**[Cite as *State v. Menifee*, 2009-Ohio-3089.]**

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

---

JOURNAL ENTRY AND OPINION
**No. 91017**

---

## STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

## BRANDON MINIFEE

DEFENDANT-APPELLANT

---

**JUDGMENT:**
**AFFIRMED IN PART, REVERSED IN PART, AND REMANDED**

---

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-498906

**BEFORE:** Boyle, J., McMonagle, P.J., and Dyke, J.

**RELEASED:** June 25, 2009

**JOURNALIZED:**

**ATTORNEY FOR APPELLANT**

Steve W. Canfil
1370 Ontario Street
Standard Bulding
Suite 2000
Cleveland, Ohio 44113

**ATTORNEYS FOR APPELLEE**

William D. Mason
Cuyahoga County Prosecutor

BY: Michael D. Horn
Timothy R. Fadel
Assistant Prosecuting Attorneys
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MARY J. BOYLE, J.;

**{¶ 1}** Defendant-appellant, Brandon Minifee, appeals his convictions for murder, felonious assault, and having weapons while under a disability. Finding some merit to the appeal, we affirm in part, reverse in part, and remand.

**{¶ 2}** In July 2007, the Cuyahoga County Grand Jury indicted Minifee on five counts: Count 1, aggravated murder, in violation of R.C. 2903.01(A); Count 2, murder, in violation of R.C. 2903.02(B); Counts 3 and 4, felonious assault, in violation of R.C. 2903.11(A)(1) and (2); and Count 5, having weapons while under a disability, in violation of R.C. 2923.13(A)(3). Counts 1 through 4 also had one- and three-year firearm specifications attached.

**{¶ 3}** The following evidence was presented at a bench trial.

**{¶ 4}** Michelle Pinson testified that at the time of the incident, June 29, 2007, she and the victim, Ronald Pierce, had been "girlfriend[-]boyfriend for about three years." At that time, Pierce lived with his mother, his nephew, Daryl Callahan, and Daryl's girlfriend, at the corner of Quimby Avenue and East 70th Street, with the house facing East 70th Street.

**{¶ 5}** Pinson recalled that on the night of the murder, she had been watching movies with Pierce and his friend, Ronald Sanders, whom they called "Sandman." They got done watching around 10:30 or 11:00 p.m. Pierce and

Sanders then went outside. Pinson remained in the house in a downstairs bedroom and watched televison.

**{¶ 6}** Soon after Pierce and Sanders went outside, Pinson testified that she received several phone calls from Pierce. The first time he called, he told her "not to go outside." She asked him why, and he told her, "I told you just don't go outside." Pierce called her a second time and said, "what are you doing? Didn't I tell you not to go outside." She told him that she had not gone outside, and he hung up. On the third call, Pierce told her to look outside, but not open the door, to see if she could see "Cheezy" (whom she later identified as Minifee). She looked outside, but did not see "Cheezy." A short time later, she heard six to eight gunshots. She then heard a "bamming at the door," and Pierce "came stumbling in." Pierce told her, "call 911, I've been shot." He did not say anything else. Pinson said that she knew Minifee "[f]rom the neighborhood."

**{¶ 7}** Callahan testified that on the night of Pierce's murder, he got home from school around 11:30 p.m. When he did, Pierce and Sanders were watching television in the living room. Callahan said that he went upstairs to go to bed. His girlfriend was upstairs already. He fell asleep for a brief period of time and was awoken by six gunshots. He said that he looked out his bedroom window and saw a man "standing with a skeleton shirt on" near a car parked on the street. He said the shirt was black, with a white skull, bones, and arms. He

explained that it looked like the man was "hunched down" and "he tried to take off running." Callahan then went downstairs and saw that Pierce had been shot.

**{¶ 8}** Sanders testified that on the day Pierce was murdered, he had gotten off work around 9:30 p.m. and went to Pierce's house with some movies. When he and Pierce were done watching movies, they went outside. While they were on the porch, "Cheezy" came up. Sanders knew "Cheezy" through Pierce, but said that he did not know his real name. According to Sanders, "Cheezy" accused Pierce of owing him money for "work." Sanders later found out that "Cheezy" meant "dope." Sanders asked "Cheezy" how much Pierce owed him, and noticed that "Cheezy" had a gun "down on the side of him, *** on his left side." Sanders told "Cheezy" that he would get the money for him.

**{¶ 9}** Pierce and Sanders then went to Sanders's house to get the money. Sanders testified that he gave $200 to Pierce to give to "Cheezy," even though Pierce denied that he owed "Cheezy" money. Sanders drove Pierce back to his house and dropped him off. He did not see "Cheezy" hanging around Pierce's house at that time. As Sanders pulled away, he said that he heard "two shots," but thought it might have been fireworks because it was "around the 4th of July." Sanders went home, and later received a call from Pinson telling him that Pierce had been shot. Sanders said that he did not see Pierce with a gun that night nor had he ever seen Pierce with a gun.

**{¶ 10}** Patricia Gunn testified that she lived across the street from Pierce on East 70th Street; she lived there for 28 years. Pierce was her grandson's uncle. On the day of the murder, Gunn had been outside with her grandchildren all day. Throughout the day, she heard Pierce and "Cheezy" arguing. She said that "Cheezy" kept telling Pierce, "you gone give me my shit back or my money." Pierce replied, "I didn't take your shit." She said that prior to that day, Pierce and "Cheezy" were friends; they "hung out" together and "Cheezy" called Pierce "uncle."

