

[Cite as *State v. Scandrick*, 2010-Ohio-2270.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

|                     |   |  |
|---------------------|---|--|
| STATE OF OHIO       | : |  |
| Plaintiff-Appellee  | : | C.A. CASE NO. 23406                          |
| v.                  | : | T.C. NO. 2008 CR 1471                        |
| LONNIE B. SCANDRICK | : | (Criminal appeal from<br>Common Pleas Court) |
| Defendant-Appellant | : |  |

**OPINION**

Rendered on the 21<sup>st</sup> day of May, 2010.

R. LYNN NOTHSTINE, Atty. Reg. No. 0061560, Assistant Prosecuting Attorney, 301 W. Third Street, 5<sup>th</sup> Floor, Dayton, Ohio 45422  
Attorney for Plaintiff-Appellee

RICHARD A. NYSTROM, Atty. Reg. No. 0040615, 1502 Liberty Tower, 120 West Second Street, Dayton, Ohio 45402  
Attorney for Defendant-Appellant

DONOVAN, P.J.

{¶ 1} This matter is before the Court on the Notice of Appeal of Lonnie B. Scandrick, filed April 29, 2009. On April 21, 2008, Scandrick was indicted on one count of murder (proximate result), in violation of R.C. 2903.02(B), an unclassified felony, with a

firearm specification; one count of felonious assault (serious harm), in violation of R.C. 2903.11(A)(1), a felony of the second degree, with a gun specification; one count of felonious assault (deadly weapon), in violation of R.C. 2903.11(A)(2), a felony of the second degree, with a firearm specification; one count of carrying a concealed weapon, in violation of R.C. 2923.12(A)(2), a felony of the fourth degree, with a firearm specification; and one count of having weapons while under disability, in violation of R.C. 2923.13(A)(2), a felony of the third degree. The victim herein, Christopher Ousley, was shot and killed by Scandrick and another defendant, Timothy Reid, in front of Nathan's Superette ("Nathan's"), a carry out located at 3219 Delphos Avenue, on April 10, 2008.

{¶ 2} On May 23, 2008, Scandrick filed a motion to suppress, which the trial court overruled after a hearing. On February 23, 2009, Scandrick pled guilty to the charge of having weapons while under disability, and the case proceeded to a jury trial on February 24<sup>th</sup> on the remaining counts. At the close of the evidence, Scandrick pled guilty to the charge of carrying a concealed weapon. Scandrick was found guilty of all remaining counts.

{¶ 3} The trial court sentenced Scandrick to 15 years to life for murder, to six years for felonious assault (serious harm), to five years for felonious assault (deadly weapon), to 12 months for carrying a concealed weapon, and to four years for having weapons while under disability. The court merged the sentence for felonious assault (serious harm) with the sentence for murder for a term of 15 years to life. The court further ordered that the sentence for murder be served consecutively to the sentence for felonious assault (deadly weapon), and that the sentences for carrying a concealed weapon and having weapons while

under disability be served concurrently to each other and consecutively to the sentences for murder and felonious assault (deadly weapon). Finally, all firearm specifications were merged into one, and the court imposed an additional term of three years on the specification to be served consecutively and prior to the definite term of imprisonment, for a total combined term of 27 years to life.

{¶ 4} Scandrick asserts two assignments of error. His first assignment of error is as follows:

{¶ 5} “WHETHER DEFENDANT’S CONVICTION AND SENTENCE FOR THE MURDER CHARGE WAS SUPPORTED BY SUFFICIENT QUALITATIVE AND QUANTITATIVE EVIDENCE, ERRONEOUS AS A MATTER OF LAW, AND THEREBY VIOLATED DEFENDANT’S CONSTITUTIONAL RIGHT TO DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I SECTION 10 OF THE OHIO STATE CONSTITUTION.”

{¶ 6} While the text of Scandrick’s first assigned error is addressed to the sufficiency of the evidence, he also asserts in the body of his brief that his conviction is against the manifest weight of the evidence, and we will address both arguments herein. Scandrick also asserts that his counsel was ineffective in the body of his brief, but since that argument is not addressed to the sufficiency or weight of the evidence, and since it is not the subject of a distinct assigned error, we will not address it.

{¶ 7} “In reviewing a claim of insufficient evidence, ‘[t]he relevant inquiry is whether, after reviewing 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.’ *State v. Jenks* (1991), 61 Ohio St.3d 259, \* \* \* paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560; see, also, *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, \* \* \* .” *State v. McKnight*, 107 Ohio St.3d 101, 112, 2005-Ohio-6046, ¶ 70.

{¶ 8} “When an appellate court analyzes a conviction under the manifest weight of the evidence standard it must review the entire record, weigh all of the evidence and all the reasonable inferences, consider the credibility of the witnesses and determine whether in resolving conflicts in the evidence, the fact finder clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. (Internal citations omitted). Only in exceptional cases, where the evidence ‘weighs heavily against the conviction,’ should an appellate court overturn the trial court’s judgment.” *State v. Dossett*, Montgomery App. No. 20997, 2006-Ohio-3367, ¶ 32.

{¶ 9} The credibility of the witnesses and the weight to be given to their testimony are matters for the trier of facts to resolve. *State v. DeHass* (1997), 10 Ohio St.2d 230, 231. “Because the factfinder \* \* \* has the opportunity to see and hear the witnesses, the cautious exercise of the discretionary power of a court of appeals to find that a judgment is against the manifest weight of the evidence requires that substantial deference be extended to the factfinder’s determinations of credibility. The decision whether, and to what extent, to credit the testimony of particular witnesses is within the peculiar competence of the factfinder, who has seen and heard the witness.” *State v. Lawson* (Aug. 22, 1997), Montgomery App. No. 16288.

{¶ 10} This court will not substitute its judgment for that of the trier of facts on the issue of witness credibility unless it is patently apparent that the trier of fact lost its way in arriving at its verdict. *State v. Bradley* (Oct. 24, 1997), Champaign App. No. 97-CA-03.

{¶ 11} R.C. 2903.02(B) provides, “No person shall cause the death of another as a proximate result of the offender’s committing or attempting to commit an offense of violence that is a felony of the first or second degree and that is not a violation of section 2903.03 or 2903.04 of the Revised Code.” R.C. 2903.11(A) provides, “No person shall knowingly do either of the following: (1) Cause serious physical harm to another \* \* \* ; (2) Cause or attempt to cause physical harm to another \* \* \* by means of a deadly weapon or dangerous ordnance.”

{¶ 12} The jury was instructed that they could convict Scandrick not only if they determined he was the principal offender but also if they instead determined that he aided and abetted Reid, and Scandrick does not dispute that he was subject to conviction under the complicity statute, R.C. 2923.03(A)(2). “To support a conviction for complicity by aiding and abetting pursuant to R.C. 2923.03(A)(2), the evidence must show that the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime, and that the defendant shared the criminal intent of the principal. Such intent may be inferred from the circumstances surrounding the crime.” (citations omitted). *State v. Sims*, Clark App. No. 2008 CA 92, 2009-Ohio-5875, ¶ 46.

{¶ 13} Dr. Brian Casto, a deputy coroner and forensic pathologist with the Montgomery County Coroner’s Office, testified, after having performed an autopsy on Ousley, that he died from “multiple gunshot wounds,” one to each of his thighs and one to

his left shoulder. Regarding the injury to the left thigh, Casto observed both an entrance and an exit wound. Regarding the right thigh, Casto testified, “[t]his wound is very irregular and the reason is, is the bullet that’s entering the right thigh is very deformed. It has hit something before it hit the decedent’s leg.” The bullet that entered Ousley’s shoulder traveled “from the decedent’s back to front, left to right and downward. \* \* \* [A]s it does so, it’s crossing multiple major organs, including the left chest wall and in between the ribs, then [it] penetrates through the left lung, then in the right lung, the right side of the diaphragm, and ultimately through the liver.” Casto stated that the wound to the shoulder was “an immediately life-threatening wound.” In the course of the autopsy, Casto recovered one bullet from the front of Ousley’s right thigh and one from his “right abdomen.”

{¶ 14} Cheryl Scroggins was a witness to the shooting of Ousley. Scroggins resided at 3309 Delphos Avenue, and she testified that on the date of the shooting a man she knew as “Lonnie B.” from her father’s “bootleg joint” asked her for a cigarette in front of Nathan’s, and that an older man was with him whom she later learned was Timothy Reid. While Scroggins walked home from Nathan’s, she encountered Ousley, whom she knew as “Squiggy,” walking toward the market. Scroggins later heard a gunshot from the direction of the market, and when she turned around, she “saw two guys standing on the side of Squiggy. They look like they were arguing.” Scroggins stated that Squiggy “was standing there with his hands up like he was trying to explain something.” “Lonnie B.” then threw Squiggy to the ground, and Reid drew a gun and fired a couple of shots at Squiggy. According to Scroggins, Reid’s gun jammed, and he “passed it to Lonnie B., and he did

something where it popped, and he gave it back to [Reid].” When Lonnie B. fired the weapon, it was aimed “at Squiggy’s body.” Scroggins observed Reid tell the clerks standing in the doorway of Nathan’s to remain in the store, and then both men left the area. Scroggins later identified Scandrick in a photo spread as Lonnie B. In court she testified that Scandrick “favored” the man she knew as Lonnie B.

