

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23226
v.	:	T.C. NO. 2008 CR 1731
ROBERT MCGHEE	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	

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OPINION

Rendered on the 12th day of March, 2010.

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FROELICH, J.

{¶ 1} Robert McGhee was convicted after a jury trial in the Montgomery County Court of Common Pleas of felonious assault (serious harm) with a firearm specification, felonious assault (deadly weapon) with a firearm specification, carrying a concealed weapon, and having weapons while under disability. The trial court sentenced him to an aggregate term of ten years in prison.

{¶ 2} McGhee appeals from his convictions, arguing that his convictions were based on insufficient evidence and against the manifest weight of the evidence, that the court erred in admitting certain photographs at trial, that the court's jury instructions were erroneous, and that the court erred in failing to merge the two counts of felonious assault as allied offenses of similar import. For the following reasons, the convictions and sentences for the two counts of felonious assault, which are allied offenses of similar import, will be reversed and the case will be remanded for merger of those offenses. In all other respects, the judgment will be affirmed.

I

{¶ 3} The State's evidence at trial established the following facts:

{¶ 4} During the morning of April 24, 2008, Terry Martin received a telephone call from his friend, Delaquan Myers. Based on that call, Martin was going to get a pound of marijuana to sell to someone named "Mike" (who was later identified as McGhee) for a little more than \$1,000. A man called "E" was going to bring the marijuana to Martin. Martin did not know McGhee.

{¶ 5} Martin called McGhee to discuss where they were going to meet. At Martin's suggestion, Martin and McGhee arranged to meet at the Barrington Apartments on Riverside Drive in Harrison Township. Martin rode with Michael Jenkins and Myers in Jenkins' girlfriend's car to the Barrington Apartments. The three went into the apartment of Ashley Cross, located at 4373 Riverside Drive, Apt. K1, where they had socialized with Derrick Ogle, Cross's boyfriend, on numerous occasions. Jenkins and Myers left almost immediately after arriving. Martin spoke by phone with McGhee, who had never been to

Cross's apartment, and gave him directions to the apartment. Martin walked outside to wait for McGhee.

{¶ 6} At approximately 12:40 p.m., McGhee drove up in a red pick-up truck. Martin flagged him down, and McGhee walked up to him carrying a shoulder-strap briefcase. Martin did not see McGhee with a handgun. The two men went into Cross's apartment through the front door.

{¶ 7} After entering Cross's residence, Martin and McGhee talked briefly in the living room, and McGhee asked Martin for some change for some money. Martin pulled approximately \$1,000 from his pocket. McGhee then pulled a handgun from his shoulder bag. Martin believed that McGhee was trying to rob him, and the two started to "tussle." After a couple of seconds, McGhee shot Martin by the living room couch and ran out of the apartment, leaving Martin's money on the floor. The bullet passed through Martin's body and lodged in the living room wall by the television.

{¶ 8} Martin yelled for help twice and then crawled with his arms to a table to get his cell phone, which he retrieved by pulling down the table cloth. Martin called Myers and told Myers that he had been shot and needed to go to the hospital. Myers and Jenkins came to Cross's apartment, carried Martin to Jenkins' girlfriend's car, and drove him to Good Samaritan Hospital. Myers and Jenkins carried Martin into the emergency room, placed him on the floor, and left. Martin was later transported by Care-Flight to Miami Valley Hospital, where he remained for one month. Martin has been paralyzed from the waist down since he was shot.

{¶ 9} At approximately 3:00 p.m. on April 24, 2008 (the same day), Cross

contacted the Montgomery County Sheriff's Office to report a burglary at her apartment. The sheriff's office had also been informed by the Dayton police department that there was a shooting victim at Good Samaritan Hospital and that the police believed that the shooting had occurred on Riverside Drive. Detective Brad Daugherty and other officers were dispatched to Cross's apartment. Evidence Technician Talmadge Crosby, who had been at Cross's apartment that morning on an unrelated incident, noticed that the apartment was in "complete disarray," which it had not been earlier in the day; there was blood on the floor and door, a bullet hole in the wall with a .45 caliber bullet, a spent .45 caliber bullet casing, and an unspent .9 mm bullet, and objects from a table were all over the floor. No money or weapon was found in the apartment. Based on a photograph taken of the shooting victim at the hospital, Cross and her friends identified the victim as Martin. Cross identified Myers and Jenkins from photographs from the Good Samaritan Hospital security system.