**{¶ 11}** Gunn testified that later that evening she heard "Cheezy" and Pierce "get into it again." She was upstairs in her bedroom when she looked out the window and saw "Cheezy" pull out a gun and tell Pierce, "I'm not playing with you, man, I'm going to kill you. I want my money or my shit." She said she had no problem hearing or seeing this from her second-floor bedroom window.

**{¶ 12}** Gunn stated that a while later, she heard a car pull up and then a car door slam. She looked out her window again and "heard [Pierce] say, oh, you punk mother-fucka, you waiting on me." She explained that when Pierce said that, he was "headed up the steps" to his porch. And then, "the gunshot started, just boom, boom, boom." She said the shots came from behind a black truck parked on Quimby Avenue between the truck and a red car. She could not see the shooter, but saw a man come out from where the shots had come. She

watched him walk toward East 70th Street and then saw him take his black "hoodie" off. When he did, she saw that the man was "Cheezy." She said she could see him "real good" under the street light. Gunn said he was wearing a black "hoodie" with white "stripes or something" on it. She did not see Pierce shooting a gun.

**{¶ 13}** Gunn testified that she had known "Cheezy" since he was about 14 years old; he had been coming around their neighborhood "creating havoc, selling dope, just mischief since he was young." She said that "five or six years ago," she and "Cheezy" had a "bad altercation." In 2002, "Cheezy" shot at her house and she fired three or four shots back at him.

**{¶ 14}** On cross-examination, Gunn agreed that she did not tell the police that she saw Minifee shoot Pierce on the night of the murder. When asked why, she said that nobody asked her. She told Pierce's mother three or four days later and then called the police.

**{¶ 15}** Dan Galita, M.D., a forensic pathologist and deputy coroner at the Cuyahoga County coroner's office, testified that Pierce was deceased when he arrived at the hospital. He died of a single shot in the right thigh that pierced his femoral artery and vein.

**{¶ 16}** Lisa Przepyszny, a forensic scientist at the Cuyahoga County coroner's office, testified that she collected gunshot residue samples from Pierce's

hands. Gunshot primer residue was identified on Pierce's left hand. She opined that the person who shot Pierce was "greater than approximately four feet" away from Pierce.

**{¶ 17}** Officer Gregory Hunter testified that he responded to Pierce's house in the early morning hours of June 29, 2007. He interviewed three witnesses at the scene. He obtained "Cheezy's" name as a suspect, and he also learned of a possible motive, that "[t]he victim allegedly found and sold drugs belonging to the suspect. It was further learned that the victim was given an opportunity to do one of two things, return the drugs or to pay for the drugs which I understood to be an amount of $200. Further intent reveals the victim refused to pay that amount or return the drugs, and the victim was told if he did not do either, he would be killed."

**{¶ 18}** Detective Charles Teel, a crime-scene evidence technician, testified he found five shell casings at the scene that were shot from a nine millimeter Luger. He found two of the shell casings on Pierce's front walkway, one on the north side of Pierce's house, one near a fire hydrant in front of the house, and one on the front tree lawn.

**{¶ 19}** Detective James Ealey, a firearm ballistic examiner, testified that the bullet that was recovered from Pierce was shot from a .38 caliber or .357 caliber revolver. He explained that a revolver is not like a semiautomatic gun,

which means that shell casings remain in the gun when it is fired. Detective Ealey stated that all five shell casings that were found at the scene were fired from the same semiautomatic, nine millimeter gun. Detective Ealey explained that shell casings usually travel three to eight feet when they are ejected from a semiautomatic gun.

**{¶ 20}** Shahid Saifullah testified to his lengthy criminal history, as well as to his case that was still pending at the time of Minifee's trial. He stated that the prosecutor told him that in exchange for his testimony, he would talk to Saifullah's judge at sentencing, but that the prosecutor did not promise him anything.

**{¶ 21}** Saifullah testified that he knew Minifee from the neighborhood as "Cheezy." He said they had "always been cool with each other." He had been friends with Pierce for almost 50 years; they grew up together. According to Saifullah, he was with Pierce "three to five minutes before he was shot and killed." Saifullah explained that he was riding his bicycle "down 70th" when Pierce stopped him and asked him if he wanted to sell his bike. Saifullah asked him why, and Pierce told him he wanted it for "the African guy that lives with the Catholic priest on Quimby, he needs a bike to get back and forth to work." Saifullah said he offered to give the bike to the man, but Pierce told him no, the man would buy it.

**{¶ 22}** According to Saifullah, he and Pierce walked to the Catholic priest's home, but no one answered the door. They walked back to Pierce's house. Saifullah said that he left his bike with Pierce and went to see his girlfriend "around the corner on Belvedere." Saifullah identified his bike in a photo. The bike was located in Pierce's home, in the front hallway, near blood on the floor.

**{¶ 23}** Saifullah testified that three to five minutes after he left Pierce, he heard a series of gunshots. He said he was sitting on a porch on Belvedere when he heard them. He waited a few minutes and then walked toward Pierce's house. By that time, the police were already there.

**{¶ 24}** Saifullah explained that he was arrested for his pending case on July 12, 2007. When he entered the city jail, he saw Minifee. Minifee told Saifullah that he turned himself in. Saifullah told Minifee that he was "lucky" he turned himself in because people in the neighborhood did not turn him in because they were "going to kill [him]."

