[Cite as *State v. Ortiz*, 2009-Ohio-4982.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91819

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

EFRAIN ORTIZ

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART,
REVERSED IN PART AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-508855

BEFORE: Blackmon, J., Rocco, P.J., and Stewart, J.

RELEASED: September 24, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant Efrain Ortiz appeals his convictions for one count of attempted murder and two counts of felonious assault. He assigns eight errors for our review.[1] Having reviewed the record and relevant law, we affirm in part and reverse and remand in part Ortiz's convictions. The apposite facts follow.

Facts

{¶ 2} The Cuyahoga County Grand Jury indicted Ortiz for the above felonies as a principal offender. His co-defendants, Sandra Carte and Alonszo Lewis, were indicted as accomplices. The charges arose from a drunken fight that included Ortiz, Carte, Lewis, and the victim. The victim suffered serious life-threatening knife wounds. Ortiz was tried jointly with Carte.[2]

{¶ 3} The victim, Nathaniel Morris, testified that on the afternoon of September 29, 2007, he saw Carte and her boyfriend, Lewis, walking down the street and arguing. Lewis was hitting Carte in the head. Morris approached Lewis and told him to stop hitting Carte because the police were

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[1]See appendix.

[2]Lewis entered a plea to attempted felonious assault.

down the street. Lewis thanked Morris for watching out for him and proceeded to Ortiz's house, which was across the street from Morris's house.

{¶ 4} Later on, Morris went over to Ortiz's house to drink beer and listen to music after getting into an argument with his fiancée. When he got there, Lewis was sitting on the porch. Morris asked if Ortiz was home. In response, Lewis called Morris a "n****r." Morris asked why Lewis was calling him that; Lewis responded by stating he had something for Morris and hit Morris in the mouth with a gun. Ortiz then pulled into the driveway in his truck and "went crazy on" Morris, punching him. Morris attempted to walk home, but Carte joined in the fray and started hitting him in the face.

{¶ 5} Morris's fiancée, Michelle Brannon, observed Carte hitting Morris and asked what was going on. Carte stopped assaulting Morris; but Ortiz continued punching Morris and Lewis joined in the beating by jumping on Morris and knocking him to the ground. When Morris got up, he and Ortiz removed their shirts and engaged in a fist fight. It was then that Ortiz stabbed Morris. As Morris tried to go home, Ortiz continued to stab him. An ambulance was called and took Morris to the hospital. He sustained a stab wound to the heart and two stab wounds to the rib area. The hospital blood tests showed Morris had a blood-alcohol level of .222. Morris remained in the hospital for a month.

{¶ 6} Morris's fiancée, Michelle Brannon, corroborated part of Morris's testimony; she did not see the actual stabbing. She was sleeping on the couch when she was awoken at 1:30 a.m. by a voice outside saying "Nate, go home. Nate, go home." She looked outside and saw Carte punching Morris. She testified, as did Morris, that Carte stopped when Brannon asked why she was punching Morris. She said that Morris and Ortiz both took off their shirts and began a fist fight. When she saw Lewis jump onto Morris, she ran inside to call 911. While on the phone, she heard Morris say, "He stabbed me." When she went outside, she saw blood gushing from Morris and observed Ortiz chasing him onto her porch. Ortiz retreated when she told him to get off her porch. Although she never saw the knife, she believed Ortiz was chasing Morris in order to stab him because Morris was saying, "he stabbed me" as he ran.

{¶ 7} Brian Kazy, a Cleveland parole officer, lived several houses down from the altercation. He did not observe the actual stabbing but observed Morris and Ortiz fighting. When he went inside to call 911 he heard someone screaming, "He was stabbed. He was stabbed." When he looked, he saw Morris was bleeding profusely.

