

[Cite as *State v. Dembie*, 2015-Ohio-2888.]

STATE OF OHIO            )  
                                  )ss:  
COUNTY OF LORAIN      )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No.     14CA010527

Appellee

v.

WILLIAM DEMBIE

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF LORAIN, OHIO  
CASE No.     11CR083428

Appellant

DECISION AND JOURNAL ENTRY

Dated: July 20, 2015

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HENSAL, Presiding Judge.

{¶1} William Dembie appeals from his convictions in the Lorain County Court of Common Pleas. For the reasons set forth below, we affirm.

I.

{¶2} On August 11, 2011, a call came in on the direct line of the Lorain County Sheriff's Office, and Joiann Sanchez, a dispatcher, answered the call. Mr. Dembie, a correctional officer at the Lorain County Jail, identified himself and told Ms. Sanchez that he had killed his wife, Holly Dembie. Deputies went to Mr. Dembie's house and took him into custody. Following his arrest, Mr. Dembie spoke with detectives about the events that led to the death of Mrs. Dembie.

{¶3} A grand jury indicted Mr. Dembie for aggravated murder, domestic violence, and two counts each of murder and felonious assault. Mr. Dembie's counsel requested a bill of particulars, but the State declined to provide one, instead providing open discovery to counsel.

Prior to trial, Mr. Dembie's counsel reiterated his desire for a bill of particulars, which the State again declined to provide; however, the assistant prosecutor did provide an overview of the State's theory of the case, stating that "they are all lesser included, with the exception of maybe the domestic violence \* \* \*." The assistant prosecutor went on to describe the events leading to Mrs. Dembie's death, concluding, "So we have all those things for the jury to consider for prior calculation and design."

{¶4} Mr. Dembie subsequently waived his right to a jury trial, and, following a bench trial, the court acquitted him of aggravated murder but found him guilty of the remaining charges. At sentencing, Mr. Dembie argued that all of his convictions were for allied offenses of similar import and should merge. The State disagreed, arguing that Mr. Dembie had committed felonious assault separate from the murder of Mrs. Dembie. The trial court determined that one of the felonious assault charges should not merge and sentenced Mr. Dembie on one of the murder charges and one of the felonious assault charges for an aggregate term of 20 years to life in prison.

{¶5} Mr. Dembie has appealed, raising five assignments of error for our review. For ease of discussions, we have rearranged Mr. Dembie's assignments of error.

## II.

### ASSIGNMENT OF ERROR I

THE TRIAL COURT ERRED IN SENTENCING APPELLANT, WILLIAM DEMBIE, BY FAILING TO RUN CONCURRENT SENTENCES ON THE COURT'S GUILTY VERDICT ON TWO COUNTS OF MURDER, TWO COUNTS OF FELONIOUS ASSAULT, AND DOMESTIC VIOLENCE SINCE THE STATE WAS JUDICIALLY AND EQUITABLY ESTOPPED FROM ARGUING AGAINST THE MERGER OF THE OFFENCES.

## ASSIGNMENT OF ERROR II

THE TRIAL COURT ERRED IN SENTENCING APPELLANT, WILLIAM DEMBIE, BY FAILING TO RUN CONCURRENT SENTENCES ON THE COURT'S GUILTY VERDICT ON TWO COUNTS OF MURDER, TWO COUNTS OF FELONIOUS ASSAULT, AND DOMESTIC VIOLENCE IN VIOLATION OF THE DOUBLE JEOPARDY CLAUSES OF THE UNITED STATES AND OHIO CONSTITUTIONS.

## ASSIGNMENT OF ERROR V

THE TRIAL COURT ERRED IN SENTENCING APPELLANT, WILLIAM DEMBIE, BY FAILING TO RUN CONCURRENT SENTENCES ON THE COURT'S GUILTY VERDICT ON TWO COUNTS OF MURDER, TWO COUNTS OF FELONIOUS ASSAULT, AND DOMESTIC VIOLENCE IN VIOLATION OF R.C. 2941.25 SINCE THE RECORD BEFORE THE TRIAL COURT ESTABLISHES THAT THE OFFENSES ARE ALLIED EVEN ABSENT ANY STATEMENT BY THE STATE AS TO ITS THEORY OF THE CASE.

