[Cite as *State v. Burrell*, 2011-Ohio-2091.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-P-0060**
- vs -	:	
CAPRICE S. BURRELL,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Court of Common Pleas, Case No. 2009 CR 0193.

Judgment: Affirmed in part, reversed in part, and remanded.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Leonard J. Breiding, II, 4825 Almond Way, Ravenna, OH 44266 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Caprice S. Burrell, appeals her convictions for Murder and Aggravated Vehicular Homicide, following a jury trial in the Portage County Court of Common Pleas. Burrell received an aggregate prison term of fifteen years to life. For the following reasons, we affirm in part and reverse in part the Judgment of the court below, and remand this matter for merger and resentencing.

{¶2} On April 2, 2009, the Portage County Grand Jury returned a two-count Indictment against Burrell. The first count was for Murder, an unclassified felony in

violation of R.C. 2903.02(B) and 2929.02, according to which Burrell did "cause the death of Daron J. Worley as a proximate result of committing or attempting to commit an offense of violence ***, to wit: Felonious Assault, in violation of R.C. 2903.11(A)(1) and/or (2)." The second count was for Aggravated Vehicular Homicide, a felony of the third degree in violation of R.C. 2903.06(A)(2), according to which Burrell did, "while operating or participating in the operation of a motor vehicle, to wit: 1997 Dodge Caravan ***, cause the death of Daron J. Worley, recklessly."

{¶3} An April 6, 2009, Burrell was arraigned and entered a plea of "not guilty" to the charges.

{¶4} On August 19, 20, 24, 25, and 26, 2009, Burrell's case was tried before a jury. The following is a summary of the testimony presented at trial.

{¶5} According to Burrell's in-court testimony and statements made to police investigators, she, Worley (her fiancée), and their children, Justina (age 18) and Cheron (age 12), had spent the day together on February 28, 2009. Burrell had driven her family in her Dodge Caravan to Spelman Chapel AME Church in Kent, the Chapel Hill Mall in Cuyahoga Falls, and the Walmart on State Route 59 in Ravenna. Burrell, who takes medication for depression, became emotional during the course of the day, following a meeting at her church. At the mall, Burrell thought the children were upset with her and, in consequence, became emotional and angry at them. Worley yelled at the children for upsetting their mother.

{¶6} At the Walmart, Burrell and Cheron went into the store to buy groceries for dinner. Justina exited the van without explaining to Worley where she was going and began walking west on Route 59 toward Kent. When Burrell and Cheron returned,

Worley could not say where Justina went. Burrell called Justina's cell phone and learned that she was near the Northeast Ohio Eye Surgeons store, where Burrell worked. Burrell and Worley disagreed about whether Justina should be picked up. Burrell drove with Cheron to pick Justina up while Worley exited the minivan in the Walmart parking lot and began walking east on Route 59 toward Ravenna. Justina's behavior further increased Burrell's anger and frustration.

{¶7} After picking Justina up, Burrell returned to the Walmart and, not finding Worley there, continued eastbound on Route 59.

{¶8} Burrell found Worley walking in the berm near the Midway Drive-In Theatre. She pulled into the drive and exited the minivan, urging Worley to return. Worley continued walking and told Burrell to "go home." Burrell remonstrated, "Honey, please don't be mad at me. Please, just get in the van." Worley again responded, "Caprice, go home," and continued walking.

{¶9} James L. Barnhart, Jr., was driving eastbound on Route 59 and observed the interaction between Burrell and Worley. He described Burrell as "kind of chasing him or trying to get him to come back," and he "looked like he wanted to get away from the van." Burrell appeared "agitated or angry with him." Barnhart testified the time was about 6 p.m. Burrell testified that she returned to the minivan yelling at the children and that they were crying. According to Burrell, everyone was screaming at this point: "I told them that I was sick of them not getting along and I couldn't understand why every time they got mad at their dad they got mad at me. You know, why couldn't we all be happy and get along. *** I told the girls that they would probably be better off if I wasn't

around and they didn't love their dad anyway, so I might as well just hit him because they didn't care about him anyway."

{¶10} Burrell backed the minivan up, and drove eastward. According to her, the minivan was straddling the road and berm while Worley continued walking in the middle of the berm.