{¶ 8} Neighbor, Michelle Rolling, who was seventeen years old, was inside her house with her friend Carol Nicholson when they heard a loud argument. They went outside and observed Morris and Ortiz fighting. She

stated that Lewis jumped on Morris, knocking him down. When Morris got up he went after Carte. Rolling observed Carte run into Ortiz's house and come out with a knife and give it to Ortiz. She said Ortiz stabbed Morris twice and then followed Morris to his house and stabbed him again. Although she initially stated she did not see the knife, she later clarified the knife was short, and she could only see the tip. She admitted her eyesight was poor without her glasses, which she was not wearing that night.

{¶ 9} Officer Haist testified that he responded to the 911 call. When he arrived, he observed large amounts of blood on the street, sidewalk, and on the porch of Morris's house. The officer spoke to Carol Nicholson, Michelle Rolling, and Sandra Carte, who were still at the scene. As a result of what he was told, he arrested Carte and began searching for Ortiz; he eventually found Ortiz at his house passed out on a couch. When Ortiz was awakened, he acted very intoxicated and belligerent. The officer observed Ortiz had dried blood between his fingers on his right hand. DNA testing revealed the blood was Morris's.

{¶ 10} The jury found Ortiz guilty of all three counts. The trial court sentenced Ortiz to nine years in prison for the attempted murder count and three concurrent years in prison for the felonious assault counts. The nine years was to run consecutive to the three years for a total of twelve years in prison.

{¶ 11} We address Ortiz's assigned errors out of order for ease of discussion.

Sufficiency/Manifest Weight

{¶ 12} In his first assigned error, Ortiz contends his convictions were not supported by sufficient evidence and were against the manifest weight of the evidence. We disagree.

{¶ 13} The sufficiency of the evidence standard of review is set forth in *State v. Bridgeman*[3] as follows:

> **"Pursuant to Criminal Rule 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."**[4]

{¶ 14} *Bridgeman* must be interpreted in light of the sufficiency test outlined in *State v. Jenks,*[5] in which the Ohio Supreme Court held:

> **"An appellate court's function when reviewing the sufficiency of the evidence to support a criminal**

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[3](1978), 55 Ohio St.2d 261, syllabus.

[4]See, also, *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 23; *State v. Davis* (1988), 49 Ohio App.3d 109, 113.

[5](1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

conviction is to examine the evidence submitted 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. (*Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, followed.)"

{¶ 15} We conclude there was sufficient evidence to support Ortiz's convictions for attempted murder and felonious assault. Morris testified that after engaging in a hand-to-hand fight, Ortiz stabbed him. Michelle Rolling also testified that she observed Carte hand Ortiz the knife; that Ortiz stabbed Morris twice, then pursued him as Morris struggled to get home, stabbing him again. The medical evidence indicated that Morris sustained serious injuries, one potential lethal wound to the heart and two to his side, requiring a one-month hospital stay.

{¶ 16} Thus, the determinative issue is whether Morris and Rolling were credible, which is an argument that goes to the manifest weight of the

evidence. In *State v. Wilson,*[6] the Ohio Supreme Court addressed the standard of review for a criminal manifest weight challenge, as follows:

> **"The criminal manifest-weight-of-the-evidence standard was explained in *State v. Thompkins* (1997), 78 Ohio St.3d 380, 678 N.E.2d 541. In *Thompkins*, the court distinguished between sufficiency of the evidence and manifest weight of the evidence, finding that these concepts differ both qualitatively and quantitatively. Id. at 386, 678 N.E.2d 541. The court held that sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, but weight of the evidence addresses the evidence's effect of inducing belief. Id. at 386-387, 678 N.E.2d 541. In other words, a reviewing court asks whose evidence is more persuasive -- the state's or the defendant's? We went on to hold that although there may be sufficient evidence to support a judgment, it could nevertheless be against the manifest weight of the evidence. Id. at 387, 678 N.E.2d 541. 'When a court of appeals reverses a judgment of a trial court on the basis**

[6] 113 Ohio St.3d 382, 2007-Ohio-2202.

that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony.' Id. at 387, 678 N.E.2d 541, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652."