{¶ 10} From other images from the Good Samaritan Hospital security system, Daugherty was able to identify Jenkins' girlfriend's car; he located the car later that day. Daugherty also attempted to find Myers and Jenkins, and he left voice mail messages for them. In the early hours of April 25, 2008, Jenkins returned Daugherty's voice mail messages, and he and Myers met with Daugherty. Jenkins and Myers did not identify a suspect. Daugherty retrieved Jenkins' bloody clothes from the attic of Jenkins' brother's apartment and Myers' bloody clothes from an apartment in Trotwood.

{¶ 11} Later that day, the detective obtained Martin's cell phone records and, from those records, identified McGhee as a suspect. On April 28, 2008, Detective Daugherty spoke to Martin about the shooting. Martin identified his shooter as "Mike." Daugherty

showed Martin a photo spread that included McGhee's photo; Martin selected McGhee's photo and identified him as the shooter.

{¶ 12} Daugherty attempted to contact McGhee, but was unsuccessful. McGhee was arrested on May 20, 2008, in Los Angeles, California, and was transported back to Ohio by the United States Marshals Service.

{¶ 13} McGhee testified on his own behalf, asserting that Martin and another unidentified man had tried to rob him inside Cross's apartment. According to McGhee, he began the day by working in his yard, but he had plans to smoke weed in the afternoon with two friends. Mid-morning, McGhee began to call around trying to find someone who could sell him a pound of marijuana. Eventually, McGhee called Delaquan Myers (aka "Cuz"), who was not a friend, but someone to whom he had sold marijuana in the past. Through Myers, McGhee made plans to buy a pound of marijuana for \$1,150 from Martin, who McGhee did not know.

{¶ 14} Initially, Martin told McGhee to go to the Meadows of Catalpa apartments. Martin later called McGhee and changed the location of the sale to the Barrington Apartments. McGhee got lost near the apartment complex and, by phone, Martin guided him to a parking lot. The two were on the phone with each other when McGhee arrived in his red truck and pulled next to a white truck in the lot. Martin waved, and McGhee exited his truck. McGhee asked if they were going inside. Martin responded affirmatively, and McGhee followed Martin into Cross's apartment.

{¶ 15} McGhee testified that Martin showed him a small bag of marijuana inside the apartment. Martin received a phone call and talked briefly while McGhee looked at the

marijuana. When Martin's call was completed, he asked McGhee if he (McGhee) had the money and asked McGhee to show him. McGhee took a glove out of his shoulder bag and retrieved \$1,065 from inside the glove. Martin then pulled a black trash bag off a table and uncovered an "uzi-looking" gun (a semi-automatic with a very long clip). Martin demanded the money; McGhee threw the money near the couch.

{¶ 16} As Martin walked toward the pile of money, he called, "Come on out, Cuz."

A man with a black bandanna covering his face came out from a hallway in the apartment. The man tried to hit McGhee in the head with a gun; McGhee blocked the swing and started fighting with the man. After the two men struggled for several seconds, McGhee heard Martin yell out, cock a weapon, and order McGhee to let the man go. McGhee heard a gunshot. He then pushed the man away and ran out of the apartment, leaving the money. McGhee denied that he had shot anyone. Defense counsel argued that Martin had been shot by the unknown man with whom McGhee had been fighting.

{¶ 17} McGhee testified that, shortly after leaving the apartment, he called Myers's and Martin's phones because he was angry; he got their voice mails. He then called his wife, because he was worried for her safety. The following morning, he and his wife left for California.

{¶ 18} In July 2008, McGhee was indicted for aggravated robbery with a firearm specification, felonious assault (serious harm) with a firearm specification, felonious assault (deadly weapon) with a firearm specification, and tampering with evidence. On October 27-30, 2008, a jury trial was held on the charges. The trial court entered a judgment of acquittal on the tampering with evidence charge for lack of sufficient evidence. The jury

could not reach a verdict on the remaining counts, and the court declared a mistrial.

