[Cite as *State v. Alcala*, 2012-Ohio-4318.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
SANDUSKY COUNTY

State of Ohio — Court of Appeals No. S-11-026

Appellee — Trial Court No. 11CR116

v.

Alexander T. Alcala — **DECISION AND JUDGMENT**

Appellant — Decided: September 21, 2012

* * * * *

Thomas L. Stierwalt, Sandusky County Prosecuting Attorney,
and Norman P. Solze, Assistant Prosecuting Attorney, for appellee.

Nathan T. Oswald, for appellant.

* * * * *

SINGER, P.J.

{¶ 1} Appellant appeals his conviction for seven counts of attempted murder and two counts aggravated arson, entered on a jury verdict in the Sandusky County Court of Common Pleas. Because we conclude that appellant's convictions were supported by sufficient evidence and the verdict was not against the manifest weight of the evidence,

we affirm his conviction. Nevertheless, because the trial court imposed restitution without sufficient substantiating evidence and failed to correctly analyze merger issues, we vacate those portions of the sentencing judgment and remand for resentencing.

{¶ 2} On the evening of January 25, 2011, Gerald Oddo and his wife, Vickie, were watching television in the living room of their Hayes Avenue home in Fremont, Ohio. Their son Brady was asleep on a couch in the same room. Four other children were in the house as well.

{¶ 3} According to the Oddos, shortly after 11:00 p.m. they heard an explosion outside one of the living room windows and saw a ball of flame on the outside. As the flame spread to the wooden frame of a window screen and up the side of the wall, the family evacuated the house and called the fire department.

{¶ 4} Because the building was brick, Gerald Oddo and his sons were able to extinguish the fire before the fire department arrived. When firefighters reached the scene, they immediately noted a strong odor of gasoline. They also found remnants of a broken liquor bottle and a length of cloth that they believed had been burning because it melted the snow on the ground where it was found. Firefighters concluded that the fire had been the result of an attack on the home with an incendiary device commonly known as a Molotov cocktail. They contacted Fremont police and the state fire marshal's office.

{¶ 5} Police with the aid of firefighters collected evidence. When police interviewed the family, Gerald Oddo told police that another son, not at home at the time of the fire-bombing, had been receiving threatening telephone calls and Facebook

messages from the former boyfriend of one of the son's school classmates. The former boyfriend was appellant, Alexander Alcala.

{¶ 6} In the early morning hours, police went to the apartment appellant shared with several other young men. Appellant denied knowledge of the fire-bombing, but during the interview officers noted a fresh burn mark on appellant's arm. Later in the day, police obtained information that appellant had told others that he and two of his friends had been responsible for the attack on the Oddo home.

{¶ 7} Police obtained a search warrant for appellant's apartment and found gasoline cans and empty liquor bottles of the same brand as the broken one found outside the Oddo house. A K-9 dog trained to detect gasoline also alerted at several locations within the apartment. After interviewing the other occupants who were in the apartment the night of the fire, police charged appellant, Nicholas Dahms and Mitch Liebold, Jr. with seven counts of attempted murder and two counts of aggravated arson.

{¶ 8} All of the co-defendants initially pled not guilty, but Dahms and Liebold agreed to plead to lesser charges and to testify against appellant. The matter proceeded to trial, at which Dahms, Liebold and two others who had been in appellant's apartment testified to his instigation of the plan to "burn down a house" that night. The investigating police officer and a fire investigator testified to the evidence collected at the Oddo house and in the search of appellant's apartment. At the conclusion of the state's case, the court denied appellant's motion for a judgment of acquittal pursuant to Crim.R. 29. The defense then rested without presenting any witnesses.

{¶ 9} On deliberation, the jury found appellant guilty of all seven attempted murder counts and both aggravated arson counts. Following a presentence investigation, the court sentenced appellant to concurrent nine-year terms of imprisonment for each of the attempted murder convictions and seven-year terms of incarceration for each of the aggravated arson counts; concurrent with each other, but consecutive to the attempted murder counts. The court also ordered appellant to pay $1,216.93 in restitution for the damage to the Oddo home. From this judgment of conviction, appellant now brings this appeal.