{¶ 17} However, "an appellate court may not merely substitute its view for that of the jury, but must find that the jury, in resolving conflicts in the evidence, clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered."[7] Accordingly, reversal on manifest weight grounds is reserved for "the exceptional case in which the evidence weighs heavily against the conviction."[8]

{¶ 18} Ortiz contends that the only witnesses to the actual stabbing were Morris and Rolling, whose testimony is suspect. Ortiz contends that because Morris was extremely intoxicated, his ability to recall the events was affected. However, Morris testified that he was not so intoxicated that he could not remember the stabbing. He stated that he was positive that Ortiz

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[7] *State v. Thompkins*, supra at 387.

[8] Id.

stabbed him. Moreover, his testimony as to the surrounding events closely mirrored the testimony of Brannon, Kazy, and Rolling.

{¶ 19} There were also discrepancies in Morris's testimony. Morris incorrectly stated he suffered seven wounds when he actually suffered three wounds. He also stated that he barely knew Rolling and had never been to her house. While this was true prior to the incident, Rolling testified that after Morris came home from the hospital, he came to her house almost every day. The jury heard all of Morris's testimony, including his inconsistent statements and chose to believe his testimony nonetheless. Resolving these inconsistencies was within the province of the jury.[9]

{¶ 20} Ortiz claims Rolling's testimony was suspect because she admitted her eyesight was poor without her glasses and was not wearing her glasses that night. However, she stated that after seeing Morris and Ortiz fighting, she and her friend decided to get a "closer look." Therefore, she may have been close enough that her eyesight was not compromised.

{¶ 21} Ortiz also claims Rolling stated that she did not give a statement the night of the incident, but Officer Haist testified that he spoke to her that night. Officer Haist testified that he questioned Rolling and several other witnesses that night. However, it appears she merely gave Officer Haist

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[9] *State v. DeHass* (1967), 10 Ohio St.2d 230.

information regarding the assailant's identity, which he did not reduce to writing. The officer's "run sheet" indicates he only noted the witnesses' names and phone numbers. Rolling's testimony that she gave a statement over the phone the next day was corroborated by Detective Reidthaler.

{¶ 22} We conclude that the jury did not clearly lose its way and create a manifest miscarriage of justice in resolving the inconsistencies. A defendant is not entitled to a reversal on manifest weight grounds merely because inconsistent evidence was presented at trial. A jury, as finder of fact, may believe all, part, or none of a witness's testimony.[10] The rationale is that the trier of fact is in the best position to take into account inconsistencies, along with the witnesses' manner and demeanor, and determine whether the witnesses' testimonies are credible.[11] Thus, the jury could choose to believe Morris's and Rolling's testimony in whole or in part in arriving at their verdict.

{¶ 23} Ortiz also claims that he did not have a motive to stab Morris, who was his friend. He contends Lewis had a motive to stab Morris based on Morris telling Lewis to stop hitting Carte. However, no one testified that

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[10]*State v. Caldwell* (1992), 79 Ohio App.3d 667; *State v. Hairston* (1989), 63 Ohio App.3d 58; *State v. Antill* (1964), 176 Ohio St. 61, 67.

[11]See *Seasons Coal Co. v. Cleveland* (1994), 10 Ohio St.3d 77, 80; *State v. DeHass* (1967), 10 Ohio St.2d 230, 231.

Lewis had the knife or stabbed Morris. The evidence also indicated that Lewis was not angry at Morris for telling him to cease hitting Carte, but was actually grateful to him for alerting him to the fact the police were down the street. Additionally, Morris's blood was found in the webbing of Ortiz's right hand, further implicating him in the stabbing. Accordingly, Ortiz's first assigned error is overruled.

Allied Offenses

{¶ 24} We will address Ortiz's third and fourth assigned errors together as they both concern the issue of allied offenses. He argues that the felonious assault counts should have merged, and that the one merged felonious assault count should have merged with the attempted murder count. We agree.

{¶ 25} At sentencing, Ortiz asked the court to merge the sentences for the two felonious assault counts and then asked the court to merge the newly merged felonious assault count with the attempted murder count. Thus, he requested to be sentenced for a single count of attempted murder. The State argued that three convictions could be sustained for the felonious assault counts and attempted murder count because the victim was stabbed three times. The court refused Ortiz's request for merger.

