the prosecutor improperly told the jury that Adkins, a witness to the felonious assault of Rodriguez, was afraid to testify for fear that Sanchez would harm her, her

children, or her grandmother. Sanchez contends these remarks were improper because there was no foundation in the evidence to warrant such prejudicial remarks.

{¶ 41} We note at the outset that defense counsel did not object to these statements during closing arguments. Therefore, we review the State's closing argument under plain error analysis. As previously stated, in order to find plain error under Crim.R. 52(B), it must be determined that, but for the error, the outcome of the trial clearly would have been otherwise. *Long* at paragraph three of the syllabus.

{¶ 42} Although the prosecuting attorney told the jury during closing arguments that Adkins was afraid to testify, this statement rebutted a "conspiracy theory" that defense counsel raised in closing argument in which the defense highlighted the same testimony. In closing argument, referring to Adkins, defense counsel stated:

> " And I think she may have been reluctant to testify, not out of any kind of fear, but out of being put in a bad position. She's friends with Ms. Rodriguez. * * *
>
> "Now, she did give an interview over the phone, and she indicated at that time, well, Raven didn't hit her, but somebody threw a bottle that hit Licenia in the head. Now she doesn't put that in her written statement later. And I would submit to you, that's because she had time to talk to Ms. Rodriguez, and they now had to put together a story, and she realizes someone throwing a bottle doesn't make any sense. Because as you heard Ms. Rodriguez and Ashley indicated that only the three of them were outside."

{¶ 43} In rebuttal, the prosecutor stated:

> "I don't know where Mr. Magee got half the stuff he just said, because it never came out at trial. And about the collaboration between Raven Rodriguez and Ashley Adkins, to cook up a story, I think was the words he used. Where was the evidence?
>
> "* * * You heard her. She's afraid of him. That's why she didn't come in here. There's no conspiracy theory. I had to provide her with an escort to get her here because she's afraid. You heard her say that. And I don't see anything wrong with a seventeen-year-old girl coming in here with a room of adults, facing the man who hurt her friend with a bottle. Mr. Magee says that doesn't make sense. I don't think there is anything clearer than a seventeen-year-old girl being afraid of this man."

{¶ 44} Clearly, the prosecutor's reference to Adkins was made simply to rebut the defense's suggestion that Adkins was hesitant to testify because she and Rodriguez had fabricated a story. Furthermore, contrary to Sanchez's claim that there was no foundation for the prosecutor's statement, the record reflects otherwise. During direct examination, Adkins testified:

> "Q: Did you want to be here yesterday?
>
> "A: No.
>
> "Q: How did you arrive here yesterday?
>
> "A: The police came and picked me up from my house.
>
> "Q: Is that because you did not want to come testify?
>
> "A: Yes.
>
> "Q: Had Detective Fraticelli ever attempted to take to you before?
>
> "A: Yes.

"Q: Did you talk to her over the phone?

"A: Yes.

"Q: What did you tell her when you talked to her over the phone?

"A: That I was scared to testify.

"Q: Why were you scared to testify?

"A: Cause I didn't — I got two kids, and I didn't want nothing happening to them and my grandma.

"Q: Okay. And that's the reason you weren't coming in until, essentially, today?

"A: Yes."

{¶ 45} Therefore, because the prosecutor's statements were made to rebut defense counsel's conspiracy theory and because there was evidence in the record to support the prosecutor's statements, we find no prosecutorial misconduct that could have affected the outcome of the trial.

{¶ 46} Accordingly, the fourth assignment of error is overruled.

Allied Offenses

{¶ 47} In the fifth assignment of error, Sanchez argues the felonious assault charges are allied offenses that should be merged. The State concedes that two counts of felonious assault against the same victim in both CR-507055 and CR-515338 should have been merged.

{¶ 48} Sanchez also argues the domestic violence conviction should be merged with the felonious assault conviction. The State contends the felonious assault conviction and domestic violence conviction are not allied offenses and therefore should not be merged.

{¶ 49} R.C. 2941.25, Ohio's allied offenses statute, protects against multiple punishments for the same criminal conduct in violation of the Double Jeopardy Clauses of the United States and Ohio Constitutions. *State v. Moore* (1996), 110 Ohio App.3d 649, 653, 675 N.E.2d 13. Specifically, R.C. 2941.25 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."

{¶ 50} In *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, the Ohio Supreme Court established a two-part test for determining whether offenses are allied offenses of similar import under R.C. 2941.25. The first step requires a reviewing court to compare the elements of the offenses in the abstract without considering the evidence in the case. Id. at paragraph one of the syllabus. If the court finds that the elements of the offenses are so similar that the commission of one will necessarily result in commission of the other, the

offenses are deemed allied offenses of similar import and the court must proceed to the second step in the analysis. Id.

{¶ 51} In the second step, the court reviews the defendant's conduct to determine whether the crimes were committed separately or with a separate animus for each crime. Id. at ¶14. If so, the defendant may be convicted of both offenses. Id. If the reviewing court concludes that two offenses are allied offenses of similar import under R.C. 2941.25, the State may elect which of the offenses to pursue on resentencing. *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, ¶24. The trial court is bound to accept the State's choice and must merge the offenses into a single conviction for purposes of resentencing. Id.

{¶ 52} We first compare the elements of the offenses in the abstract. *Cabrales* at paragraph one of the syllabus. Sanchez was convicted of felonious assault under R.C. 2903.11(A)(1), which requires proof that he (1) knowingly, (2) caused, (3) serious physical harm. Sanchez was convicted of domestic violence under R.C. 2919.25(A), which requires proof that Sanchez (1) knowingly, (2) caused, (3) physical harm, (4) to a family or household member.

{¶ 53} In comparing the respective elements of these two offenses, we find that the offenses are not allied offenses of similar import. Although the offenses share the elements of knowledge and causation, felonious assault involves a finding of serious physical harm committed against any person, whereas

domestic violence distinguishes that the victim must be a family or household member and requires a lesser degree of harm. We also note that this court has previously determined that domestic violence under R.C. 2919.25 and felonious assault under R.C. 2903.11 are not allied offenses of similar import. *State v. Sandridge*, Cuyahoga App. No. 87321, 2006-Ohio-5243. See, also, *State v. Robinson*, Logan App. No. 8-08-05, 2008-Ohio-4956, ¶23; *State v. Marshall*, Summit App. No. 22706, 2005-Ohio-5947, ¶46-50.

{¶ 54} Accordingly, the fifth assignment of error is sustained in part.

Judgment affirmed in part, reversed in part, and case remanded for merger of allied offenses and for resentencing.

It is ordered that appellant and appellee 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.

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

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COLLEEN CONWAY COONEY, JUDGE

MARY EILEEN KILBANE, P.J., and
JAMES J. SWEENEY, J., CONCUR