{¶ 10} Appellant sets forth the following eight assignments of error:

> I. The trial court erred by denying Mr. Alcala's motion for acquittal when the record contained no evidence that Mr. Alcala intended to cause anyone's death[.]
>
> II. The trial court erred by denying Mr. Alcala's motion for acquittal when the record contained no evidence that Mr. Alcala knowingly created a substantial risk of serious physical harm[.]
>
> III. Mr. Alcala's seven attempted murder convictions are based on insufficient evidence because the record does not support the conclusion that anyone's death would have resulted from Mr. Alcala's conduct [.]
>
> IV. Mr. Alcala's several convictions were against the manifest weight of the evidence [.]

V. The trial court committed plain error by giving jury instructions that omitted essential elements and substantially lowered the state's burden of proof [.]

VI. Mr. Alcala was denied effective assistance of counsel by trial counsel's stipulation to jury instructions that substantially lowered the state's burden of proof [.]

VII. The trial court committed plain error by sentencing Mr. Alcala to pay a restitution amount that lacked a reasonable degree of certainty based on competent, credible evidence in the record[.]

VIII. The trial court erred by failing to merge Mr. Alcala's several convictions, which are allied offenses of similar import[.]

I. Weight and Sufficiency of Evidence

{¶ 11} In his first four assignments of error, appellant suggests that the evidence submitted at trial was insufficient to support his attempted murder or aggravated arson convictions or that the verdict was against the manifest weight of the evidence.

{¶ 12} In a criminal appeal, a verdict may be overturned if it is either against the manifest weight of the evidence or because there is an insufficiency of evidence. In the former, the appeals court acts as a "thirteenth juror" to determine whether the trier of fact lost its way and created such a manifest miscarriage of justice that the conviction must be overturned and a new trial ordered. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541(1997). In the latter, the court must determine whether the evidence

submitted is legally sufficient to support all of the elements of the offense charged. *Id.* at 386-387. Specifically, we must determine whether the state has presented evidence which, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The test is, viewing the evidence in a light most favorable to the prosecution, could any rational trier of fact have found the essential elements of the crime proven beyond a reasonable doubt. *Id.* at 390 (Cook, J., concurring); *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. *See also State v. Eley*, 56 Ohio St.2d 169, 383 N.E.2d 132 (1978); *State v. Barnes*, 25 Ohio St.3d 203, 495 N.E.2d 922 (1986).

{¶ 13} R.C. 2923.02(A) 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." Whoever violates this provision is guilty of attempt of the substantive offense. R.C. 2923.02(E)(1). One who purposely causes the death of another is guilty of murder. R.C. 2903.02(A). Whoever, by means of fire or explosion either knowingly causes a substantial risk of serious physical harm to another, R.C. 2909.02(A)(1), or causes physical harm to an occupied structure, R.C. 2909.02(A)(2), is guilty of aggravated arson.

> A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to

accomplish thereby, it is his specific intention to engage in conduct of that nature. R.C. 2901.22(A).

A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist. R.C. 2901.22(B).

{¶ 14} Appellant maintains that the record is devoid of evidence that he had the specific intent to kill anyone. Moreover, there was no evidence presented at trial to show that appellant was aware that his conduct would place anyone at a substantial risk of serious physical harm or, for that matter, to show that appellant was aware there was anyone inside the Oddo home. Appellant also suggests that there is no evidence that appellant's conduct, had it been successful, would have caused anyone's death.

{¶ 15} Appellant's position seems to be that, because there was no direct evidence as to his intent when he threw the incendiary device at the Oddo house, the state has failed to prove the essential element of purposeful intent with respect to the attempted murder counts and knowing conduct with respect to the arson. This is a myopic view of the role of a finder of fact. As we have stated:

It is well settled that the state may rely on circumstantial evidence to prove an essential element of an offense, because circumstantial evidence and direct evidence inherently possess the same probative value. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph one of the

syllabus. "Circumstantial evidence" is the proof of certain facts and circumstances in a given case, from which the jury may infer other connected facts which usually and reasonably follow according to the common experience of mankind. *State v. Duganitz*, 76 Ohio App.3d 363, 601 N.E.2d 642 (1991), quoting Black's Law Dictionary (5 Ed.1979) 221. Since circumstantial evidence and direct evidence are indistinguishable so far as the jury's fact-finding function is concerned, all that is required of the jury is that it weigh all of the evidence, direct and circumstantial, against the standard of proof beyond a reasonable doubt. *Jenks*, 61 Ohio St.3d at 272. Although inferences cannot be based on inferences, a number of conclusions can result from the same set of facts. *State v. Lott*, 51 Ohio St.3d 160, 168, 555 N.E.2d 293 (1990). Therefore, the [trier of fact] may employ a series of facts or circumstances as the basis for its ultimate conclusion. *Id*. * * *. *State v. Nobles*, 6th Dist. No. L-10-1172, 2011-Ohio-5041, ¶ 19, quoting *State v. Allah*, 8th Dist. No. 91955, 2009-Ohio-3887, ¶ 16.