{¶11} Burrell testified that it was her intention to scare Worley so that he would get back into the minivan. She stated that, on several prior occasions in which Worley had tried walking away from a situation, she would "swoosh" him, i.e. drive a vehicle at him and turn away before impact.

{¶12} Burrell also testified that she wanted the children to profess their love for Worley: "I wanted them to say, no mommy, we love daddy, don't do that."

{¶13} Burrell asked Cheron, "why are you always mad at me, so mean to me?" Cheron, according to Burrell, responded, "it's because you stay with him." Burrell turned around so that she could see Cheron and "told her that I stay with him because I love him." When Burrell turned back around: "he was right there *** and I swerved *** I hit him."

{¶14} Burrell's trial testimony was largely consistent with a written statement taken at the scene:

{¶15} Burrell: I was arguing with the kids saying I can't have anything I want. You're gonna lose me and your dad, too. Ch[e]ron said don't hit dad. Why you don't like him anyway. You hate him. She said we'll lose you, too.

{¶16} Trooper: When this is going on, what's the relation with your vehicle to the roadway and Dar[o]n?

{¶17} Burrell: I was on the berm, he was walking pretty far ahead.

{¶18} Trooper: How fast were you going at this point?

{¶19} Burrell: I have no idea. I was angry, upset, and yelling.

{¶20} Trooper: Were you going faster than the speed limit?

{¶21} Burrell: I know I wasn't going that fast.

{¶22} Trooper: Were you going faster than Dar[o]n was walking?

{¶23} Burrell: Ya, think so.

{¶24} The right front passenger side of Burrell's minivan hit Worley and he fell back into the windshield and then was throw onto an embankment next to the berm. Forensic pathologist, Dorothy E. Dean, testified that "Worley died from a laceration of his brain with fractures of his skull due to blunt impacts of his head." The time of death was recorded as 6:50 p.m.

{¶25} Hannah McMasters was driving eastbound on Route 59 at the time of the incident. As she passed the Midway Drive-In, she noticed a white van parked in the exit of the theater and a man walking on the berm, near to the curb-side, i.e. the right side of the berm. Having driven past them, she looked in her rearview mirror and saw the minivan driving in the berm. "It stayed in the berm as it moved forward and I looked in my rearview mirror and it hit the man," who "flip[ped] in the air and then came back down and then I looked away." McMasters watched the incident in her rearview mirror for about 4 or 5 seconds. McMasters testified that the van was entirely on the berm and that she did not observe the driver of the van take any evasive maneuver. McMasters did not stop and did not notify the police of what she had seen until the following day.

{¶26} Trooper Christopher T. Jester, a crash reconstructionist for the Ohio State Highway Patrol, produced a written report and testified at trial regarding the results.

Jester based his findings on the position of a "scratched area" in the berm[1], points of impact in the sod of the embankment next to the berm, and the location of Worley's shoes and blood-stains on the berm and embankment. Jester concluded that Worley was three feet from the curb on the right side of the berm, whose width is nine feet. According to the report, then, Worley was right-of-center in the berm at the point of impact, rather than in the middle as Burrell testified. Jester also concluded, "using pedestrian-strike/deceleration methods," that the minivan was travelling between 25 and 31 mph, less than the posted speed limit of 35 mph for that portion of Route 59. Finally, Jester testified that there was no physical evidence that Burrell had taken any evasive action either before or after striking Worley.

{¶27} David L. Uhrich, a Professor Emeritus in Physics from Kent State University, testified as an expert on behalf of the defense. He noted that the physical evidence from the scene of the collision was inconclusive as to Worley's location on the berm. There was no certainty that the marks found in the scratched area were the result of the minivan striking Worley. Moreover, Uhrich testified that a lack of physical evidence that Burrell took evasive action is not conclusive of the fact, since her speed was not excessive at the time of impact.

{¶28} On August 26, 2009, the jury found Burrell guilty of Murder and Aggravated Vehicular Homicide.

1. The "scratched area" refers to particular patterns in the dust and grit that cover the berm. "When the pedestrian is struck on the right front corner or left front corner of a vehicle, that vehicle experiences a great weight shift or a lot of pressure on that wheel and sometimes it will cause a wheel to stutter and leave a mark." Trooper Jester noted that the right shoe had grit in its tread. "[W]e believe the right shoe actually struck the -- or pressed up against the asphalt a little harder than before causing the grit to become imbedded inside the sole and also the grain against the roadway." The point of impact was identified based on the alignment of these marks in the berm with the location of the shoes, blood stains, and sod-impact points.