{¶ 26} R.C. Section 2941.25(A) provides as follows:

"(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."

{¶ 27} In *State v. Cabrales,*[12] the Ohio Supreme Court instructed 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."

{¶ 28} Prior to *Cabrales*, the leading case in Ohio regarding the test for determining whether crimes are allied offenses of similar import was *State v.*

[12] 118 Ohio St.3d 54, 2008-Ohio-1625,syllabus.

Rance.[13] The Supreme Court in *Cabrales* noted that some courts incorrectly applied *Rance's* "abstract elements comparison test" by conducting a "strict textual comparison" of the elements under R.C. 2941.25(A), which led to "inconsistent, unreasonable, and, at times, absurd results."[14] Thus, *Cabrales* has engendered a more "holistic" or "pragmatic" approach to the question of offenses of similar import.[15]

{¶ 29} Recently, the Ohio Supreme Court in *State v. Brown,*[16] revisited the issue and expanded the first step of the allied offense analysis by adding the additional factor of the societal interests protected by the statutes, which the Court held should also be considered as part of the analysis of whether offenses are "of similar import" or of "dissimilar import."[17]

Felonious Assault

{¶ 30} In the instant case, we begin by comparing the two felonious assault counts. The two felonious assault counts charged Ortiz with different forms of that offense. Count 1 charged, pursuant to R.C.

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[13]85 Ohio St.3d 632, 1999-Ohio-291.

[14]*State v. Mosley*, Cuyahoga App. No. 90706, 2008-Ohio-5483, at ¶31, citing *Cabrales*, at 59.

[15]See *State v. Williams*, Cuyahoga App. No. 89726, 2008-Ohio-5286, at ¶31; *State v. Sutton*, Cuyahoga App. No. 90172, 2008-Ohio-3677, at ¶89.

[16]119 Ohio St.3d 447, 2008-Ohio-4569.

[17]*Brown*, supra, at ¶ 35-36.

2903.11(A)(1), that Ortiz did knowingly cause physical harm to the victim, while Count 2 charged, pursuant to R.C. 2903.11(A)(2), that Ortiz did cause or attempt to cause physical harm to the victim by means of a deadly weapon.

{¶ 31} The Ohio Supreme Court in *State v. Harris*[18] recently held that felonious assault charges pursuant to R.C. 2903.11(A)(1) and R.C. 2903.11(A)(2) are allied offenses of similar import if the State is unable to show that there was a separate animus for each count of felonious assault.[19] Therefore, we need not consider whether the elements align to such an extent as to result in the offenses being allied offenses. However, we must determine if the offenses were committed with a separate animus.

{¶ 32} We conclude in the instant case that the two felonious assault counts were committed with the same animus. The fact that there were several wounds does not automatically mean that a separate animus attaches to each injury. The Ohio Supreme Court in *State v. Cotton,*[20] relying on *State v. Brown*[21] as an authority, found that both of the felonious assault

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[18] *State v. Harris,* 122 Ohio St.3d 373, 2009-Ohio-3323.

[19] See, also, *State v. Cotton*, 120 Ohio St.3d 321, 2008-Ohio-6249; *State v. Potter*, Cuyahoga App. No. 91575, 2009-Ohio-3373; *State v. Wilson*, Cuyahoga App. No. 91091, 2009-Ohio-1681, at ¶46.

[20] *Cotton*, supra.

[21] *Brown,* supra.

counts were committed with one animus even though there were three stab wounds to the same victim.

{¶ 33} The stabbing in the instant case occurred in quick succession. Both Brannon and Kazy testified that they turned momentarily from the scene to call 911 and by the time they looked back, the stabbings had occurred. Therefore, although there were several knife wounds, because the stabbings occurred close together in time, we conclude they were committed with a single animus.