{¶ 16} There was ample trial testimony that appellant instigated the attack on the Oddo home in retaliation against one of the Oddo sons for his real or imagined romantic interest in appellant's former girlfriend. Under the doctrine of transferred intent it is immaterial that this particular son was not in the house when appellant attacked. *See*

State v. Solomon, 66 Ohio St.2d 214, 421 N.E.2d 139 (1981), paragraph one of the syllabus.

{¶ 17} It is in the realm of common knowledge that a Molotov cocktail is an incendiary bomb, sometimes used in combat, which is fully capable of causing death if thrown at someone. Indeed, the testimony at trial was that, but for the fact that the window at which appellant threw the bomb had a storm window, a screen and an interior window pane, the ball of fire resulting from the bomb would have entered the interior of the house and engulfed one of the Oddo sons who was sleeping on a couch in front of the window. Moreover, the bomb was thrown at approximately 11:00 p.m., a time at which common knowledge suggests that some occupants of the house might be sleeping and vulnerable to a house fire.

{¶ 18} In our view, this is all evidence by which a reasonable jury could have inferred that appellant intended to kill someone and that he knew his conduct created a substantial risk of serious physical harm to the occupants of the Oddo house. Accordingly, appellant's first three assignments of error are not well-taken.

{¶ 19} With respect to the weight of the evidence, we have fully reviewed the record of the trial in this matter and fail to find anything to suggest that the jury lost its way or that there was any miscarriage of justice. Appellant's fourth assignment of error is not well-taken.

II. Instructions/Assistance of Counsel

{¶ 20} In his fifth assignment of error, appellant asserts that the trial court committed plain error when, in its instructions, it failed to define the offense of murder as requiring the specific intent to cause the death of another. In his sixth assignment of error, appellant maintains that his trial counsel provided ineffective assistance of counsel when he failed to object to the faulty jury instructions

{¶ 21} We need not engage in a prolonged plain error/harmless error analysis in this matter because appellant's complaint fails in its premise. He complains that the court's instruction that "[Y]ou must find beyond a reasonable doubt that * * * the defendant purposefully engaged in conduct which, if successful, would have resulted in the commission of the offense of murder," is insufficient to charge attempted murder because it does not define murder and it does not include the requirement that the actor have the specific intent to kill another.

{¶ 22} Yet in the paragraph after the next in the transcript of the proceedings (and in its written instructions) the court instructs the jury:

> [P]urpose * * * to cause the death of another is an essential element of the crime of attempted murder. A person acts purposely when it is his specific intention to cause a certain result. It must be established in this case that at the time in question there was present in the mind of the Defendant a specific intention to cause the death of another. Purpose is a

decision in the mind to do an act with a conscious objective of producing a specific result.

{¶ 23} The court provided the jury with a definition of murder and charged that it must find the defendant acted with the specific intent to cause the death of another. Thus, the deficiency of which appellant complains is specious. Accordingly, appellant's fifth assignment of error is not well-taken.

{¶ 24} Since ineffective assistance of counsel requires the deficient performance of counsel, *see Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and the only deficiency in counsel appellant sets forth is his failure to object to what we have concluded were adequate jury instructions, appellant's sixth assignment of error too is found not well-taken.

III. Restitution

{¶ 25} In his seventh assignment of error, appellant insists that there was insufficient basis for the court to order the $1,216.93 restitution that was part of the sentence.

{¶ 26} The figure upon which the restitution was based came from a statement prepared by Vicki and Jerry Oddo and presented to the court at the sentencing hearing by a representative of the victim advocate's office. The Oddos represented that the $1,216.93 is the cost of repairing the damage to their home caused by appellant's fire-bomb.

