[Cite as *State v. Hairston*, 2009-Ohio-2346.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 08AP-735
v.	:	(C.P.C. No. 07CR-05-3690)
Deante L. Hairston,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

O P I N I O N

Rendered on May 19, 2009

Ron O'Brien, Prosecuting Attorney, and *Sheryl L. Pritchard*, for appellee.

Keith O'Korn, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

TYACK, J.

{¶1} Following a jury trial, Deante L. Hairston ("Deante") was convicted on all seven counts of an indictment that included aggravated murder, attempted murder, kidnapping, and aggravated robbery, for shooting two men on February 10, 2007. The trial court sentenced Deante—who was a juvenile at the time of the shooting—to a term of 58 years to life in prison. Deante now appeals his conviction and sentence, raising eleven assignments of error for our review:

> [I.] THE TRIAL COURT ERRED BY NOT PERMITTING APPELLANT TO RETAIN HIS COUNSEL OF CHOICE

AND/OR NOT CONTINUING THE TRIAL[,] THEREBY DEPRIVING APPELLANT OF HIS DUE PROCESS AND EQUAL PROTECTION RIGHTS[,] AND HIS RIGHT TO A FAIR TRIAL AND COUNSEL OF CHOICE AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE [U.S.] CONSTITUTION[,] AND ARTICLE I, SECTIONS 10 & 16 OF THE OHIO CONSTITUTION.

[II.] APPELLANT'S CONVICTIONS WERE NOT SUPPORTED BY THE SUFFICIENCY OF THE EVIDENCE IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 1 & 16 OF THE OHIO CONSTITUTION AND THE CONVICTIONS WERE ALSO AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

[III.] THE COURT ERRED IN NOT HOLDING A COMPETENCY HEARING SUA SPONTE[,] THEREBY DENYING APPELLANT'S RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE [U.S.] CONSTITUTION, AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION.

[IV.] THE [JUVENILE] COURT ERRED IN FINDING PROBABLE CAUSE AT THE BINDOVER HEARING THAT APPELLANT COMMITTED ANY OF THE OFFENSES.

[V.] THE STATE'S LATE DISCLOSURE OF WITNESS TAPES AND SUMMARIES AT TRIAL[,] AND NON-DISCLOSURE AT THE BINDOVER HEARING VIOLATED APPELLANT'S DUE PROCESS RIGHTS PURSUANT TO *BRADY v. MARYLAND* AND THE FEDERAL AND OHIO CONTITUTIONS[,] AND JUV.R. 24(A).

[VI.] THE TRIAL COURT VIOLATED APPELLANT'S RIGHTS UNDER THE OHIO RULES OF EVIDENCE AND THE CONFRONTATION CLAUSE BY DETERMINING THAT DESTINY RICE WAS UNAVAILABLE UNDER EVID. R. 804[,] AND PERMITTING THE STATE TO INTRODUCE [HER] TESTIMONY FROM A BINDOVER HEARING (WITH ITS LOWER BURDEN OF PROOF) AT THE TRIAL, WHICH HAD THE EFFECT OF DENYING TRIAL COUNSEL THE

> OPPORTUNITY TO CONFRONT AND CROSS EXAMINE DESTINY RICE WITH IMPEACHING MATERIAL.
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> [VII.] THE GANG SPECIFICATION STATUTE AS APPLIED TO APPELLANT[,] AND ON ITS FACE[,] IS VOID FOR VAGUENESS[,] AND VIOLATES EVID. R. 401–404 & 609[,] AND APPELLANT'S FIRST, FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS [sic] RIGHTS UNDER THE U.S. [CONSTITUTION] AND ARTICLE I, SECTIONS 10, 11, AND 16 UNDER THE OHIO CONSTITUTION.
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> [VIII.] THE COURT PLAINLY ERRED BY PERMITTING THE CONVICTION[,] AND SENTENCING THE APPELLANT ON ROBBERY, KIDNAPPING, AND FELONIOUS ASSAULT COUNTS ALONG WITH THE APPELLANT'S CONVICTIONS FOR AGGRAVATED MURDER AND ATTEMPTED MURDER[,] IN VIOLATION OF THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT OF THE U.S. CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION[,] AND OHIO'S MULTIPLE-COUNT STATUTE.
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> [IX.] THE COURT'S 58 YEARS TO LIFE SENTENCE OF A JUVENILE VIOLATES APPELLANT'S RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT AS GUARANTEED BY THE EIGHTH AND FOURTEENTH [AMENDMENTS] TO THE [U.S.] CONSTITUTION[,] AND ARTICLE I, SECTION 9 OF THE OHIO CONSTITUTION.
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> [X.] TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE 6TH AMENDMENT TO THE U.S. CONSTITUTION[,] AND ARTICLE I, SECTIONS 10 & 16 OF THE OHIO CONSTITUTION.
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> [XI.] THE COMBINED EFFECT OF MULTIPLE TRIAL COURT ERRORS VIOLATED [APPELLANT'S] DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION[,] AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION.

{¶2} The second assigned error attacks both the sufficiency and weight of the evidence supporting Deante's convictions. The analysis of this argument is the most

general, and is the most fact-intensive. Also, either argument is dispositive of the entire case. We will therefore consider it first.

{¶3} Sufficiency of the evidence is the legal standard applied to determine whether the evidence is legally sufficient, as a matter of law, to support the jury's verdict. *State v. Kepiro*, 10th Dist. No. 06AP-1302, 2007-Ohio-4593, ¶6 (citing *State v. Smith*, 80 Ohio St.3d 89, 1997-Ohio-355). The weight of the evidence, or manifest weight, refers to the inclination of the greater amount of credible evidence offered at trial, and whether the greater weight of that evidence tends to support one side of the issue rather than the other.

{¶4} In reviewing the record for sufficiency, the relevant inquiry is whether, after viewing 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. Id. quoting *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.