{¶ 34} Accordingly, the trial court should have merged the felonious assault counts for sentencing. Although the court ran the sentences concurrently, running counts concurrent is not the equivalent of merging them.[22]

2) Attempted Murder

{¶ 35} Ortiz argues the merged felonious assault is an allied offense to attempted murder. The attempted murder count charged, pursuant to R.C. 2903.02(A), that Ortiz purposely attempted to cause the victim's death.

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[22] *State v. Baker* 119 Ohio St.3d 1441, 2008-Ohio-4487; *State v. Reid*, Cuyahoga App. No. 89006, 2007-Ohio-5858, at ¶8; *State v. Hines*, Cuyahoga App. No. 84218, 2005-Ohio-4421, at¶20; *State v. Underwood*, 2nd Dist. No. 22454, 2008-Ohio-4748, at ¶27-28 ("The failure to merge allied offenses of similar import constitutes plain error, even when the defendant received concurrent sentences.")

{¶ 36} We conclude that felonious assault and attempted murder protects the same societal interest, to protect persons from serious physical harm. Also, this court in *State v. Sutton*,[23] and *State v. Williams*,[24] applying the *Cabrales* analysis, concluded that felonious assault and attempted murder are allied offenses of similar import. The State contends our analysis in those decisions was incorrect and urges us to not follow these cases. Both of these cases are currently pending before the Ohio Supreme Court.[25] Therefore, until the Ohio Supreme Court holds otherwise, we will continue to follow our precedent.

{¶ 37} However, our analysis does not conclude with our reliance on our precedent. We must determine whether the offenses were committed with a separate animus. In determining whether a separate animus exists for both felonious assault and attempted murder, courts have examined case-specific factors such as whether the defendant at some point broke "a temporal continuum started by his initial act"; whether facts appear in the record that "distinguish the circumstances or draw a line of distinction that enables a trier of fact to reasonably conclude separate and distinct crimes were

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[23]Cuyahoga App. No. 90172, 2008-Ohio-3677.

[24]Cuyahoga App. No. 89726, 2008-Ohio-5286.

[25]*State v. Sutton,* 120 Ohio St.3d 1524, 2009-Ohio-614; *State v. Williams*, 120 Ohio St.3d 1504, 2009-Ohio-361.

committed"; whether, at some point, the defendant created a "substantial independent risk of harm"; and, whether a significant amount of time passed between the beginning of the felonious assault and the end of the attack."[26]

{¶ 38} In *Williams,* we concluded that a separate animus did not exist for felonious assault and attempted murder when a defendant fired two shots at a victim in rapid succession without breaking a temporal continuum, eliminating any possibility that he had a separate animus to both feloniously assault and murder the victim. Likewise, in *Sutton*, where two victims were shot, we concluded the offenses were committed with the same animus because the defendant rapidly fired multiple shots into the vehicle.

{¶ 39} We conclude, in the instant case, that Ortiz acted with the same animus because, as we stated previously, the stabbings occurred in close succession. Under these circumstances, we conclude the trial court erred by not merging the felonious assault count into the attempted murder count. Accordingly, Ortiz's third and fourth assigned errors have merit, and the matter is reversed and remanded for the trial court to merge the felonious assault counts into the attempted murder count.

Jury Instruction

[26] *State v. Williams*, supra, at ¶37; *State v. Hines,* Cuyahoga App. No. 90125, 2008-Ohio-4236, at ¶48; *State v. Chaney*, 5th Dist. No. 2007CA00332, 2008-Ohio-5559, at ¶33.

{¶ 40} In his second assigned error, Ortiz contends the trial court erred by incorrectly instructing the jury regarding the appropriate consideration of aggravated assault as an inferior degree offense to felonious assault. Given our disposition in the third and fourth assigned errors in which the felonious assault counts are merged into the attempted murder count, we conclude this assigned error is moot.

Court Costs

{¶ 41} In his fifth assigned error, Ortiz contends the trial court erred by imposing court costs as part of his sentence because the court failed to impose costs at the sentencing hearing. He also contends the trial court failed to consider his present and future ability to pay the costs.