{¶6} In Mr. Dembie's first, second, and fifth assignments of error, he argues that the trial court erred by sentencing him for allied offenses of similar import.<sup>1</sup> Specifically, he argues that his murder and felonious assault convictions are allied offenses pursuant to Revised Code Section 2941.25. He also argues that the State should have been prevented from arguing against the merger of the charges based upon statements made by the prosecutor prior to trial.

{¶7} "Whether multiple punishments imposed in the same proceeding are permissible is a question of legislative intent." *State v. Washington*, 137 Ohio St.3d 427, 2013-Ohio-4982, ¶ 10, citing *Missouri v. Hunter*, 459 U.S. 359, 365 (1983). "Absent a more specific legislative statement, R.C. 2941.25 is the primary indication of the General Assembly's intent to prohibit or

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<sup>1</sup> Although Mr. Dembie's assignments of error repeatedly state that the trial court erred by not running his sentences concurrently to each other, he does not argue that the trial court failed to comply with Revised Code Section 2929.14(C)(4), which governs the imposition of consecutive sentences. Instead, he confines his arguments to the issue of allied offenses, and, therefore, we similarly confine our analysis to that issue. See *State v. Young*, 9th Dist. Summit No. 26725, 2014-Ohio-1715, ¶ 28 (noting that it was appropriate to confine analysis to issues raised by appellant).

allow multiple punishments for two or more offenses resulting from the same conduct.”

*Washington* at ¶ 11.

{¶8} R.C. 2941.25 provides:

(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

(B) Where the defendant’s conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

“In determining whether offenses are allied offenses of similar import within the meaning of R.C. 2941.25, courts must evaluate three separate factors—the conduct, the animus, and the import.” *State v. Ruff*, \_\_\_ Ohio St.3d \_\_\_, 2015-Ohio-995, paragraph one of the syllabus.

Under R.C. 2941.25(B), a defendant whose conduct supports multiple offenses may be convicted of all the offenses if any one of the following is true: (1) the conduct constitutes offenses of dissimilar import, (2) the conduct shows that the offenses were committed separately, or (3) the conduct shows that the offenses were committed with separate animus.

*Id.* at paragraph three of the syllabus. It is the defendant’s burden to establish his or her entitlement to the protections of Section 2941.25. *Washington* at ¶ 18.

{¶9} Although there is some dispute whether the events in this case occurred over the course of seconds or minutes, the parties do not dispute what occurred. During an argument on the night in question, Mr. Dembie struck Mrs. Dembie in the face. Mr. Dembie then went to the bedroom where he was staying and retrieved a sheathed knife. Mr. Dembie, while holding the knife still in its sheath, spoke with Mrs. Dembie. Mr. Dembie became upset when Mrs. Dembie told him what he wanted to hear because he believed that she was lying to him. Mrs. Dembie attempted to run out of the house, but Mr. Dembie grabbed her. During the struggle, Mrs. Dembie’s shirt came off, and she was able to get away from Mr. Dembie and lock herself in the

bathroom. Mr. Dembie kicked in the bathroom door and a new struggle occurred as Mrs. Dembie attempted to escape out the second-story window. While Mrs. Dembie was outside the window, Mr. Dembie stabbed her in the abdomen and thereafter, Mrs. Dembie fell to the ground below. Mr. Dembie proceeded down the steps and outside to where Mrs. Dembie lay. He stabbed her repeatedly and cut her throat, killing her.

{¶10} The trial court acquitted Mr. Dembie of aggravated murder but found him guilty of the remaining charges. The trial court requested that the parties prepare arguments for the sentencing hearing regarding whether all of the offenses should merge. At the sentencing hearing, the State urged for the court to conclude that the felonious assault that occurred as Mrs. Dembie attempted to flee out the bathroom window to have happened with an animus separate from that of the subsequent killing. Mr. Dembie on the other hand argued that the evidence at trial demonstrated that Mr. Dembie had not formed a separate animus between when he stabbed Mrs. Dembie while she attempted to flee out the bathroom window and when he subsequently killed her. The trial court remarked, “I saw at least two occasions in which [Mr. Dembie] was guilty of felonious assault; when he stabbed [Mrs. Dembie] in the bathroom, and when he stabbed her downstairs repeatedly.” It further stated that it “saw two separate animuses” in the attack on Mrs. Dembie as she attempted to flee out the bathroom window and the attack that resulted in Mrs. Dembie’s death. Ultimately, the trial court determined that the murder counts should merge with each other and that the remaining counts should merge. The State elected to proceed to sentencing on the charge of murder in violation of Revised Code Section 2903.02(A) (purposefully causing the death of another) and felonious assault in violation of Section 2903.11(A)(2) (knowingly causing physical harm by means of a deadly weapon). The trial court

sentenced Mr. Dembie to 15 years to life imprisonment for murder and five years for felonious assault and ordered the sentences run consecutively.