{¶5} Deante is arguing that there was insufficient evidence to support his convictions, specifically aggravated murder, robbery, and kidnapping, as to the deceased victim Jaurkeen Hairston (no relation). Deante bases this on his argument that there were no eyewitnesses to the shooting, the police did not find a gun, and that of the four sets of fingerprints the police recovered, none of them belonged to Deante. (Appellant's Brief, at 11.) Although all of these statements are technically true, they are not dispositive of whether the evidence was sufficient to support Deante's convictions. In considering whether Deante's convictions were supported by sufficient evidence, we

turn to the pertinent portions of the trial court record and transcript of the proceedings and testimony.

{¶6} The primary witness for the State was Destiny Rice, who was present at the eastside Columbus apartment on the night of the shooting. Rice testified that she saw Deante standing over Shawyn Jones, the second victim, holding a black handgun, and that Deante ordered Jones to empty his pockets. (Tr. 229–33.) Rice testified that she was hiding in the closet of the bedroom where Deante was holding the victims at gunpoint, but that she could see most of what was happening through the closet door. She testified that she heard several gunshots, and saw Jaurkeen Hairston fall to the floor, and that is when she ran out of the closet with the other girls. They had to jump over Jones, who apparently also had been shot. (Tr. 230–34.)

{¶7} The fact that Rice did not actually see Deante pull the trigger casts very little doubt on whether he actually did do it. She saw Deante holding a gun, while standing over one of the victims. She testified that she did not see anyone else at the apartment with a gun, and that she saw Deante standing over Jones, pointing the gun at him just before she heard shots and saw the other victim fall to the floor. Next, she heard more shots, and saw that Jones had been shot. Furthermore, Rice was not the only witness. The other girls in the closet, Chaquela Johnson, Keisha Barbour, and Asia Dowling, also told the police that Deante was the shooter, and picked him out of a photo array. (Tr. 274, 322–27, 338–40, 355–56.) Lastly, Shawyn Jones, the victim who survived the shooting, testified that Deante struck him in the eye with a gun, instructed him to empty his pockets, and then began shooting at Jaurkeen Hairston before turning the gun towards Jones himself. (Tr. 400–08.) Jones sustained nine gunshot wounds—

five in the chest, and two in each leg. (Tr. 405.) He underwent several lifesaving surgeries, and remained in the hospital for three months. Id. Despite the extent of his wounds, Jones survived, and testified that Deante was his assailant.

{¶8} To sustain a conviction for aggravated murder, under R.C. 2903.01(B), the State must prove beyond a reasonable doubt that the defendant purposely caused the death of another while committing or attempting to commit a kidnapping, robbery, or aggravated robbery. The testimony of Rice, Johnson, Barbour, Dowling, and Jones is evidence, which strongly supports that Deante intentionally shot Jaurkeen Hairston, and that Jaurkeen died from these gunshot wounds. Thus, whether Deante is guilty of aggravated murder turns on whether he also committed one of the enumerated felonies in R.C. 2903.01(B).

{¶9} Kidnapping is defined as the use of force, threat, or deception to remove another from the place where they are found, or to restrain that person's liberty for purposes of facilitating the commission of any felony or flight thereafter, or to terrorize or inflict serious physical harm on them, etc. See R.C. 2905.01(A).

{¶10} Robbery is defined as committing or attempting to commit a theft offense while possessing a deadly weapon, inflicting or threatening to inflict physical harm, or using or threatening to use physical force against the victim. See R.C. 2911.02(A). Aggravated robbery is similar, but requires that the defendant use or brandish the weapon in some way, or inflict or attempt to inflict serious physical harm upon the victim. See R.C. 2911.01(A).

{¶11} Applying the facts of this case to the elements of these crimes, there was sufficient evidence to sustain convictions for either with respect to Jaurkeen Hairston.

Based on the testimony of the multiple female eyewitnesses, combined with the testimony of the second victim, there was evidence that Deante held Jaurkeen Hairston at gunpoint, thereby restraining his liberty, and that Deante's intent was to terrorize or inflict serious physical harm on the deceased victim (i.e., he shot and killed him). Alternatively, Deante's intent with regard to holding Jaurkeen Hairston at gunpoint could have been to facilitate his robbery of Shawyn Jones, the other victim. Turning to robbery, or aggravated robbery, Deante used a deadly weapon (handgun) to restrain or inflict serious physical harm upon both victims while robbing Shawyn Jones ("empty your pockets").

{¶12} Counsel for Deante argues that Deante never intended to commit a robbery with respect to Jaurkeen Hairston. But this is irrelevant, because the aggravated murder charge is essentially the same as "felony murder." The felony murder rule is the law in Ohio, and this court must follow it. The social policy behind the felony murder rule is that of deterrence—the law punishes those who kill as incident to the commission of other dangerous felonies. In theory, the felony murder rule is supposed to cause would-be felons to take extreme care not to kill anyone while they engage in criminal activity.

{¶13} Viewing the evidence in a light most favorable to the prosecution, any rational trier of fact would have found beyond a reasonable doubt that Deante caused Jaurkeen Hairston's death, and that he did so during the commission of a robbery or kidnapping. Thus, there is sufficient evidence to support Deante's conviction for aggravated murder.

{¶14} Now we discuss whether Deante's convictions were against the manifest weight of the evidence. When considering the weight of evidence, the test is considerably different (from sufficiency). *Kepiro*, at ¶23. In this regard, we sit as a thirteenth juror—we weigh the quality of the evidence, and the credibility of the witnesses. Id. (citing *State v. Robinson*, 10th Dist. No. 01AP-748, 2002-Ohio-205, quoting *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211; *State v. Martin* (1983), 20 Ohio App.3d 172, 175). All things considered, we determine whether the jury "clearly lost its way," in a manner that created such a "manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." This discretionary power should only be exercised in the extraordinary case where the evidence weighs heavily against the conviction. Indeed, the Ohio Constitution prevents us from overturning the jury's verdict without a unanimous vote by this panel. See Section 3(B)(3), Article IV, Ohio Constitution ("No judgment resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all three judges hearing the cause.").