**{¶ 25}** Three days later, Saifullah said that he saw Minifee in the "holding area." He said they talked for about one-and-a-half hours. Saifullah asked Minifee what happened. He said that Minifee told him that Pierce shot at him first. According to Saifullah, Minifee also told him that he would not have shot at Pierce if Pierce had not shot at him. Minifee further explained to Saifullah that he had left some crack cocaine in an abandoned house across the street from

Pierce's house. Minifee said he left for a short time; when he came back, the drugs were gone. A girl in the neighborhood told Minifee that she had bought crack cocaine from Pierce. Minifee saw the girl's crack cocaine and identified it as the drugs he had left in the abandoned house. Minifee then went to Pierce and demanded that Pierce give him the "stuff" or $200.

**{¶ 26}** On cross-examination, Saifullah said that the "first information on the street" was that "four guys with black hoodies came from behind the house, and attempted to rob [Pierce]." Saifullah stated that he heard at least 25 shots. Saifullah also said that he did not see Sanders with Pierce that night. Nor did Pierce tell him that Minifee had been to his house demanding money.

**{¶ 27}** Cheryl Gardner, Pierce's sister and Callahan's mother, testified that she lived across the street from her mother, Pierce, and her son, on East 70th Street. She had known Minifee all her life and considered him to be her nephew. Minifee's uncle was her best friend and his grandmother was "real dear" to her. Gardner testified that her brother and Minifee hung out together everyday and both of them sold drugs. On the day of the shooting, Pierce had told Gardner about a disagreement he was having with Minifee.

**{¶ 28}** Gardner said that evening she got home from work around 10:30 p.m. She was in her upstairs bedroom when she heard gunshots. She looked out of her bedroom window and saw Minifee "running *** from [her] mother's house

towards [her] house." She did not see any weapons on him. She said that he was wearing a "black shirt with skeleton like body, head on it." When she saw Minifee earlier that day, he had been wearing the same thing, along with a "hoody-like pullover."

**{¶ 29}** Gardner testified that she talked to Minifee's grandmother later, and Minifee had told his grandmother that Pierce was shooting at him.

**{¶ 30}** On cross-examination, Gardner stated that she did not tell the police what she saw until a week after Pierce had been shot. She also stated that she told her mother that Pierce had been killed and that she heard it was Minifee. But she agreed that she did not tell her mother what she saw on the night of the shooting.

**{¶ 31}** Detective Michael Smith of the homicide unit testified that Pinson told him at the hospital that Pierce had called her and told her to look outside to see if she saw "Cheezy." She described "Cheezy" as a black male, 21 - 25 years old, approximately 180 pounds, and he "lived in the area of East 66th through East 68th and Hough." Detective Smith stated that he first learned that "Cheezy" was Minifee from an unidentified citizen. He then interviewed Sanders, Pierce's mother, Gardner, and Gunn. Gunn and Gardner both identified Minifee from a photo.

**{¶ 32}** At the close of the state's case, Minifee moved for a Crim.R. 29 acquittal, which the trial court denied. Minifee rested. The prosecutor requested the court to "consider as a lesser included offense to the aggravated murder the charge of voluntary manslaughter."

**{¶ 33}** The trial court found Minifee not guilty of count one, aggravated murder, but guilty of the remaining four counts as set forth in the indictment: murder with the firearm specifications, both counts of felonious assault with the firearm specifications, and having weapons while under a disability.

**{¶ 34}** The trial court sentenced Minifee 15 years to life for murder; three years for the firearm specifications, to be served consecutively; one year for having weapons while under a disability, to be served consecutively; and five years for each felonious assault conviction, to be served concurrently, for an aggregate term of 19 years to life in prison. It also notified him that he would be subject to five years of postrelease control upon his release from prison.

**{¶ 35}** It is from this judgment that Minifee appeals, raising five assignments of error for our review:

**{¶ 36}** "[1.] The indictment charging appellant with murder, with attendant firearm specifications, failed to contain the element of culpable mental state, rendering such indictment fatally flawed and his conviction on count two voidable.

**{¶ 37}** "[2.] Counts three and four fail to sufficiently allege the attendant firearm specifications.

**{¶ 38}** "[3.] There was insufficient evidence to sustain the convictions.

**{¶ 39}** "[4.] The convictions are against the manifest weight of the evidence.

**{¶ 40}** "[5.] By virtue of their relationship to each other as lesser included offenses or allied offenses, the convictions must merge into a single conviction."

Felony-Murder Indictment

**{¶ 41}** In his first assignment of error, Minifee argues that the indictment charging him with felony murder under R.C. 2903.02(B) was defective because it failed to include an essential element of murder - recklessly -, and the result is "both structural and plain error" under *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624. We disagree.

**{¶ 42}** Count 2 of the indictment against Minifee alleged that he:

**{¶ 43}** "[U]nlawfully did cause the death of Ronald Pierce, as a proximate result of the offender committing or attempting to commit an offense of violence that is a felony of the first or second degree, in violation of R.C. 2903.02 of the Revised Code."

**{¶ 44}** Counts 3 and 4 charged Minifee with two subsections of felonious assault. Count 3 alleged that Minifee "did knowingly cause serious physical harm to Ronald Pierce" under R.C. 2903.11(A)(1). Count 4 alleged that Minifee

"knowingly did cause or attempt to cause physical harm to Ronald Pierce by means of a deadly weapon or dangerous ordnance, to- wit[,] firearm, as defined in [R.C. 2923.11(A)(2)]."