{¶29} On September 11, 2009, a sentencing hearing was held. At the close of the hearing, the trial court sentenced Burrell to serve fifteen years to life in prison for Murder and, concurrently, five years in prison for Aggravated Vehicular Homicide. Additionally, the court ordered Burrell to pay court costs, imposed a lifetime license suspension, and advised her of a five-year period of post-release control.

{¶30} On September 15, 2009, the trial court entered a written Judgment Entry, memorializing Burrell's sentence.

{¶31} On September 21, 2009, Burrell filed her notice of appeal. On appeal, Burrell raises the following assignments of error:

{¶32} "[1.] The trial court erred in denying Appellant Burrell's request for a jury instruction on vehicular homicide as a lesser included offense of aggravated vehicular homicide and violated her rights under R.C. 2945.74, as the evidence supporting the requested instruction was sufficient to warrant the instruction."

{¶33} "[2.] The State [sic] erred in finding Appellant Burrell, guilty of both aggravated vehicular homicide and murder subjecting her to being twice punished in violation of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution for a single collision resulting in a single death."

{¶34} "[3.] The trial court erred in sentencing Appellant Burrell for aggravated vehicular homicide and murder subjecting her to multiple punishments in violation of R.C. 2941.25 for allied offenses from a single act with a single victim with a single animus."

{¶35} "[4.] The jury lost its way in finding Appellant Burrell guilty on the charge of murder with an underlying felony of felonious assault and guilty of aggravated vehicular homicide where the convictions were against the manifest weight of the evidence per Section (3)(B)(3), Article IV of the Ohio Constitution."

{¶36} Burrell's assignments of error shall be considered out of order.

{¶37} In her first assignment of error, Burrell claims the trial court erred by denying her request to give an instruction on Vehicular Homicide as a lesser included offense of Aggravated Vehicular Homicide.

{¶38} "When the indictment or information charges an offense, including different degrees, or if other offenses are included within the offense charged, the jury may find the defendant not guilty of the degree charged but guilty of an inferior degree thereof or lesser included offense." R.C. 2945.74; Crim.R. 31(C); *State v. Evans*, 122 Ohio St.3d 381, 2009-Ohio-2974, at ¶8 ("a criminal defendant may be found guilty of a lesser included offense even though the lesser offense was not separately charged in the indictment"). "Where the evidence in a criminal case would support a finding by the jury of guilt of a lesser offense included in the offense for which defendant was indicted and tried, the refusal of the trial court to charge upon that lesser included offense is error prejudicial to the rights of defendant." *State v. Loudermill* (1965), 2 Ohio St.2d 79, at syllabus; *State v. Thomas* (1988), 40 Ohio St.3d 213, at paragraph two of the syllabus ("a charge on [a] lesser included offense is required only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense").

{¶39} A trial court's ruling on whether to instruct the jury on a lesser included offense is reviewed under an abuse of discretion standard. *State v. Latessa*, 11th Dist. No. 2006-L-108, 2007-Ohio-3373, at ¶39; cf. *State v. Wolons* (1989), 44 Ohio St.3d 64, 68.

{¶40} Vehicular Homicide is defined as "negligently" causing the death of another while operating a motor vehicle. R.C. 2903.06(A)(3)(a) and (C). Aggravated Vehicular Homicide is defined as "recklessly" causing the death of another while operating a motor vehicle. R.C. 2903.06(A)(2)(a) and (B)(1). "The difference between aggravated vehicular homicide and vehicular homicide is that in the former, the driver *recklessly* causes the death of another, while in the latter, the driver *negligently* causes the death of another." *State v. Grant*, 11th Dist. No. 92-L-037, 1993 Ohio App. LEXIS 3579, at *13 (emphasis sic). Thus, "[v]ehicular homicide is a lesser included offense of aggravated vehicular homicide." *State v. Murphy*, 4th Dist. No. 07CA2953, 2008-Ohio-1744, at ¶34 (citations omitted).

