[Cite as *State v. Lanier*, 2011-Ohio-898.]

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

STATE OF OHIO,	:	APPEAL NO. C-080162 TRIAL NO. B-0705661
Plaintiff-Appellee,	:	
vs.	:	*O P I N I O N O N R E M A N D.*
DANIEL LANIER,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Sentence Vacated and Cause Remanded

Date of Judgment Entry on Appeal: March 2, 2011

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Scott M. Heenan*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Roger W. Kirk, for Defendant-Appellant.

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

DINKELACKER, Presiding Judge.

I. History of the Case

{¶1} Defendant-appellant, Daniel Lanier, was originally convicted of one count of attempted murder[1] and two counts of felonious assault,[2] all with accompanying firearm specifications. The trial court sentenced Lanier on all three offenses.

{¶2} The record shows that, following an earlier dispute, Lanier had chased down Biondi Stevenson, pulled out a gun, and started shooting at him. One of the shots had hit Stevenson, injuring him. Stevenson had yelled that he had been shot, but Lanier had continued to shoot. He did not stop until the gun jammed after he had fired at least four more shots.

{¶3} On appeal, Lanier argued that he should not have been sentenced for all three offenses because they were allied offenses of similar import. We affirmed the trial court's findings of guilt, but vacated the sentences imposed and remanded the case for resentencing.[3] Relying on *State v. Cabrales*,[4] we stated that the three offenses had to be considered separately and in the abstract.[5] We agreed with Lanier that the offenses based on the two separate subsections of the felonious-assault statute were allied offenses of similar import that should have been merged for sentencing.[6]

{¶4} We went on to hold that felonious assault under R.C. 2903.11(A)(2) and attempted murder under R.C. 2903.02(A) and 2923.02(A) were allied offenses of similar import[7] and that they had not been committed separately or with a separate

[1] R.C. 2903.02(A) and 2923.02(A).
[2] R.C. 2903.11(A)(1) and 2903.11(A)(2).
[3] *Sate v. Lanier*, 180 Ohio App.3d 376, 2008-Ohio-6906, 905 N.E.2d 687, ¶1 ("*Lanier I*").
[4] 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181.
[5] *Lanier*, supra, at ¶22.
[6] Id. at ¶22.
[7] Id. at ¶23-24.

animus as to each.[8] Therefore, the trial court should have also merged those offenses for sentencing.[9]

{¶5} Finally, we held that felonious assault under R.C. 2903.11(A)(1) and attempted murder were not allied offenses of similar import.[10] Therefore, Lanier could properly have been sentenced for both.

{¶6} We recognized that our decision was in conflict with the decisions of another appellate district. Consequently, we certified the case to the Ohio Supreme Court.[11] The Ohio Supreme Court determined that a conflict existed and held the case for decision in another case.[12] The supreme court also accepted Lanier's discretionary appeal and consolidated the two case numbers.[13]

{¶7} Before the supreme court accepted the case, we decided *State v. Love*.[14] In that case, we held that felonious assault under R.C. 2903.11(A)(2) and attempted murder under R.C. 2903.02(A) and 2923.02(A) were not allied offenses of similar import, and that the defendant in that case could properly have been sentenced for both offenses. We overruled our previous decision in *Lanier* to the extent that it was in conflict with *Love*.[15]

{¶8} Subsequently, the supreme court decided *State v. Williams*,[16] which, in essence, overruled our decision in *Love*.[17] In that case, the supreme court relied on *Cabrales* and held that attempted murder under R.C. 2903.02(A) and 2923.02(A) and felonious assault under 2903.11(A)(2) were allied offenses.[18]

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[8] Id. at ¶29-31.
[9] Id. at ¶31.
[10] Id. at 25-27.
[11] Id. at ¶33.
[12] 121 Ohio St.3d 1448, 2009-Ohio-1820, 904 S.Ct. 899.
[13] 121 Ohio St.3d 1449, 2009-Ohio-1820, 904 S.Ct. 900.
[14] 1st Dist. Nos. C-070782 and C-080078, 2009-Ohio-1079.
[15] Id. at ¶16-23.
[16] 124 Ohio St.3d 381, 2010-Ohio-147, 922 N.E.2d 937.
[17] *State v. Johnson*, 1st Dist. No. C-090413, 2010-Ohio-3861, ¶13.
[18] *Williams* at paragraph two of the syllabus.

{¶9} Most recently, the supreme court decided *State v. Johnson*,[19] in which it changed the analysis that courts are to apply in allied-offenses cases. The analysis in *Cabrales* had been based upon State *v. Rance*,[20] which the *Johnson* court overruled.[21] The court also overruled that part of our decision in *Lanier I* related to allied offenses and remanded the case to us to for application of *Johnson*.[22]

II. Allied Offenses of Similar Import

{¶10} R.C. 2941.25, Ohio's allied-offenses statute, codifies double-jeopardy protections and specifies when multiple punishments may be imposed for the same conduct.[23] It provides the following:

{¶11} "(A) Where the same conduct by the 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.

{¶12} "(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."