**{¶ 45}** The felony-murder statute, R.C. 2903.02(B), became effective on June 30, 1998. *State v. Miller*, 96 Ohio St.3d 384, 2002-Ohio-4931, _21. It provides in relevant part:

**{¶ 46}** "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 ***."

**{¶ 47}** In *Miller*, the Ohio Supreme Court discussed the mens rea necessary to commit felony murder when felonious assault is the predicate offense. It stated:

**{¶ 48}** "In reversing the felony murder conviction, the court of appeals critically misconstrued the standard of mens rea necessary to commit felony murder. Felonious assault is defined as knowingly causing, or attempting to cause, physical harm to another by means of a deadly weapon. *** If defendant knowingly caused physical harm to his wife by firing the gun at her through a holster at close range, he is guilty of felonious assault. The fact that she died from her injuries makes him guilty of felony murder, regardless of his purpose."

**{¶ 49}** The First District Court of Appeals and the Ninth District Court of Appeals have addressed the issue raised here in light of *Colon*, i.e., whether a felony-murder indictment needs to specify the mens rea element. See *State v. Dubose*, 1st Dist. No. C-70397, 2008-Ohio-4983, discretionary appeal not allowed by 120 Ohio St.3d 1508; and *State v. Sandoval*, 9th Dist. No. 07CA009276, 2008-Ohio-4402, discretionary appeal not allowed by Slip Opinion No. 2009-Ohio-1638. In both cases, the defendants had been charged with felony murder and felonious assault. In *Dubose*, the defendant argued that the felony-murder indictment was defective because it failed to include the required mens rea element. Id. at _13. In *Sandoval*, the defendant argued that the felony-murder indictment was defective because it did not include the mens rea element of knowingly. Id. at _23.

**{¶ 50}** The First District explained:

**{¶ 51}** "[F]elony murder is one of the few crimes in Ohio that has no mens rea element directly attached to it. The mens rea element is found in the predicate offense and does not arise from the catchall culpable mental state of recklessly found in R.C. 2901.21(B). *** '[A] person commits felony murder pursuant to R.C. 2903.02(B) by proximately causing another's death while possessing the mens rea element set forth in the underlying first or second

degree felony offense of violence. In other words, the predicate offense contains the mens rea element of the felony murder.'" *Dubose* at _17.

**{¶ 52}** The Ninth District stated:

**{¶ 53}** "Contrary to Sandoval's assertion, it was not necessary for the State to include the mens rea of 'knowingly' in Count One of the indictment as well as in Count Two. Count Two of the indictment specifies that Sandoval 'knowingly' committed felonious assault. Count One specifies that his felony murder charge rested upon his having committed felonious assault pursuant to R.C. 2903.11(A)(1). Thus, a reasonable person viewing the indictment would understand all of the essential elements of Count One and that a conviction for felony murder could only stand upon a finding that Sandoval knowingly caused [the victim's] death through his commission of the predicate offense of felonious assault. Compare *Colon I*, supra (involving a statute that did not explicitly set forth a mens rea, did not rely upon a predicate offense, and depended upon the default mens rea of 'recklessly'). While it would not have been error for the State to also include the mens rea of 'knowingly' in Count One, the omission of the same did not make the indictment defective. Consequently, Sandoval's second assignment of error lacks merit." *Sandoval* at _23.

**{¶ 54}** We agree with the thorough reasoning of the First and Ninth Appellate Districts on this issue. Accordingly, we find that the indictment

charging Minifee with felony murder was not defective because it did not include the mens rea element.

**{¶ 55}** Minifee's first assignment of error is overruled.

Firearm Specifications

**{¶ 56}** In his second assignment of error, Minifee argues that the indictment was also defective with respect to the one- and three-year firearm specifications. He maintains that the firearm specifications were defective because they were duplicitous, i.e., they were worded in the disjunctive – either the firearm was about his person or under his control (one-year specification), or he displayed, brandished, or indicated that he possessed the firearm or actually used it (three-year specification). Therefore, he argues that "it leaves open the possibility that seven grand jurors did not agree on a particular factual theory of criminal conduct." We disagree.

**{¶ 57}** The Ohio Supreme Court recently addressed this issue, although with respect to a jury, not a grand jury. See *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787. The court stated, "[a]lthough Crim.R. 31(A) requires juror unanimity on each element of the crime, jurors need not agree to a single way by which an element is satisfied. *Richardson v. United States* (1999), 526 U.S. 813, 817. Applying the federal counterpart of Crim.R. 31(A), the *Richardson* court stated that a 'jury need not always decide unanimously which of several possible

sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime.'" *Gardner* at _38. See, also, *State v. Gilbert*, 8th Dist. No. 90615, 2009-Ohio-463, _17-19 (firearm specifications found not to be duplicitous when there "was substantial evidence to support each alternative means of the specifications").

**{¶ 58}** Here, we find that just as in *Gilbert*, there was substantial evidence presented to support each alternative means of the firearm specifications.

**{¶ 59}** Accordingly, Minifee's second assignment of error is overruled.

Sufficiency and Weight of the Evidence

**{¶ 60}** In his third assignment of error, Minifee contends that the state did not present sufficient evidence to convict him of murder and felonious assault, and in his fourth assignment of error, he maintains that his convictions for those crimes were against the manifest weight of the evidence. We disagree.

**{¶ 61}** A challenge to the sufficiency of the evidence supporting a conviction requires a court to determine whether the state has met its burden of production at trial. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52. On review for sufficiency, courts are to assess not whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. Id. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact

could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

**{¶ 62}** A challenge to the manifest weight of the evidence, however, attacks the credibility of the evidence presented. *Thompkins* at 387. Because it is a broader review, a reviewing court may determine that a judgment of a trial court is sustained by sufficient evidence, but nevertheless conclude that the judgment is against the weight of the evidence. Id., citing *State v. Robinson* (1955), 162 Ohio St. 486, 487.