{¶ 19} In December 2008, McGhee was indicted on two additional charges arising from the events of April 24, 2008: carrying a concealed weapon and having weapons while under disability.

{¶ 20} In January 2009, a second jury trial was held. The trial court dismissed the tampering with evidence charge on double jeopardy grounds, and the jury acquitted McGhee of the aggravated robbery charge. McGhee was found guilty of the remaining counts. The court merged the firearm specifications and imposed a three-year term of incarceration for the firearm specifications. The court sentenced McGhee to seven years for each of the felonious assault charges, eighteen months for carrying a concealed weapon, and five years for having weapons while under disability, to be served concurrently to each other, but consecutive to the firearm specification, for a total of ten years.

{¶ 21} McGhee raises five assignments of error on appeal. We will address them in an order that facilitates our analysis.

II

{¶ 22} McGhee's third assignment of error states:

{¶ 23} "APPELLANT'S CONVICTIONS ARE NOT SUPPORTED BY SUFFICIENT EVIDENCE TO PROVE GUILT BEYOND A REASONABLE DOUBT AND ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 24} In his third assignment of error, McGhee claims that his convictions were based on insufficient evidence and were against the manifest weight of the evidence.

{¶ 25} "A sufficiency of the evidence argument disputes whether the State has

presented adequate evidence on each element of the offense to allow the case to go to the jury or sustain the verdict as a matter of law.” *State v. Wilson*, Montgomery App. No. 22581, 2009-Ohio-525, at ¶10, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. When reviewing whether the State has presented sufficient evidence to support a conviction, the relevant inquiry is whether any rational finder of fact, after viewing the evidence in a light most favorable to the State, could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Dennis*, 79 Ohio St.3d 421, 430, 1997-Ohio-372, citing *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d. 560. A guilty verdict will not be disturbed on appeal unless “reasonable minds could not reach the conclusion reached by the trier-of-fact.” *Id.*

{¶ 26} In contrast, “a weight of the evidence argument challenges the believability of the evidence and asks which of the competing inferences suggested by the evidence is more believable or persuasive.” *Wilson* at ¶12. When evaluating whether a conviction is contrary to the manifest weight of the evidence, the appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider witness credibility, and determine whether, in resolving conflicts in the evidence, the trier of fact “clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.” *Thompkins*, 78 Ohio St.3d at 387, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶ 27} Because the trier of fact sees and hears the witnesses at trial, we must defer to the factfinder’s decisions whether, and to what extent, to credit the testimony of particular witnesses. *State v. Lawson* (Aug. 22, 1997), Montgomery App. No. 16288. However, we

may determine which of several competing inferences suggested by the evidence should be preferred. *Id.*

{¶ 28} The fact that the evidence is subject to different interpretations does not render the conviction against the manifest weight of the evidence. *Wilson* at ¶14. A judgment of conviction should be reversed as being against the manifest weight of the evidence only in exceptional circumstances. *Martin*, 20 Ohio App.3d at 175.

{¶ 29} On appeal, McGhee contends that the State's evidence was insufficient, because Martin's testimony, upon which the State's case primarily relied, was not sufficient evidence upon which to find the elements of the offenses proven beyond a reasonable doubt.

{¶ 30} We find ample evidence to support McGhee's convictions. The State presented evidence – and McGhee does not dispute – that Martin was shot in Cross's apartment and suffered serious physical harm, namely paraplegia, as a result of the gunshot wound. Additionally, the State presented evidence that blood was on the floor and front door of Cross's apartment, which had not been there earlier in the morning, and that a bullet was found lodged in a wall of the apartment. The apartment showed signs of a struggle. Martin testified that McGhee pulled a gun on him during a drug transaction and shot him; that evidence, if believed, is sufficient to establish that McGhee committed felonious assault both by causing physical harm by means of a deadly weapon and by causing serious physical harm. Moreover, Martin testified that McGhee pulled a gun out of his shoulder bag, which he had brought with him. A probation officer with the Greene County Adult Probation Department testified that McGhee had previously been convicted of trafficking in marijuana; a certified copy of the judgment entry in the Greene County case was admitted as State's

Exhibit 64. Thus, the State's evidence, if believed, also establishes that McGhee carried a concealed weapon and had a weapon while under disability. McGhee's convictions were based on sufficient evidence.