A. A New Test

{¶13} In *Johnson*, the supreme court stated, "When determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25, the

[19] ___ Ohio St.3d ___, 2010-Ohio-6314, ___ N.E.2d ____.
[20] (1999), 85 Ohio St.3d 632, 1999-Ohio-291, 710 N.E.2d 699.
[21] *Johnson*, supra, at syllabus.
[22] *State v. Lanier*, ___ Ohio St.3d ___, 2011-Ohio-5, ___ N.E.2d ___, ¶2.
[23] *State v. Moore*, 2nd Dist. No. 2010 CA 13, 2011-Ohio-636, ¶52; *State v. Craig*, 8th Dist. No. 94455, 2011-Ohio-206, ¶64.

conduct of the accused must be considered."[24] According to *State v. Craycraft*, *Johnson* established a new two-part test for determining whether offenses are allied offenses of similar import.[25]

{¶14} We agree with the analysis of *Johnson* set out in *Craycraft*. The court in that case stated, "The first inquiry focuses on whether it is possible to commit both offenses with the same conduct. It is not necessary that the commission of one will *always* result in the commission of the other. Rather, the question is whether it is *possible* for both offenses to be committed by the same conduct. Conversely, if the commission of one offense will *never* result in the commission of the other, the offenses will not merge."[26]

{¶15} "If it is possible to commit both offenses with the same conduct, the court must next determine whether the offenses were in fact committed by a single act, performed with a single state of mind. If so, the offenses are allied offenses of similar import and must be merged. On the other hand, if the offenses are committed separately or with a separate animus, the offenses will not merge."[27]

B. Application of the Test

{¶16} We turn now to step one of the analysis. To determine whether attempted murder and felonious assault under both R.C. 2903.11(A)(1) and R.C. 2903.11(A)(2) are allied offenses of similar import, we examine whether it is possible to commit each of the offenses with the same conduct.[28]

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[24] *Johnson*, supra, at syllabus.
[25] *State v. Craycraft*, 12th Dist. Nos. CA2009-02-013 and CA2009-02-014, 2011-Ohio-413, ¶11.
[26] *Craycraft*, supra, at ¶11, citing *Johnson*, supra, at ¶48 and 51 (citations omitted) (emphasis in original). See, also, *State v. Burton*, 8th Dist. No. 94449, 2011-Ohio-198, ¶27-32; *State v. Smith*, 6th Dist. No. OT-10-001, 2011-Ohio-138, ¶13-36.
[27] Id. at ¶12, citing *Johnson*, supra, at ¶49-51 (citations omitted).
[28] See id. at ¶13, citing *Johnson*, supra, at ¶48.

{¶17} R.C. 2903.02(A), the murder statute, provides, "No person shall purposely cause the death of another[.]" R.C. 2923.02(A), the attempt statute, provides, "No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense." Thus, to obtain a conviction for attempted murder, the state must prove that the accused had purposely or knowingly engaged in conduct, that, if successful, would have resulted in the victim's death.[29]

{¶18} Felonious assault under R.C. 2903.11(A)(1) provides, "No person shall knowingly * * * [c]ause serious physical harm to another[.] Felonious assault under R.C. 2903.11(A)(2) provides, "No person shall * * * [c]ause or attempt to cause physical harm to another by means of a deadly weapon or dangerous ordnance."

{¶19} We conclude that it is possible to commit all three of these offenses with the same conduct. Where, as here, a defendant shoots another person with a gun and succeeds in injuring the other person but not in killing him, the defendant has attempted to and has caused physical harm with a deadly weapon and has engaged in conduct that, if successful, would have resulted in the victim's death. Thus, the first part of the allied-offenses test is satisfied.

{¶20} Consequently, we apply the second part of the test and examine whether Lanier committed the offenses "by way of a single act, performed with a single state of mind."[30] The state argues that Lanier made the conscious choice to fire multiple shots at Stevenson and stopped only after the gun had jammed. Even though he had fired multiple shots, the state argues, he was only convicted of three offenses, and those offenses were separate. We disagree.

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[29] *Lanier I*, supra, at ¶23; *State v. Byrd*, 1st Dist. No. C-050490, 2007-Ohio-3787, ¶36.
[30] *Johnson*, supra, at ¶49, quoting *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, ¶50 (Lanzinger, J., dissenting); *Craycraft*, supra, at ¶15.

{¶21} Lanier fired the shots at the same victim with the same gun at the same location in rapid succession. He did not pause or reload the gun. This court has previously stated, "The murder of a single victim by a single perpetrator who fires multiple gunshots results in only a single punishment. The perpetrator's discharge of gunshots in rapid succession either constitutes a single, continuous act 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."[31]

{¶22} *Johnson* supports the result that the conduct in this case involved a single occurrence. In fact, the plurality opinion in *Johnson* stated that "[w]e have consistently recognized that the purpose of R.C. 2941.25 is to prevent shotgun convictions, that is, multiple findings of guilty and corresponding punishments heaped on a defendant for closely related offenses arising from the same occurrence. This is a broad purpose and ought not to be watered down with artificial and academic equivocation regarding the similarities of the crimes."[32]

{¶23} Thus, we hold that the three offenses in this case were not committed separately or with a separate animus as to each. Therefore, they were allied offenses of similar import and should have been merged for sentencing. We vacate the sentences imposed in this case and remand the case to the trial court for resentencing on only one of the three offenses consistent with this opinion.

Sentences vacated and cause remanded.

SUNDERMANN and **FISCHER, JJ.,** concur.

Please Note:

The court has recorded its own entry this date.

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[31] *State v. Jackson*, 1st Dist. No. C-090414, 2010-Ohio-4312, ¶25; see, also, *State v Gandy*, 1st Dist. No. C-070152, 2010-Ohio-2873, ¶11; *Lanier I*, supra, at ¶29-32.
[32] *Johnson*, supra, at ¶43.