{¶ 15} Anthony White also witnessed the shooting. White was in a vacant house across the street from Nathan’s, where he had gone to “shoot” heroin. As he stood by the window at the front of the house, he testified that Scandrick “ \* \* \* shot and killed little Chris.” According to White, Scandrick was with “some other dude” who was “standing by the alley.” White stated that he observed a gun in Scandrick’s hand. He heard Ousley tell Scandrick to leave the area before the police arrived, and Scandrick replied, “Fuck the police. I’m the police,” and he shot Ousley. White stated that he believed the bullet from Scandrick’s weapon entered Ousley’s back shoulder. White testified that he heard a total of three shots. After the shooting, White testified that Scandrick and the man he was with walked away together. White did not speak to the police about what he observed until June. He was incarcerated at that time, and he asked his lawyer to contact the police. After he was shown a photo spread, White identified Scandrick, and he also identified another man in the same photo lineup. White identified Scandrick in court as the shooter.

{¶ 16} Majed Saleh, whose nickname is Mark, was working at Nathan’s with his cousin, Ibrahim Saleh, whose nickname is Sean, at the time of the shooting. Mark was standing at the cash register, and he observed Ousley, a regular Nathan’s customer, pass by the front of the market. Shortly thereafter, Mark heard a gunshot, and he and Sean went to

the door. Mark stated that he observed Ousley on the ground in front of the market, and “two guys with guns” standing over him. One of the men gestured for Mark to “go back in” the store. Mark went to the back of the store and dialed 911, reporting “two guys shot one guy,” and “they’re still shooting.” In total he heard two or three gunshots. Mark identified Scandrick in a photo spread and also in court.

{¶ 17} Sean Saleh testified that he was working “at the lottery” when he heard a gunshot. He looked outside and observed Scandrick with a gun in his hand facing Ousley, who was standing near him. Ousley and Scandrick spoke to each other briefly, and then Ousley knocked Scandrick to the ground, according to Sean. Scandrick dropped his weapon, and it slid under a car. Sean heard another gunshot, and he observed another man in front of a parked car in front of the store with a gun in his hand. Sean testified that the second gunman’s weapon was jammed, and “he was fixing it.” Sean recognized both of the gunmen, and he testified that “they used to come to the store always together, buy some beer and leave.” After the second shot, Sean testified that Ousley, who was on top of Scandrick on the ground, rolled off and “was on the floor.” Sean heard Ousley call Sean’s name, and he ran to the back of the store and took the phone from Mark, telling the 911 dispatcher that they needed help. Sean then returned the phone to Mark and ran back to the front door of the store. At that time, Scandrick, with a gun in hand, was attempting to remove a brown bag from Ousley’s pocket, and “Chris was on the floor, doing like this, like don’t touch. Move.” Sean then observed Scandrick shoot Ousley in the leg. When Sean began to open the door to the store, he testified that Scandrick told him to “back up.” After the police arrived, Sean went outside and noticed that the brown bag in Ousley’s pocket was gone. Sean initially

told the police that he did not observe the shooters' faces. When he was shown a photo spread, Sean testified that he recognized Scandrick but did not select his photo. Sean identified Scandrick in court.

{¶ 18} Officer Steve Bryant, a crime scene investigator for the Dayton Police Department, testified that he collected two .40 caliber spent shell casings and Ousley's clothing from the scene, his clothing having been removed by the paramedics. Bryant also investigated the home of Scandrick, at 125 Brooklyn Avenue, where he recovered, among other things, clothing, a brown paper bag containing a bottle of vodka, and a wallet containing "several identifications for Timothy Reid."

{¶ 19} Sergeant James Mullins of the Dayton Police Department testified that he and his partner, Rodney Barrett were on patrol in an unmarked vehicle on April 10<sup>th</sup> when they were dispatched to Nathan's on the report of a shooting by two black males wearing gray clothing. As the officers approached Nathan's, they observed a marked cruiser already at the scene, and thus, they proceeded to look for the suspects. As Mullins turned onto Huron, less than two minutes after receiving the dispatch, he observed Scandrick, "a black male in gray on the sidewalk." The officers approached, exited their cruiser, and told Scandrick to stop. The officers observed that Scandrick had a "dark colored hat" in his hand, which he threw to the ground. As "the hat went down to the ground, a pistol fell out of the hat and the magazine also fell out of the hat." The pistol was a .40 caliber Glock. Scandrick was arrested for carrying a concealed weapon.