{¶ 31} McGhee further claims that his convictions were against the manifest weight of the evidence. He emphasizes that he and Martin were the only two witnesses who were present at the time of the shooting, and he claims that his version of events was supported by the physical evidence. Specifically, McGhee notes that the police recovered a black bandanna from Martin at the hospital and that an unfired .9 mm bullet was found on the floor of the apartment – in addition to the .45 caliber bullet retrieved from the wall of the apartment – which was consistent with McGhee's assertion that another individual with a second weapon was present in the apartment.

{¶ 32} At its core, the jury's verdicts were based on its apparent decision to believe Martin over McGhee. As stated above, Martin testified that McGhee attempted to rob him in Cross's apartment during their drug deal. Martin indicated that they struggled near the couch and that McGhee shot him during the course of their "tussle." In contrast, McGhee claimed that Martin and an unknown second individual had tried to rob him, resulting in the unknown individual's shooting Martin while that man struggled with McGhee.

{¶ 33} Although McGhee claims that his version of events was more credible, his version was not without flaws. The jury could have believed, as argued by the prosecutor on rebuttal, that if McGhee had struggled with the unknown man near the front door as McGhee claimed, the bullet would have hit a television set, not Martin and the part of the wall where the bullet hole was located. Thus, the jury could have concluded that the

struggle did not occur as McGhee had testified. In addition, McGhee's landlord at the time of the shooting testified that McGhee told her that he was having financial difficulties and would have his rent by the end of the month; McGhee had not paid his April rent. Immediately after the shooting, McGhee and his wife left Ohio and fled to California, where he remained until he was arrested and returned by federal marshals. McGhee did not return phone calls from Detective Daugherty and claimed not to know "why he was there" after he was brought back to Ohio. Accordingly, the jury could have also reasonably concluded that McGhee's testimony was not credible.

{¶ 34} We note that the jury's verdicts reflect apparent findings that McGhee, in fact, had a weapon, which he had concealed, and that McGhee shot Martin with a firearm in finding him guilty of both counts of felonious assault, carrying a concealed weapon, and having weapons while under disability.

{¶ 35} We acknowledge that Martin's version of events also had weaknesses. As defense counsel argued during closing arguments, it was Martin who had suggested the location of the drug deal, frequented the apartment where Martin and McGhee met, knew that McGhee was bringing approximately \$1,000 for the purchase of marijuana, and was friends with Myers, who had set up the deal. In contrast, McGhee had never been to Cross's apartment, had gotten lost on the way to the apartment, and was not friends with Myers. According to Martin's own testimony, McGhee left without taking any money from Martin, which could be seen as odd if McGhee had planned a robbery. Moreover, Martin did not call the police for assistance after he had been shot. A black bandanna was among Martin's property at the hospital, and a second unspent bullet of a different caliber was

found at the scene. In addition, Martin was on probation at the time of the trial, thus supporting McGhee's contention that he had a reason to lie. Based on this evidence, the jury could also have reasonably concluded that Martin planned the robbery of McGhee at the apartment rather than that McGhee had planned a robbery of Martin.

{¶ 36} It was the province of the jury to determine whose testimony should be credited and how much weight to give to that testimony, and we give substantial deference to the jury's determinations. We cannot conclude that the jury "lost its way" when it apparently credited Martin's testimony.

{¶ 37} The third assignment of error is overruled.

III

{¶ 38} McGhee's first assignment of error states:

{¶ 39} "THE FAILURE OF THE TRIAL COURT TO INCLUDE A SELF-DEFENSE INSTRUCTION IN THE JURY CHARGE CONSTITUTES PLAIN ERROR."