{¶ 42} Ortiz argues the Ohio Supreme Court in *State v. Threatt*[27] requires that costs must be objected to at the sentencing hearing or the matter is waived on appeal. He contends by failing to impose the costs at the hearing, the court prevented him from being able to raise the issue on appeal. However, we conclude we need not address this issue because the trial court did in fact impose court costs at the sentencing hearing. The court specifically stated, "Court costs are assessed."[28] Thus, pursuant to *State v.*

[27] 108 Ohio St.3d 277, 2006-Ohio-905.

[28] Tr. 1374.

Threatt, because Ortiz failed to object to the imposition of costs at sentencing, he has waived the issue for appeal purposes.

{¶ 43} However, even applying a plain error analysis, there is no merit to his argument that the court erred by failing to determine his present and future ability to pay. R.C. 2947.23 governs the imposition of court costs and provides, in pertinent part:

> **"In all criminal cases, * * * the judge or magistrate shall include in the sentence the costs of prosecution and render a judgment against the defendant for such costs."**[29]

{¶ 44} Thus, the plain language of the statute requires the court to impose court costs upon any convicted criminal defendant, even if the defendant is indigent.[30] The statute does not require the court to inquire as to a defendant's ability to pay prior to ordering the costs. Accordingly, Ortiz's fifth assigned error is overruled.

Sentence Invalid

{¶ 45} In his sixth assigned error, Ortiz argues the sentence imposed by the trial court is invalid because the trial court stated the felonious assault counts were first-degree felonies, when, in fact, they were second-degree felonies. Given our disposition in the third and fourth assigned errors in

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[29]R.C. 2947.23(A)(1).

[30]*State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989.

which we held the felonious assault counts merge with the attempted murder count, this assigned error is moot.

Ineffective Assistance of Counsel

{¶ 46} In his seventh assigned error, Ortiz contends his counsel was ineffective for failing to object to the aggravated assault jury instruction and for counsel's failure to challenge the imposition of court costs.

{¶ 47} We review a claim of ineffective assistance of counsel under the two-part test set forth in *Strickland v. Washington*.[31] Under S*trickland*, a reviewing court will not deem counsel's performance ineffective unless a defendant can show his lawyer's performance fell below an objective standard of reasonable representation and that prejudice arose from the lawyer's deficient performance.[32] To show prejudice, a defendant must prove that, but for his lawyer's errors, a reasonable probability exists that the result of the proceedings would have been different.[33] Judicial scrutiny of a lawyer's performance must be highly deferential.[34]

{¶ 48} We already addressed Ortiz's arguments regarding counsel's failure to object to the aggravated assault instruction and imposition of costs

[31](1984), 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052.

[32]*State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph one of syllabus.

[33]Id. at paragraph two of syllabus.

[34]*State v. Sallie*, 81 Ohio St.3d 673, 674, 1998-Ohio-343.

and have determined counsel's failure to object did not result in prejudicial error. Therefore, Ortiz has not shown that but for his attorney's error, the result of the proceedings would have been different. Accordingly, Ortiz's seventh assigned error is overruled.

Grand Jury Testimony

{¶ 49} In his eighth assigned error, Ortiz argues the trial court erred by refusing his request for a copy of the grand jury transcript. Ortiz argues that because the State reindicted him to include the proper mens rea, it was likely that the grand jury was not presented with evidence of the mens rea.

{¶ 50} The only change to the indictment was regarding Count 1. The original indictment for Count 1 was for attempted murder pursuant to R.C. 2923.02 and 2903.02(B) and stated, Ortiz "unlawfully did attempt to cause the death of Nathaniel Morris, as a proximate result of the offender committing or attempting to commit an offense of violence that is a felony of the first or second degree." Ortiz was re-indicted in order to change Count 1 to attempted murder pursuant to R.C. 2923.02, and instead of R.C. 2903.02(B), he was re-indicted under R.C. 2903.02(A), alleging that Ortiz "unlawfully did attempt to purposely cause the death of Nathaniel Morris." The felonious assault counts remained the same. Ortiz contends the grand jury could have possibly been incorrectly instructed regarding the mens rea

for attempted murder because of this change, or were not instructed at all as to the mens rea.