**{¶ 63}** In determining whether a conviction is against the manifest weight of the evidence, the court of appeals functions as a "thirteenth juror," and, after "reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Thompkins* at 387, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175. Reversing a conviction as being against the manifest weight of the evidence and ordering a new trial should be reserved for only the "exceptional case in which the evidence weighs heavily against the conviction." Id.

**{¶ 64}** After viewing the evidence in a light most favorable to the prosecution, we conclude that any rational trier of fact could have found that the

essential elements of murder and felonious assault were proven beyond a reasonable doubt. We further find, after reviewing the entire record and considering all of the evidence, that Minifee's convictions were not against the manifest weight of the evidence.

**{¶ 65}** The evidence, if believed, established that Minifee and Pierce had been arguing for most of the day because Minifee accused Pierce of taking his drugs; that Minifee had also threatened to kill Pierce earlier that day; that Minifee showed up at Pierce's home later that evening with a gun in his hand and threatened Pierce again; and that Minifee was outside Pierce's home immediately after Pierce had been shot. This evidence is sufficient to establish beyond a reasonable doubt that Minifee shot Pierce.

**{¶ 66}** In addition, this is not the exceptional case where the fact finder created such a manifest miscarriage of justice that it should be reversed and a new trial granted. Although we agree with the trial court that the most "troubling" evidence was Saifullah's testimony since it seemed to contradict the testimony of every other witness regarding what occurred on the night Pierce was murdered, we conclude that in the end, the judge, as the fact finder, was free to believe the other witnesses over Saifullah.

**{¶ 67}** Accordingly, Minifee's third and fourth assignments of error are overruled.

Allied Offenses

**{¶ 68}** In his fifth assignment of error, Minifee maintains that his two felonious-assault convictions are allied offenses and should be merged. He further argues that the newly merged felonious assault convictions should then merge with the murder conviction since murder and felonious assault are also allied offenses.[1]

**{¶ 69}** We note at the outset that at the sentencing hearing, the prosecutor stated to the judge: "I believe, for purposes of sentencing, the felonious assault counts that the Defendant was convicted of would merge with the murder that he was convicted of." The trial court stated "Okay," but then did not merge the convictions. Rather, the trial court sentenced Minifee concurrently on those charges. Minifee did not object, but we find that if the offenses are indeed allied, then this was plain error. See *State v. Whitfield*, 8th Dist. No. 90244, 2008-Ohio-3150, _37, discretionary appeal allowed by 120 Ohio St.3d 1486, 2009-Ohio-278 ("[i]t is plain error to impose multiple sentences for allied offenses of similar import, even if the sentences are run concurrently").

[1]Minifee actually argues that felonious assault is a lesser included offense of felony murder. But we glean from his brief that he intended to argue that they were allied offenses since he contends that the offenses should merge into the felony-murder conviction, not into the lesser included offense of felonious assault.

**{¶ 70}** As we stated in *State v. Sutton*, 8th Dist. No. 90172, 2008-Ohio-3677, discretionary appeal allowed by Slip Opinion No. 2009-Ohio-614, this court "sees numerous cases where trial judges find certain counts are allied offenses and proceed to sentence concurrently; while the outcome in the ultimate sentence may be the same, the appropriate manner of 'merging' is to make a finding that the counts are allied offenses, proceeding to sentence only on the greater felony (in this case 'felonies') and not sentencing at all upon the allied counts." Id. at _94, fn. 17.

**{¶ 71}** As for the state of the law on allied offenses, we could not agree more with how one commentator described it, namely, that "one would be hard-pressed to find an area of Ohio law that is more confused than this one."[2] Wading through cases applying the ten-year-old opinion, *State v. Rance*, 85 Ohio St.3d 632, 634, 1999-Ohio-291, as well as the more recent cases attempting to "clarify" the law, i.e., *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, and *State v. Winn*, 121 Ohio St.3d 413, 2009-Ohio-1059, is no small task. But this is exactly what we are going to attempt to do in this case.

---

[2]See Russ Bensing, The Briefcase, Commentary and Analysis of Ohio Law (Oct. 9, 2008), "Another go-around on Rance," at http://briefcase8.com/2008/10/09/another-go-around-on-rance.

**{¶ 72}** Addressing the question of "whether cumulative punishments for two separate offenses stemming from the same conduct violate the Double Jeopardy Clause is determined by legislative intent." *State v. Winn*, 121 Ohio St.3d 413, 2009-Ohio-1059, _6. Courts discern legislative intent "by applying R.C. 2941.25, Ohio's multiple-count statute." Id. "R.C. 2941.25(B) demonstrates a clear indication of the General Assembly's intent to permit cumulative sentencing for the commission of (1) offenses of dissimilar import and (2) offenses of similar import committed separately or with separate animus." *Brown* at _17, citing *Rance* at 636.

**{¶ 73}** R.C. 2941.25 provides:

**{¶ 74}** "(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.

**{¶ 75}** "(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."

**{¶ 76}** In *Rance*, the Ohio Supreme Court adopted Justice Rehnquist's dissent in *Whalen v. United States* (1980), 445 U.S. 684, 709-711, and held that offenses were of similar import if the offenses "correspond to such a degree that the commission of one crime will result in the commission of the other." *Brown* at _20. The *Rance* court further held that courts should compare the statutory elements in the abstract, which is what led to much of the confusion. Id.

**{¶ 77}** Last year, in *Cabrales*, the Ohio Supreme Court recognized that courts have struggled with the "abstract-elements" test that it set forth in *Rance*. Id. at _16. In explaining the "inconsistent, unreasonable, and, at times, absurd results" that *Rance* caused, the high court stated:

**{¶ 78}** "For example, the Second District Court of Appeals considered whether involuntary manslaughter and aggravated vehicular homicide are allied offenses of similar import when there is only one victim. *State v. Hendrickson*, 2d Dist. No. 19045, 2003-Ohio-611. Finding that it was compelled to apply *Rance*, the court compared the elements of the two offenses and because the elements did not correspond to such a degree that commission of one crime will result in the commission of the other, they were not allied offenses. Id. at _25-26. Thus, the court held that Hendrickson could be sentenced to both involuntary manslaughter and aggravated vehicular homicide. Id. at _28. However, the court stated, 'Despite the misalignment of offenses in the abstract,

only one death occurred under the facts of the present case. Consequently, Hendrickson should have been sentenced either for involuntary or for aggravated vehicular homicide, not both.' Id. at _26, see also *State v. Waldron* (Sept. 1, 2000), 11th Dist. No. 99-A-0031, (Christley, J., concurring) (by holding that involuntary manslaughter and aggravated vehicular homicide are not allied offenses of similar import when there was only one victim, 'we have not only said that appellant was guilty of killing two people, we are saying that he was guilty of killing each victim two times')." *Cabrales* at _16, 20.

**{¶ 79}** The Supreme Court further explained that many appellate courts had misinterpreted *Rance* by requiring a "strict textual comparison" of the offenses. *Cabrales* at _21. It disagreed that "only where the offenses *exactly overlap* are they allied offenses of similar import." (Emphasis added.) Id. It stated, "nowhere does *Rance* mandate that the elements of compared offenses must exactly align in order to be allied offenses of similar import under R.C. 2941.25(A). To interpret *Rance* as requiring a strict textual comparison would mean that only where all the elements of the compared offenses coincide exactly will they be considered allied offenses of similar import under R.C. 2941.25(A). Other than identical offenses, we cannot envision any two offenses whose elements align exactly. We find this to be an overly narrow interpretation of *Rance's* comparison test." Id. at _22.

**{¶ 80}** The *Cabrales* court explained that the application of R.C. 2941.25 involves, as it always has, a two-tiered analysis. Id. at _14. In the first step, courts must compare the elements of the two crimes to determine if the offenses are allied offenses of similar import under R.C. 2941.25(A). Id. But in doing so, *Cabrales* clarified that "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." (Emphasis added.) Id. at paragraph one of the syllabus, _24.

**{¶ 81}** If the offenses are allied, then "'[i]n the second step, the defendant's conduct is reviewed to determine whether the defendant can be convicted of both offenses. If the court finds either that the crimes were committed separately or that there was a separate animus for each crime, the defendant may be convicted of both offenses.'" *Cabrales* at _14, quoting *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117.

**{¶ 82}** In analyzing the offenses in *Cabrales*, the Supreme Court held that "possession under 2925.11(A) [the offender must knowingly obtain, possess, or use a controlled substance] and trafficking under R.C. 2925.03(A)(1) [the

offender must knowingly sell or offer to sell a controlled substance] are not allied offenses of similar import because trafficking under R.C. 2925.03(A)(1) requires an intent to sell, but the offender need not possess the controlled substance in order to offer to sell it. Conversely, possession requires no intent to sell. Id. at _29. Thus, the "commission of one offense does not necessarily result in the commission of the other." Id.

**{¶ 83}** The Supreme Court went on to compare possession and trafficking under R.C. 2925.03(A)(2), which requires that "the offender must knowingly prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance, knowing, or having reason to know, that the substance is intended for sale." The court reasoned that "[i]n order to ship a controlled substance, deliver it, distribute it, or prepare it for shipping, etc., the offender must 'hav[e] control over' it. R.C. 2925.01(K) (defining 'possession')." Thus, the court held that "trafficking in a controlled substance under R.C. 2925.03(A)(2) and possession of that same controlled substance under R.C. 2925.11(A) are allied offenses of similar import, because commission of the first offense necessarily results in commission of the second." Id. at _30. The court further determined that the offender "trafficked and possessed the marijuana with a single animus: to sell it" and thus, he could not be convicted of both offenses. Id. at _31.

**{¶ 84}** Five months after *Cabrales*, the Ohio Supreme Court revisited allied offenses of similar import in *Brown*, supra. While generally upholding the two-tiered test for allied offenses set forth in *Rance*, as clarified in *Cabrales*, the court addressed the additional factor of "societal interests," i.e., "'whether the legislature manifested an intention to serve two different interests in enacting the two statutes.'" *Brown* at _35, quoting *Whalen*, 445 U.S. at 713 (Rehnquist, J., dissenting).

**{¶ 85}** In *Brown*, the Ohio Supreme Court first found that aggravated assault under R.C. 2903.12(A)(1) and (A)(2) would not be allied offenses of similar import when comparing the elements under *Rance*, as clarified by *Cabrales* (because the offenses vary in the degree of harm required; one proscribes "serious physical harm" regardless of the means used to cause that harm, while the other proscribes the lesser "physical harm" by means of a deadly weapon or dangerous ordnance). Id. at _34. But the high court did not end its analysis there. The court went on to note that the tests for allied offenses of similar import are rules of statutory construction designed to determine legislative intent. Id. at _35. The court reasoned that while the two-tiered test for determining whether offenses constitute allied offenses of similar import is helpful in construing legislative intent, it is not necessary to resort to that test when the intent of the legislature is clear from the language of the statute. Id.