{¶ 40} In his first assignment of error, McGhee claims that the trial court should have instructed the jury on self-defense, even though such an instruction had not been requested by defense counsel.

{¶ 41} Self-defense is an affirmative defense which the accused has the burden to prove by a preponderance of the evidence. R.C. 2901.05(A); *State v. Jackson* (1986), 22 Ohio St.3d 281. "In order to establish self-defense, a defendant must prove: (1) that the defendant was not at fault in creating the situation giving rise to the affray; (2) that the defendant had a bona fide belief that he was in imminent danger of death or great bodily

harm and that his only means of escape from such danger was in the use of such force; and (3) that the defendant did not violate any duty to retreat or avoid the danger.” *State v. Davis*, Montgomery App. No. 21904, 2007-Ohio-6680, ¶14, citing *State v. Robbins* (1979), 58 Ohio St.2d 74.

{¶ 42} “A criminal defendant has the right to expect that the trial court will give complete jury instructions on all issues raised by the evidence.” *State v. Williford* (1990), 49 Ohio St.3d 247, 251. Jury instructions should be tailored to fit the facts of the case. *State v. Mullins*, Montgomery App. No. 22301, 2008-Ohio-2892, ¶9. “The trial court is not required to instruct the jury on self-defense in every situation in which its presentation is attempted; rather, a trial court need only instruct the jury on self-defense if the defendant ‘has introduced sufficient evidence, which, if believed, would raise a question in the minds of reasonable [jurors] concerning the existence of such issue.’” *State v. Warner* (Sept. 21, 2001), Lorain App. No. 96 CA 6534, quoting *State v. Melchior* (1978), 56 Ohio St.2d 15, paragraph one of the syllabus. “Evidence is sufficient where a reasonable doubt of guilt has arisen based upon a claim of self-defense. If the evidence generates only a mere speculation or possible doubt, such evidence is insufficient to raise the affirmative defense, and submission of the issue to the jury will be unwarranted.” (Citations omitted) *Melchior*, 56 Ohio St.2d at 20.

{¶ 43} A defendant’s failure to object to any of the jury instructions about which he complains on appeal waives all but plain error. *State v. Powell*, 176 Ohio App.3d 28, 2008-Ohio-1316, ¶13. “Plain error does not exist unless but for the error, the outcome of the trial clearly would have been otherwise.” *Id.*

{¶ 44} McGhee claims that he was entitled to an instruction on self-defense. He states that he entered the apartment at the invitation of Martin, that Martin and a second unknown man attempted to rob him by brandishing firearms, and that McGhee engaged in a struggle with the unknown man, who had tried to hit him (McGhee) on the head with a gun. Thus, McGhee asserts, he did not create the situation, he reasonably believed that he was in imminent danger of death or great bodily harm, and he had no reasonable avenue of retreat.

{¶ 45} Although McGhee's testimony satisfied certain elements of self-defense, an instruction of self-defense was, nonetheless, inconsistent with his testimony at trial, because McGhee repeatedly asserted that he had not fired a weapon. During his direct testimony, McGhee's counsel asked him:

{¶ 46} "Q: Did you pull a trigger on any gun in this –

{¶ 47} "A: No, sir.

{¶ 48} "Q: – apartment?

{¶ 49} "A: No." (Tr. 437)

{¶ 50} On cross-examination, during an exchange with the prosecutor about whether he had dropped out of school after the shooting, McGhee again denied having shot Martin. He testified:

{¶ 51} "A: I left [school] under emergency situations, so I did not actually drop out of those classes?

{¶ 52} "Q: Emergency situation was you shot a guy, right?

{¶ 53} "A: No, I did not shoot anyone." (Tr. 475-76.)

{¶ 54} Stated simply, McGhee never claimed that he had shot Martin, but that he

was entitled to do so in his own defense. Rather, he denied that he used force against Martin and claimed that Martin's unknown accomplice had shot Martin. Thus, the evidence at trial did not support an instruction on self-defense, and the trial court did not commit error – plain or otherwise – when it failed to give an instruction on self-defense.

{¶ 55} The first assignment of error is overruled.

