[Cite as *State v. Russell*, 2010-Ohio-4765.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	Appellate Case No. 23454
Plaintiff-Appellee	:	
	:	Trial Court Case No. 04-CR-3840/2
v.	:	
	:	
JAMES A. RUSSELL	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

. . . . . .

O P I N I O N

Rendered on the 1st day of October, 2010.

. . . . . .

MATHIAS H. HECK, JR., by R. LYNN NOTHSTINE, Atty. Reg. #0061560, Montgomery County Prosecutor's Office, Appellate Division, Montgomery County Courts Building, P.O. Box 972, 301 West Third Street, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

ROBERT ALAN BRENNER, Atty. Reg. #0067714, Post Office Box 341021, Beavercreek, Ohio 45434-1021
Attorney for Defendant-Appellant

. . . . . .

BROGAN, J.

{¶ 1} James Russell appeals from his conviction and sentence in Montgomery County Common Pleas Court following a retrial on charges of felony murder, aggravated robbery, evidence tampering, grand theft of a motor vehicle,

gross abuse of a corpse, and firearm specifications.

{¶ 2} We reversed the convictions in February 2008, holding that the trial court should have declared a mistrial upon discovering that the jury inadvertently had received a verdict form for a weapons charge that had been tried to the bench. See *State v. Russell*, Montgomery App. No. 21458, 2008-Ohio-774. The case was retried beginning in late April 2008. The State's evidence on retrial established that Russell had been living with his girlfriend, Candace Hargrove, in a local apartment. Hargrove, an admitted prostitute, arranged to meet the victim, Philip Troutwine, to have sex at the apartment. Before Troutwine arrived, Hargrove decided she did not want to have sex. She and Russell planned to rob Troutwine instead. After Troutwine entered the apartment, Russell emerged from a hiding place, pointed a gun at him, and demanded money. While Hargrove was in another room, she heard sounds of a struggle and a single gunshot. Russell then entered the room and told her he had shot Troutwine. Hargrove and Russell proceeded to wrap Troutwine's body in a tent. They took the body downstairs and placed it in the trunk of Troutwine's car. They then cleaned up the blood, moved Troutwine's car to a parking lot near the Dayton Mall, and fled the area, going to Kentucky, Michigan, and finally California, where they were arrested.

{¶ 3} Hargrove testified against Russell at trial and recounted the foregoing facts. The State also presented testimony from residents of the apartment complex who had heard the gunshot and had watched Hargrove and Russell drag something heavy and covered with a tent down the stairs. The residents later heard sounds of scrubbing and smelled bleach. Forensic testing revealed Troutwine's blood in the apartment, and

his body was found inside his car. At the conclusion of the trial, the jury found Russell guilty of felony murder, aggravated robbery, evidence tampering, grand theft of a motor vehicle, gross abuse of a corpse, and the firearm specifications. Russell also had a weapons-under-disability conviction that we previously had not reversed. The trial court imposed an aggregate sentence of forty and one-half years to life in prison.

{¶ 4} Russell advances five assignments of error on appeal. First, he contends the trial court erred in mishandling an issue under *Batson v. Kentucky* (1986), 476 U.S. 79. Second, he claims the trial court erred in barring defense counsel from cross examining Hargrove with letters she had sent him while he was incarcerated awaiting retrial. The trial court disallowed use of the letters because they had not been provided to the prosecutor. Third, he contends defense counsel rendered constitutionally ineffective assistance by failing to provide the letters to the prosecutor. Fourth, he asserts that the trial court erred in failing to merge the aggravated robbery and felony murder convictions for purposes of sentencing. Russell argues that they are allied offenses of similar import. Fifth, he claims the trial court erred in ordering him to pay restitution without considering his ability to pay.

{¶ 5} Russell's first assignment of error concerns the State's exercise of a peremptory challenge to remove juror number nine, Tawana Pasqual, who is black. Russell contends the trial court mishandled the issue, in violation of *Batson*, supra, thereby allowing the State to exclude Pasqual based on her race.

{¶ 6} In *Batson,* the U.S. Supreme Court set forth a three-part test for determining whether a prosecutor's use of a peremptory challenge is racially motivated:

{¶ 7} "First, the defendant must make a prima facie showing that the prosecutor

has exercised peremptory challenges on the basis of race." *Batson,* 476 U.S. at 82. "In order to establish a prima facie case of discrimination, the defendant must point to facts and other relevant circumstances that are sufficient to raise an inference that the prosecutor used its peremptory challenge specifically to exclude the prospective juror on account of his race." [1] *State v. Carver*, Montgomery App. No. 21328, 2008-Ohio-4631, ¶48, citations omitted. "The trial court must 'consider all relevant circumstances in determining whether a prima-facie case exists, including statements by counsel exercising the peremptory challenge, counsel's questions during voir dire, and whether a pattern of strikes against minority venire members is present.'" Id., quoting *Batson,* supra, at 96-97.

{¶ 8} "Second, once the defendant establishes a prima facie case of discrimination, the burden shifts to the prosecutor to articulate a race-neutral explanation for the peremptory challenge 'related to the particular case to be tried.'" Id.

