[Cite as *State v. Coffman*, 2010-Ohio-1995.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 09AP-727
v.	:	(C.P.C. No. 09CR-03-1256)
Brandon Coffman,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on May 6, 2010

Ron O'Brien, Prosecuting Attorney, *Laura M. Swisher*, and *Sarah W. Creedon*, for appellee.

Dennis Kaps, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶1} Defendant-appellant, Brandon Coffman ("appellant"), appeals the judgment of the Franklin County Court of Common Pleas, which convicted him of (1) improperly discharging a firearm at or into a habitation, (2) felonious assault, and (3) involuntary manslaughter with one specification for discharging a firearm from a motor vehicle and another for using a firearm in the commission of the offense. For the following reasons, we affirm.

{¶2} Appellant pleaded guilty to these offenses and specifications, and the prosecution provided the following statement of facts at the plea hearing. Appellant and three accomplices "sprayed bullets" into some apartments while they drove by, and he was charged with improperly discharging a firearm at or into a habitation for this activity. (Apr. Tr. 15.) One bullet hit Kenyatta Bradley and killed her, and he was charged with involuntary manslaughter and related specifications for her death. Another bullet nearly hit four-year-old Takizeana Mitchell, and he was charged with felonious assault for this conduct. Although defense counsel noted that "there might be a few exceptions" to these facts, he stipulated to them because appellant was complicit in the crimes. (Apr. Tr. 16.) At the sentencing hearing, defense counsel argued that the court cannot impose consecutive sentences for the offenses and specifications because they "were all interrelated," however the court rejected this argument and imposed consecutive sentences for each offense and specification. (June Tr. 9.) Appellant filed a motion to modify the sentences, but the court denied it.

{¶3} Appellant appeals, raising two assignments of error:

> ASSIGNMENT OF ERROR NO. 1
>
> THE TRIAL COURT ERRED WHEN IT FAILED TO MERGE CONVICTIONS FOR INVOLUNTARY MANSLAUGHTER, FELONIOUS ASSAULT AND DISCHARGING A FIREARM INTO A HABITATION. ALL THREE CHARGES ARE ALLIED OFFENSES OF SIMILAR IMPORT AND SHARE SOME OF THE SAME ELEMENTS.
>
> ASSIGNMENT OF ERROR NO. 2
>
> THE TRIAL COURT ERRED BY FAILING TO MERGE THE TWO FIREARM SPECIFICATIONS OF POSSESSION OF A FIREARM WHILE COMMITTING AN OFFENSE AND DISCHARGING A FIREARM FROM A MOTOR VEHICLE

> WHEN THE [sic] BOTH OFFENSES INVOLVED THE SAME CONDUCT AND ONLY ONE TRANSACTION.

{¶4} In his first assignment of error, appellant argues that the trial court erred by not merging his offenses of involuntary manslaughter, felonious assault, and improperly discharging a firearm at or into a habitation. We disagree.

{¶5} R.C. 2941.25, Ohio's multiple count statute, 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.

{¶6} For purposes of R.C. 2941.25, a conviction consists of a guilty verdict and sentence. *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, ¶12. Under the statute, punishment is permitted for multiple offenses if they are not allied offenses of similar import, i.e., offenses whose elements, compared in the abstract, do not correspond in a manner where the commission of one will result in the commission of the other. See *State v. Rance*, 85 Ohio St.3d 632, 636, 1999-Ohio-291; *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, ¶14, 26. Likewise, punishment is permitted for multiple offenses of similar import committed separately or with a separate animus. *Rance* at 636; *Cabrales* at ¶14. When multiple offenses of similar import happen from a single act and animus, however, the court must merge the crimes into one conviction for sentencing. See *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, ¶41-42.

{¶7} This court has previously recognized that, because a felonious assault offense can occur without an improperly discharging a firearm offense, they are not allied offenses of similar import and do not merge. *State v. Gray*, 10th Dist. No. 04AP-938, 2005-Ohio-4563, ¶24. We also note that the improperly discharging a firearm offense can occur without committing involuntary manslaughter. For instance, unlike involuntary manslaughter, an improperly discharging a firearm offense does not require the death of another, and conversely, involuntary manslaughter can occur without a firearm. See R.C. 2903.04 and R.C. 2923.161. Therefore, involuntary manslaughter and improperly discharging a firearm are not allied offenses of similar import, and, thus, the offenses do not merge and appellant may be punished for both. Accordingly, the trial court did not err by not merging appellant's firearm offense with the felonious assault or involuntary manslaughter.