{¶ 27} Citing *State v. Christy*, 3d Dist. No. 16-04-04, 2004-Ohio-6963, appellant maintains that an order of restitution must be supported by competent credible evidence and that it is plain error to enter such an order absent such evidence. The statement of a victim's advocate at a sentencing hearing is insufficient evidence, according to appellant.

{¶ 28} R.C. 2929.18 provides that a court imposing sentence on an offender convicted of a felony may impose financial sanctions, including restitution to the victim of the offender's crime.

> If the court imposes restitution, at sentencing, the court shall determine the amount of restitution to be made by the offender. If the court imposes restitution, the court may base the amount of restitution it orders on an amount recommended by the victim, the offender, a presentence investigation report, estimates or receipts indicating the cost of repairing or replacing property, and other information, provided that the amount the court orders as restitution shall not exceed the amount of the economic loss suffered by the victim as a direct and proximate result of the commission of the offense. If the court decides to impose restitution, the court shall hold a hearing on restitution if the offender, victim, or survivor disputes the amount. R.C. 2929.19(A)(1).

{¶ 29} In the present matter, appellant did not object to the imposition or the amount of restitution ordered during the sentencing hearing. Ordinarily, an appellate court need not consider an error not raised in the trial court. *State v. Williams*, 51 Ohio

St.2d 112, 364 N.E.2d 1364 (1977), paragraph one of the syllabus. Pursuant to Crim.R. 52(B), however, errors or defects that affect substantial rights may be noticed on review as plain error.

{¶ 30} To be a lawful order, the amount of the restitution must be supported by competent, credible evidence from which the court can discern the amount of the restitution to a reasonable degree of certainty. *State v. Gears*, 135 Ohio App.3d 297, 300, 733 N.E.2d 683 (6th Dist.1999). When an award of restitution is not supported by such evidence, it is an abuse of discretion by the court that alters the outcome of the proceeding, thus constituting plain error. *State v. Marbury*, 104 Ohio App.3d 179, 181, 661 N.E.2d 271 (8th Dist.1995).

{¶ 31} In the *Christy* case upon which appellant relies, Christy was convicted of vehicular homicide following an accident in which a passenger in his car was killed. At Christy's sentencing hearing a victim's advocate for the deceased's family told the court, "your honor, in regard to restitution, the cost of visitation, funeral expenses and cemetery monument totaled $19,334.12 * * *." *Christy, supra,* at ¶ 12. Nothing else was introduced at the hearing to support or verify this expense. Although, in its judgment entry imposing restitution, the court stated that it had reviewed numerous victim impact statements, none were made a part of the record. *Id.* at ¶ 13.

{¶ 32} The appellate court concluded that "[w]ithout being substantiated, statements made by a victim advocate, alone, are not sufficient to support a finding that the expenses are reasonable." *Id.* The appeals court found it was plain error to enter an

unsubstantiated restitution order, vacated the order and remanded the matter to the trial court to make a proper determination of the amount of the expenses. *Id.* at ¶ 14.

{¶ 33} Appellant insists the present matter is no different that *Christy* and should obtain the same result. The state responds that the present matter is distinguishable because, in addition to the victim advocate's statement to the court, the presentence investigation report also details the amount of the restitution ordered. Since a presentence investigation report is one of those items expressly mentioned in R.C. 2929.18(A)(1) as a proper basis for a restitution order, the state argues, the restitution award was proper.

{¶ 34} Whether a restitution report in a presentence investigation report meets the court's responsibility to "engage in a 'due process ascertainment that the amount of restitution bears a reasonable relationship to the loss suffered,'" *State v. Gears, supra,* at 300, quoting *Marbury, supra,* at 181, is a question we need not answer. A review of the presentence investigation report in this matter fails to disclose any restitution recommendation from adult probation. Accordingly, appellant's seventh assignment of error is well-taken and the matter must be remanded for a determination of the amount of restitution.

IV. Allied Offenses of Similar Import

{¶ 35} In his final assignment of error, appellant maintains that the trial court erred when it overruled his request to merge the seven counts of attempted murder with each other and with the two counts of arson of which he was convicted. All of these offenses

were predicated on a single act, appellant insists, and pursuant to *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, and R.C. 2941.25 should be merged as allied offenses of similar import.

{¶ 36} 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.

