

[Cite as *State v. Jackson*, 2010-Ohio-4312.]

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-090414
	:	TRIAL NO. B-0805964
Plaintiff-Appellee,	:	
	:	<i>OPINION.</i>
vs.	:	
DION JACKSON,	:	
	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: September 15, 2010

Joseph T. Deters, Prosecuting Attorney, and *Rachel Lipman Curran*, Assistant
Prosecuting Attorney, for Plaintiff-Appellee,

Christine Y. Jones, for Defendant-Appellant.

Please note: This case has been removed from the accelerated calendar.

CUNNINGHAM, Presiding Judge.

{¶1} Raising six assignments of error, defendant-appellant Dion Jackson appeals from his convictions, following a jury trial, for the felonious assault and murder of William Champion. Jackson, a guest at a birthday party, quarreled with Champion, brawled with him in an apartment building hallway, and shot Champion during the struggle. He then fled downstairs, stopped, and returned to finish Champion off with a final shot to his back.

{¶2} Jackson argues in his six assignments of error that (1) the trial court erred by refusing to instruct the jury on lesser offenses; (2) his convictions were contrary to the manifest weight of the evidence and were based upon insufficient evidence; (3) the trial court erred by imposing multiple punishments for one crime; and (4) the trial court imposed an excessive sentence. We find none of the assignments to have merit and affirm the trial court's judgment.

I. The Murder of William Champion

{¶3} On July 2, 2008, Deshiela Dean celebrated her 47th birthday by inviting about 20 friends to her Cincinnati apartment. Frances Champion, her husband, William, and her two children had been invited to the party. Vincent Carr had been invited and brought Jackson as his guest. Deshiela's daughter, Krystal, knew Jackson from high school.

{¶4} When Jackson arrived, he asked Krystal to hold his 9-mm handgun. She refused. But another guest, Brittany Gary, agreed to hold the weapon. Jackson smoked marijuana, played cards, and mingled with the other guests. During the party, Jackson learned that Champion was a friend of persons who had shot Jackson's brother several months before the party. A conversation about basketball turned heated. Jackson became

enraged. He overturned the card table, ran through the apartment, and threatened to beat Champion. The two scuffled in the apartment. The Deans and their other guests tried to calm Jackson. Jackson retrieved his gun. And Deshiela and Krystal Dean succeeded in pushing Jackson out of the apartment. Krystal followed.

{¶5} In the hallway, Krystal saw Jackson struggling with Champion. She saw Jackson pull his gun and point it at Champion. Krystal hid in a corner of the hallway, closed her eyes, and then heard a shot. Her mother ran out into the hallway, and both she and Krystal saw Jackson run down the stairs to the building exit. Then, rather than fleeing, Jackson returned to find Champion struggling to his feet at the top of the staircase. Jackson then approached Champion from behind and fired again. Champion collapsed backwards and slid down the stairs.

{¶6} While the Deans and other witnesses recalled hearing only two shots, the deputy coroner, Dr. Greta Stephens, testified that Champion had been struck by bullets three times. Her testimony and that of a police firearms expert revealed that Jackson's first gunshot, taken from close range, had struck Champion in the back and had resulted in serious injuries to his right lung, diaphragm, and liver. Jackson's last shot, made while Champion teetered at the top of the stairs, was inflicted at greater range and had entered Champion's back and perforated his lungs and heart. Dr. Stephens also noted a third, minor wound to Champion's leg.

{¶7} After shooting Champion, Jackson ran into the night and threw the gun away. He traveled to Georgia ostensibly to see his daughter. But he did not attempt to visit the child in Decatur. He was apprehended during a disturbance with his landlord in Atlanta. After giving police a false name, Jackson was ultimately identified and returned to Hamilton County.

{¶8} At the conclusion of the trial, the jury returned verdicts on counts two, three, and four of the indictment, finding Jackson guilty of felony murder, under R.C. 2903.02(B), felonious assault resulting in serious physical harm, under R.C. 2903.11(A)(1), and felonious assault with a deadly weapon, under R.C. 2903.11(A)(2). The jury was unable to reach a verdict on purposeful murder as alleged in count one of the indictment. The trial court ultimately dismissed that charge. At sentencing, the trial court merged the two felonious-assault offenses. It imposed a 15-year-to-life prison sentence for felony murder and made that term consecutive to a maximum, eight-year prison term for serious-harm felonious assault and to a three-year term for a firearm specification accompanying the murder offense. The aggregate prison sentence was 26 years to life. This appeal ensued.

II. Alleged Trial Errors

{¶9} In his sixth assignment of error, Jackson asserts that the trial court erred when it failed to instruct the jury on voluntary manslaughter and on aggravated assault, both offenses of inferior degree to the charged crimes. Both inferior offenses contain the mitigating circumstance of serious provocation occasioned by the victim.¹ A trial court is required to instruct the jury on these offenses “only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser * * * offense.”² Here, Jackson’s own testimony revealed he had not been under the influence of sudden passion or in a sudden fit of rage. He denied being angry when he fought with Champion. The other evidence adduced at trial demonstrated that Jackson had not been provoked by Champion and that Jackson had initiated the fight. Thus there

¹ See *State v. Smith*, 168 Ohio App.3d 141, 2006-Ohio-3720, 858 N.E.2d 1222, ¶5.

² See *State v. Thomas* (1988), 40 Ohio St.3d 213, 533 N.E.2d 286, paragraph two of the syllabus (stating the test for giving a lesser-included-offense instruction); see, also, *State v. Shane* (1992), 63 Ohio St.3d 630, 632, 590 N.E.2d 272 (holding that the same test is employed when determining whether an instruction should be given for an inferior-degree offense).

was insufficient evidence to support a conclusion that Jackson had been provoked into a sudden passion or fit of rage by Champion.³ The assignment of error is overruled.

{¶10} In three interrelated assignments of error, Jackson next challenges the weight and the sufficiency of the evidence adduced to support his convictions. Jackson was convicted of felony murder, under R.C. 2903.02(B), which proscribes causing the death of another as a proximate result of committing an offense of violence that is a felony of the first or second degree. The predicate offense of violence in this case was felonious assault,⁴ under R.C. 2903.11(A)(1), which proscribes knowingly causing serious physical harm to another.

{¶11} Our review of the record fails to persuade us that the jury, sitting as the trier of fact, clearly lost its way and created such a manifest miscarriage of justice that the convictions must be reversed and a new trial ordered.⁵ The jury was entitled to reject Jackson's theory that Champion had begun the altercation when Jackson tried to leave the party, that an accidental discharge of Jackson's gun during the hallway fight had caused the first wounding of Champion, that Jackson had then shot Champion in the back to prevent Champion from flipping him over the railing, and that he had fled to Georgia to see his daughter before turning himself in to authorities.

{¶12} The state presented ample evidence to support the convictions, including Jackson's own testimony that he had shot Champion. Each witness, save Jackson, testified that Jackson had started the fight with Champion inside the Deans' apartment, and that Krystal and her mother had pushed Jackson out into the hallway, where the two continued the fight. Krystal Dean testified that Jackson had drawn his gun at the beginning of the fight. She and her mother both testified that, after the first shot, Jackson

³ See *State v. Levett*, 1st Dist. No. C-040537, 2006-Ohio-2222; see, also, *State v. Smith* at ¶43 et seq.

⁴ See R.C. 2901.01(A)(9).

⁵ See *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.

had raced downstairs and then returned. Krystal stated that as Champion stood injured at the top of the stairs, Jackson had fired the final, fatal shot from the steps below. The deputy coroner and a firearms expert corroborated the Deans' versions of how Jackson had inflicted the gunshot wounds on Champion.

{¶13} As the weight to be given the evidence and the credibility of the witnesses were for the jury, sitting as the trier of fact, to determine,⁶ in resolving conflicts and limitations in the testimony, the jury could have found that Jackson had knowingly caused serious physical harm to Champion, and that as a proximate result of that assault he had caused Champion's death.

{¶14} The record reflects substantial, credible evidence from which the trial court could have reasonably concluded that the state had proved all elements of the charged crimes beyond a reasonable doubt, including that Jackson had possessed a weapon when he assaulted Champion in the hallway and returned to administer the fatal gunshot.⁷

{¶15} The trial court also properly denied Jackson's motions for a judgment of acquittal, as reasonable minds could have reached different conclusions as to whether each element of the crimes charged had been proved beyond a reasonable doubt.⁸ The first, second, and third assignments of error are overruled.

III. Multiple Punishments

{¶16} In his fifth assignment of error, Jackson argues that the trial court erred in sentencing him on counts two (felony murder), three (serious-harm felonious assault), and four (deadly-weapon felonious assault) of the indictment. He asserts that these offenses were allied offenses of similar import. We note that the trial court correctly

⁶ See *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus.

⁷ See *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781; see, also, *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, 842 N.E.2d 996, ¶36.

⁸ See Crim.R. 29; see, also, *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 381 N.E.2d 184.

determined that the two felonious-assault offenses were allied offenses of similar import and properly imposed only one sentence for felonious assault.⁹ The trial court imposed an eight-year period of incarceration for count three, which charged Jackson with felonious assault resulting in serious harm, under R.C. 2903.11(A)(1). Therefore, the gravamen of Jackson's argument is that felony murder, as charged in count two, and serious-harm felonious assault, as charged in count three, were allied offenses of similar import.¹⁰

{¶17} In this case, Jackson did not object to the imposition of multiple sentences on the ground that he had been found guilty of allied offenses of similar import; he has therefore waived the issue absent a showing of plain error.¹¹ To constitute plain error, there must be an error that constitutes an "obvious" defect in the trial proceedings and that affects "substantial rights."¹² The Ohio Supreme Court has interpreted the final element to mean "that the trial court's error must have affected the outcome of the trial."¹³

{¶18} R.C. 2941.25, Ohio's multiple-count statute, clearly reflects the General Assembly's intent to permit cumulative sentencing for the commission of certain offenses.¹⁴ In a single proceeding, a trial court may convict and sentence a defendant for two offenses " 'having as their genesis the same criminal conduct or transaction, [if] the offenses (1) [are] not allied and of similar import, (2) were committed separately or (3) were committed with a separate animus as to each offense.' "¹⁵

⁹ See *State v. Harris*, 122 Ohio St.3d 373, 2009-Ohio-3323, 911 N.E.2d 882, paragraph two of the syllabus; see, also, *State v. Cotton*, 120 Ohio St.3d 321, 2008-Ohio-6249, 898 N.E.2d 959.

¹⁰ See *State v. Minifee*, 8th Dist. No. 91017, 2009-Ohio-3089, ¶113.

¹¹ See *State v. Sawyer*, 1st Dist. No. C-080433, 2010-Ohio-1990, ¶16, citing *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶31; see, also, Crim.R. 52(B).

¹² *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68, 759 N.E.2d 1240.

¹³ *Id.*

¹⁴ See *State v. Rance*, 85 Ohio St.3d 632, 635-636, 1999-Ohio-291, 710 N.E.2d 699.

¹⁵ See *State v. Bickerstaff* (1984), 10 Ohio St.3d 62, 65-66, 461 N.E.2d 892, quoting *State v. Moss* (1982), 69 Ohio St.2d 515, 519, 433 N.E.2d 181.

{¶19} The Ohio Supreme Court has mandated a two-step analysis to determine whether a trial court may impose multiple sentences under R.C. 2941.25. The first step of the analysis requires courts to compare the statutorily defined elements of the “offenses in the abstract, i.e., without considering the evidence in the case, but [it] does not require an exact alignment of elements.”¹⁶ “ ‘If the elements of the offenses correspond to such a degree that the commission of one crime will result in the commission of the other, the crimes are allied offenses of similar import and the court must then proceed to the second step. In the second step, the defendant’s conduct is reviewed to determine whether the defendant can be convicted of both offenses. If the court finds either that the crimes were committed separately or that there was a separate animus for each crime, the defendant may be convicted of both offenses.’ ”¹⁷

{¶20} Unless committed separately or with a separate animus, allied offenses must be merged for purposes of sentencing following the state’s election of which offense should survive.¹⁸ And the defendant may be convicted of only one of the offenses, even though the defendant has been properly charged with and found guilty of allied offenses.¹⁹

{¶21} In *State v. Finley*, we held that felony murder and serious-harm felony assault were allied offenses of dissimilar import and affirmed the trial court’s conviction and imposition of sentence on each offense.²⁰ But earlier this year, the Ohio Supreme Court, in *State v. Williams*, applied its two-step analysis to multiple convictions for serious-harm felonious assault and attempted felony murder and held them to be allied

¹⁶ *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, ¶27; see, also, *State v. Rance*, paragraph one of the syllabus; *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147, 922 N.E.2d 937, ¶16.

¹⁷ *State v. Harris* at ¶10, quoting *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117, 526 N.E.2d 816.

¹⁸ See *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182.

¹⁹ See R.C. 2941.25(B); see, also, Crim.R. 32(C); *State v. Smith*, 1st Dist. No. C-070216, 2008-Ohio-2469.

²⁰ See 1st Dist. No. C-061052, 2008-Ohio-4904, ¶42-43.

offenses of similar import.²¹ The court identified the elements of attempted felony murder, under R.C. 2903.02(B), which requires that the offender engage in conduct that, if successful, would result in the death of another as a proximate result of committing or attempting to commit an offense of violence. It then concluded that since serious-harm felonious assault is an offense of violence, “the commission of attempted murder, as statutorily defined, necessarily results from the commission of [the] felonious assault.”²² Thus, under the comparison-of-the-elements step of its analysis, the two offenses are allied offenses of similar import.²³

{¶22} Unlike the defendant in *State v. Williams*, Jackson’s actions in this case resulted in the completed murder of his victim. But we fail to see how this difference would affect the applicability of the *Williams* holding.²⁴ Under the *State v. Williams* rationale, a perpetrator cannot commit felony murder based on the predicate offense of serious-harm felonious assault without also committing the felonious assault. Accordingly, we overrule that portion of our decision in *State v. Finley* that holds these two offenses to be allied offenses of dissimilar import.²⁵

{¶23} Though we recognize that felony murder and serious-harm felonious assault are allied offenses of similar import, our resolution of Jackson’s assignment of error is not at an end. Under the second step of the multiple-count analysis, we must

²¹ See *State v. Williams*, paragraph one of the syllabus; see, also, *State v. Love*, 124 Ohio St.3d 560, 2010-Ohio-1421, 925 N.E.2d 137 (applying *Williams* to reverse this court’s holding that R.C. 2903.11[A][2] felonious assault and attempted murder under R.C. 2903.02[A] and 2923.02 are not allied offenses); *State v. Garnett*, 1st Dist. No. C-090471, 2010-Ohio-3303, ¶19 (applying *Williams* and holding that, despite the imposition of concurrent prison terms, the trial court erred in failing to merge felonious assault and attempted murder into one conviction); *State v. Gandy*, 1st Dist. No. C-070152, 2010-Ohio-2873, ¶7.

²² *State v. Williams* at ¶23.

²³ See *id.*

²⁴ See, also, *State v. Reid*, 2nd Dist. No. 23409, 2010-Ohio-1686, ¶40.

²⁵ See, also, *State v. Reid*; *State v. Scandrick*, 2nd Dist. No. 23406, 2010-Ohio-2270, ¶55; *State v. Minifee* at ¶113.

determine whether Jackson's actions involved separate conduct or whether he committed the charged offenses with a separate animus.

{¶24} Here, Jackson fired at least two gunshots at Champion. The first was taken at very close range during their hallway struggle. It resulted in serious, but not immediately fatal, injuries to Champion's right lung, diaphragm, and liver. The second shot, inflicted at greater range, entered Champion's back and perforated both lungs and his heart. Dr. Stephens described this shot as having inflicted "a very quick killing wound."

{¶25} The murder or assault of a single victim by a single perpetrator who fires multiple gunshots often results in only a single punishment. The perpetrator's discharge of gunshots in rapid succession either constitutes a single, continuous act²⁶ or is evidence of a single animus to harm the victim with some of the attacker's shots achieving his purpose and some striking wide of the mark.²⁷ But Jackson's conduct was radically different. After wounding Champion with his first shot, Jackson fled from the hallway, descended a staircase, and headed toward the building exit. But instead of leaving the seriously injured Champion in the hallway, Jackson returned, saw that Champion had struggled to his feet, and shot him in the back, inflicting a mortal wound.

{¶26} As this court has long noted, "when two allied offenses are committed at separate times, * * * the offender may be sentenced for two crimes."²⁸ In *State v. Thomas*, applying an earlier comparison-of-the-elements test, this court affirmed the imposition of multiple sentences for attempted murder and serious-harm felonious assault.²⁹ Thomas had fought with his wife and had wrestled a firearm from her hands. He then shot her in

²⁶ See *State v. Gandy* at ¶11; see, also, *State v. Harris* at ¶26.

²⁷ See *State v. Williams* at ¶27; see, also, *State v. Reid* at ¶40 (the allied offenses of felonious assault and murder were not committed separately or with a separate animus, even though defendant had shot the victim three times, with only one shot proving fatal).

²⁸ *State v. Fields* (1994), 97 Ohio App.3d 337, 346, 646 N.E.2d 866.

²⁹ (May 19, 1993), 1st Dist. No. C-920135.

the back as she ran away. Thomas started to flee, “then turned and shot her one or two more times, inflicting wounds in her neck and hand.”³⁰ We held that this conduct demonstrated that Thomas had committed two separate acts. Here, the temporal separation, however slight, between Jackson’s two acts of shooting indicates that, as in *Thomas*, Jackson had committed two separate acts resulting in two distinct offenses.

{¶27} And, as the state argues, Jackson’s two separate shootings were each committed with a separate animus. The first shot had occurred while Jackson was engaged in a fistfight with Champion. The second, fatal shot came after Jackson had fled downstairs and then had returned to finish Champion off. Reviewing Jackson’s conduct, we are persuaded that the evidence supports the conclusion that he had knowingly caused serious physical harm to Champion with the first shot but that he had a more malevolent goal for the second shot.

{¶28} Because Jackson committed these offenses separately and with a separate animus for each offense, the trial court properly convicted and sentenced Jackson for each of the allied offenses of serious-harm felonious assault, under R.C. 2903.11(A)(1), and felony murder, under R.C. 2903.02(B).³¹ Since the trial court did not err, much less commit an obvious and outcome-determinative error in imposing multiple convictions and sentences,³² the fifth assignment of error is overruled.

IV. The Sentences Imposed Were Not Excessive

{¶29} Finally, Jackson argues that the trial court erred in imposing maximum, consecutive sentences. We conduct a two-part review of Jackson’s sentences of imprisonment.³³ First we must determine whether the sentences were contrary to law.³⁴

³⁰ *Id.*

³¹ See R.C. 2941.25; see, also, *State v. Bickerstaff*, 10 Ohio St.3d at 65-66, 461 N.E.2d 892

³² See Crim.R. 52(B).

³³ See *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124.

³⁴ See *id.* at ¶14.

Then, if the sentences were not contrary to law, we must review each to determine whether the trial court abused its discretion in imposing them.³⁵

{¶30} Here, Jackson concedes that the sentences are within the range provided by statute.³⁶ At the sentencing hearing, the trial court listened to Jackson's statement and the statements of his family members. It heard the victim-impact statement of Champion's wife. It reviewed the presentence-investigation report. On the state of this record, we cannot say that the trial court acted unreasonably, arbitrarily, or unconscionably in imposing these sentences.³⁷ The fourth assignment of error is overruled.

{¶31} Therefore, the judgment of the trial court is affirmed.

Judgment affirmed.

SUNDERMANN and DINKELACKER, JJ., concur.

Please Note:

The court has recorded its own entry on the date of the release of this opinion.

³⁵ See *id.* at ¶17.

³⁶ See *State v. Boggs*, 1st Dist. No. C-050946, 2006-Ohio-5899, ¶6; see, also, *State v. Hairston*, 118 Ohio St.3d 289, 2008-Ohio-2338, 888 N.E.2d 1073, syllabus.

³⁷ See *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.