{¶ 20} As Mullins patted Scandrick down, locating a second magazine in Scandrick's rear pocket, Barrett observed another male running in the alley behind Huron.

Barrett pursued the other suspect. At that time, Scandrick, according to Mullins, “made the statement out of the blue, [‘]that guy beat up my boy. He beat him up over drugs.[’]” Mullins retrieved Scandrick’s identification, noting that his address, was “just a couple streets to the east and that was the direction that [Barrett] was chasing this other male.” Via his radio, Mullins relayed Scandrick’s address to other officers. Mullins identified Scandrick in court as the suspect he and Barrett apprehended.

{¶ 21} Barrett’s testimony regarding the arrest of Scandrick was consistent with that of Mullins. Barrett further testified that as he pursued the second suspect, who was wearing a gray jacket, he observed that “he had a brown paper bag in his hand as he was running. It appeared to be a bag \* \* \* of possible liquor or a can of alcohol.” Barrett lost sight of the second suspect, and having been advised of the Brooklyn address, he proceeded to that location with another officer. When Barrett approached the front door, which was open, he observed a “brown bag like the one I saw the individual I was chasing carrying,” sitting on top of a television inside the home. Other officers arrived at the scene, and they and Barrett entered the home, announcing their presence. The officers found Timothy Reid in a bedroom under a blanket. They also recovered a gray jacket in another bedroom that Barrett recognized from his pursuit of Reid.

{¶ 22} Amy Rismiller, a forensic scientist in the serology DNA section of the Miami Valley Regional Crime Laboratory (“Crime Lab”), testified that blood stains on Scandrick’s gray knit jacket testified positive for the presence of Ousley’s DNA.

{¶ 23} Timothy Duerr, a forensic scientist from the Crime Lab and an expert in the area of firearms and toolmark examination, testified that he examined the .40 caliber Glock

thrown down by Scandrick, the bullets recovered from Ousley's body and the spent casings recovered from the scene. Duerr stated that the Glock "was an operable firearm that fired a projectile." Regarding the bullets, Duerr stated they were "severely mutilated, meaning microscopically there was not enough characteristics to even determine a proper caliber." On cross-examination, Duer indicated that the bullets were greater than a .32 caliber, and also "fell within [the] classification" of .9 millimeter projectiles. Due to their condition, Duerr was unable to compare the bullets to Scandrick's weapon. However, after comparing the spent casings to the .40 caliber Glock, Duerr opined to a reasonable degree of scientific certainty that the casings were expelled from the weapon Scandrick discarded when he was apprehended.

{¶ 24} Detective Michael Galbraith of the Dayton Police Department was assigned as a homicide detective at the time of the shooting. In the course of his investigation, he photographed Scandrick the night he was arrested. Galbraith stated that Scandrick was wearing a gray sweatshirt at the time with visible blood stains. Regarding the witnesses he interviewed, Galbraith testified that Sean initially indicated that he did not recognize anyone when shown a photo spread. Galbraith stated that he interviewed Mark at his home and showed him a photo spread, and that Mark identified Scandrick as the person "standing over Chris," and that he also identified Reid in another photo spread. When he showed the photo spread to Scroggins, she "identified Lonnie Scandrick as the person she saw standing down over top of the victim." Galbraith testified that White's attorney contacted him regarding the shooting, and that he spoke to White on July 7<sup>th</sup> while he was incarcerated for a drug offense. When shown a photo spread, White, who knew Scandrick, identified him.

Galbraith stated that he spoke to Sean about the shooting again in January of 2009, and that Sean provided a statement at that time regarding his observations of the shooting. Galbraith did not again show Sean the photo spread. At the conclusion of Galbraith's testimony, the State rested its case.

{¶ 25} At trial, Scandrick testified on his own behalf. According to Scandrick's testimony, he was shot in the head when he was a teenager, and as a result he has some permanent paralysis on his right side, and he walks with a limp. Scandrick testified that his cousin Devon resided with him on Brooklyn, and that Reid is also his cousin. Reid used to live with Scandrick but had moved out about month before the shooting. On the day of the shooting, Scandrick testified that Reid and Gaylon Drake came over to his home and the three of them took some car parts they had recovered to the salvage yard. After receiving \$150.00 for the parts, the men went to the liquor store, where Reid bought a pint sized bottle of gin or vodka. Next, the men returned to Scandrick's home and "sat around the house, kicked it," and played chess.