{¶ 37} Ohio jurisprudence on allied offenses has been somewhat fluid, but as we recently explained:

> The Supreme Court of Ohio recently redefined the test for determining whether multiple offenses should be merged as allied offenses of similar import under R.C. 2941.25. In *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, ¶ 44, 942 N.E.2d 1061, the court overruled its prior decision in *State v. Rance*, 85 Ohio St.3d 632, 710 N.E.2d 699 (1999), "to the extent that it calls for a comparison of statutory elements solely in the

abstract under R.C. 2941.25." Pursuant to *Johnson*, the conduct of the accused must be considered in determining whether two offenses should be merged as allied offenses of similar import under R.C. 2941.25. *Id*., at the syllabus. The determinative inquiry is two-fold: (1) "whether it is possible to commit one offense and commit the other with the same conduct," and (2) "whether the offenses were committed by the same conduct, i.e., 'a single act, committed with a single state of mind.'" (Emphasis sic.) *Id*. at ¶ 48-49, quoting *State v. Brown*, 119 Ohio St.3d 447, 2008 Ohio 4569, at ¶ 50, 895 N.E.2d 149 (Lanzinger, J., dissenting). "If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged." *Id*. at ¶ 50. "Conversely, if the court determines that the commission of one offense will *never* result in the commission of the other, or if the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge." (Emphasis sic.) *Id*. at 51. *State v.* Ruby, 6th Dist. No. S-10-028, 2011-Ohio-4864, ¶ 58.

{¶ 38} The *Ruby* case is also instructive as to why appellant's argument for merger of the multiple attempted murder charges fails. As we stated at ¶ 60:

> The two counts of attempted murder involve two different victims, and each attempted murder was "necessarily committed with a separate animus." 1973 Legislative Service Commission comments to R.C.

2941.25, 1972 Am.Sub.H.B. No. 511. See, also, *State v. Harvey*, 3d Dist. No. 5-10-05, 2010-Ohio-5408, ¶ 24 ("Clearly, a defendant can be convicted for more than one offense if each offense involves a different victim, even though the offenses charged are identical * * *"); *State v. Young*, 2d Dist. No. 23642, 2011-Ohio-747, ¶ 39 ("separate convictions and sentences are permitted when a defendant's conduct results in multiple victims"); *State v Poole*, 8th Dist. No. 94759, 2011 Ohio 716, ¶ 14, quoting *State v. Poole*, 8th Dist. No. 80150, 2002-Ohio-5065, ¶ 33 ("'felonious assault [like attempted murder] is a crime defined in terms of conduct toward another and * * * where there are two victims, there is a dissimilar import for each person and the two charges of felonious assault are not allied offenses of similar import'").

See also State v. Johnson, supra, at ¶ 15, fn. 2.

{¶ 39} Appellant is correct with respect to the merger of the arson counts. He was charged alternatively with the violation of R.C. 2909.02(A)(1) (creating a substantial risk of serious physical harm to any person) and R.C. 2909.02(A)(2) (causing physical harm to an occupied structure). These are clearly offenses that may be committed by the same conduct and, as we have seen from the facts of this matter, were committed by the same conduct. As a result, these were allied offenses of similar import that should have been merged.

{¶ 40} The state insists that they were merged, but the judgment of conviction reveals instead that the court imposed concurrent sentences. While from a penal standpoint the result is indistinguishable, there may be collateral considerations. Moreover, R.C. 2941.25(A) requires that a defendant charged in an indictment or information with two or more allied offenses of similar import "may be convicted of only one." Since concurrent sentences denote conviction on more than one count, imposition of such a sentence for allied offenses is improper. For this reason we find appellant's eighth assignment of error with respect to the arson charges well-taken.

{¶ 41} As to whether the attempted murder charges and the merged arson charge are allied, this may depend on which of the arson convictions remains following merger. On remand, the trial court should conduct a *Johnson* analysis on the convictions that remain after merger.

{¶ 42} On consideration whereof, the judgment of the Sandusky County Court of Common Pleas is affirmed, in part, and reversed in part. This matter is remanded to said court to substantiate the amount of restitution ordered, merge the arson charges and ascertain whether the remaining arson count should merge with the attempted murder counts. It is ordered that appellee pay the court costs of this appeal pursuant to App.R. 24.

Judgment, affirmed, in part,
and reversed, in part.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE