[Cite as *State v. Gray*, 2010-Ohio-1139.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. Julie A. Edwards, P.J.
Plaintiff-Appellee	:	Hon. W. Scott Gwin, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 09-CA-50
MARION GRAY	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Richland County Court of Common Pleas Case No. 2007-CR-560
JUDGMENT:	REVERSED AND REMANDED
DATE OF JUDGMENT ENTRY:	March 12, 2010

APPEARANCES:

For Plaintiff-Appellee:	For Defendant-Appellant:
KIRSTEN PSCHOLKA-GARTNER 0077792 Assistant Richland County Prosecutor 38 South Park Street Mansfield, Ohio 44902	WILLIAM FITHIAN, III 0012689 111 North Main Street Mansfield, Ohio 44902

Delaney, J.

{¶1} Defendant-Appellant, Marion Gray, appeals his conviction and sentence for one count of felonious assault, a felony of the first degree, in violation of R.C. 2903.11(A)(1), and one count of murder, an unclassified felony, in violation of R.C. 2903.02(B). The State of Ohio is Plaintiff-Appellee.

{¶2} On Friday, March 9, 2007, James Malone and his girlfriend, Kamala Snelling drove to Mansfield, Ohio, where they planned to have dinner. On the way, Mr. Malone stopped at the B.P. gas station located at Longview Boulevard and North Main Street to buy beer and cigarettes. Mr. Malone got out of the car and went into the convenience store. As she waited in the car, Ms. Snelling observed Appellant walk around the driver's side of her car. He was standing with his back to her, and she thought that he was having a conversation with someone in another car. Mr. Malone returned with his purchases and placed them in the car. He then reached into his pocket and pulled out his money to give Kamala twenty dollars. At that time, Appellant turned around, reached through the driver's side window, and grabbed several twenty-dollar bills from Mr. Malone's hand. Kamala testified that Appellant and Mr. Malone struggled, grabbing at each other's arms; however, Appellant was able to rip the money out of Mr. Malone's hands, scratching Mr. Malone's hands in the process. During the struggle, Appellant had the upper half of his body inside the car in an unsuccessful attempt to steal Ms. Snelling's purse. Kamala testified that she was able to break up the fight and get Appellant out of her car by putting the car in reverse. Appellant withdrew when the car coasted backwards, yelling “[r]un me over, you fucking bitch.” (1T. at 275). Kamala was yelling at James Malone to leave the scene because she was scared that Appellant

might have a gun. Mr. Malone put the car in drive and pulled out of the B.P. parking lot. However, he became angry over the theft of his money, and decided to get his money back from Appellant. Mr. Malone made a U-turn in the road and pulled back into the B.P. parking lot.

{¶3} Sometime around 10:00 p.m., Amber Kanz and Rodney Iceman stopped at the same B.P. station. Mr. Iceman got out of the car to go to the convenience store. While Amber was waiting in the car, Appellant got into the passenger side of the car and demanded her purse. When she refused, Appellant tried to take it from her. Ms. Kanz testified that she grabbed her purse and pulled back. At the same time, she was yelling in an attempt to get Mr. Iceman's attention. Mr. Iceman ran back to the car, and pulled Appellant out. The two men briefly fought before Amber Kanz honked her car horn, scaring Appellant into leaving.

{¶4} Amber testified that after the confrontation between Rodney Iceman and Appellant, she backed her car out of the parking space. However, before she left the parking lot, she saw James Malone and Kamala Snelling pulling into the gas station. Rodney Iceman yelled Mr. Malone's name, but was unable to get his attention. They saw Mr. Malone park his car, get out, and engage in a confrontation with Appellant.

{¶5} Kamala Snelling testified that Appellant approached Mr. Malone as soon as he got out of the car. At that time, Kamala heard Mr. Malone say that he wanted his money back. Appellant and James Malone then began to argue and push each other until they were standing behind Ms. Snelling's car. At some point during this confrontation, Amber Kanz approached Kamala Snelling to ask what was going on. She stated that she planned to call the police; however, she did not make the call because

Mr. Iceman said that he had warrants out for his arrest. Tracy Cox, another bystander, also witnessed this confrontation between Appellant and Mr. Malone, and, at one point, told the convenience store clerk to call the police.

{¶6} Kamala Snelling, Amber Kanz, and Tracy Cox all testified that they saw Appellant punch Mr. Malone several times in the head before he fell and hit his head on the pavement. Ms. Snelling testified that the first punch knocked Mr. Malone onto his hands and knees. As he struggled to get back up, Appellant punched him a second time on the forehead. This blow threw Mr. Malone back, causing him to strike his head hard on the pavement.

{¶7} Amber Kanz testified that Appellant punched Mr. Malone in the head, knocking him down. Appellant punched Mr. Malone again as he tried to get up, causing Mr. Malone to strike his head on the pavement.

{¶8} Tracy Cox testified that Appellant was “beating the tar” out of James Malone. She indicated that the second or third punch knocked Mr. Malone off his feet, and she heard his head smack on the pavement.

{¶9} Kamala Snelling testified that as she ran over to where Mr. Malone was laying, she heard appellant yell “I think I killed that son of a bitch.” At that point, Tracy Cox testified that she saw Appellant run over to the open driver's side door of the victim's car, reach under the seat and grab something. As bystanders attempted to help Mr. Malone, Appellant jumped into a waiting car and fled the scene. Amber Kanz and Rodney Iceman also left before police arrived because they thought Mr. Malone would be okay.

{¶10} Appellant did not argue that he acted in self-defense or that he was provoked; rather he testified that the decedent slipped and fell causing the injury to his head. Appellant denied ever striking Mr. Malone.

{¶11} Mr. Malone was unresponsive after the incident, and never regained consciousness. He was transported to Med Central Hospital where emergency surgery was performed in an attempt to reduce the swelling on his brain. However, due to his massive head injuries, Mr. Malone was ultimately declared brain dead and was removed from life support on March 15, 2007. An autopsy revealed injuries consistent with Mr. Malone being struck in the face with massive force before falling and hitting his head on the pavement. Forensic Pathologist Dr. William Cox testified that the blow to the face alone caused sufficient damage to result in Mr. Malone's death.

{¶12} Appellant was initially arrested on a warrant for felonious assault. After Mr. Malone's death, he was indicted by the Richland County Grand Jury on one count of aggravated robbery, one count of robbery alleging that he caused physical harm to James Malone while committing a theft offense, one count of robbery alleging that he used force against Amber Kanz while attempting to commit a theft offense, one count of felonious assault, and one count of felony murder.

{¶13} The jury found Appellant guilty of the physical harm robbery of James Malone, the force robbery of Amber Kanz, the felonious assault of James Malone, and the murder of James Malone. He was acquitted on the charge of aggravated robbery. The trial court sentenced Appellant to seventeen years to life.

{¶14} Appellant filed a direct appeal, raising multiple assignments of error.

{¶15} On June 12, 2008, at oral argument on direct appeal, counsel for Appellant argued that Appellant's convictions should be reversed in light of the Supreme Court's April 9, 2008, decision in *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917.

{¶16} This court affirmed Appellant's convictions on July 16, 2008. See *State v. Gray*, 5th Dist. No. 2007-CA-64, 2008-Ohio-6345. Thereafter, counsel for Appellant filed a motion for reconsideration in light of the *Colon* decision. This Court granted Appellant's motion on September 8, 2008, and reopened Appellant's direct appeal for consideration of whether Appellant's indictment was defective because it omitted the culpable mental states for the charges of robbery. On February 4, 2009, this court reversed Appellant's convictions for the robberies of Amber Kanz and James Malone, and remanded the case to the trial court for further proceedings. *State v. Gray*, 5th Dist. No. 2007-CA-64, 2009-Ohio-455.

{¶17} Subsequent to this court's remand, the trial court resentenced Appellant on the remaining felony murder and felonious assault charges. At the resentencing hearing, Appellant's counsel argued that no separate animus existed between the felonious assault and murder charges to allow for separate sentences. The State objected, stating that a separate animus existed for each separate punch that Appellant exacted on Malone. The trial court then sentenced Appellant to seven years on the felonious assault to run concurrent with the fifteen year to life sentence on the felony murder conviction. It is from this most recent resentencing that Appellant now appeals.

{¶18} Appellant raises one Assignment of Error:

{¶19} "I. THE TRIAL COURT ERRED BY SENTENCING APPELLANT SEPARATELY ON THE CRIMES OF FELONIOUS ASSAULT, OHIO REVISED CODE SECTION 2903.11(A)(1) AND FELONY MURDER, OHIO REVISED CODE SECTION 2903.02(B) WHEN THERE WAS ONLY ONE CRIMINAL ACT COMMITTED."