---

[1]Standing alone, the fact that the prosecutor struck an African American juror is not enough to establish a prima facie case. *State v. Curtis*, Clark App. No. 2003 CA 74, 2005-Ohio-120, ¶11 ("The mere fact that the State uses one of the challenges to excuse an African-American does not establish a prima facie case of racial discrimination."); *State v. Henry*, Clark App. Nos. 2003-CA-47, 2003-CA-88, 2005-Ohio-4512, ¶50-60; *State v. Alexander* (Nov. 29, 1996), Trumbull App. No. 93-T-4948 ("Contrary to the trial court's belief that the peremptory challenge of a sole black venireman available to serve on a black defendant's jury is sufficient to establish a prima facie cause and shift the burden to the state, Federal courts have consistently held that the mere use of a peremptory challenge alone is insufficient to give rise to a prima facie case."); *State v. Sheppard*, 84 Ohio St.3d 230, 234, 1998-Ohio-323 ("Appellant claims that the state's peremptory challenges against two jurors were racially motivated. Yet, contrary to this claim, the facts and any other relevant circumstances did not establish a prima facie case because they did not raise an inference that the prosecutor used the challenges for racial reasons."); *State v. Cook* (1992), 65 Ohio St.3d 516, 519 (finding it "doubtful" whether a prima facie case existed even though the defendant was black and the State exercised peremptory challenges on three black potential jurors).

at ¶49, quoting *Batson*, supra, at 98. “Although a simple affirmation of general good faith will not suffice, the prosecutor's explanation ‘need not rise to the level justifying exercise of a challenge for cause.’” Id., quoting *Batson*, supra, at 97. “In fact, the prosecutor's explanation for striking the prospective juror is not required to be persuasive, or even plausible.” Id. “‘At this [second] step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.’” Id., quoting *Purkett v. Elem* (1995), 514 U.S. 765.

{¶ 9} “Third, the trial court must determine ‘whether the defendant has carried his burden of proving purposeful discrimination.’” Id. at ¶50, quoting *Batson,* supra, at 82. “In making such a determination, the trial court must decide whether the prosecutor's race-neutral explanation is credible, or instead is a ‘pretext’ for unconstitutional discrimination.” Id., citing *Hernandez v. New York* (1991), 500 U.S. 352, 363. “Because this third stage of the analysis rests largely on the trial court's evaluation of the prosecutor's credibility, an appellate court is required to give the trial court's findings great deference.” Id., citations omitted.

{¶ 10} After the State struck Pasqual in the present case, the following exchange occurred:

{¶ 11} “THE COURT: Juror Number 9 excused by the State for their third peremptory, to be replaced by Juror Number 23.

{¶ 12} “[PROSECUTOR] TANGEMAN: Mr. Chase, correct?

{¶ 13} “THE COURT: I will –

{¶ 14} “[DEFENSE COUNSEL] HAIRE: Judge –

{¶ 15} "THE COURT: I will note for the record, I don't think we can even get to the possibility of a *Batson* challenge at this point, because in order to get to that you have to have a pattern of excuse of African Americans. And we don't have a pattern yet, because this is the first African American who has been excused other than for cause by the State. But I will make a note of that for the record.

{¶ 16} "[DEFENSE COUNSEL] HAIRE: Thank you.

{¶ 17} "THE COURT: Uh-huh.

{¶ 18} "[PROSECUTOR] DAIDONE: And the record should also note there is another African American on the jury.

{¶ 19} "THE COURT: There is. * * *"

{¶ 20} On appeal, the parties agree that the trial court erred in finding no *Batson* issue because no "pattern" existed. The existence of a pattern of potentially discriminatory strikes, while relevant, is not necessary to establish either a prima facie case under *Batson* or to establish an actual violation. See, e.g., *Carver*, supra, ¶57-58, citing *State v. White*, 85 Ohio St.3d 433, 436, 1999-Ohio-281. By failing to recognize the existence of a *Batson* issue, the trial court unfortunately "failed to provide an adequate basis to uphold the denial of [a] *Batson* challenge."[2] Id. at ¶59. By not addressing the *Batson* issue in accordance with the three-part test set forth above, the trial court also

[2]Precisely the same error occurred in *Carver*. In that case, the State used a peremptory challenge to remove a black alternate juror. Defense counsel raised a *Batson* issue. The trial court rejected it out of hand, finding no pattern of potentially discriminatory strikes. Upon review, we held that the trial court's error was harmless because the *Batson* issue concerned a prospective alternate juror who ultimately would not have deliberated. *Carver* is distinguishable because prospective juror Pasqual was not an alternate.

has deprived us of an adequate record for appellate review. Id.

{¶ 21} The State insists, however, that Russell forfeited any *Batson* argument on appeal by not raising a *Batson* objection at trial. We disagree. Based on the dialogue set forth above, we can infer that defense counsel was attempting to articulate a *Batson* objection when the trial court cut counsel off. Immediately after the State struck juror number nine, defense counsel began to address the court. The trial court interrupted and expressed its belief that there was no *Batson* issue. Defense counsel then replied, "Thank you," as if acknowledging that the trial court had resolved the issue counsel was going to raise. Because defense counsel's initial attempt to speak reasonably may be construed as an objection, there was no need for counsel to "take exception" or object again after the trial court's erroneous ruling about the need for a "pattern."