{¶11} Upon review of the record, we agree with the trial court's determination that Mr. Dembie's convictions for felonious assault with a deadly weapon and murder are not allied offenses. Mrs. Dembie's fall from the bathroom window after Mr. Dembie stabbed her interrupted his attack. Although he resumed the attack a short time later, the fall created a distinct line of demarcation between the attack that occurred in the house and the one that occurred after Mrs. Dembie fell. Thus, we conclude that the record at trial establishes that Mr. Dembie committed the felonious assault while Mrs. Dembie attempted to flee out the bathroom window with an animus separate from the murder.

{¶12} Mr. Dembie argues that, to reach such a conclusion, one would have to engage in a blow-by-blow analysis, which Justice Brown declined to do in the lead opinion in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314. *See id.* at ¶ 56. Mr. Dembie argues that *Johnson* similarly involved a break between the first beating and the second beating but that the Supreme Court nevertheless concluded that they were allied offenses of similar import. However, Mr. Dembie's argument misreads the facts in *Johnson*. The defendant in *Johnson* was convicted of three crimes: child endangering, felony murder, and excessive physical discipline. *Id.* The discipline charge occurred prior to interruption and did not merge with the remaining charges. *Id.* ("Although there were arguably two separate incidents of abuse, separated by time and brief intervention by Milton's mother, the state obtained a conviction for the first sequence of abuse under R.C. 2919.22(B)(3) for administering excessive physical discipline."). When the Supreme Court declined to engage in a blow-by-blow analysis, it was actually looking solely at the events that occurred *after* the interruption. *Id.* ("It was the second sequence of abuse for

which the state obtained a conviction under R.C. 2919.22(B)(1) for abuse that caused serious physical harm. And the conviction for the second sequence of events under R.C. 2919.22(B)(1) is the basis for the predicate offense of felony murder under R.C. 2903.02(B).”). Thus, to the extent the lead opinion in *Johnson* is persuasive in this case, it is in favor of affirming the trial court.

{¶13} Mr. Dembie also argues that the trial court was required to merge all of his convictions because the State, through statements made prior to trial, had induced Mr. Dembie not to present evidence that the offenses did merge. He suggests that the doctrines of equitable and judicial estoppel require this outcome.

{¶14} We initially note, with regard to Mr. Dembie’s suggestion that the doctrine of equitable estoppel should be applied in this case, that he has not cited a single authority where that doctrine applies in a criminal proceeding. Indeed, the Supreme Court has noted that a criminal defendant’s attempt to rely on such a doctrine is “misplaced.” *State v. Fry*, 125 Ohio St.3d 163, 2010-Ohio-1017, ¶ 54. Furthermore, the suggestion that he was induced to not put forth evidence is purely speculative as there is no suggestion in the brief or in the record as to what additional evidence he declined to pursue. Under the circumstances, we cannot conclude that Mr. Dembie has demonstrated reversible error.

{¶15} Turning to Mr. Dembie’s argument regarding judicial estoppel, “for that doctrine to prohibit a party from raising an argument, the argument in question must be inconsistent with one *successfully* and ‘*unequivocally*’ asserted by the same party earlier.” (Emphasis added.) *Washington*, 137 Ohio St.3d 427, 2013-Ohio-4982, at ¶ 22, quoting *State ex rel. Motor Carrier Serv., Inc. v. Rankin*, 135 Ohio St.3d 395, 2013-Ohio-1505, ¶ 33. Mr. Dembie, focusing solely on the second prong, argues that the State had unequivocally taken the position in its pretrial

statements that the offenses in this case were allied. Prior to trial, the State, in response to Mr. Dembie's repeated requests for a bill of particulars, made the following statement:

If [defense counsel] wants a short preview, I'll be happy to sit here and tell him some of the things I will be arguing, but they are all lesser includeds, with the exception of maybe the domestic violence because of the additional element of a spouse.

I mean, you have prior calculation and design, you have purposeful, but those are both in the same thing. The felonious assault resulting in death and the felonious assault is underlying. So it's all the same behavior.

I think what he's trying to get to is the prior calculation and design. \* \* \* We have plenty in this case \* \* \*. We have going to get the knife. We have removing the scabbard and sheath from the knife to make it into a weapon. We have stabbing her upstairs when she's trying to escape for the third time from him. And we have him going down the steps, through her room, through the bathroom, all the way through the house, out the back door, and then stabbing her seven more times in places that were calculated to cause problems, such as twice through the liver, once that was close to the liver and kidney that he missed, slashing her throat at the top, slashing it at the bottom, stabbing her and hitting her in the spine and getting the external jugular, stabbing her in the back and getting the internal jugular, and one defensive wound that blocked the right side of the neck.

\* \* \*

So we have all those things for the jury to consider for prior calculation and design.

Mr. Dembie, pointing to the statements the assistant prosecutor makes in the first two paragraphs above, argues that these statements constitute an unequivocal taking of the position that all of the offenses merged.

{¶16} Assuming for the sake of argument that statements made prior to opening arguments could bind the State to a position concerning merger, we are unconvinced that judicial estoppel could be applied in this case. Although far from clear given the spontaneous nature of the assistant prosecutor's statements, it would appear that, based upon the totality of the statements, the position the assistant prosecutor was actually taking was that all of the events of

the evening were evidence of premeditation, which was an element of aggravated murder. In other words, the assistant prosecutor was arguing that the stabbing as Mrs. Dembie attempted to flee Mr. Dembie through the bathroom window was evidence that Mr. Dembie had developed a plan to kill Mrs. Dembie, making Mr. Dembie guilty of aggravated murder. However, the trial court found Mr. Dembie not guilty of aggravated murder; thus, the State did not succeed in its argument. *See Washington* at ¶ 22. Accordingly, judicial estoppel would not apply in this case to prevent the State from arguing against merger at sentencing. *See id.*

{¶17} Based on the foregoing, we cannot conclude that Mr. Dembie met his burden and established that the State relied upon the same conduct to convict him of allied offenses of similar import. *See id.* at ¶ 18. *See also Ruff*, \_\_\_ Ohio St.3d \_\_\_, 2015-Ohio-995, paragraphs one and three of the syllabus. Accordingly, his first, second, and fifth assignments of error are overruled.

#### ASSIGNMENT OF ERROR III

THE TRIAL COURT ERRED IN SENTENCING APPELLANT, WILLIAM DEMBIE, BY FAILING TO RUN CONCURRENT SENTENCES ON THE COURT'S GUILTY VERDICT ON TWO COUNTS OF MURDER, TWO COUNTS OF FELONIOUS ASSAULT, AND DOMESTIC VIOLENCE IN VIOLATION OF THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE ONE SECTION TEN OF THE OHIO CONSTITUTION.

#### ASSIGNMENT OF ERROR IV

THE TRIAL COURT ERRED IN SENTENCING APPELLANT, WILLIAM DEMBIE, BY FAILING TO RUN CONCURRENT SENTENCES ON THE COURT'S GUILTY VERDICT ON TWO COUNTS OF MURDER, TWO COUNTS OF FELONIOUS ASSAULT, AND DOMESTIC VIOLENCE IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

{¶18} In Mr. Dembie's third and fourth assignments of error, he argues that his right to due process and his right to know the charges against him were violated because the State

changed its position during sentencing from its pretrial statements. However, Mr. Dembie does not cite any authority, beyond merely quoting the portions of the United States Constitution and the Ohio Constitution articulating his rights, to support the conclusion that what occurred in this case violated those rights. *See* App.R. 16(A)(7). Instead, Mr. Dembie rearticulates his arguments from above that the State should have been estopped from arguing against merger after indicating that all of the actions were part of the same conduct. However, this argument fails for the same reasons it failed in his other assignments of error.

{¶19} Accordingly, in light of the limited arguments set forth in Mr. Dembie's third and fourth assignments of error, those assignments of error are overruled.

### III.

{¶20} Mr. Dembie's assignments of error are overruled, and the judgment of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

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There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is

instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

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JENNIFER HENSAL  
FOR THE COURT

CARR, J.  
SCHAFFER, J.  
CONCUR.

APPEARANCES:

BRIAN J. DARLING, Attorney at Law, for Appellant.

DENNIS P. WILL, Prosecuting Attorney, and NATASHA RUIZ GUERRIERI, Assistant Prosecuting Attorney, for Appellee.