{¶15} This case is not such an extraordinary case that would suggest that the jury clearly lost its way, or committed a manifest injustice. To the contrary, there were multiple eyewitnesses, including one of the victims. Each of them testified that Deante was the shooter. The lack of physical evidence tying Deante to the crimes does not outweigh the testimony of multiple eyewitnesses, especially when each eyewitness told essentially the same story. Furthermore, there is no exculpatory physical evidence, and no evidence to suggest either that any of the eyewitnesses had a bias against Deante, or that any of the witnesses had been untruthful. The convictions were not against the manifest weight of the evidence.

{¶16} The second assignment of error is overruled.

{¶17} Somewhat related to the second assignment of error, we will now address the fourth assigned error, which challenges the juvenile court's finding of probable cause and decision to bindover Deante for trial as an adult. Counsel for Deante argues that there was no probable cause that Deante committed any of the crimes, because no eyewitness testified to actually seeing him pull the trigger. We disagree.

{¶18} In certain situations, the juvenile court is required to transfer a case to the general division of the common pleas court for prosecution of the juvenile defendant as an adult. *In re A.J.S.*, 120 Ohio St.3d 185, 186, 2008-Ohio-5307, at fn. 1 (citing R.C. 2152.12). For example, if a juvenile defendant is charged with a crime of murder, and is 16 or 17 years old at the time of commission, the juvenile court *must* bindover the defendant for trial as an adult if the court finds that there was probable cause that the defendant committed the crime. R.C. 2152.12(A)(1)(a).

{¶19} To meet the standard of probable cause, the State must present "some credible evidence as to each and every element of the offense." *State v. Iacona*, 93 Ohio St.3d 83, 92–93, 2001-Ohio-1292. This "some credible evidence" standard is a flexible concept grounded in probabilities, requiring more than a mere suspicion of guilt, but far less than evidence beyond a reasonable doubt. See Id., at 93 (quoting *Brinegar v. United States* (1949), 338 U.S. 160, 175, 69 S.Ct. 1302). Once the State has established probable cause as to each element of the offense charged, the State has satisfied its burden, and the juvenile court must bindover the case. See *In re A.J.S.*, at ¶46 (citing *Iacona*, at 93, 95). Even if the defendant puts forth some alternate theory of the crime, it is not the State's burden to disprove such an alternate theory. That question would be

reserved for ultimate adjudication by the trier-of-fact at trial in the general division of the common pleas court. See Id.

{¶20} In this case, the State's key witness at the bindover hearing was Destiny Rice. Rice testified that she saw Deante standing over Shawyn Jones, while pointing a gun at him. She also testified that simultaneously with seeing Deante pointing the gun at Jones, she heard several shots and saw Jaurkeen Hairston fall to the floor. She then testified that she heard another burst of gunshots, and that when the girls ran out of the closet, they had to step over Jones to get out of the bedroom.

{¶21} This evidence was sufficient to sustain Deante's conviction for aggravated murder; thus, it was equally sufficient to establish probable cause in the juvenile court that he committed aggravated murder.

{¶22} The fourth assignment of error is overruled.

{¶23} Next, we will consider the sixth assigned error, which challenges the trial court's ruling determining that Destiny Rice was "unavailable" within the meaning of Evid.R. 804(A), and allowing the State to read Rice's testimony into the record as former testimony as a hearsay exception under Evid.R. 804(B)(1).

{¶24} Under Evid.R. 804(B)(1), there are six hearsay exceptions that apply when the hearsay declarant is "unavailable." The first of these exceptions is former testimony, which is defined as:

> **Former testimony.** Testimony given as a witness at another hearing of the same or a different proceeding * * * if the party against whom the testimony is now offered * * * had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. Testimony given at a preliminary hearing must satisfy the right to confrontation and exhibit indicia of reliability.

{¶25} "Unavailability" is defined by Evid.R. 804(A), which includes any situation in which the hearsay declarant:

> (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement;
>
> (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so;
>
> (3) testifies to a lack of memory of the subject matter of the declarant's statement;
>
> (4) is unable to be present or to testify at the hearing because of death or then-existing physical or mental illness or infirmity;
>
> (5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under division (B)(2), (3), or (4) of this rule, the declarant's attendance or testimony) by process or other reasonable means.
>
> A declarant is not unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the declarant's statement for the purpose of preventing the witness from attending or testifying.

{¶26} In addition to Ohio's evidentiary rules, the Confrontation Clause of the U.S. Constitution is also at issue here. The Confrontation Clause provides that: "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." U.S. Const. amend. VI; see *Crawford v. Washington* (2004), 541 U.S. 36, 50, 124 S.Ct. 1354. Thus, if the hearsay evidence sought to be admitted comprises testimony from an absent witness, who cannot be cross-examined or

observed face-to-face by the trier of fact, the Confrontation Clause limits the admission of that hearsay evidence. *State v. Keairns* (1984), 9 Ohio St.3d 228, 229.

{¶27} Typically, the standard of review for evidentiary matters is abuse of discretion. See, e.g., *Renfro v. Black* (1990), 52 Ohio St.3d 27, 33. When the gravamen of the evidentiary question involves a constitutional right or other pure legal question, however, the standard of review is de novo. See, e.g., *Gaston v. Brigano* (C.A.6, 2006), 208 Fed.Appx. 376, 384. To the extent we review an ordinary decision made by the trial court, to admit or exclude testimony, we will not disturb such a decision absent evidence that the court abused its discretion.

{¶28} Although it is not clear from his brief, it appears that Deante is challenging both aspects of the trial court's ruling with respect to the admission of Rice's testimony: (1) the trial court's determination that Rice was "unavailable," within the meaning of Evid.R. 804(A); and (2) the trial court's overall discretion in admitting the testimony. These arguments both fail.

{¶29} Both the Confrontation Clause and Evid.R. 804 require the State, as proponent of the evidence, to establish a witness's unavailability before a trial court may admit hearsay into evidence. *Keairns,* at 230. "A witness is not considered unavailable unless the prosecution has made reasonable efforts in good faith to secure his presence at trial." Id. If no possibility of procuring a witness exists, the State is not required to do anything to satisfy its burden to prove unavailability. See *State v. Young* (1984), 20 Ohio App.3d 269, paragraph two of the syllabus. If, however, there is a possibility that reasonable affirmative measures might produce the witness, the State must undertake those measures. "Good faith," however, does not require complete

exhaustion of all available remedies. Id. The critical determination, thus, is whether the State exercised *reasonable efforts* to secure the witness's appearance.