{¶ 51} The trial court granted Ortiz's request by ordering a copy of the transcript to be delivered to the court for in camera inspection. The trial court reviewed the transcript and stated on the record:

> **"I did not find any material inconsistencies there with regard to the mens rea. Recklessly was not stated, which was [sic] specific question that was asked. So with regard to that, I did grant defense's motions as far as in-court or in-camera review of the grand jury proceedings."**[35]

{¶ 52} Ortiz then proceeded to argue that because no mens rea was presented to the grand jury, the indictments should be dismissed. He based this argument on the Supreme Court case of *State v. Colon* ("*Colon* I"),[36] which was decided three weeks prior and was still relatively new. The trial court gave the parties time to brief the issue. Thereafter, Ortiz made a motion for a copy of the transcript to ascertain what was exactly presented to the jury regarding the mens rea. The court again reviewed the transcript and found no structural error and dismissed the motion. Ortiz claims he should have been given a copy of the transcript so that he could review it to determine if evidence of the mens rea was presented. We disagree.

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[35]Tr. 56-57.

[36]118 Ohio St.3d 26, 2008-Ohio-1624. ("*Colon* I")

{¶ 53} The Ohio Supreme Court in *State v. Laskey*[37] set forth the standard for considering such a request:

> **"Generally, proceedings before a grand jury are secret and an accused is not entitled to inspect grand jury minutes before trial [or at trial] * * *. This rule is relaxed only when the ends of justice require it, such as when the defense shows that a particularized need exists for the minutes which outweighs the policy of secrecy."**[38]

{¶ 54} In *State v. Greer,*[39] the Supreme Court further explained:

> **"Whether a particularized need for disclosure of grand jury testimony is shown is a question of fact; but, generally, it is shown where from a consideration of all the surrounding circumstances it is probable that the failure to disclose the testimony will deprive the defendant of a fair adjudication of the allegations placed in issue by the witness' trial testimony."**[40]

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[37](1970), 21 Ohio St.2d 187.

[38]Id. at 191.

[39](1981), 66 Ohio St.2d 139.

[40]Id. at paragraph three of the syllabus.

{¶ 55} We conclude there was no particularized need for the grand jury transcript. Although defense counsel at the time believed *Colon* I required the State to present the mens rea to the grand jury, *Colon* I dealt with an indictment that was defective on its face because it did not properly charge a robbery count. The indictment in the instant case properly charged Ortiz with attempted murder, therefore, *Colon* I does not apply.

{¶ 56} The Ohio Supreme Court also issued a clarification in *State v. Colon* ("*Colon* II"),[41] in reconsideration of its holding in *Colon* I. The *Colon* II court limited the holding of *Colon* I to "rare cases, * * * in which multiple errors at the trial follow the defective indictment."[42] It explained, "[i]n *Colon* I, the error in the indictment led to errors that 'permeate[d] the trial from beginning to end and put into question the reliability of the trial court in serving its function as a vehicle for determination of guilt or innocence.'"[43] The indictment in the instant case did not lead to multiple errors.

{¶ 57} Additionally, this court in *State v. Blalock,*[44] citing to the U.S. Supreme Court case of *United States v. Calandra*[45] held:

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[41]119 Ohio St.3d 204, 2008-Ohio-3749 ("*Colon* II").

[42]Id. at ¶8

[43] Id., citing *Colon* I, at ¶23 and *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297.

[44]Cuyahoga App. Nos. 80419 and 80420, 2002-Ohio-4580.

> **"[t]he grand jury's sources of information are widely drawn, and the validity of an indictment is not affected by the character of the evidence considered. Thus an indictment valid on its face is not subject to challenge on the ground the grand jury acted on the basis of inadequate or incompetent evidence."**

{¶ 58} We conclude the trial court did not err by refusing Ortiz's request for a copy of the grand jury transcript. Accordingly, Ortiz's eighth assigned error is overruled.