{¶8} Appellant argues that his involuntary manslaughter and felonious assault offenses merge because they occurred from a single act and animus. But, in *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147, ¶20-21, 28, the Supreme Court of Ohio declined to merge offenses that a defendant committed with different gunshots, even though there was a single shooting incident. *Williams* establishes that, in the drive-by shooting involving appellant, when one shot was fired to commit involuntary manslaughter, and another was fired to commit felonious assault, separate conduct existed for each offense for purposes of R.C. 2941.25, and the offenses do not merge. See also *State v. Cooper*, 104 Ohio St.3d 293, 2004-Ohio-6553, ¶30 (holding that a defendant may be punished for multiple offenses under R.C. 2941.25 "[w]here the state has not relied upon the same conduct" to prove them). Moreover, appellant's argument

that he committed these offenses with a similar animus fails, even if we consider them as part of one course of conduct. When a defendant commits offenses against different victims during the same course of conduct, the offenses do not merge because a separate animus exists for each. *State v. Payne*, 10th Dist. No. 02AP-723, 2003-Ohio-4891, ¶82-83. See also *Gray* at ¶16-19 (holding that R.C. 2941.25 permitted punishment for multiple offenses committed against different victims in a shooting incident). Therefore, we also conclude that, because the involuntary manslaughter and felonious assault were committed against different victims, a separate animus existed for each offense, and appellant may be punished for both. Accordingly, the trial court did not err by not merging these offenses.

{¶9} Having concluded that the trial court did not err by not merging appellant's offenses of involuntary manslaughter, felonious assault, and improperly discharging a firearm at or into a habitation, we overrule his first assignment of error. In his second assignment of error, he argues that the trial court erred by not merging the firearm specifications that attached to his involuntary manslaughter offense. We disagree.

{¶10} R.C. 2929.14(D)(1)(c) governed sentencing on appellant's R.C. 2941.146 specification for discharging a firearm from a motor vehicle, and R.C. 2929.14(D)(1)(a) governed sentencing on the R.C. 2941.145 specification for using a firearm in the commission of an offense. In support of his argument that the trial court was required to merge these specifications, and not impose consecutive sentences for them, he relies on R.C. 2929.14(D)(1)(c), which states, in part, that "[a] court shall not impose more than one additional prison term on an offender under division (D)(1)(c) of this section for felonies committed as part of the same act or transaction." Under its plain meaning, this

provision specifically applies to sentencing on R.C. 2941.146 specifications and not firearm specifications in general. See *Hudson v. Petrosurance, Inc.*, 10th Dist. No. 08AP-1030, 2009-Ohio-4307, ¶14 (stating that courts apply a statute as written when it conveys a clear, unequivocal, and definite meaning). Consequently, the provision has no application to appellant's case because the trial court imposed only one prison term, pursuant to R.C. 2929.14(D)(1)(c), for the specification on discharging a firearm from a motor vehicle.

{¶11} In fact, another provision in R.C. 2929.14(D)(1)(c) states: "If a court imposes an additional prison term on an offender under division (D)(1)(c) of this section relative to an offense, the court also shall impose a prison term under division (D)(1)(a) of this section relative to the same offense, provided the criteria specified in that division for imposing an additional prison term are satisfied relative to the offender and the offense." Under this provision, if an offense is properly accompanied with a specification under R.C. 2941.146 and another under 2941.145, there is no merger of the specifications, and the court must impose a sentence for each. See *State v. Bates*, 10th Dist. No. 03AP-893, 2004-Ohio-4224, ¶8, 10. And, according to R.C. 2929.14(E)(1)(a), an offender must serve consecutive prison terms for these specifications. See *Bates* at ¶9-10. It is undisputed that the R.C. 2941.146 and 2941.145 specifications properly attached to appellant's involuntary manslaughter offense, and we conclude that the trial court did not err by imposing consecutive sentences on the specifications and not merging them. See R.C. 2929.14(D)(1)(c); R.C. 2929.14(E)(1)(a); *Bates* at ¶8-10. Accordingly, we overrule appellant's second assignment of error.

{¶12} In summary, we overrule appellant's two assignments of error. Thus, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

SADLER, J., concurs.
TYACK, P.J., concurs in part and dissents in part.

TYACK, P.J., concurring in part and dissenting in part.

{¶13} I agree that the felonious assault charge and the involuntary manslaughter charge are not allied offenses of similar import in this case because the crime involved separate victims. I also agree that improperly discharging a firearm into a habitation is not an allied offense of similar import because a number of habitations were shot. I therefore would not apply R.C. 2941.25 to the underlying crimes.

{¶14} I have more difficulty in giving consecutive sentences for firearm specifications under the facts of this case. Brandon Coffman apparently shot out of a moving motor vehicle when committing his crimes. I view firearm specifications as being offenses for purposes of R.C. 2941.25, Ohio's multiple counts statute.

{¶15} When R.C. 2941.25 was enacted, Ohio did not yet have firearm specifications of any sort, but the stacking of convictions and sentences for the same conduct was clearly intended by the legislature to be limited.

{¶16} Subsequently, the legislature enacted firearm specifications for use of a firearm in a crime. Later yet, the legislature enacted a specification for "drive-by" shootings. As acknowledged in the majority opinion, the legislature clearly limited the application of the specification for shooting from a motor vehicle to a single specification for the same act or transaction. I believe it is clear that the legislature contemplated that

a single penalty would be imposed, namely the five-year sentence mandated by R.C. 2941.146.

{¶17} At all times, the courts of Ohio have been under the mandate from the legislature contained in R.C. 2901.04(A), which tells us that "sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused." I do not see the majority opinion as honoring that mandate.

{¶18} I would reverse the sentence imposed on Brandon Coffman and send the case back to the trial court with instructions to impose a single penalty of five years for the gun specification. Since the majority opinion does not do so, I respectfully dissent from that portion of the opinion.