{¶30} Unless the defendant concedes availability, to demonstrate that such reasonable efforts were exercised, the State must present a witness to testify under oath as to the efforts made to secure the witness in question. *Keairns,* at 230; *State v. Jones* (June 5, 1997), 10th Dist. No. 96APA11-1601, 1997 WL 302002, at *5. For example, in *Keairns,* although the prosecutor stated at trial that law enforcement officials had looked for the witness and that subpoenas had been issued, the court determined that the State failed to establish that the witness was unavailable because the State did not offer any sworn testimony of what efforts it undertook to locate the witness. See *State v. Wolderufael*, 10th Dist. No. 02AP-1148, 2003-Ohio-3817; see also *Keairns*, at 249.

{¶31} Turning to the facts in this case, the State presented the testimony of two Columbus police detectives, both of whom attempted to locate Destiny Rice for trial. Detective Justice testified that she tried to serve a subpoena on Rice, but could not locate her, and that she enlisted Detective Weis's subsequent help. (Tr. 96–99.) Detective Weis testified that he searched for possible addresses for Rice via computer, and that he went to an apartment complex with Rice's last known address, only to learn that Rice had been evicted. Detective Weis also went to Rice's mother's home, and spoke with Rice's stepfather, who claimed to have no knowledge of Rice's whereabouts. (Tr. 106–08.) Detective Weis then testified that he looked in areas Rice was presumed to frequent, checked jail computers, and checked with the Bureau of Motor Vehicles. (Tr. 109–11.) None of these avenues proved fruitful. Based on this testimony, it

appears that the State demonstrated a good-faith effort to locate Rice. Thus, the witness was "unavailable" within the meaning of Evid.R. 804(A).

{¶32} With regard to the trial court's discretion in admitting the former testimony of Rice, the trial court's attitude does not appear to be arbitrary, unreasonable, or unconscionable, which is the standard when reviewing for an abuse of discretion. See *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217. Counsel for Deante argues that Rice's testimony should have been excluded because the bindover hearing carried a lower burden of proof than that of the jury trial, and that as a result, counsel's cross-examination of Rice was not meaningful enough to satisfy the requirements of Evid.R. 804(B)(1). We disagree.

{¶33} The hearsay exception for former testimony is very specific, which leaves very little to be interpreted by courts. The former testimony, which is sought to be admitted, must meet the following requirements: (1) it must be testimony given by a witness; (2) at a previous hearing, regardless whether it is the same matter or not; (3) the party against whom the testimony is being offered must have had an opportunity to cross-examine the witness; (4) the cross-examination must have satisfied the right to confrontation; and (5) must appear to be reliable testimony.

{¶34} Here, all of those requirements are met. Counsel for Deante is arguing that the bindover hearing was not "the proper forum to cross-examine Destiny," and that the State failed to provide certain evidence in discovery, which prevented counsel from being able to effectively cross-examine the witness. Counsel cites no case law to support these propositions. (See Appellant's Brief, at 18.) Counsel did, however, cite *Crawford*, but counsel's reliance on *Crawford* is misplaced. *Crawford*'s holding is limited

to the general proposition that the defendant must have had a prior opportunity to cross-examine the witness before the former testimony may be admitted. See Id., at 36. *Crawford*'s holding cannot be legitimately extended to hold that testimony from a bindover hearing is per se inadmissible, or is a per se violation of the Confrontation Clause.

{¶35} Because the State demonstrated that the witness was unavailable at trial, and because counsel for Deante had an opportunity to cross-examine her previously, at the bindover hearing, the former testimony of Rice was properly admitted by the trial court.

{¶36} The sixth assignment of error is overruled.

{¶37} Shifting now to Deante's due process arguments regarding trial counsel. In his first assignment of error, Deante argues that the trial court infringed his due process rights and Sixth Amendment right to counsel by refusing to grant a continuance on the first day of trial, so that Deante could fire his appointed public defender and retain private counsel. Deante also argues that the public defender rendered him ineffective assistance of counsel. We disagree with both assertions.

{¶38} The Sixth Amendment guarantees criminal defendants the right to competent assistance of an attorney. See generally *United States v. Morrison* (1981), 449 U.S. 361, 364, 101 S.Ct. 665; *Gideon v. Wainwright* (1963), 372 U.S. 335, 341–42, 82 S.Ct. 792. Regarding choice of counsel, defendants are typically free to *hire* any attorney of their liking. See *Morris v. Slappy* (1983), 461 U.S. 1, 13–14, 103 S.Ct. 1610. But this principle cannot be interpreted to mean that indigent defendants can *choose* which counsel a court appoints to represent them. See, e.g., *Wheat v. United*

States (1988), 486 U.S. 153, 159, 108 S.Ct. 1692 ("[A] defendant may not insist on representation by an attorney he cannot afford or who for other reasons declines to represent the defendant."); *Thurston v. Maxwell* (1965), 3 Ohio St.2d 92, 93 ("The right to have counsel assigned by the court does not impose a duty on the court to allow the accused to choose his own counsel; the selection is within the discretion of the court.").

{¶39} In this case, Deante decided to tell the trial court that he was dissatisfied with his trial counsel as the court was preparing to voir dire and impanel the jury:

> [THE COURT:] * * * This morning the court had been made aware [the defendant] indicated an interest in hiring Byron Potts in this matter. In fact, Mr. Potts was in my office with your current attorney and counsel for the state of Ohio a little while ago.
>
> And I expressed a concern about Mr. Potts' late involvement in your case. And the reason I was concerned is that, if we went forward with the change of counsel, it would cause a delay in this trial being getting started [sic].
>
> I am not just talking about a day or two. Because of the calendars of the attorneys that would be involved, both Mr. Potts, who has an active practice, and also counsel for the state of Ohio, the trial of this case could be postponed for maybe two or three months, a long time. And you have already been in jail a long time. You are believed to be an innocent person. Because of the bond situation, you are being held in jail.
>
> * * *
>
> When Mr. Potts was talking with us—that is all of us—he indicated that he was not quite certain as to whether or not the family would be able to meet his financial requirements, that is, to pay when he has to be paid.
>
> So, I instructed him to get together with your family and go over this. But there had to be a clear understanding, if he came in the courtroom today indicating that he was going to

be representing you, he would have to be your attorney and I would not allow him to withdraw.

I understand that after his conversations with the family, Mr. Potts is not willing to go forward with this case. I do know, because I have had conferences with the attorneys and your present attorney, Miss Kurila, that Miss Kurila has been preparing for this trial and witnesses have been lined up by the state of Ohio. So, we are going to go forward and Miss Kurila will be representing you.

I understand that sometimes there are communication problems with attorneys and clients, and that sort of thing happens. I just want to tell you in my 14 years down here, I have worked with Mr. Kurila [sic] on a number of cases and never had any reason to question her ability to do a good job for her client.

* * *

Is there anything that you would like to ask me?

THE DEFENDANT: On behalf of this attorney situation, I just don't feel like my life—I feel it is in jeopardy in her hand.

THE COURT: I am having a difficult time hearing you.

THE DEFENDANT: I said with the attorney situation, and my life being on the line, I don't feel like it is in the right place, in the public defender's hands. I had talked to Mr. Byron Potts about this earlier. He had told me to come and let you know. As far as the money issue, it will be to him.

THE COURT: All I can say is that Mr. Potts has left. He is on his way to Mansfield now. He had a court appearance up there. He told me personally in this hallway, not ten minutes ago, that he would not be able to take this case, I am assuming, because you couldn't get the money situation worked out.

THE DEFENDANT: I paid Mr. Byron [sic].

THE COURT: If you have, then you are entitled to get that money back. What he said to me is he cannot get it worked out. He is not here and he will not be representing you. And I

> just assumed because the money situation was not worked out to his satisfaction.

(Tr. 2–5.)

{¶40} It is abundantly clear from the record that Deante could not afford to hire Mr. Potts. Regardless, Mr. Potts informed the court that he would not be representing Deante, and that he had other business to attend to that day. These facts are substantially similar to the facts in *Wheat*, at 159, in which the United States Supreme Court held that the right to counsel does not guarantee indigent defendants the right to have any attorney of their choosing—at the expense of the State, and the Ohio Supreme Court has held the same. See, e.g., *Thurston*, at 93.

{¶41} We should also emphasize that at no time did the trial court refuse to allow Deante to retain the counsel of his choice. The trial court had an in-camera conference with Deante's appointed trial attorney, Ms. Kurila, the prosecuting attorney(s), and Mr. Potts, and at that time, the trial court gave Mr. Potts an opportunity to assume Deante's representation. Mr. Potts declined. The court even appeared willing—however reluctantly—to grant Deante a reasonable continuance in order to allow Mr. Potts an opportunity to prepare for trial. Based on these facts, the trial court did not deprive the defendant of any due process or other constitutional right with regard to the choice of counsel.

{¶42} Accordingly, the first assignment of error is overruled.

{¶43} With regard to the tenth assigned error, to succeed on an ineffective assistance of counsel claim, the defendant must demonstrate that: (1) trial counsel acted incompetently, such that the defendant was effectively denied the constitutionally

protected right to counsel; and (2) trial counsel's errors were so serious that the outcome of the trial is unreliable. See, e.g., *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052; *State v. Bradley* (1989), 42 Ohio St.3d 136; see also *State v. Swann*, 171 Ohio App.3d 304, 2007-Ohio-2010, ¶23. There are two major hurdles to proving ineffective assistance of counsel. First, because even the best criminal defense attorneys would not defend a particular defendant in the same way, trial counsel enjoy a strong presumption that their conduct falls within the wide range of reasonable professional assistance. See *Strickland*, at 689; *Michel v. Louisiana* (1955), 350 U.S. 91, 101, 76 S.Ct. 158. Second, even if the defendant can show that trial counsel erred, the defendant must show that, but for counsel's error, the defendant would have been found not guilty.

{¶44} In this case, Deante alleges that trial counsel committed six errors during the course of his representation, but fails to explain or demonstrate how these alleged errors would have had a significant impact on the outcome of the trial. (See Appellant's Brief, at 28–29.) Thus, even if we were to assume that trial counsel did err with respect to each and every allegation Deante cites, he has still failed to satisfy the second prong of the *Strickland* test. The record before us does not show that trial counsel erred in the first place. The majority of errors Deante cites to are alleged failure to preserve issues for appeal (e.g., *Brady* issues, and choice of counsel). But it appears from the record that trial counsel did make a record of these issues (except as to competency, which we will discuss infra), and that they were properly preserved for appeal. Accordingly, we cannot find that Deante received ineffective assistance of counsel.

{¶45} The tenth assignment of error is overruled.

{¶46} In his third assignment of error, Deante argues that the trial court erred by not holding a competency hearing.

{¶47} Consistent with the notion of fundamental fairness and due process, a criminal defendant who is not competent to stand trial may not be tried or convicted. See, e.g., *Pate v. Robinson* (1966), 383 U.S. 375, 377, 86 S.Ct. 836; *State v. Berry* (1995), 72 Ohio St.3d 354, 359. Under the Fourteenth Amendment, the test for competency is whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States* (1960), 362 U.S. 402, 80 S.Ct. 788, at 789.

{¶48} Other than the facts that Deante was young, and had a "low IQ," there is nothing in the record that calls his competence into question. Thus, trial counsel did not raise the issue of competency, and the trial court did not commit plain error by failing to raise it sua sponte. In fact, prior to empanelling the jury, the court addressed Deante to make sure he understood the nature of the proceedings against him in relation to his being represented by the public defender:

> [THE COURT:] Now, there is another alternative. Mr. Hairston, if he doesn't want to accept the appointed attorney, the attorney I have appointed, he can represent himself. And under all of these circumstances, I don't think anybody would be suggesting that, but he does have that right. If he wants to represent himself, then he can do that, but we are still going to start today.
>
> Miss Kurila, would you like to talk with your client?
>
> Mr. Hairston, I want you to look at me.
>
> Thank you.

> Do you understand what I just said?
>
> THE DEFENDANT: No.
>
> THE COURT: You do not. I don't think there is any doubt you appear to be a very young man and also you understand the English language. I think you do understand what I said. I don't take it personally. We are going forward. Miss Kurila is the attorney of record or Mr. Hairston can represent himself.
>
> Mr. Hairston, do you wish to represent yourself?
>
> THE DEFENDANT: I am not too for sure.
>
> THE COURT: The answer is one [of] two words: Yes or no. Silence means consent. We will be moving forward. Get this jury and bring them in.

(Tr. 23–24.)

{¶49} Gauging by the dialogue between Deante and the court, it appears that Deante was simply being difficult, for the sake of being uncooperative, and to delay (unsuccessfully) the court's moving forward with his trial. There is nothing on the face of the record that calls Deante's competency into question, and we must also assume that the trial court—which was in a much better position to assess Deante's competency in person—did not observe any clues that suggest that a competency hearing should be ordered.

{¶50} We accordingly overrule the third assignment of error.

{¶51} The fifth assigned error concerns the State's alleged late disclosure of witness tapes and summaries at trial, which Deante argues were violations of his due process rights under *Brady v. Maryland* (1963), 373 U.S. 83, 83 S.Ct. 1194. To prove that the prosecution violated *Brady*, the defendant must establish three facts: First, the

defense must show that the prosecutor actually withheld the evidence. Second, the defense must show that the defense was ignorant of the evidence. Third, the defense must show that the evidence was both material and exculpatory. See e.g., *State v. Holloman*, 10th Dist. No. 06AP-608, 2006-Ohio-6789, ¶12 (citing *Brady*; *United States v. Agurs* (1976), 427 U.S. 97, 103, 96 S.Ct. 2392; *State v. Johnston* (1988), 39 Ohio St.3d 48, paragraph four of the syllabus). These burdens lie with the defendant—there is no reciprocal burden on the prosecution to prove that the evidence did not meet the requirements stated in *Brady*.

{¶52} Here, Deante makes a conclusory assertion that the prosecutor failed to turn over evidence, which was either exculpatory, or useful for impeachment of the State's witnesses. (Appellant's Brief, at 15–16.) Deante does not allege that the State withheld this evidence deliberately or otherwise. Indeed, the State probably should have made this evidence available to the defense sooner than it did—at trial—but a late disclosure of evidence, without proof of intent, does not a *Brady* violation make. Furthermore, the defense has not even argued that they were ignorant of the evidence, which is the second requirement to prove that the State violated *Brady*. For these reasons, Deante has failed to set forth the requirements of a *Brady* violation.

{¶53} The fifth assignment of error is overruled.

{¶54} In his seventh assigned error, Deante argues that Ohio's gang specification statute is unconstitutionally vague, violates numerous evidentiary rules, and violates due process. We disagree.

{¶55} Ohio's gang specification statute authorizes a trial court to impose an additional mandatory prison term of one, two, or three years upon an offender who

commits a felony offense of violence "while participating in a criminal gang." R.C. 2941.142. This court has already rejected similar arguments that the gang specification statute is void for vagueness. See *State v. Williams*, 148 Ohio App.3d 473, 2002-Ohio-3777. Committing felonies is not protected by the constitution, even when committed by a group exercising their constitutional right to free association. See Id., at ¶33. Thus, gang activity is not protected by the First Amendment either.

{¶56} Deante has not presented any new arguments that would call our previous judgment into question. We therefore reject the argument that R.C. 2941.142 is unconstitutional. To the extent Deante has made passing references to the Fifth and Sixth Amendments, and other constitutional provisions, these assertions are not supported by any credible arguments or supporting case law. We therefore decline to address them.

{¶57} Several witnesses at trial pointed towards Deante's involvement or affiliation with a gang known as the Elaine Crips. One of these witnesses was Detective Mark Lovett, of the Columbus Division of Police, who testified as an expert witness regarding gang-related crimes and affiliations. On direct-examination, Detective Lovett testified that his full-time job is to document and investigate gang activity, and that he has been exclusively working in that area of the department for the past three-to-four years. (Tr. 517–23.)

{¶58} The Ohio Supreme Court has held that a police officer may be qualified as an expert on gangs if he has gained knowledge and experience about gangs through investigating gang activities and if his testimony shows that he possesses specialized knowledge about gang symbols, cultures, and traditions, beyond that of the trier of fact.

State v. Drummond, 111 Ohio St.3d 14, 2006-Ohio-5084, ¶116; *State v. Jones* (June 13, 2000), 10th Dist. No. 99AP-704.

{¶59} It appears from the record that there was sufficient evidence linking Deante to the Elaine Crips, and to engaging in gang activity. We therefore find no error in the trial court's disposition and sentence(s) with regard to the gang specifications.

{¶60} The seventh assignment of error is overruled.

{¶61} The ninth assignment of error attacks the length of Deante's sentence as "cruel and unusual punishment," in violation of the Eighth Amendment of the U.S. Constitution. We disagree.

{¶62} The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The provision is applicable to the States through the Fourteenth Amendment. *Furman v. Georgia* (1972), 408 U.S. 238, 239, 92 S.Ct. 2726 (per curiam); *State v. Weitbrecht* (1999), 86 Ohio St.3d 368, 370–71. Rarely invoked, the Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions; historically, this meant inhumane punishment, such as torture, or other barbarous acts. See, e.g., *Robinson v. California* (1962), 370 U.S. 660, 676, 82 S.Ct. 1417. Over the years, however, Eighth Amendment jurisprudence has evolved to prohibit punishments that were disproportionate to the crimes committed. See *Weitbrecht*, at 370; see also *Atkins v. Virginia* (2002), 536 U.S. 304, 311, 122 S.Ct. 2242; *Weems v. United States* (1910), 217 U.S. 349, 367, 30 S.Ct. 544.