Judgment affirmed in part and reversed and remanded in part.

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 Court of Common Pleas 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.

PATRICIA ANN BLACKMON, JUDGE

KENNETH A. ROCCO, P.J., CONCURS;
MELODY J. STEWART, J., CONCURS IN PART
AND DISSENTS IN PART WITH ATTACHED OPINION.

MELODY J. STEWART, J., CONCURRING IN PART AND DISSENTING IN PART:

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[45](1974), 414 U.S. 338, 344-45.

{¶ 59} I concur in the majority opinion with regard to all assignments of error except the fourth. I disagree with the majority's conclusion that in committing the felonious assaults and the attempted murder, appellant acted with the same animus. I therefore respectfully dissent from the majority's decision to merge the felonious assault and attempted murder convictions.

{¶ 60} In *State v. Hines*, Cuyahoga App. No. 90125, 2008-Ohio-4236, the defendant and the victim exchanged heated words in an elevator. The defendant then shot and seriously wounded the victim. As the injured victim struggled to escape, the defendant followed the victim out of the building while pulling the trigger of his gun, only to have it misfire. We found that under those facts a jury could find that the defendant committed two separate crimes, the first shot that wounded the victim, being a felonious assault, and the subsequent attempt to shoot the victim, being an attempted murder. Id. at ¶47.

{¶ 61} Similarly, in *State v. Roberts*, 180 Ohio App.3d 666, 2009-Ohio-298, the defendant initially stabbed the victim with a steak knife and then, after the knife broke, obtained a new knife and chased the victim down a hallway and resumed stabbing her. The Third District found that the initial stabbing of the victim with the steak knife constituted a separate animus for felonious assault and that the resumption of the stabbing with a butcher knife constituted a separate animus for attempted murder. Id. at ¶17. The court held that the cessation in

the attack followed by a resumption of the attack constituted a break in the "temporal continuum" such that separate and distinct crimes were committed. Id.

{¶ 62} The record shows that appellant and the victim were fighting in the street. During the fight, appellant stabbed the victim – seriously injuring him. While bleeding profusely, the victim retreated from the fight and stumbled toward his home. Appellant followed him and stabbed him again. While all of these events took place in a short period of time, the victim, when retreating to safety with one or more life threatening stab wounds, is a different, more vulnerable victim than the one stabbed initially during the fight. These circumstances created a break in the "temporal continuum" started by appellant's initial act of stabbing the victim during the fight. By following and stabbing, or even attempting to stab, his seriously injured victim again after the fight had ended and the victim was trying to get to safety, appellant created a substantial independent risk of harm. Under these facts, a jury could find that appellant committed two separate crimes – a felonious assault and an attempted murder. Accordingly, I would overrule appellant's fourth assigned error.

APPENDIX

Assignments of Error

> **"I. Defendant's convictions for attempted murder and felonious assault were against the manifest weight of the evidence."**

"II. The court erred when it improperly instructed the jury as to the inferior offense of aggravated assault thereby denying Mr. Ortiz due process of law as guaranteed by the United States Constitution Amendment V, and XIV, the Ohio Constitution Article 1, Section 10 in violation of R.C. 2945.74."

"III. The convictions in Counts Two and Three are for allied offenses of similar import and thus must merge into a single count of conviction."

"IV. The accused's conviction for attempted murder in Count One is an allied offense of similar import to his conviction in Counts Two and Three and thus must merge into a single count of conviction."

"V. The court erred in sentencing Mr. Ortiz to pay court costs without addressing the issue of court costs at the sentencing hearing and by not considering the accused's ability to pay a monetary sanction."

"VI. The court erred in sentencing Mr. Ortiz to a sentence that is not supported by the record and is contrary to law in violation of the United States Constitution Article I, Section 10, R.C. 2929.13 and R.C. 2929.14."

"VII. Defendant Efrain Ortiz was denied effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the U.S. Constitution and Article I, Section 10 of the Ohio Constitution."

"VIII. The trial court erred in refusing to disclose the Grand Jury testimony."