The court then concluded that the subdivisions of the aggravated assault statute set forth two different forms of the same offense, in each of which the legislature manifested its intent to serve the same interest, i.e., preventing physical harm to persons, and they were therefore allied offenses. Id. at _39.

**{¶ 86}** Most recently, the Ohio Supreme Court addressed whether kidnapping and aggravated robbery are allied offenses of similar import. See *Winn*, supra. The court compared the elements of each in the abstract. Id. at _21. It found that in comparing the elements, "[i]t is difficult to see how the presence of a weapon that has been shown or used, or whose possession has been made known to the victim during the commission of a theft offense, does not also forcibly restrain the liberty of another." Id. Accordingly, the court found, quoting *Cabrales*, that "the two offenses are 'so similar that the commission of one necessarily results in the commission of the other.'" Id. In rejecting a "strict textual comparison" of the elements, the court reasoned, "[w]e would be hard pressed to find any offenses allied if we had to find that there is no conceivable situation in which one crime can be committed without the other." Id. at _24.

**{¶ 87}** Notably, in *Winn*, the Ohio Supreme Court found aggravated robbery and kidnapping to be allied offenses of similar import under the *Cabrales* test, and did *not* consider the "societal interests" underlying the statutes to determine legislative intent as it did in *Brown*. The *Winn* court

stated that in Ohio, we discern legislative intent on this issue by applying R.C. 2941.25, as the statute is a "clear indication of the General Assembly's intent to permit cumulative sentencing for the commission of certain offenses." Id. at _6. Thus, although the Ohio Supreme Court in *Brown* appeared to expand the first step of the allied offense analysis by adding the additional factor of "societal interests" protected by the statutes, in light of the Supreme Court's analysis in *Winn*, it now appears that "societal interests" is a tool to be used in certain circumstances to determine if the intent of the legislature is clear from the criminal statutes being compared.

**{¶ 88}** In sum, after reviewing the whirlwind of *Cabrales*, *Brown*, and *Winn*, we find that under the first step, courts must still "compare the elements in the abstract," but that the elements do not have to "exactly align" (as courts had previously interpreted *Rance* to mean). If when comparing the elements, "the offenses are so similar that the commission of one will necessarily result in the commission of the other [but not *both*, meaning the opposite does not have to be true], then the offenses are allied offenses of similar import." That means that if *either crime* "is wholly subsumed within the other," then the offenses are of similar import. *Cabrales* at ¶39 (Fain, J., concurring in judgment).

**{¶ 89}** It may be helpful to state the test another way. When comparing the offenses, *if either offense* could not be committed without also committing the

other (for example, as in *Cabrales*, one cannot commit trafficking by knowingly preparing for shipment, transporting, or preparing for distribution, etc., without also possessing the drugs), then the offenses are allied. But if *both* offenses require "proof of an element that the other does not," meaning *both* offenses can be committed without committing the other (for example, as in *Cabrales*, one does not have to ever possess drugs to commit trafficking by knowingly selling or offering to sell), then the offenses are not allied. *Cabrales* at ¶ 28 (Fain, J., concurring in judgment), citing *State v. Palmer*, 148 Ohio App.3d 246, 2002-Ohio-3536, ¶11. And if the offenses are allied, then courts must then address the second prong of the two-tiered test, i.e., whether the offender committed the offenses with a separate animus.

**{¶ 90}** We now turn to the offenses in the present case.

A. *Felonious Assaults under R.C. 2903.11(A)(1) and (A)(2)*

**{¶ 91}** We first address the question whether the two felonious assault convictions are allied offenses of similar import. We conclude that they are.

**{¶ 92}** Minifee was convicted of two subsections of the felonious assault statute under R.C. 2903.11(A)(1) and (A)(2). R.C. 2903.11 provides:

**{¶ 93}** "(A) No person shall knowingly do either of the following:

**{¶ 94}** "(1) Cause serious physical harm to another ***;

**{¶ 95}** "(2) Cause or attempt to cause physical harm to another *** by means of a deadly weapon or dangerous ordnance."

**{¶ 96}** "Serious physical harm to persons" is defined by R.C. 2901.01 and includes "any physical harm that carries a substantial risk of death." R.C. 2901.01(A)(5)(b). In contrast, "physical harm to persons" includes "any injury, illness, or other physiological impairment, regardless of its gravity or duration." R.C. 2901.01(A)(3).

**{¶ 97}** Just as the Ohio Supreme Court explained in *Brown* regarding nearly identical subsections of aggravated assault:

**{¶ 98}** "The only elements shared by these two alternate theories of aggravated assault are those of mens rea and physical harm. But while the offenses share the element of physical harm, they vary in the degree of harm required. R.C. 2903.12(A)(1) proscribes causing 'serious physical harm' regardless of the means used to cause that harm, while subsection (A)(2) proscribes causing the lesser 'physical harm' by means of a deadly weapon or dangerous ordnance. Thus, these two forms of aggravated assault do not satisfy the two-tiered test for allied offenses of similar import set forth in *Rance* and clarified in *Cabrales* because, comparing the elements of the offenses in the abstract, the commission of one will not necessarily result in commission of the other." *Brown* at _34.