IV

{¶ 56} McGhee's second assignment of error states:

{¶ 57} "THE TRIAL COURT ERRED IN CHARGING THE JURY WITH A COMPLICITY INSTRUCTION IN THE ABSENCE OF ANY EVIDENCE OF COMPLICITY."

{¶ 58} In his second assignment of error, McGhee claims that the trial court erred in giving a jury instruction on complicity, because there was no evidence that he aided or assisted any other person to commit the offenses of which he was convicted. McGhee made a general objection to the complicity instruction during the discussion between the court and counsel about the proposed jury instructions. The record alludes to a more-detailed, off-the-record discussion about the proposed complicity instruction, but the substance of that discussion, any motion or objection by McGhee, and any ruling by the court is not in the record.

{¶ 59} During the trial court's instruction on felonious assault, the trial court told the jury:

{¶ 60} "The law provides two ways in which criminal responsibility may be placed upon a defendant: First, that the defendant was the principal offender. That is, the

defendant did all of the acts which make up all of the elements of the particular offense charged in the indictment.

{¶ 61} “The other way for placing criminal responsibility on a defendant is that the defendant aided and abetted one or more persons in committing an offense or offenses, knowing that he was facilitating the offense charged in the indictment.

{¶ 62} “Whether a defendant is the principal offender or an aider or abettor, the State must prove each and every element of an offense beyond a reasonable doubt before a defendant can be found guilty of the offense.

{¶ 63} “If you find that the State proved beyond a reasonable doubt that the defendant committed all of the essential elements of the offenses charged in the indictment, your verdict must be guilty as to that offense, or if you find beyond a reasonable doubt that another person or persons committed the offense charged in the indictment, then you may consider whether or not the defendant aided and abetted such person or persons in the commission of the offense.

{¶ 64} “An aider and abettor is a person who knowingly aids, helps, assists, encourages or directs himself with another person or persons to commit an offense. An aider and abettor is regarded as if he were the principal offender and is just as guilty as if he personally performed every act constituting the offense.

{¶ 65} “The mere association with one who perpetrates an unlawful act does not render a person a participant in the crime so long as his acts are innocent; ***.”

{¶ 66} The decision whether to give a particular jury instruction is a matter left to the sound discretion of the trial court, and its decision will not be disturbed on appeal absent an

abuse of discretion. *Davis* at ¶14.

{¶ 67} R.C. 2923.03(A)(2), the complicity statute, provides: “No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following: *** (2) Aid or abet another in committing the offense.” A person who is complicit in an offense may be charged and punished as if he were the principal offender, and a charge of complicity may be stated under R.C. 2923.03 or in terms of the principal offense. R.C. 2923.03(F). “To support a conviction for complicity by aiding and abetting pursuant to R.C. 2923.03(A)(2), the evidence must show that the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime, and that the defendant shared the criminal intent of the principal. Such intent may be inferred from the circumstances surrounding the crime.” *State v. Johnson*, 93 Ohio St.3d 240, 245, 2001-Ohio-1336; *State v. Wilson*, Montgomery App. No. 22581, 2009-Ohio-525, ¶27.

{¶ 68} The State argued to the jury that Martin had been set up by McGhee, Jenkins, and Myers. Both Martin’s and McGhee’s testimony indicated that the purported marijuana deal had been arranged by Myers and McGhee. Jenkins and Myers had purchased marijuana from McGhee in the past. On April 24, 2008, Myers and Jenkins drove Martin to Cross’s apartment and left him there. Within minutes of leaving the apartment, McGhee called Myers’ cell phone. No weapon or money was found in the apartment when Cross returned home and called the police. After Detective Daugherty made contact with Jenkins and Myers, the detective obtained the clothes that these two men had been wearing when they took Martin to the hospital. Jenkins’ bloody clothes were located in a trash bag in the

attic of Jenkins' brother's apartment; nothing else was stored in the attic. Myers' clothing was retrieved at an apartment in Trotwood. Although the State's evidence of complicity was not strong, the evidence, if believed, was legally sufficient to establish that McGhee was complicit with Jenkins and Myers in planning a robbery of Martin in Cross's apartment. Although McGhee was ultimately found not guilty of aggravated robbery, the trial court did not abuse its discretion in giving a complicity instruction to the jury over defense counsel's objection.

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

V

{¶ 70} McGhee's fifth assignment of error states:

{¶ 71} "THE TRIAL COURT ERRED IN ADMITTING SEVERAL PHOTOGRAPHS WHICH WERE CUMULATIVE AND PREJUDICIAL."

{¶ 72} In his fifth assignment of error, McGhee claims that the trial court abused its discretion in admitting, over his objection, State's Exhibits 42 through 48, which consisted of photographs taken of Martin while he was at Good Samaritan Hospital on April 24, 2008. Exhibits 42 through 45 depicted Martin's back and exit wound. Exhibits 46 through 48 showed Martin lying on his back in the hospital bed. McGhee argues that the unfair prejudice caused by the inflammatory nature of the photographs substantially outweighed the photographs' probative value. McGhee concedes that "one or two such photographs are admissible under the balancing test in Evid.R. 403," but he claims that the photographs, as a whole, are cumulative and unduly prejudicial.

{¶ 73} In general, relevant evidence is admissible unless its probative value is

substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury. Evid.R. 402; Evid.R. 403(A). The decision whether to admit evidence is left to the sound discretion of the trial court, and a reviewing court will not reverse that decision absent an abuse of discretion. *State v. Sage* (1987), 31 Ohio St.3d 173, paragraph two of the syllabus.

{¶ 74} The trial court overruled McGhee’s objections to Exhibits 42 through 48, stating:

{¶ 75} “*** [A]n element of the State’s charge is serious physical harm and physical harm and the photographs are certainly are relevant to that element, and I do not find them to be either unduly cumulative as to the presentation of Mr. Martin’s injuries that he displayed yesterday, because I think there is a difference between, quite frankly, how he looks now after several months of recovery and how he looked at the night of the incident.

{¶ 76} “And I also don’t believe that these are unduly prejudicial. They’re not gory. They simply show Mr. Martin in a hospital setting with a bullet wound. ***”

{¶ 77} Having reviewed the photographs, we agree with the trial court’s assessment. The trial court did not abuse its discretion when it admitted Exhibits 42 through 48 over McGhee’s counsel’s objections.

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

VI

{¶ 79} McGhee’s fourth assignment of error states:

{¶ 80} “THE TRIAL COURT ERRED IN CONVICTING THE APPELLANT OF BOTH FELONIOUS ASSAULT COUNTS WHICH WERE ALLIED OFFENSES OF

SIMILAR IMPORT.”

{¶ 81} McGhee’s fourth assignment of error claims that the trial court committed plain error when it failed to merge the two counts of felonious assault as allied offenses of similar import. We agree.

{¶ 82} R.C. 2941.25 provides:

{¶ 83} “(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.

{¶ 84} “(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.”

{¶ 85} “R.C. 2941.25 codifies the double jeopardy protections in the federal and Ohio constitutions, which prohibit courts from imposing cumulative or multiple punishments for the same criminal conduct unless the legislature has expressed an intent to impose them. R.C. 2941.25 expresses the legislature’s intent to prohibit multiple convictions for offenses which are allied offenses of similar import per paragraph (A) of that section, unless the conditions of paragraph (B) are also satisfied.” *State v. Barker*, Montgomery App. No. 22779, 2009-Ohio-3511, at ¶22, citing *State v. Rance*, 85 Ohio St.3d 632, 1999-Ohio-291.

{¶ 86} In determining whether offenses are allied offenses of similar import under

R.C. 2941.25, courts are not to employ a strict textual comparison of the offenses. *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625. Rather, offenses are allied “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[.]” *Id.* at ¶26.