{¶41} Burrell asserts the evidence presented at trial warranted a jury instruction on the lesser included offense of Vehicular Homicide. Burrell cites her testimony that she never intended to hit Worley, but only to scare him. "But as she drove toward him, she was distracted by an argument with her daughters [and] turned around to look at her youngest daughter and to speak to her." (Appellant's Brief). When Burrell turned back around, it was too late to avoid a collision with Worley. Burrell claims this testimony supports the "substantial lapse from due care" that defines negligence. R.C. 2901.22(D) ("[a] person acts negligently when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that his conduct may cause a certain result or

may be of a certain nature"). Burrell further claims the trial court erred by considering the persuasiveness of this evidence, rather than its substance. *State v. Wilkins* (1980), 64 Ohio St.2d 382, 388 ("[t]he persuasiveness of the evidence regarding the lesser included offense is irrelevant"). We disagree.

{¶42} Burrell's conduct of turning away from the road in front of her while operating a motor vehicle to speak with the passenger behind her, without more, is negligent conduct. Under the circumstances of this case, where Burrell was admittedly and intentionally accelerating her vehicle in the direction of another human being, turning her attention from the road in front of her, was reckless, not negligent. It cannot be said that Burrell failed to perceive or avoid the risk of striking Worley. By her own testimony, it was her purpose to create such a risk. To divert one's attention from the person at which one has aimed their vehicle is to perversely disregard the risk of striking that person, with heedless indifference to the consequences. R.C. 2901.22(C) (defining "recklessly").

{¶43} Burrell cites the case of *State v. Beasley*, 1st Dist. No. C-940899, 1995 Ohio App. LEXIS 3176, in support of her argument. In *Beasley*, the court of appeals reversed a conviction for Aggravated Vehicular Homicide where the trial court failed to give an instruction on Vehicular Homicide. The appellant was convicted for striking and killing a man in the emergency lane of the freeway. The court of appeals noted the following evidence: "There was no evidence presented that appellant was either speeding or under the influence of alcohol or drugs. Other drivers testified that appellant was weaving from side to side before the accident and was driving in the emergency lane before striking [the victim]. Appellant claimed to have been checking

his load constantly to see if it had shifted. He applied his brakes before striking [the victim]. He stopped his vehicle and returned to the scene of the accident." Id. at *5. The court concluded that, based on these facts, a jury could reasonably have concluded that the appellant "failed to perceive or avoid the risk of striking a motorist stopped in the emergency lane" due to a "substantial lapse from due care." Id.

{¶44} *Beasley* is factually distinguishable from the present case for the reason stated above. There was no evidence in *Beasley* that the appellant intentionally weaved or swerved into the emergency lane or intended to create a situation in which striking the motorist was a likely possibility. In this case, Burrell's conduct was reckless in that she intentionally drove her vehicle at Worley with the idea of making him and/or her children believe that she could and would kill him. It does not matter that, subjectively, she did not intend to harm him, whether she was focused on her driving, or whether she braked or swerved before impact. None of these circumstances would have rendered her essentially reckless conduct negligent.

{¶45} Thus, even construing the evidence most strongly in Burrell's favor, the evidence at trial would not reasonably support an acquittal of Aggravated Vehicular Homicide and a conviction of Vehicular Homicide. The first assignment of error is without merit.

{¶46} We now consider Burrell's fourth assignment of error, in which she argues that her convictions for Aggravated Vehicular Murder and Murder were against the manifest weight of the evidence.

{¶47} A challenge to the manifest weight of the evidence involves factual issues. The "weight of the evidence addresses the evidence's effect of inducing belief." *State v.*

Wilson, 113 Ohio St.3d 382, 2007-Ohio-2202, at ¶25 (citation omitted); *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52 ("[w]eight of the evidence concerns 'the inclination of the *greater amount of credible evidence*, offered in a trial'") (emphasis sic) (citation omitted). "In other words, a reviewing court asks whose evidence is more persuasive -- the state's or the defendant's?" *Wilson*, 2007-Ohio-2202, at ¶25.

{¶48} "The [appellate] court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Thompkins*, 78 Ohio St.3d at 387, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. "[T]he weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. DeHass* (1967), 10 Ohio St.2d 230, syllabus; *State v. Thomas* (1982), 70 Ohio St.2d 79, syllabus. However, when considering a weight of the evidence argument, a reviewing court "sits as a 'thirteenth juror'" and may "disagree[] with the factfinder's resolution of the conflicting testimony." *Thompkins*, 78 Ohio St.3d at 387, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42. "The only special deference given in a manifest-weight review attaches to the conclusion reached by the trier of fact." Id. at 390 (Cook, J., concurring opinion).