{¶ 22} Having found that the trial court erred in its treatment of the *Batson* issue and that Russell preserved the issue for appeal, the remaining question involves the remedy. We are persuaded that when a trial court erroneously preempts a *Batson* inquiry and thereby fails to make any determinations for us to review, the proper remedy is a remand for a *Batson* analysis. In reaching this conclusion, we note that "trial courts, not appellate courts, are to assume the responsibility of making factual determinations regarding a prima facie showing of discrimination, the prosecution's race-neutral explanation, and the ultimate existence of purposeful discrimination." *Harris v. Haeberlin* (6th Cir. 2008), 526 F.3d 903, 913.

{¶ 23} In the present case, the trial court did not determine whether Russell had established a prima facie violation, and, consequently, the State did not articulate its reasons for striking Pasqual. The State attempts to explain the strike on appeal, but its

reasons were not expressed in the trial court, where the issue was not addressed. In *United States v. Harris* (1999), 192 F.3d 580, the Sixth Circuit remanded a case to the trial court for a proper *Batson* analysis where the trial court "made no effort to weigh the credibility of the prosecutor's asserted reasons for striking the panelists, relying instead on impermissible factors in reaching its conclusion." Id. at 588; see, also, *Uhl v. Mid-Ohio Heart Clinic*, Richland App. No. 01-CA-57, 2002-Ohio-994 (finding a remand necessary where the trial court failed to make the necessary determinations under *Batson*). In a similar case, *State v. Robertson* (1993), 90 Ohio App.3d 715, we did likewise. There, however, the State had given as its reasons for striking a prospective juror a perceived "closed body language and hostile, intimidating appearance." Id. at 725. The trial court had failed to make any finding as to whether these were the real reasons for the peremptory strike. On review, we found a remand necessary for the trial court to decide whether to accept the State's explanation if it could recall the incident. Id. at 725-726; see, also, *State v. Dockery*, Hamilton App. No. C-000316, 2002-Ohio-189 (ordering a limited remand for a *Batson* hearing to be followed by supplementation of the record where the prosecutor had not been required to provide reasons for the strike).

{¶ 24} Unlike *Harris* and *Robertson*, of course, the prosecutor in the present case gave no reasons below for striking Pasqual because the trial court preempted the entire *Batson* issue. But this is an equally good reason to remand the case to the trial court for a proper tripartite *Batson* analysis. As the Sixth Circuit recognized in *Harris*, "trial courts, not appellate courts, are to assume the responsibility of making factual determinations regarding a prima facie showing of discrimination" under *Batson*.

Harris, supra, at 913. Accordingly, Russell's first assignment of error is sustained. His convictions will be reversed and the matter will be remanded to the trial court for a *Batson* analysis. If the trial court finds no *Batson* violation, it may reinstate Russell's convictions and sentence. If the trial court finds that a *Batson* violation exists, then Russell will be entitled to a new trial. If, for whatever reason, the trial court is unable to determine whether *Batson* was violated, then Russell also will be entitled to a new trial. See *Robertson*, 90 Ohio App.3d at 726-727.

{¶ 25} In his second assignment of error, Russell claims the trial court erred in barring defense counsel from cross examining Hargrove with four letters she had sent him while he was incarcerated awaiting retrial.

{¶ 26} In the letters, Hargrove wrote various things that Russell believes call into question her credibility and show her motivation to lie. Defense counsel inadvertently neglected to turn copies of the letters over to the prosecutor during discovery. As a result, the trial court held that defense counsel could question Hargrove about the letters but could not introduce them as prior inconsistent statements. In other words, the trial court determined that defense counsel would be "stuck" with Hargrove's response to any question about the content of her letters.

{¶ 27} On appeal, Russell does not challenge the trial court's finding that his failure to share the letters with the State constituted a discovery violation. He argues only that the trial court abused its discretion in imposing the sanction it did. We disagree. The letters did not come to light until after the prosecutor completed his direct examination and defense counsel attempted to cross examine Hargrove with them. The prosecutor objected, explaining that he may have performed his direct examination

differently if he had known about the letters. The prosecutor also maintained that he would have requested copies of certain letters Russell apparently had written to Hargrove from jail. Because Hargrove's letters revealed that she was responding to correspondence from Russell, the prosecutor pointed out the importance of having the "full picture of what, if anything, she was responding to." In light of these valid concerns, we cannot say the trial court abused its discretion in excluding Hargrove's letters rather than granting a brief continuance for the prosecutor to review them.

{¶ 28} Even assuming, purely arguendo, that the trial court should have imposed a lesser sanction, defense counsel's cross examination of Hargrove fails to show that Russell was prejudiced by the trial court's ruling. Defense counsel only asked Hargrove a few questions about the content of the letters. Defense counsel first asked whether she had "poured out her heart and soul" in the letters. Hargrove responded that she had at times. Defense counsel then asked whether she had expressed frustration about the way Russell's family treated her children. Hargrove responded that she did not recall. Counsel then asked whether she had expressed frustration about the way Russell's ex-wife treated her children. Hargrove responded that she probably had. Hargrove also agreed that she had mentioned thinking someone named "Kim" was not a good grandmother. Hargrove next failed to recall writing that she was living life "day to day." Nor could she remember writing that life was like chess and that a person has to "play to win." Defense counsel asked no other questions about the letters. Upon review, we conclude that Hargrove's responses are not particularly probative of anything material. Even if defense counsel had been permitted to use Hargrove's letters to establish that she was living life "day to day" and "playing to win," these statements are too

ambiguous to have much evidentiary value.

{¶ 29} On appeal, Russell asserts that the letters contain other potentially more important statements from Hargrove. These include her writing (1) that she wanted to help Russell out as long as she didn't get too long of a sentence herself, (2) that something was hanging over her head, (3) that her "big picture" included freedom and that she made a deal because she could not communicate with Russell and it was "every man for his self," and (4) that she questioned "[w]hat the hell had I done?" The record reveals, however, that defense counsel never asked Hargrove about these statements on cross examination. Therefore, we do not know whether she would have admitted or denied writing them. If asked, she may have admitted writing these statements. In so, defense counsel would have had no need, and no ability, to impeach her with the actual letters themselves. Because defense counsel did not ask Hargrove about these statements, Russell cannot establish that he was prejudiced by the trial court's exclusion of the letters.

{¶ 30} Finally, Russell argues that the trial court violated his constitutional right to confront his accuser when it disallowed use of the letters. But any harm to Russell was self-inflicted. Defense counsel failed to turn over the letters in discovery, thereby causing Russell to suffer the consequences. Thus, Russell, through his own counsel, is responsible for his inability to use the letters. In any event, as set forth above, the record does not reflect that he was particularly prejudiced by the trial court's ruling. The second assignment of error is overruled.

{¶ 31} In his third assignment of error, Russell alleges ineffective assistance of counsel based on his attorney's failure to turn over Hargrove's letters to the prosecutor.

To prevail on this claim, Russell must show deficient performance and resulting prejudice. *Strickland v. Washington* (1984), 466 U.S. 668. To establish deficiency, he must show that counsel's representation fell below an objective standard of reasonableness. Id. To show prejudice, he must demonstrate that counsel's deficiency had an effect on the judgment. *State v. Bradley* (1989), 42 Ohio St.3d 136, 142. Reversal is warranted if there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. Id.

{¶ 32} Upon review, we conclude that defense counsel provided deficient performance by failing to turn over Hargrove's letters in discovery. Russell's ineffective assistance of counsel claim nevertheless fails because he cannot show prejudice. As set forth above, the things in the letters that defense counsel questioned Hargrove about were not particularly important. As for the other things in the letters that defense counsel did not inquire about, we have no way of knowing whether she would have admitted or denied writing them if asked. Because Hargrove may have admitted writing them, Russell cannot demonstrate that he needed to use the letters as prior inconsistent statements to impeach her. Therefore, he cannot establish prejudice resulting from defense counsel's inability to use the letters. The third assignment of error is overruled.

{¶ 33} In his fourth assignment of error, Russell argues that his aggravated robbery and felony murder convictions are allied offenses of similar import. He insists that the aggravated robbery charge was subsumed by the felony murder charge, which was predicated on his commission of aggravated robbery, and that the two crimes were

committed together with the same animus.[3]

{¶ 34} In response, the State argues that Russell's crimes are not allied offenses because aggravated robbery can be committed without killing anyone and felony murder can be committed without engaging in aggravated robbery. The State points out that felony murder occurs when death results from the commission of any offense of violence that is a felony of the first or second degree. See R.C. 2903.02(B). But even if aggravated robbery and felony murder are allied offenses, the State contends merger was not required because Russell committed the two crimes separately or with a separate animus.

{¶ 35} Upon review, we find the State's argument to be persuasive. "[T]he Double Jeopardy Clause does not entirely prevent sentencing courts from imposing multiple punishments for the same offense but rather 'prevent[s] the sentencing court from prescribing greater punishment than the legislature intended.'" *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147, ¶12, quoting *State v. Rance*, 85 Ohio St.3d 632, 635, 1999-Ohio-291. "Thus, in determining whether offenses are allied offenses of similar import, a sentencing court determines whether the legislature intended to permit

---

[3]The record reflects that the jury returned its guilty verdicts on Friday, May 1, 2009. After excusing the jury, the trial court proceeded immediately to sentencing. Among other things, it orally imposed a sentence of ten years for aggravated robbery and fifteen years to life for murder. Thereafter, at 12:15 p.m. on May 4, 2009, the jury verdicts were filed. At 2:14 p.m. on May 4, 2009, Russell filed a motion raising the allied-offense issue. Less than two hours later, at 4:02 p.m. on May 4, 2009, the trial court's termination entry was filed. In light of this timing, it is questionable whether the trial court judge had an opportunity to review Russell's motion raising the allied-offense issue. Regardless of the timeliness of Russell's motion, it is plain error to sentence a defendant for multiple counts that are allied offenses of similar import. *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, ¶31. Therefore, we will address his argument.

the imposition of multiple punishments for conduct that constitutes multiple criminal offenses." Id.

{¶ 36} "In Ohio, the vehicle for determining application of the Double Jeopardy Clause to the issue of multiple punishments is R.C. 2941.25." *State v. Reid*, Montgomery App. No. 23409, 2010-Ohio-1686, ¶29. The statute provides:

{¶ 37} "(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.

{¶ 38} "(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."

{¶ 39} "A two-step analysis is required to determine whether two crimes are allied offenses of similar import." *Williams*, supra, at ¶16 (citations omitted). "'In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), courts are required to compare the elements of offenses in the abstract without considering the evidence in the case, but are not required to find an exact alignment of the elements. Instead, if, in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in commission of the other, then the offenses are allied offenses of similar import.'" Id., quoting *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, at paragraph one of the syllabus. "If the offenses are allied, the court proceeds to the second step and considers whether the

offenses were committed separately or with a separate animus." Id., citing *Cabrales*, at ¶ 31.

{¶ 40} Applying the foregoing analysis, we conclude that felony murder and aggravated robbery are not allied offenses. Comparing the elements of the two offenses in the abstract, commission of neither offense necessarily results in commission of the other. The felony murder statute, R.C. 2903.02(B), provides: "No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree * * *." The aggravated robbery statute, R.C. 2911.01(A)(1), provides: "No person, in attempting or committing a theft offense * * * or in fleeing immediately after the attempt or offense, shall do any of the following: * * * Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it[.]"[4]

{¶ 41} Aggravated robbery plainly may be committed without causing the death of anyone, and felony murder may be committed without engaging in aggravated robbery. The felony murder statute requires causing the death of another as the proximate result of committing any first or second-degree felony offense of violence, not just aggravated robbery. This court and others have recognized that a defendant may be convicted and sentenced separately for felony murder, aggravated murder, or involuntary manslaughter as well as a predicate offense supporting those charges.

{¶ 42} In *State v. Brown*, Montgomery App. No. 18643, 2002-Ohio-277, for

[4]Although the aggravated robbery statute has other subsections, Russell was charged with violating 2911.01(A)(1).

example, we held that felony murder and aggravated arson were not allied offenses even though the victim's death was caused by the aggravated arson. In reaching this conclusion, we applied the two-part test set forth above, as articulated by the Ohio Supreme Court in *Rance*, supra.[5] We reasoned: "Aggravated arson as it applies in this case requires that the defendant, knowingly, 'by means of fire or explosion * * * [c]reate a substantial risk of serious physical harm to any person other than [himself].' R.C. 2909.02(A)(1). Felony murder requires that the defendant 'cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree.' R.C. 2903.02. Looked at in the most abstract light, these two offenses are not allied offenses of similar import. Aggravated arson can be committed without a killing, and felony murder can be committed by means of a first or second degree felony other than aggravated arson."

{¶ 43} Similarly, in a recent case, *State v. Green*, Greene App. No. 2007 CA 2, 2009-Ohio-5529, we relied on the test articulated in *Cabrales*, supra, and held that aggravated murder and aggravated robbery were not allied offenses of similar import. We reasoned: "Comparing the elements of aggravated murder and aggravated robbery, as *Cabrales* instructs, the two offenses are not allied offenses of similar import. Aggravated murder requires purposefully causing the death of another while committing one of nine specified felonies, of which aggravated robbery is only one. Aggravated

---

[5]In *Cabrales*, the Ohio Supreme Court purported to clarify *Rance* by stressing that courts are "not required to find an exact alignment of the elements[.]" Rather, "if, in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in commission of the other, then the offenses are allied offenses of similar import." *Cabrales*, supra, at paragraph one of the syllabus.

robbery, in contrast, requires only that the defendant recklessly inflict or attempt to inflict serious physical harm; a purposeful killing is not required. In short, aggravated robbery can be committed without committing aggravated murder, and aggravated murder can be committed without committing an aggravated robbery. Accordingly, aggravated robbery and aggravated murder are not allied offenses of similar import." Id. at 222 (citations omitted).

{¶ 44} In *Rance* itself, the Ohio Supreme Court concluded that involuntary manslaughter and aggravated robbery are not allied offenses. The *Rance* court rejected a view that the involuntary manslaughter conviction necessarily encompassed all the elements of aggravated robbery. In so doing, it determined that a comparison of the statutory elements was necessary and endorsed Justice Rehnquist's dissent in *Whalen v. United States* (1980), 445 U.S. 684, a case that involved felony murder and rape. In particular, the *Rance* court quoted with approval the following language from Justice Rehnquist's dissent:

{¶ 45} "'The multiplicity of predicates creates problems when one attempts to apply *Blockburger.* If one applies the test in the abstract by looking solely to the wording of [the statutes], *Blockburger* would always permit imposition of cumulative sentences * * *. If, on the other hand, one looks to *the facts alleged in a particular indictment* brought under [the statute], then *Blockburger* would bar cumulative punishments for violating [the compound offense] and the particular predicate offense charged in the indictment, since proof of the former would necessarily entail proof of the latter.

{¶ 46} "'* * *

{¶ 47} "'If one tests the above-quoted statutes in the abstract, one can see that

rape is not a lesser included offense of felony murder, because proof of the latter will not necessarily require proof of the former. One can commit felony murder without rape and one can rape without committing felony murder. If one chooses to apply *Blockburger* to the *indictment* in the present case, however, rape is a 'lesser included offense' of felony murder because *in this particular case,* the prosecution could not prove felony murder without proving the predicate rape.

{¶ 48} "'Because this Court has never been forced to apply *Blockburger* in the context of compound and predicate offenses, we have not had to decide whether *Blockburger* should be applied abstractly to the statutes in question or specifically to the indictment as framed in a particular case. Our past decisions seem to have assumed, however, that *Blockburger*'s analysis stands or falls on the wording of the statutes alone. * * * Moreover, because the *Blockburger* test is simply an attempt to determine legislative intent, it seems more natural to apply it to the language as drafted by the legislature than to the wording of a particular indictment.'" *Rance*, supra, at 637, quoting *Whalen*, supra, at 709-711 (Rehnquist, J., dissenting).

{¶ 49} Adopting Justice Rehnquist's approach, the *Rance* court proceeded to compare the elements of involuntary manslaughter and aggravated robbery "in the statutory abstract."

{¶ 50} *Rance*, supra, at 637. It reasoned: "Involuntary manslaughter requires causing the death of another as a proximate result of committing or attempting to commit a felony. R.C. 2903.04(A). Aggravated robbery does not require that the victim be killed or even injured. Violation of the particular code section with which Rance was charged requires only that the defendant inflict, or attempt to inflict, serious physical

harm. Former R.C. 2911.01(A)(2), now (A)(3). Aggravated robbery requires a theft offense or an attempt to commit one. Involuntary manslaughter does not, since aggravated robbery is only one of the many felonies that may support a charge of involuntary manslaughter. Because each offense requires proof of an element that the other does not, they are not allied offenses of similar import." Id. at 639; see, also, *State v. Smith*, 80 Ohio St.3d 89, 117, 1997-Ohio-355 ("[Defendant] argues that because felony-murder contains all the elements necessary to prove the underlying robbery, simultaneous punishment for both crimes constitutes double jeopardy. Defendant's argument is not persuasive.").

{¶ 51} The foregoing case law indicates that Russell's felony murder and aggravated robbery convictions are not allied offenses of similar import. Aggravated robbery does not require a killing. And aggravated robbery is only one of a number of first or second-degree felony offenses of violence that will support a felony murder conviction. Therefore, felony murder does not require the commission of aggravated robbery.

{¶ 52} Before rejecting Russell's argument, however, we must consider the impact, if any, of the Ohio Supreme Court's recent decision in *Williams*, supra, which was decided in January 2010. *Williams* involved, inter alia, convictions for attempted felony murder and felonious assault. Addressing the allied-offense issue, the *Williams* court reasoned:

{¶ 53} "In order to commit the offense of attempted [felony] murder as defined in R.C. 2903.02(B), one must purposely or knowingly engage in conduct that, if successful, would result in the death of another as a proximate result of committing or

attempting to commit an offense of violence. Since felonious assault is an offense of violence, R.C. 2901.01(A)(9), the commission of attempted murder, as statutorily defined, necessarily results from the commission of an offense of violence, here, felonious assault. Accordingly, felonious assault as defined in R.C. 2903.11(A)(1) is an allied offense of attempted murder as defined by R.C. 2903.02(B) and 2923.02." *Williams*, supra, at ¶23; see, also, *State v. Reid*, Montgomery App. No. 23409, 2010-Ohio-1686, ¶37-42 (relying on *Williams* to find that felonious assault and felony murder were allied offenses).

{¶ 54} The same logic could be applied in Russell's case. In order to commit felony murder, one must cause the death of another as a proximate result of committing or attempting to commit an offense of violence that is a felony of the first or second degree. Aggravated robbery is an offense of violence that is a felony of the first or second degree. Therefore, the commission of felony murder, as statutorily defined, necessarily results from the commission of an offense of violence, here, aggravated robbery.

{¶ 55} The problem with adopting the foregoing analysis is that it requires us to apply the allied-offense test to the *language of Russell's indictment* rather than to the *statutory language*. In other words, to find that felony murder and aggravated robbery are allied offenses of similar import we necessarily must take into consideration the fact that aggravated robbery is the particular predicate offense underlying the felony murder charge in Russell's case. In *Rance*, however, the Ohio Supreme Court expressly rejected this approach, instead adopting Justice Rehnquist's view that the two offenses should be compared "in the statutory abstract." As in *Rance*, that would result in a

finding that felony murder and aggravated robbery are not allied offenses because crimes other than aggravated robbery will support a felony murder charge.

{¶ 56} Significantly, the Ohio Supreme Court has never overruled *Rance* or indicated that the conclusion it reached was incorrect. See *State v. Steward*, Franklin App. No. 08AP-974, 2009-Ohio-2990, ¶13 ("Nowhere in *Cabrales* did the court indicate that the conclusion reached in *Rance* was incorrect. The court indicated only that other courts have struggled to apply the test in *Rance.* Nowhere in *Cabrales* did the court indicate that the court itself misapplied the test in deciding *Rance.*"). In *Cabrales*, supra, the court simply clarified *Rance* by stressing that "nowhere does *Rance* mandate that the elements of compared offenses must exactly align for the offenses to be allied offenses of similar import under R.C. 2941.25(A)." *Cabrales*, supra, at 59. *Williams* also does not purport to overrule or modify *Rance*.

{¶ 57} Reading *Rance* and *Williams* together, we conclude that felonious assault is an allied offense of felony murder per *Williams*. We further conclude, however, that other offenses of violence capable of supporting a felony murder charge under R.C. 2903.02(B), including aggravated robbery, are not allied offenses of felony murder per *Rance*. This conclusion, which attempts to harmonize *Rance* and *Williams*, is not necessarily inconsistent. It is reasonable to say that every felony murder necessarily includes a felonious assault, which involves physical harm to persons. A defendant simply cannot kill his victim without causing physical harm. Therefore, felony murder and felonious assault necessarily must be allied offenses of similar import, even under the *Rance* approach. This is not true, however, of other predicate felonies that can support a felony murder charge. For example, as explained above, it is possible to

commit felony murder without also committing aggravated robbery, aggravated burglary, or rape. These offenses are not implicit in every felony murder. Therefore, it is reasonable to conclude that felony murder and felonious assault are allied offenses, as we did in *Reid*, supra, relying on *Williams*, and to conclude, relying on *Rance* and the other cases cited above, that felony murder and aggravated robbery are not allied offenses.

{¶ 58} Finally, while Russell has not raised the issue, we note that our conclusion herein is consistent with *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569. In *Brown*, the Ohio Supreme Court held that a defendant could not be convicted and sentenced separately under two subdivisions of the aggravated assault statute where the offenses resulted from a single act committed with a single animus. The court reasoned that the "subdivisions set forth two different forms of the same offense, in each of which the legislature manifested its intent to serve the same interest—preventing physical harm to persons." Id. at 455. Therefore, it concluded that the legislature did not intend the defendant's violations to be separately punishable, even though they did not qualify as allied offenses of similar import under *Rance* and *Cabrales*. Id.

{¶ 59} In *State v. Alsup*, Montgomery App. No. 23641, 2010-Ohio-4038, we recently recognized that after *Brown*, "the analysis does not stop with a determination that each of two offenses can be committed without committing the other. Even if the two offenses are distinct in that sense, one must go further and determine whether the societal interests protected by the two proscribing criminal statutes are distinct." Id. at ¶8. In that case, we relied on *Brown* to find that a defendant's convictions for felony

murder and felonious assault (deadly weapon) had to merge for sentencing. Assuming, arguendo, that each offense could be committed without committing the other, we concluded that the societal interest underlying both statutes was the same: protection of persons from physical harm. Id. at ¶9-12. Therefore, we held that felony murder and felonious assault convictions must merge. Id.

{¶ 60} Unlike *Brown* and *Alsup*, the societal interests underlying the felony murder and aggravated robbery statutes are not identical. As we recognized in *Alsup*, the societal interest underlying the felony murder statute is protection of persons from physical harm, specifically death. The societal interest underlying the aggravated robbery statute is two-fold. The purpose of the aggravated-robbery statute is to punish potential or actual harm to persons *and* to protect property. *State v. Canyon*, Hamilton App. Nos. C-070729, C-070730, C-070731, 2009-Ohio-1263, ¶35. The existence of an additional societal interest, the protection of property, underlying the aggravated robbery statute supports finding a legislative intent to consider aggravated robbery and felony murder as having different imports. Id. (finding that the felonious assault and aggravated robbery statutes were intended to protect different societal interests; while both statutes were enacted to prevent physical harm to persons, the aggravated robbery statute had the additional purpose of protecting property).

{¶ 61} Based on the reasoning set forth above, we conclude that Russell's felony murder and aggravated robbery convictions are not allied offenses of similar import.[6]

[6]In light of this conclusion, we need not decide whether Russell committed felony murder and aggravated robbery separately or with a separate animus. But, see, *State v. Gilbert*, Cuyahoga App. No. 90615, 2009-Ohio-463, ¶84 ("With respect to the aggravated robbery charge in count three, although the aggravated robbery occurred in

Nor are the societal interests served by the felony murder and aggravated robbery statutes the same. Accordingly, Russell's fourth assignment of error is overruled.

{¶ 62} In his final assignment of error, Russell contends the trial court erred in ordering restitution without considering his ability to pay it. Under R.C. 2929.19(B)(6), a trial court must consider an offender's present and future ability to pay before imposing a financial sanction such as restitution. "The trial court does not need to hold a hearing on the issue of financial sanctions, and there are no express factors that the court must take into consideration or make on the record." *State v. Culver,* 160 Ohio App.3d 172, 2005-Ohio-1359, ¶ 57. A trial court need not even state that it considered an offender's ability to pay. *State v. Parker*, Champaign App. No. 03CA0017, 2004-Ohio-1313, ¶42. However, the record should contain some evidence that the trial court considered the offender's ability to pay. In *Parker*, we upheld financial sanctions where the record included documentation of a defendant's financial affairs, including a presentence investigation report, and the record demonstrated that the trial court had considered the report for sentencing purposes.

{¶ 63} In the present case, the trial court did not indicate that it had considered Russell's present and future ability to pay restitution. Nor does the record support an inference that the trial court considered his ability to pay. With regard to Russell's present ability to pay, the record contains no testimony about his having any significant assets. He was living in an apartment at the time of the instant offenses, and he was

---

conjunction with the aggravated murder, the record reflects that a separate animus existed. The evidence reflects that in committing the aggravated robbery, Gilbert was seeking money from the victim. When the victim did not comply, Gilbert, acting with a separate animus, shot and killed the victim.").

working as a barber in California at the time of his arrest. He filed an affidavit of indigency in the proceedings below, and he was represented by the Ohio Public Defender's office. Although a presentence investigation report was filed in this case, it contains no additional information about Russell's financial affairs. Therefore, nothing in the record supports an inference that the trial court considered his present ability to pay restitution of more than $15,000.

{¶ 64} With regard to Russell's future ability to pay, trial testimony established that he once operated his own barber shop. Moreover, the record reflects that the trial court considered the presentence investigation report at sentencing.[7] The report indicated that Russell was twenty-nine years old at the time of the instant offenses. It further indicated that he was a licenced barber. The report also revealed that Russell had obtained a GED and had completed one and one-half years of college. Finally, the report characterized him as being in good physical and mental health. While these facts suggest that Russell might be employable, we note that he received a sentence of forty and one-half years to life in prison. As a result, Russell will be approximately seventy years old, at least, if he ever has the good fortune to be released from prison. In light of this fact, we cannot infer that the trial court considered Russell's future ability to pay when it ordered restitution of more than $15,000. Cf. *State v. Napper*, Ross App. No. 06CA2885, 2006-Ohio-6614, ¶16 (reversing a restitution order where it was unclear how a defendant with no assets and a prison sentence of fifty-one years to life would have the ability to pay). Accordingly, the fifth assignment of error is sustained.

[7]The presentence investigation report was from Russell's first trial. The trial court considered it in the present case after he was convicted again upon retrial.

{¶ 65} The judgment of the Montgomery County Common Pleas Court is reversed, and the cause is remanded for a full *Batson* analysis, as set forth supra. If the trial court finds no *Batson* violation, it may reinstate Russell's convictions and sentence (except for his restitution obligation). If the trial court finds that a *Batson* violation exists, then Russell will be entitled to a new trial. If, for whatever reason, the trial court is unable to determine whether *Batson* was violated, then Russell also will be entitled to a new trial. See *Robertson*, 90 Ohio App.3d at 726-727.

. . . . . .

GRADY, J., concurs.

FROELICH, J., concurring:

{¶ 66} I concur and write separately only to urge counsel and courts to critically examine peremptory challenges. See, e.g., Bringewatt, Snyder v. Louisiana: Continuing the Historical Trend Towards Increased Scrutiny of Peremptory Challenges, 108 Mich. L. Rev. 1283 (May 2010).

{¶ 67} Before the burden of going forward shifts to the party exercising a peremptory challenge, the party raising a *Batson* objection to that challenge must first establish a prima facie case of discrimination. However, one of the weaknesses of *Batson's* three-part test is the lack of guidance in the law as to what type and quantum of proof is necessary to constitute a prima facie case. A party (and it could be either the prosecution or defense) could exercise a peremptory challenge for totally discriminatory reasons and never have to present a race-neutral explanation. This is one of the reasons that some justices and commentators have urged a reconsideration

of peremptory challenges. *Batson*, 476 U.S. at 102-108 (Marshall, concurring); *Miller-El v. Dretke* (Miller-El II), (2005), 545 U.S. 231, 266-273, 125 S.Ct. 2317, 162 L.Ed.2d 196 (Breyer, concurring); and see, e.g., Straus, (Not) Mourning the Demise of the Peremptory Challenge: Twenty Years of *Batson v. Kentucky*, 17 Temp. Pol. and Civ. Rts. L. Rev. 309, 331 (Fall 2007).

{¶ 68} Counsel should be aware of such possibilities (of being required to establish a prima facie case or of having to explain the challenge) from the very beginning of jury selection and make an appropriate record; likewise, the court should ensure the record is made and be prepared to explain its determination of the presence or absence of a prima facie case or a race-neutral explanation.

. . . . . .

Copies mailed to:

Mathias H. Heck, Jr.
R. Lynn Nothstine
Robert A. Brenner
Hon. Michael T. Hall