{¶ 26} After about 45 minutes, the men walked to Nathan's to get some beer. Scandrick and Drake went into the store and bought beer while Reid indicated that he was "going to buy some weed." When Scandrick and Drake exited the store, Scandrick observed Reid speaking with "about six dudes," one of whom Scandrick recognized as "the one dude that we buy the weed from." Scandrick yelled to Reid to "come on" and he began to walk home with Drake. As they turned into an alley, "Gaylon turned around and looked and said they was jumping on Tim." Scandrick told Drake to go help Reid and walked home, being unable to help Reid himself due to his paralysis.

{¶ 27} Shortly after Scandrick reached his home, Drake, followed by Reid, arrived. Reid “appeared to be in distress. He was holding his head. He had been dumped on his head or something.” Reid went into the house. Drake’s vehicle was parked at the rear of the house, and he and Scandrick also went inside as Drake prepared to leave through the back door. Once in the house, Scandrick noticed that the “house gun,” a .9 millimeter German Reuger, which Scandrick kept in a bag hanging on the door to the attic, was missing. The gun bag was “by the couch on the floor.” Drake left, and Scandrick walked to Reid’s nearby nephew’s house looking for Reid, who was not there. Scandrick testified he then thought Reid “was going to seek revenge.”

{¶ 28} According to his testimony, Scandrick then decided to go Nathan’s to get some bread. He retrieved the .40 caliber Glock from Devon’s room along with a magazine sitting beside it, since “this [is] kind of a rough neighborhood and plus what had just happened earlier that day.” Scandrick put the pistol in his waistband and covered it with his gray sweatshirt and walked to the store, where he encountered Ousley, whom Scandrick knew as a drug dealer. Scandrick testified that he told Ousley that Reid was “out here with a gun and if I was you I wouldn’t be up here.” Scandrick decided to “extract [himself] from this situation because [he] \* \* \* done been down that situation before,” and when he turned to leave, Ousley “came across my chest with something and I went up in the air and my feet went up in the air and I was dazed. And, that’s when he jumped on top of me. And, then somebody came \* \* \* out of the alley and started shooting.” Scandrick testified that the lone shooter was Reid.

{¶ 29} According to Scandrick, when Ousley took him to the ground, the Glock fell

out of his waistband and slid under a nearby car. Ousley then “slumped,” and Scandrick pushed him to the side and retrieved his pistol while Reid continued fire. Scandrick looked at Reid and had “never seen a face made like that before.” He ran to Reid and called his name twice, and when Reid did not respond, Scandrick admitted that he “turned around and shot in the ground twice. Then it seemed to make [Reid] snap out of \* \* \* whatever he was in.” Scandrick fired into the ground because “that was the only way [he] knew how to get [Reid’s] attention.” When Reid stopped shooting, he reached into Ousley’s pockets and removed something from them and ran back down a nearby alley. Scandrick walked in the direction of his home and was apprehended.

{¶ 30} Scandrick testified that he told the police “what grade I had completed. I told them about me being shot. I told them about me and \* \* \* Ousley, him taking me down to the ground.” When he was asked about the shooting, Scandrick terminated the interview, and he testified as follows: “My thinking was, \* \* \* I want to cooperate with them, but I know how things can be manipulated by the police. So, if I just give them a little bit, then \* \* \* they would \* \* \* know I was going to cooperate if I \* \* \* was given the right \* \* \* inducements.” On direct examination, Scandrick stated that he did not originally tell the police what happened because, “\* \* \* they would have charged me with what they charged me with now. And \* \* \* I wouldn’t have had nothing to bargain with.”

{¶ 31} On cross-examination, Scandrick denied telling the police that Ousley “beat my boy” over drugs, although he admitted telling the officer “he jumped on my \* \* \* dude.” Scandrick admitted that he initially told the police that a man named Mark Green fired the .40 caliber Glock pistol, having retrieved it after it slid under the car. In response to further

questioning about Green, Scandrick at first stated that Green was in fact present at the shooting. He later admitted that he was lying when he told the police that Green fired the Glock, and he stated, “Mark Green, \* \* \* I just made that up.” Scandrick also admitted that there was a market “a lot closer” to his home that sold bread, but he testified that he went to Nathan’s because the bread there is less expensive. Scandrick testified that he put the additional magazine for the Glock in his pocket when he left his home because he did not realize that the weapon was already loaded.

