

[Cite as *State v. Noble*, 2010-Ohio-5493.]

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

STATE OF OHIO,	:	APPEAL NO. C-100049
Plaintiff-Appellee,	:	TRIAL NO. B-0903940-B
vs.	:	<i>DECISION.</i>
WESLEY NOBLE,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: November 12, 2010

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

Michaela Stagnaro, for Defendant-Appellant.

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

J. HOWARD SUNDERMANN, Judge.

{¶1} On June 18, 2009, defendant-appellant Wesley Noble was indicted for two counts of aggravated murder in violation of R.C. 2903.01(B), one count of murder in violation of R.C. 2903.02(A), two counts of murder in violation of R.C. 2903.02(B), one count of rape in violation of R.C. 2907.02(A)(2), one count of aggravated robbery in violation of R.C. 2911.01(A)(1), one count of aggravated robbery in violation of R.C. 2911.01(A)(3), and one count of tampering with evidence in violation of R.C. 2921.12(A)(1).

{¶2} In November 2009, Noble pleaded guilty to one count of manslaughter in violation of R.C. 2903.04(A), one count of aggravated robbery in violation of R.C. 2911.01(A)(1), and one count of tampering with evidence in violation of R.C. 2921.12(A)(1). In return, the state dismissed the other counts in the indictment. Noble's written guilty plea also contained an agreed sentence. Noble and the state agreed that Noble would serve ten years in prison on the manslaughter count, ten years in prison on the aggravated-robbery count, and three years in prison on the tampering-with-evidence count. The sentences were to be served consecutively, for a total aggregate sentence of 23 years in prison. The trial court imposed the agreed sentence.

{¶3} On appeal, Noble raises a sole assignment of error, in which he argues that the trial court erred in imposing separate sentences for the involuntary-manslaughter and aggravated-robbery counts because they involved allied offenses of similar import under R.C. 2941.25.

{¶4} In *State v. Underwood*, the Ohio Supreme Court held that R.C. 2953.08(D)(1) does not bar appellate review of an agreed sentence when the

sentence includes multiple convictions for offenses that are allied offenses of similar import, because such a sentence is not “authorized by law.”¹ Noble argues that his sentence was not “authorized by law” because the involuntary-manslaughter and aggravated-robbery counts involved allied offenses of similar import. We disagree.

{¶5} In *State v. Rance*, the Ohio Supreme Court expressly held in paragraph two of the syllabus that “involuntary manslaughter and aggravated robbery are not allied offenses of similar import.”² Noble argues that *Rance* is no longer good law in light of recent Ohio Supreme Court decisions that have rejected a strict textual comparison of the elements of the offenses for allied-offense claims.³

{¶6} In *State v. Steward*, the Tenth Appellate District considered whether *State v. Cabrales* had altered the test articulated in *Rance* to such a degree that the court’s holding in *Rance* that involuntary manslaughter and aggravated robbery were not allied offenses of similar import was no longer valid.⁴ After reviewing the syllabus and text of the *Cabrales* decision, the Tenth Appellate District concluded that the Ohio Supreme Court had not intended to change or broaden the test in *Rance* or to overrule the ultimate conclusion in *Rance*.⁵ Rather, the *Cabrales* court had merely intended to clarify the test enunciated in *Rance*, and as a result, the holding in *Rance* remained valid.⁶

{¶7} The Tenth Appellate District acknowledged that its decision was consistent with case law from the Eighth Appellate District, which had also relied upon *Rance* to reject a defendant’s argument that involuntary manslaughter and

¹ 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, paragraph one of the syllabus.

² 85 Ohio St.3d 632, 1999-Ohio-291, 710 N.E.2d 699.

³ *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1652, 886 N.E.2d 181; *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147, 922 N.E.2d 937.

⁴ 10th Dist. No. 08AP-974, 2009-Ohio-2990, at ¶10-18.

⁵ Id. at ¶13-15.

⁶ Id.

aggravated robbery were allied offenses of similar import after *Cabrales* had been decided.⁷ As a result, the Tenth Appellate District applied the *Rance* analysis and concluded that involuntary manslaughter and aggravated robbery, when viewed in the abstract, were not allied offenses because the commission of one offense does not necessarily result in the commission of the other.⁸ The Tenth Appellate District expressly held that the Ohio Supreme Court’s subsequent clarification in *Cabrales*—that the elements need not exactly align—did not change this result.⁹

{¶8} More recently, in *State v. Russell*, the Second Appellate District, in holding that felony murder, as defined in R.C. 2903.02, and aggravated robbery, as defined in R.C. 2911.01(A)(1), were not allied offenses of similar import, analyzed whether the supreme court’s decisions in *Cabrales* and *State v. Williams*,¹⁰ which held that felonious assault and felony murder were allied offenses, had altered *Rance*’s analysis.¹¹ The Second Appellate District expressly agreed with the Tenth Appellate District’s reading of *Cabrales* in *Steward*, stating that nothing in the *Cabrales* opinion purported to overrule *Rance* or indicated that the conclusion it had reached was incorrect.¹² Likewise, the Second Appellate District stated that “*Williams* [also] does not purport to overrule or modify *Rance*.”¹³

{¶9} We agree with the analysis of the Tenth Appellate District in *Steward* and the Second Appellate District in *Russell*. Because the Ohio Supreme Court has not overruled *Rance*, and because *Rance* can be harmonized with the supreme court’s more recent decision in *Williams*, we conclude that involuntary manslaughter

⁷ Id. at ¶16, citing *State v. Garrett*, 8th Dist. No. 90428, 2008-Ohio-3549.

⁸ Id. at ¶17.

⁹ Id.

¹⁰ 124 Ohio St.3d 381, 2010-Ohio-147, 922 N.E.2d 937.

¹¹ 2nd Dist. No. 23454, 2010-Ohio-4765, at ¶56.

¹² Id.

¹³ Id.

and aggravated robbery are not allied offenses of similar import. Because an abstract comparison of the elements of the two offenses does not reveal that the commission of involuntary manslaughter necessarily results in the commission of aggravated robbery, we overrule Noble's sole assignment of error and affirm the judgment of the trial court.

Judgment affirmed.

CUNNINGHAM, P.J., and **MALLORY, J.,** concur.

Please Note:

The court has recorded its own entry this date.