{¶49} In order to convict Burrell of Aggravated Vehicular Homicide, the State had to prove, beyond a reasonable doubt, that Burrell did, "while operating or participating in the operation of a motor vehicle ***, cause the death of Daron J. Worley, recklessly," i.e. with heedless indifference to the consequences, perversely disregarding a known risk that her conduct was likely to cause a certain result or was likely to be of a

certain nature. R.C. 2903.06(A)(2)(a) and R.C. 2901.22(C). As part of our analysis of the first assignment of error, it was demonstrated that the evidence presented at trial did not reasonably support an acquittal of the charge of Aggravated Vehicular Homicide. For the same reasons, Burrell's conviction for Aggravated Vehicular Homicide is not against the weight of the evidence. By her own admission, Burrell drove her vehicle at Worley intending to swerve before impact. This demonstrates a perverse disregard for the fact that Worley would be killed or seriously injured if she, as happened, failed to swerve. Cf. *State v. Kay*, 8th Dist. No. 90360, 2008-Ohio-4580, at ¶37 (appellant's admission that he intended to scare the victim "by swerving towards her car," and physical "evidence that part of his front tire made contact with *** the minivan, indicating appellant was turning in towards [the victim's] minivan" were sufficient to sustain a conviction for Aggravated Vehicular Homicide); *State v. Pirro*, 9th Dist. No. 93CA005567, 1993 Ohio App. LEXIS 5612, at *11-*12 (evidence that appellant's vehicle was in the victim's lane of traffic and that appellant had, on prior occasions, swerved at oncoming cars were sufficient to sustain a conviction for Aggravated Vehicular Homicide).

{¶50} In order to convict Burrell of Murder, the State had to prove, beyond a reasonable doubt, that Burrell did "cause the death of Daron J. Worley as a proximate result of committing or attempting to commit *** Felonious Assault." R.C. 2903.02(B). To demonstrate that Burrell had committed Felonious Assault, the State was required to prove that she "knowingly *** [c]ause[d] serious physical harm to another," and/or "[c]aus[ed] or attempt[ed] to cause physical harm to another *** by means of a deadly weapon or dangerous ordnance," i.e. regardless of her purpose, that she was aware

that her conduct would probably cause a certain result or would probably be of a certain nature. R.C. 2903.11(A)(1) and (2) and R.C. 2901.22(B).

{¶51} The essential question with respect to the Murder conviction is whether Burrell acted knowingly in causing Worley's death. The State relied on Burrell's oral statement that she intended to kill Worley to deprive the children of both parents: "I said that *** they don't like him and so *** I'm just gonna hit him with the car and then they don't have to worry about me because I'll be gone." The result of Burrell's conduct was consistent with her stated intent. Additionally, the State provided corroborative evidence. Barnhart, an eyewitness to Burrell's interaction with Worley at the entrance to the drive-in, testified that she looked "agitated" or "angry." McMaster, an eyewitness to the collision, testified that Burrell's minivan was wholly in the berm at the point of impact and that it did not swerve before or after striking Worley. Trooper Jester, the State's accident reconstruction expert, testified that there was no physical evidence that evasive maneuvers were taken.

{¶52} Burrell counters that her testimony was consistent that she never intended to strike Worley and that her statement was only made to frighten the children and make them believe that she would strike him. Burrell argues a lack of physical evidence is not determinative of the issue of whether she swerved to avoid striking Worley, based on her expert, Uhrich's, testimony that she was not travelling fast enough to leave definite marks in the berm. Moreover, Burrell discounts Barnhart's and McMaster's testimony as not having substantial probative value. She notes that Barnhart's impression that she seemed angry was based on her body language, and that he admitted that he did not have a "definite look" at her face. Likewise, McMaster only witnessed the impact

through her review mirror, at a distance of between 200 and 250 feet, and for a period of four to five seconds.

{¶53} The State has presented sufficient credible evidence that Burrell knowingly caused Worley's death by striking him with her minivan, as was her stated intention. Burrell's arguments all bear on the credibility of the evidence and testimony. Although this court is permitted to indulge in a limited weighing of the evidence when considering the manifest weight of the evidence, Burrell's arguments do not render the State's evidence or theory of the case wholly incredible. The jury's verdict that Burrell is guilty of Murder as the result of the commission of a Felonious Assault is reasonably supported by the evidence presented at trial and does not constitute a manifest miscarriage of justice.

{¶54} The fourth assignment of error is without merit.

{¶55} In her second assignment of error, Burrell argues the trial court erred in upholding her convictions for Murder and Aggravated Vehicular Homicide in violation of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution, where both convictions stemmed from one collision resulting in the death of one person. In the third assignment of error, Burrell argues the court erred in sentencing her, in violation of R.C. 2941.25, for allied offenses from a single act with a single victim with a single animus.

{¶56} The Fifth Amendment to the United States Constitution provides that no person "shall *** be subject for the same offence to be twice put in jeopardy of life or limb." Section 10, Article I of the Ohio Constitution provides that "no person shall be twice put in jeopardy for the same offense." "Ohio courts have historically treated the

protections afforded by the Double Jeopardy Clauses of the Ohio Constitution and the United States Constitution as co-extensive." *State v. Gustafson*, 76 Ohio St.3d 425, 432, 1996-Ohio-299. The protections of the federal and state Double Jeopardy Clauses are commonly described as prohibiting successive prosecutions for the "same offense" and multiple punishments for the "same offense." *United States v. Halper* (1989), 490 U.S. 435, 440, citing *North Carolina v. Pearce* (1969), 395 U.S. 711, 717; *State v. Rance*, 85 Ohio St.3d 632, 634, 1999-Ohio-291, overruled, in part, on other grounds by *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314.

{¶57} "In contrast to the double jeopardy protection against multiple trials, the final component of double jeopardy -- protection against cumulative punishments -- is designed to ensure that the sentencing discretion of courts is confined to the limits established by the legislature." *Ohio v. Johnson* (1984), 467 U.S. 493, 499; *Brown v. Ohio* (1977), 432 U.S. 161, 165 ("[w]here consecutive sentences are imposed at a single criminal trial, the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense"). Thus, "[a] legislature *** may prescribe the imposition of cumulative punishments for crimes *** without violating the federal protection against double jeopardy or corresponding provisions of a state's constitution." *Rance*, 85 Ohio St.3d at 635; *State v. Botta* (1971), 27 Ohio St.2d 196, 202-203 ("[i]t is well established law in Ohio that one act may constitute several offenses and that an individual may at the same time and in the same transaction commit several separate and distinct crimes and that separate sentences may be imposed for each offense").

{¶58} The Ohio General Assembly's intent on the subject of cumulative punishments for the same conduct is expressed by R.C. 2941.25, the multiple counts or allied offenses of similar import statute, which "manifests the General Assembly's intent to permit, in appropriate cases, cumulative punishments for the same conduct." *Rance*, 85 Ohio St.3d 632, at paragraph three of the syllabus. The allied offenses statute addresses the issue of "whether cumulative punishments imposed within a single trial for more than one offense resulting from the same criminal conduct violate the federal and state constitutional provisions against double jeopardy." Id. at 639. "The sole question, then, is one of state statutory construction: are the offenses at issue those certain offenses for which the General Assembly has approved multiple convictions pursuant to R.C. 2941.25?" Id.

{¶59} Ohio's multiple counts statute provides:

> **{¶60}** (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.
>
> **{¶61}** (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.[2]

{¶62} R.C. 2941.25.

{¶63} In a plurality decision, the Ohio Supreme Court has recently explained the analysis to be conducted in the application of the multiple counts statute.

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2. The trial court is not required to merge the offenses until after the jury has returned its verdicts. "Allied offenses of similar import do not merge until sentencing, since a conviction consists of verdict and sentence." *State v. McGuire*, 80 Ohio St.3d 390, 399, 1997-Ohio-335; *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, at ¶47 ("[u]nder R.C. 2941.25, the court must determine prior to sentencing whether the offenses were committed by the same conduct").

{¶64} In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), the question is whether it is possible to commit one offense *and* commit the other with the same conduct, not whether it is possible to commit one *without* committing the other. [*State v.*] *Blankenship,* 38 Ohio St.3d [116,] 119, 526 N.E.2d 816 (Whiteside, J., concurring) ("It is not necessary that both crimes are always committed by the same conduct but, rather, it is sufficient if both offenses *can be* committed by the same conduct. It is a matter of possibility, rather than certainty, that the same conduct will constitute commission of both offenses." [Emphasis sic]). If the offenses correspond to such a degree that the conduct of the defendant constituting commission of one offense constitutes commission of the other, then the offenses are of similar import.

{¶65} If the multiple offenses can be committed by the same conduct, then the court must determine whether the offenses were committed by the same conduct, i.e., "a single act, committed with a single state of mind." [*State v.*] *Brown,* 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, at ¶50 (Lanzinger, J., dissenting).

{¶66} If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged.

{¶67} Conversely, if the court determines that the commission of one offense will *never* result in the commission of the other, or if the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge.

{¶68} *Johnson*, 2010-Ohio-6314, at ¶¶48-51 (emphases sic).[3]

{¶69} In the present case, Burrell was convicted of felony Murder, predicated on Felonious Assault, and Aggravated Vehicular Homicide. The relatively simple facts of this case demonstrate that it is possible to commit felony Murder/Felonious Assault and Aggravated Vehicular Homicide with the same conduct.

3. We recognize that the Ohio Supreme Court's opinion with respect to the analysis to be conducted in the application of the multiple counts statute was a plurality opinion, and, thus, of limited precedential value. Cf. *Kraly v. Vannewkirk* (1994), 69 Ohio St.3d 627, 633 (precedent "is of questionable precedential value [where] it was a plurality opinion which failed to receive the requisite support of four justices of this court in order to constitute controlling law"). The concurring plurality opinion in *Johnson* did not expressly disavow the passages cited herein, but stated that the lead opinion did not "clearly set[] forth the appropriate considerations for determining whether the offenses arise out of the same conduct and should be merged pursuant to R.C. 2941.25." 2010-Ohio-6314, at ¶59 (O'Connor, J., concurring in judgment).

{¶70} Burrell knowingly drove her minivan into Worley, thereby causing his death. By doing so, she recklessly caused his death while operating a vehicle (thus committing Aggravated Vehicular Homicide) and knowingly caused serious physical harm resulting in his death (Murder/Felonious Assault). Cf. R.C. 2901.22(E) ("[w]hen recklessness suffices to establish an element of an offense, then knowledge or purpose is also sufficient culpability for such element"). According to the multiple counts statute, then, Burrell cannot be convicted of felony Murder and Aggravated Vehicular Homicide.

{¶71} The State maintains that Burrell did not seek the merger of the two counts and, thus, has waived all but plain error. The Ohio Supreme Court has decidedly rejected the position that the failure to merge convictions on allied offenses cannot be said to constitute plain error. Rather, the Supreme Court has repeatedly held "that imposition of multiple sentences for allied offenses of similar import is plain error." *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, at ¶31, citing *State v. Yarbrough*, 104 Ohio St.3d 1, 2004-Ohio-6087, at ¶¶96-102.

{¶72} While Burrell was properly tried for both felony Murder and Aggravated Vehicular Homicide, she may only be convicted and sentenced for one of these charges. It is for the State to decide which of the two charges will merge with the other. *Maumee v. Geiger* (1976), 45 Ohio St.2d 238, 244 ("The choice is given to the prosecution to pursue one offense or the other, and it is plainly the intent of the General Assembly that the election may be of either offense"); *Johnson*, 2010-Ohio-6314, at ¶15, fn. 2 (citing the Legislative Service Commission's comments to R.C. 2941.25, that "[u]nder this section, [the defendant] may be charged with both offenses but he may be

convicted of only one, and the prosecution must sooner or later elect which offense it wishes to pursue"). The second and third assignments of error are with merit.

{¶73} For the foregoing reasons, the Judgment of the Portage County Court of Common Pleas, sentencing Burrell for Murder and Aggravated Vehicular Homicide, is reversed and this matter is remanded for further allied offense and sentencing proceedings consistent with this opinion. In all other respects, the lower court's Judgment is affirmed. Costs to be taxed against the parties equally.

MARY JANE TRAPP, J.,

THOMAS R. WRIGHT, J.,

concur.