{¶ 32} Having reviewed the evidence in a light most favorable to the prosecution, we conclude that any rational juror could have found the essential elements of murder and the felonious assault offenses proven beyond a reasonable doubt, whether Scandrick acted as a principal or aided and abetted Reid. Further, having thoroughly reviewed the entire record, weighed the evidence and all reasonable inferences, and having considered the credibility of the witnesses, we cannot conclude that Scandrick’s conviction is against the manifest weight of the evidence.

{¶ 33} Dr. Brian Casto gave detailed testimony regarding the “multiple gunshot wounds” that killed Ousley and the bullets he removed from Ousley’s body.

{¶ 34} Although the testimony of the witnesses to the shooting was somewhat varied, they testified consistently that Scandrick shot Ousley and that multiple shots were fired. Cheryl Scroggins testified that she saw Lonnie B. in front of Nathan’s, that she encountered Ousley walking in the direction of the market as she walked home, and that she heard a gunshot, turned around, and observed Lonnie B. and Ousley in an argument. Ousley had his “hands up like he was trying to explain something.” Scroggins then observed

Lonnie B. aim a weapon at Ousley, who was on the ground, and shoot. Scroggins identified Scandrick in a photo spread. Anthony White also observed Scandrick shoot Ousley, and he identified him in court. Mark Saleh told the 911 dispatcher that “two guys shot one guy,” and he identified Scandrick in a photo spread and in court. Finally, Sean Saleh observed Scandrick remove a brown bag from Ousley’s pocket and shoot him.

{¶ 35} Scandrick, heavily armed, was apprehended close to the scene within minutes of the shooting. Sergeant Mullins stated that Scandrick volunteered that Ousley “beat” someone, presumably Reid, over drugs. Amy Rismiller testified that Scandrick’s gray sweatshirt was stained with Ousley’s blood. Timothy Duerr testified that the spent shell casings recovered by Steve Bryant at the scene came from Scandrick’s Glock.

{¶ 36} Regarding Scandrick’s testimony, the jury was free to discredit his version of events. If the jury believed Scroggins, who stated that Ousley stood “with his hands up” while arguing with Scandrick, “like he was trying to explain something,” they could reasonably conclude that Ousley’s posture was consistent with being confronted and not with being warned that Reid was armed and in the area. While Scandrick stated that he returned to the scene of the alleged attack on Reid merely to buy bread, and that he immediately attempted to “extract” himself from the “situation” with Ousley, the jury was free to discredit his testimony in its entirety. Considering all of the evidence, the jury was free to conclude that Scandrick shot Ousley more than once. Scandrick’s self-serving testimony on cross-examination further established his lack of credibility; he freely admitted that he lied to the police about Mark Green.

{¶ 37} Regarding the State’s alternative theory of complicity, we disagree with

Scandrick that “the inference \* \* \* is that Scandrick aided Ousley and not Reid.” Scandrick testified that Reid used to live with him, is his cousin, and that Reid and Scandrick were together on the day of the shooting. Further, Sean testified that Scandrick and Reid were “always together” when they came to the store. In contrast, Scandrick merely described Ousley as a known drug dealer. Reid, his wallet, and multiple forms of his identification, along with a brown bag of alcohol Barrett recognized from his pursuit of Reid, were found at Scandrick’s residence on Brooklyn. The brown bag recovered was also consistent with Sean’s description of the item Scandrick removed from Ousley’s pocket. Finally, Scroggins saw both men shoot Ousley, and Mark described “two guys” firing at Ousley. In other words, even if Reid fired the shot that killed Ousley, Scandrick’s intent to commit the charged offenses is established under the circumstances herein.

{¶ 38} Since there is sufficient evidence to support Scandrick’s convictions, and because the jury did not lose its way in convicting Scandrick, Scandrick’s first assignment of error is overruled.

{¶ 39} Scandrick’s second assignment of error is as follows:

{¶ 40} “WHETHER IT WAS ERROR TO SENTENCE DEFENDANT ON TWO SEPARATE FELONIOUS ASSAULT CHARGES DERIVED FROM A SINGLE ACT AND ANIMUS PRECLUDED DEFENDANT’S CONSTITUTIONAL RIGHTS TO DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I SECTION 10 OF THE OHIO STATE CONSTITUTION.”

{¶ 41} According to Scandrick, the “felony murder charge here[in] incorporates the

felonious assault charges as an element in the indicted offense. The felonious assault with a deadly weapon and the felonious assault causing serious physical harm charges have been determined to be allied offenses of similar import. \* \* \* The two felonious assault charges \* \* \* are not to be separately punishable when the offenses result from a single act undertaken with a single animus. \* \* \* Accordingly, all three indicted charges - felony murder, felonious assault-deadly weapon, and felonious assault-serious harm - are allied offenses of similar import. That means Scandrick can be convicted and sentenced for only one.”