**{¶ 99}** But in *Brown*, the Ohio Supreme Court went on to describe the various assault offenses:

**{¶ 100}** "R.C. Chapter 2903 defines four assault offenses: (1) felonious assault, (2) aggravated assault, (3) assault, and (4) negligent assault. R.C. 2903.11 through 2903.14. See also Legislative Service Commission Summary of Am.Sub.H.B. 511, supra, at 5.

**{¶ 101}** "R.C. 2903.12 defines the offense of aggravated assault. Division (A) of that section sets forth the distinguishing factor of provocation and the requisite mens rea for the offense: knowingly. Then subdivisions (1) and (2) set forth two means of committing the offense – causing serious physical harm to another, or causing or attempting to cause physical harm by means of a deadly weapon or dangerous ordnance. These 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. See *Whalen*, 445 U.S. at 714 (Rehnquist, J., dissenting).

**{¶ 102}** "In light of this statutory language, we conclude that 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. Accordingly, we

affirm that portion of the decision of the court of appeals holding that Brown can be convicted of and sentenced only for one offense of aggravated assault." *Brown* at _39-40.[3]

**{¶ 103}** The provisions of felonious assault under R.C. 2903.11(A)(1) and (A)(2) are substantially similar to those of aggravated assault analyzed by the Supreme Court in *Brown*. Even though the two subsections of felonious assault "are not aligned in the abstract," they are nonetheless "so similar that the commission of one offense will necessarily result in the commission of the other." *Cabrales*, paragraph one of the syllabus. Thus, they meet the test for allied offenses as it was redefined by *Cabrales*.

**{¶ 104}** Moreover, there is nothing in the record to indicate that Minifee committed two separate acts or committed them with a separate animus. The evidence points to a single gunshot wound to Pierce's femoral artery that led to his death over an argument regarding missing drugs.

---

[3]After *Brown*, the Ohio Supreme Court reversed a decision by this court, *State v. Johnson*, 8th Dist. No. 88169, 2007-Ohio-2225, in a one-paragraph opinion. See *State v. Johnson*, 120 Ohio St.3d 320, 2008-Ohio-6247. As relevant to the case sub judice, this court had held that R.C. 2903.11(A)(1) and (A)(2) were of dissimilar import and that the appellant could be convicted of both. *Johnson*, No. 88169, at _42. In reversing this court, the Supreme Court stated: "The judgment of the court of appeals is reversed, on the authority of *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, as to the court of appeals' holding on appellant's fourth assignment of error below to the extent that the two counts of felonious assault in violation of R.C. 2903.11(A)(1) and (2), and the two counts of aggravated robbery in violation of R.C. 2911.01(A)(1) and (3), were respectively held to not be allied offenses of similar import under R.C. 2941.25(A). The cause is remanded to the trial court for further proceedings consistent with *State v. Brown*."

**{¶ 105}** Further, this court has previously determined that convictions under these felonious assault subdivisions are allied offenses of similar import where there is a single animus. *State v. Goldsmith*, 8th Dist. No. 90617, 2008-Ohio-5990, _37 (holding "felonious assault pursuant to R.C. 2903.11(A)(1) and R.C. 2903.11(A)(2) are allied offenses of similar import *** because Goldsmith fired multiple shots at one victim in rapid succession and did not have a separate animus for each count of felonious assault").

**{¶ 106}** In this case, the two counts of felonious assault are likewise allied offenses, where the evidence establishes a single animus concerning the assault of a single victim. Accordingly, Minifee's convictions for felonious assault should have been merged.

B. *Felonious Assault and Felony Murder*

**{¶ 107}** Since *Cabrales*, this court has also held that attempted felony murder and felonious assault are allied offenses of similar import. See *Sutton*, supra, and *State v. Williams*, 8th Dist. No. 89726, 2008-Ohio-5286, discretionary appeal allowed by 120 Ohio St.3d 1504, 2009-Ohio-361. We note that the Ohio Supreme Court has accepted both of these cases for discretionary review on this issue. But we will continue to follow *Williams* and *Sutton* as the law in this district, unless the Supreme Court rules otherwise.

**{¶ 108}** Again, felony murder under R.C. 2903.02(B) provides that "[n]o 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 ***."

**{¶ 109}** And R.C. 2903.11 provides:

**{¶ 110}** "(A) No person shall knowingly do either of the following:

**{¶ 111}** "(1) Cause serious physical harm to another ***;

**{¶ 112}** "(2) Cause or attempt to cause physical harm to another *** by means of a deadly weapon or dangerous ordnance."

**{¶ 113}** In the instant case, we fail to see how a person could commit felony murder based on the predicate offense of felonious assault without also committing the felonious assault. If the convictions for felony murder and felonious assault are not merged here, Minifee would be convicted of causing serious physical harm to – which is death of the victim in this case – and killing the victim based on a single incident. This is exactly the type of result the *Cabrales* court sought to avoid in the future by clarifying *Rance*. Further, as we stated, there is no evidence of a separate act or animus, as there was one shot that led to the death of the one victim. Accordingly, we find the trial court should have merged the felonious assault convictions with the felony murder conviction, resulting in a single conviction, that of felony murder.

**{¶ 114}** Minifee's fifth assignment of error is sustained.

**{¶ 115}** Judgment is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

It is ordered that appellant and appellee share in the costs of this appeal.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed in part, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY J. BOYLE, JUDGE

CHRISTINE T. MCMONAGLE, P.J., CONCURS;
ANN DYKE, J., CONCURS IN JUDGMENT ONLY