I.

{¶20} In Appellant's sole assignment of error, he argues that the trial court erred by failing to merge his convictions for one count of murder in violation of R.C. 2903.02(B) and one count of felonious assault, in violation of R.C. 2903.11(A)(1). In light of the Ohio Supreme Court's recent decision in *State v. Williams*, ___ Ohio St.3d ___, Slip Opinion No. 2010-Ohio-147, we agree.

{¶21} Ohio's allied offenses statute, R.C. 2941.25, provides:

{¶22} "(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.

{¶23} "(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."

{¶24} The Ohio Supreme Court, in *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117, 526 N.E.2d 816; and again in *State v. Rance* (1999), 85 Ohio St.3d at 636, 710 N.E.2d 699, set forth a two part test to determine whether crimes constitute allied offenses of similar import. Recently, in *State v. Cabrales*, 118 Ohio St.3d 54, 2008-

Ohio-1625, 886 N.E.2d 181, the Supreme Court stated, "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. at paragraph one of the syllabus. The Court further stated that 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. at ¶31.

{¶25} On January 27, 2010, the Supreme Court again examined the allied offenses analysis in *State v. Williams*, ___ Ohio St.3d ___, Slip Opinion No. 2010-Ohio-147. In *Williams*, the court analyzed whether felonious assault is an allied offense of attempted murder. Specifically, the court determined that felonious assault, as defined in R.C. 2903.11(A)(1) is an allied offense of attempted murder, as defined in R.C. 2903.02(B) and 2923.02 and that felonious assault, as defined in R.C. 2903.11(A)(2) is an allied offense of attempted murder, as defined in R.C. 2903.02(A) and 2923.02.

{¶26} In *Cabrales,* the Supreme Court held that an allied offense analysis requires a comparison of the elements of the offense in the abstract, without considering the evidence in the case, but does not require an exact alignment of those elements. Therefore, in *Williams*, the Court analyzed the offenses of felonious assault as defined in R.C. 2903.11(A)(1) and attempted murder, as defined in R.C. 2903.02(B) and 2923.02, as follows:

{¶27} "In order to commit the offense of attempted 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.

{¶28} "The next step in the *Cabrales* analysis requires a determination of whether the offenses were committed separately or with a separate animus. Williams knowingly engaged in conduct that, if successful, would have resulted in the death of another as a proximate result of committing felonious assault. He did so by knowingly firing a gun at McKinney and paralyzing him with one bullet. Thus, he committed the offenses of attempted murder and felonious assault with a single act and animus. Accordingly, while he may be found guilty of both offenses, he may be sentenced for only one. See *State v. Whitfield*, --- Ohio St.3d ----, 2010-Ohio-2, --- N.E.2d ----, at ¶ 17." *Williams*, supra at ¶¶23-24.

{¶29} Based upon the Supreme Court's analysis in *Williams*, we find that the commission of felonious assault in this case, as defined in R.C. 2903.11(A)(1) is an allied offense of murder, as defined in R.C. 2903.02(B). Appellant punched Malone three times in succession, which resulted in his death.

{¶30} Pursuant to the Supreme Court's holding in *State v. Whitfield*, --- Ohio St.3d ----, 2010-Ohio-2, --- N.E.2d ----, at paragraph one of the syllabus, "[t]he state

retains the right to elect which allied offense to pursue on sentencing on a remand to the trial court after appeal."

{¶31} Accordingly, we reverse the judgment of the trial court and in accordance with the Supreme Court's decisions in *Williams* and *Whitfield*, remand this cause to the trial court for further proceedings consistent with this opinion.

By: Delaney, J.

Edwards, P.J. and

Gwin, J. concur.

HON. PATRICIA A. DELANEY

HON. JULIE A. EDWARDS

HON W. SCOTT GWIN

[Cite as *State v. Gray*, 2010-Ohio-1139.]

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
MARION GRAY	:	
Defendant-Appellant	:	Case No. 09-AP-50

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Richland County Court of Common Pleas is reversed and this cause is remanded for further proceedings consistent with this Opinion and the law. Costs assessed to Appellee.

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HON. PATRICIA A. DELANEY

_____
HON. JULIE A. EDWARDS

_____
HON. W. SCOTT GWIN