{¶ 87} Here, McGhee was convicted of felonious assault under R.C. 2903.11(A)(1) and felonious assault under R.C. 2903.11(A)(2) based on a single gunshot wound to a single victim. The conduct involved a single act undertaken with a single animus. Accordingly, the two counts of felonious assault are allied offenses of similar import. *State v. Cotton*, 120 Ohio St.3d 321, 2008-Ohio-6249. We have held that the failure to merge allied offenses of similar import constitutes plain error, even when the defendant received concurrent sentences. *State v. Coffey*, Miami App. No. 2006 CA 6, 2007-Ohio-2.

{¶ 88} The State asserts that the trial court’s failure to merge the two felonious assault counts was not plain error, because the Supreme Court of Ohio did not state, until *State v. Harris*, 122 Ohio St.3d 373, 2009-Ohio-3323, that violations of R.C. 2903.11(A)(1) and (2) are allied offenses of similar import when the charges arise from the same act.

{¶ 89} In *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, the Supreme Court of Ohio addressed whether alternative means of committing an offense under R.C. 2903.12, the aggravated assault statute, constitute allied offenses of similar import. The Court held that, in light of the statutory language, “the General Assembly did not intend violations of R.C. 2903.11(A)(1) and (A)(2) to be separately punishable when the offenses result from a single act undertaken with a single animus. Thus, aggravated assault in violation of R.C. 2903.12(A)(1) and (A)(2) are allied offenses of similar import.” *Brown* at ¶40.

{¶ 90} A few months later, on the authority of *Brown*, the Supreme Court reversed the First District Court of Appeals to the extent that court of appeals had held that two counts of felonious assault under R.C. 2903.11(A)(1) and (2) were not allied offenses of similar import. *Cotton*, supra. Based on *Cotton*, the Supreme Court reaffirmed in *Harris* that “convictions for felonious assault defined in R.C. 2903.11(A)(1) and felonious assault defined in R.C. 2903.11(A)(2) are allied offenses of similar import, and therefore a defendant cannot be convicted of both offenses when both are committed with the same animus against the same victim.” *Harris* at ¶20.

{¶ 91} *Cotton* was rendered in December of 2008, prior to McGhee’s sentencing. Accordingly, the trial court was on notice that McGhee’s two counts of felonious assault, which were committed by a single act against one victim, were allied offenses of similar import. Nevertheless, even if *Harris* had announced a new rule, we apply new rules of law to cases pending on direct appeal. *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, ¶3-4; *State v. Evans* (1972), 32 Ohio St.2d 185, 186.

{¶ 92} Where two offenses must be merged as allied offenses of similar import, the prosecutor must elect which offense it will pursue. *Harris* at 21-23. “If, upon appeal, a court of appeals finds reversible error in the imposition of multiple punishments for allied offenses, the court must reverse the judgment of conviction and remand for a new sentencing hearing at which the state must elect which allied offense it will pursue against the defendant.” *State v. Whitfield*, – Ohio St.3d –, 2010-Ohio-2, ¶25. The Supreme Court has provided additional guidance to the trial court, as follows:

{¶ 93} “On remand, the trial court should fulfill its duty in merging the offenses for

purposes of sentencing, but remain cognizant that R.C. 2941.25(A)'s mandate that a 'defendant may be convicted of only one' allied offense is a proscription against sentencing a defendant for more than one allied offense. Nothing in the plain language of the statute or in its legislative history suggests that the General Assembly intended to interfere with a determination by a jury or judge that a defendant is guilty of allied offenses. As the state asserts, by enacting R.C. 2941.25(A), the General Assembly condemned multiple sentences for allied offenses, not the determinations that the defendant was guilty of allied offenses.

{¶ 94} "Because R.C. 2941.25(A) protects a defendant only from being punished for allied offenses, the determination of the defendant's guilt for committing allied offenses remains intact, both before and after the merger of allied offenses for sentencing. Thus, the trial court should not vacate or dismiss the guilt determination." (Footnote omitted.) *Whitfield* at ¶26-27.

{¶ 95} The fourth assignment of error is sustained.

VII

{¶ 96} The convictions and sentences for the two counts of felonious assault, which are allied offenses of similar import, will be reversed and the case will be remanded for merger of those offenses. In all other respects, the judgment will be affirmed.

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FAIN, J. and GRADY, J., concur.

Copies mailed to:

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