{¶63} The analysis we use to determine whether a punishment is cruel and unusual is an evolving standard, which is based upon our "maturing society," and

whether a reasonable member of society would consider the punishment "shocking." See, e.g., *Trop v. Dulles* (1958), 356 U.S. 86, 100–01, 78 S.Ct. 590 (plurality); *State v. Chaffin* (1972), 30 Ohio St.2d 13, paragraph three of the syllabus; *McDougle v. Maxwell* (1964), 1 Ohio St.2d 68, 70.

{¶64} For example, in 1977, the U.S. Supreme Court held that it was cruel and unusual to execute a man for rape (of an adult woman). See *Coker v. Georgia* (1977), 433 U.S. 584, 597, 97 S.Ct. 2861. Almost 30 years later, the court held that it was cruel and unusual to execute an individual who was a juvenile at the time he committed capital murder. See *Roper v. Simmons* (2005), 543 U.S. 551, 574–75, 125 S.Ct. 1183. And just last year, the court reaffirmed its prohibition on the execution of a rapist, by extending that prohibition to include those convicted of raping a child. *Kennedy v. Louisiana* (2008), 128 S.Ct. 2641, 2646.

{¶65} Needless to say, this case does not concern capital punishment; in fact, Deante did not even receive a sentence of life without parole. Very recently, however, the Ohio Supreme Court upheld the mandatory life sentence of a 15-year-old convicted of forcibly raping a 9-year-old. See *State v. Warren*, 118 Ohio St.3d 200, 2008-Ohio-2011, ¶58. If a 15-year-old can be sentenced to life in prison for rape, it should go without saying that a 17-year-old can be sentenced to 58 years for murder. There is nothing shocking to us about a young man going to prison for 58 years as punishment for shooting two others, one to death, without provocation and in cold blood. The sentence is not cruel or unusual.

{¶66} Accordingly, the ninth assignment of error is overruled.

{¶67} In the eleventh assignment of error, Deante argues that his convictions should be overturned because the cumulative effect of multiple trial court errors denied him due process of law. We disagree.

{¶68} Deante's argument, here, is based on the U.S. Supreme Court's ruling in *Chambers v. Mississippi* (1973), 410 U.S. 284, 93 S.Ct. 1038, which held that the combined effect of multiple trial court errors may, in the aggregate, render the verdict in the case fundamentally unfair. See Id. at 298, 302–03. This holding is based on the reasoning that when a court commits several small errors in a proceeding, none of which is independently significant enough to warrant reversal, the aggregate effect of multiple errors may be so prejudicial that the conviction should be thrown out and a new trial ordered.

{¶69} The majority of alleged errors Deante cites in his brief relate to the trial court's admission of evidence—graphic photographs, witness statements, and expert testimony. (See Appellant's Brief, at 30.) Again, the trial court has broad discretion over evidentiary matters, and we will not disturb such rulings absent a showing that the trial court abused its discretion.

{¶70} Deante does not argue or demonstrate that the trial court did abuse its discretion; moreover, many of the alleged errors were not properly preserved for appeal. Any issue not preserved for appeal cannot be reviewed except for plain error. See, e.g., *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, ¶52. Plain error must be (1) obvious; and (2) "but for the error, the outcome of the trial clearly would have been otherwise." Id. (quoting *State v. Sanders*, 92 Ohio St.3d 245, 257, 2001-Ohio-189; *State v. Long* (1978), 53 Ohio St.2d 91, paragraph two of the syllabus).

{¶71} Deante does not present any specific legal arguments in support of his argument that the combined effect of multiple cumulative errors denied him a fair trial.

{¶72} The eleventh assignment of error is overruled.

{¶73} The eighth assignment of error concerns the merger doctrine, and Ohio's multiple-count statute, R.C. 2941.25, which provides that:

> (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 offense, and the defendant may be convicted of all of them.

{¶74} One example of the application of R.C. 2941.25 is seen when a defendant steals merchandise, and is charged with both theft and receiving stolen property ("RSP"). See *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, ¶16. If he is found in possession of the stolen goods, he is guilty of RSP, and if he is found to have misappropriated them, he is guilty of theft also. Id. He may be indicted on both counts, but under R.C. 2941.25, he can only be convicted of one or the other. Id. "The basic thrust of th[is] section is to prevent 'shotgun' convictions." Id.

{¶75} Ohio's multiple-count statute is essentially based on the Double Jeopardy Clause of the U.S. Constitution, which provides that no person shall "for the same offence to be twice put in jeopardy of life or limb[.]" U.S. Const. amend. V; see *Blockburger v. United States* (1932), 284 U.S. 299, 304, 52 S.Ct. 180 ("The applicable rule is that, where the same act or transaction constitutes a violation of two distinct

statutory provisions * * * whether each provision requires proof of a fact which the other does not.").

{¶76} To determine whether Ohio's multiple-count statute applies in a particular case, the Ohio Supreme Court follows a two-part test to determine whether the two offenses should be considered allied offenses of similar import. See, e.g., *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, ¶18 (citing *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, ¶14).

{¶77} First, the court compares the elements of the two crimes. If the elements of both offenses correspond to such a degree that the commission of one crime will result in the commission of the other, the crimes are allied offenses of similar import. The court must then apply the second step, in which the court considers the defendant's conduct to determine whether the defendant should be convicted of both offenses. If the court finds that the crimes were committed separately, or that there was a separate animus for each crime, the defendant may be convicted of both offenses. See id; see also *State v. Winn*, ___N.E.2d ___, 2009 WL 723268, 2009-Ohio-1059, ¶10 (quoting *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117). When conducting the first step in the analysis, the court has emphasized that the elements of the two crimes need not be identical, only that they be similar. See *Winn*, at ¶12; *Cabrales*, at ¶26.