{¶ 42} The State responds that the issue of whether the felonious assault offenses should have been merged is “moot because the court did merge the serious physical harm form of felonious assault with the felony murder count,” and that felony murder and felonious assault with a deadly weapon are not allied offenses of similar import. Even if they were allied offenses, the State asserts, the trial court was correct in not merging them. According to the State, the evidence showed that Scandrick shot Ousley twice, once in the shoulder and once in the leg.

{¶ 43} As we recently noted in *State v. Reid*, Montgomery App.No. 23409, 2010-Ohio-1686, which involved Timothy Reid, Scandrick’s co-defendant, the Supreme Court of Ohio determined, “our analysis of allied offenses originates in the prohibition against cumulative punishments embodied in the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, and Section 10, Article I of the Ohio Constitution. *United States v. Halper* (1989), 490 U.S. 435, 440, 109 S.Ct. 1892, 104 L.Ed.2d 487, citing *North Carolina v. Pearce* (1969), 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656. However, both this court

and the Supreme Court of the United States have recognized that the Double Jeopardy Clause does not entirely prevent sentencing courts from imposing multiple punishments for the same offense but rather ‘prevent[s] the sentencing court from prescribing greater punishment than the legislature intended.’ *State v. Rance* (1999), 85 Ohio St.3d 632, 635, \* \* \* quoting *Missouri v. Hunter* (1983), 459 U.S. 359, 366, 103 S.Ct. 673, 74 L.Ed.2d 535, and citing *State v. Moss* (1982), 69 Ohio St.2d 515, 518, 23 O.O.3d 447, \* \* \* . Thus, in determining whether offenses are allied offenses of similar import, a sentencing court determines whether the legislature intended to permit the imposition of multiple punishments for conduct that constitutes multiple criminal offenses. *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147, at ¶ 12.” *Reid*, ¶ 28.

{¶ 44} R.C. 2941.25 determines the application of the Double Jeopardy Clause to the issue of multiple punishments and provides:

{¶ 45} “(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.

{¶ 46} “(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.”

{¶ 47} ““A two-step analysis is required to determine whether two crimes are allied offenses of similar import. E.g. *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117, \* \* \*

; *Rance*, 85 Ohio St.3d at 636, \* \* \* . Recently, in *State v. Cabrales* 118 Ohio St.3d 54, 2008-Ohio-1625, \* \* \* we stated: “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 commission of the other, then the offenses are allied offenses of similar import.” *Id.* at paragraph one of the syllabus. If the offenses are allied, the court proceeds to the second step and considers whether the offenses were committed separately or with a separate animus. *Id.* at ¶ 31.’ *Williams*, at ¶ 16.

{¶ 48} “Courts have sometimes applied R.C. 2941.25 as requiring merging of ‘convictions.’ That is conceptually incorrect. When its terms are satisfied, the court must merge multiple offenses of which a defendant is found guilty into a single conviction. That scenario contemplates multiple charged offenses on which the verdicts returned by the trier of fact pursuant to Crim.R. 31(A) contain a finding of guilt. Following the State’s election of which allied offenses should survive, *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, the court must merge the offenses concerned into a single judgment of conviction entered pursuant to Crim.R. 32(C), followed by the court’s imposition of a sentence on that conviction pursuant to Crim.R. 32(A). The convictions stand undisturbed.” *Reid*, ¶ 32-33.

{¶ 49} The jury returned verdicts finding Scandrick guilty of the offenses of murder, R.C. 2903.02(B), felonious assault (serious harm), R.C. 2903.11(A)(1), and felonious assault

(deadly weapon), R.C. 2903.11(A)(2).

{¶ 50} Timothy Reid was charged with the same two separate forms of felonious assault as Scandrick: knowingly causing serious physical harm to another, R.C. 2903.11(A)(1), and knowingly causing physical harm to another by means of a deadly weapon, R.C. 2903.11(A)(2). In *Reid*, we relied upon *State v. Harris*, 122 Ohio St.3d 373, 2009-Ohio-3323, in which the defendant was also charged with the (A)(1) and (A)(2) versions of felonious assault, and in which “the evidence showed that the defendant acted in complicity with another person who fired two shots which struck the same victim as he and the defendant fled the scene of an attempted burglary.” *Reid*, ¶ 35. The *Harris* court determined that the (A)(1) and (A)(2) versions of felonious assault are allied offenses of similar import, and “[o]n that record, the court held that the two assaults arising from shots that struck the same victim and which were committed simultaneously were committed with the same animus. On that finding, the court held that Harris’ two offenses should have been merged into a single conviction pursuant to R.C. 2941.25. *Harris*, at ¶ 24.” *Id.* See also *State v. Cotton*, 120 Ohio St.3d 321, 2008-Ohio-6249. We held likewise in *Reid*.

{¶ 51} Herein, we also conclude that Scandrick’s R.C. 2903.11(A)(1) and (A)(2) offenses of felonious assault, arising from his conduct in shooting Ousley, directly or in complicity with Reid, must be merged for sentencing pursuant to R.C. 2941.25.

{¶ 52} We further determine that Scandrick is entitled to a merger of the surviving felonious assault offense with his offense of felony murder in violation of R.C. 2903.02(B). That section states, “No person shall cause the death of another as a proximate result of the offender’s committing or attempting to commit an offense of violence that is a felony of the

first or second degree \* \* \* .”

{¶ 53} First, as we noted in *Reid*, ““A proximate cause of any given result is that cause which in the natural and continued sequence of events contributes to produce the result, and without which it would not have happened.’ *Monnin v. Fifth Third Bank of Miami Valley* (1995), 103 Ohio App.3d 213, 224. Felonious assault as defined by R.C. 2903.11(A)(1) and (A)(2) are felonies of the second or first degree. R.C. 2903.11(D). Further, R.C. 2903.11 is an ‘offense of violence.’ R.C. 2901.01(A)(9).

{¶ 54} “In *Williams*, the Supreme court held that R.C. 2903.11(A)(1), knowingly causing serious bodily harm, is an allied offense of attempted murder, R.C. 2903.02(B) and 2923.02. The holding applied to facts in which the defendant shot twice at the same victim, striking him once.” *Reid*, ¶ 38-39.

{¶ 55} As in *Reid*, the matter herein involves a completed murder and not an attempt. Although Ousely was shot three times, only one of the shots was fatal. As in *Reid*, on the authority of *Williams*, we conclude that Scandrick’s felonious assault in violation of R.C. 2903.11(A)(1) is an allied offense of felony murder, R.C. 2903.02(B), and that the offenses must merge for purposes of conviction, pursuant to R.C. 2941.25. See *Reid*, ¶ 40.

{¶ 56} Finally, as we noted in *Reid*, “R.C. 2903.02(B) does not prohibit specific conduct. Instead, the section prohibits the result of causing the death of another as a proximate result of committing an offense of violence that is a first or second degree felony. Thus, commission of another felony offense is a necessary predicate to an R.C. 2903.02(B) offense, and the predicate felony must be a proximate cause of the death R.C. 2903.02(B)

prohibits. The further issue is whether, when they involve the same conduct, R.C. 2903.11(A)(2) is an allied offense of R.C. 2903.02(B) because the commission of one offense will necessarily result in commission of the other offense. *State v. Cabrales*.

{¶ 57} “It is possible to commit a violation of R.C. 2903.11(A)(2), felonious assault with a deadly weapon that causes physical harm, without also causing the death of another as a proximate result in violation of R.C. 2903.02(B). However, it is not possible to cause the death of another as a proximate result of causing physical harm with a deadly weapon in violation of R.C. 2903.02(B), without also committing a felonious assault with a deadly weapon in violation of R.C. 2903.11(A)(2). The death would not have occurred without the felonious assault having been committed, and the felonious assault is itself a cause which in the natural and continuous sequence of events involved resulted in the victim’s death. On this record, the two offenses involved the same conduct. Because they were not committed separately or with a separate animus for each, their merger for purposes of R.C. 2941.25 is required. A legislative intent to permit multiple punishments is not manifested. *Williams*.” *Reid*, at ¶ 41-42.

{¶ 58} Scandrick’s second assignment of error is sustained, and we will reverse and vacate Scandrick’s sentences for felonious assault (deadly weapon) and his sentence for felony murder, which included his sentence for felonious assault (serious harm).<sup>1</sup> The case will be remanded to the trial court to first merge Scandrick’s two offenses of felonious assault, and to merge the surviving felonious assault offense with Scandrick’s felony murder

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<sup>1</sup>Unlike his co-defendant, Reid, Scandrick’s sentence included a merger of sentencing for one count of felonious assault into the murder.

offense, and to resentence Scandrick accordingly. Otherwise, the judgment of the trial court is affirmed.

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GRADY, J. and HARSHA, J., concur.

(Hon. William H. Harsha, Fourth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

R. Lynn Nothstine  
Richard A. Nystrom  
Hon. Timothy N. O'Connell