{¶78} Using this analysis, Deante argues that all of the robbery, kidnapping, and felonious assault counts should merge into the aggravated murder and attempted murder convictions. (Appellant's Brief, at 25.) In the alternative, Deante argues that even if the robbery and kidnapping counts do not merge into the aggravated murder and

attempted murder counts, the kidnapping counts must merge into the robbery counts. Id. at 26.

{¶79} Count one of the indictment was for aggravated murder (R.C. 2903.01) as to victim Jaurkeen Hairston, using the felony murder statute (while committing a kidnapping, robbery, or aggravated robbery) as the predicate offense. Count two was for attempted murder (R.C. 2923.02) as to Shawyn Jones, using aggravated robbery (R.C. 2911.01) as the predicate offense. Count three—aggravated robbery (R.C. 2911.01), as to victim Hairston. Count four—aggravated robbery, as to victim Jones. Count five—kidnapping, as to victim Hairston. Count six—kidnapping, as to victim Jones. Count seven—felonious assault, as to victim Jones.

{¶80} Preliminarily, we note that the Ohio Supreme Court has consistently held that predicate offenses to felony murder (aggravated murder) do not merge with the aggravated murder charge under R.C. 2903.01(B). See, e.g., *State v. Campbell*, 90 Ohio St.3d 320, 347, 2000-Ohio-183; *State v. Keene* (1998), 81 Ohio St.3d 646, 668; *State v. Logan* (1979), 60 Ohio St.2d 126, 135. In other words, if a defendant accidentally kills a victim while robbing him at gunpoint, the defendant can be convicted of both aggravated murder and aggravated robbery, despite the fact that both crimes arise out of the same transaction or conduct (and regardless of whether there is a "separate animus," under R.C. 2941.25).

{¶81} With that in mind, we look at the crimes charged as to Jaurkeen Hairston, the deceased victim. Deante is charged with aggravated murder, aggravated robbery, and kidnapping. Under *Campbell*, Deante can be convicted of aggravated murder, and its predicate offense—either aggravated robbery or kidnapping. Whether Deante can

be convicted of all three depends on whether aggravated robbery and kidnapping are similar offenses of allied import under R.C. 2941.25.

{¶82} Given the Ohio Supreme Court's recent decision in *Winn*, we need not perform a multiple-count analysis of these two crimes, because the court held, as a matter of law, that these crimes merge. See id. at syllabus. "Holding that kidnapping and aggravated robbery are allied offenses is also in keeping with 30 years of precedent." Id. at ¶22 (citing *Logan*, at 130; *State v. Jenkins* (1984), 15 Ohio St.3d 164, 198, fn. 29; *State v. Fears* (1999), 86 Ohio St.3d 329, 344 (holding that a kidnapping specification merges with aggravated robbery specification unless the offenses were committed with a separate animus); *State v. Davis,* 116 Ohio St.3d 404, 2008-Ohio-2, ¶204, citing *Jenkins,* at 198, fn. 29 ("implicit within every robbery (and aggravated robbery) is a kidnapping"); *Cabrales,* at ¶18, 25). Thus, under *Winn*, Deante's conviction for kidnapping merges into the conviction for aggravated robbery.

{¶83} With regard to the victim Shawyn Jones, Deante is charged with attempted murder, aggravated robbery, kidnapping, and felonious assault. We have already said that the kidnapping charge merges into the aggravated robbery charge. We therefore only need to determine whether felonious assault merges into attempted murder.

{¶84} Attempted murder is to purposely or knowingly engage in conduct that, if successful, would result in the death of another. See R.C. 2903.02(A) and 2923.02(A). Felonious assault is to knowingly (1) cause serious physical harm to another; or (2) cause/attempt to cause (ordinary) physical harm to another while using a deadly weapon. See R.C. 2903.11(A).

{¶85} The State argues that because Deante fired multiple gunshots, "a separate animus existed." (Appellee's Brief, at 29.) This argument, however, is nonsensical, because the word "animus" relates to the defendant's motive, intent, spirit, or purpose in or while committing the offense(s). See, e.g., Oxford English Dictionary (6th Ed.2007); but see *Logan*, at 131. Since it is unlikely (if at all ascertainable) that Deante fired each shot with a distinct or separate purpose, intent, or motive, the fact that he did fire multiple gunshots is not dispositive with regard to animus. See *State v. Wilson*, 8th Dist. No. 91091, 2009-Ohio-1681, ¶51–52 (rejecting the State's argument that the record demonstrated a separate animus for each of nine gunshots).

{¶86} Under *Cabrales*, the proper consideration is whether a person may attempt to cause another's death without using a deadly weapon or dangerous ordnance, as required under R.C. 2903.11(A)(2). And whether a person may cause or attempt to cause physical harm to another with a deadly weapon, but at the same time not attempting to cause the other's death. The answer to both of these questions is yes, which means that attempted murder and felonious assault do not align so closely that the commission of one necessarily results in the commission of the other. Although there are some Ohio courts that have held otherwise, this appears to be the prevailing view. See, e.g., *State v. Locklear*, 10th Dist. No. 06AP-259, 2006-Ohio-5949, ¶28–31; *State v. Love* 1st. Dist. No. C-070782, 2009-Ohio-1079; *State v. Hardges*, 9th Dist. No. 24175, 2008-Ohio-5567, ¶45; *State v. Johnson*, 6th Dist. No. L-03-1206, 2005-Ohio-1222, ¶27–28. We, therefore, hold that felonious assault and attempted murder are not allied offenses of similar import.

{¶87} Having found, however, that under *Winn*, the kidnapping charges merge into the aggravated robbery charges, we sustain that portion of the eighth assignment of error and we overrule the remaining portions of the eighth assignment of error.

{¶88} In sum, the first, second, third, fourth, fifth, sixth, seventh, ninth, tenth, and eleventh assignments of error are overruled. The eighth assignment of error is overruled in part, and sustained in part.

{¶89} Having sustained the eighth assignment of error in part, this case is remanded to the Franklin County Court of Common Pleas for re-sentencing in accordance with this opinion.

Judgment affirmed in part, reversed in part; remanded with instructions.

FRENCH, P.J. and McGRATH, J., concur.

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