[Cite as *State v. White*, 2010-Ohio-2342.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92972

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

BENTON WHITE

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART
AND REMANDED FOR RESENTENCING

Criminal Appeal from the
Cuyahoga County Court of Common Pleas

Case No. CR-514495

BEFORE: Stewart, P.J., Dyke, J., and Boyle, J.

RELEASED: May 27, 2010

JOURNALIZED:

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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), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten 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. 2.2(A)(1).

MELODY J. STEWART, P.J.:

{¶ 1} Defendant-appellant, Benton White, appeals from a judgment of conviction finding him guilty of two counts of aggravated burglary, three counts of felonious assault, two counts of aggravated robbery, one count of grand theft motor vehicle, and six counts of kidnapping. The charges stemmed from an incident in which White and three others broke into a family's house; restrained, assaulted and robbed the occupants; and then stole the family's vehicle. White complains that the guilty verdicts are not supported by sufficient evidence, that the guilty verdicts are against the manifest weight of the evidence, and that his convictions for aggravated burglary, felonious assault, aggravated robbery, and kidnapping should have merged for sentencing purposes because they were allied offenses of similar import that were committed with the same animus.

I

{¶ 2} White raises two arguments in support of his contention that the state failed to offer sufficient evidence to support a guilty verdict: (1) the court erred by finding that a plastic BB/pellet gun was a deadly weapon and (2) the state failed to establish the "serious physical harm" element for felonious assault and aggravated robbery.

A

{¶ 3} Questions concerning the sufficiency of evidence are addressed with a highly deferential standard of review: we view the evidence in a light

most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks* (1981), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

B

{¶ 4} One aggravated burglary count [R.C. 2911.11(A)(2)], two felonious assault counts [R.C. 2903.11(A)(2) and (A)(3)], and one aggravated robbery count [R.C. 2911.01(A)(1)] specified that White committed those offenses either by using or possessing a deadly weapon. For purposes of all three offenses, a "deadly weapon" is defined as "any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon." See R.C. 2923.11(A).[1]

{¶ 5} Although it is not a firearm, a BB gun can be a deadly weapon if the BB is expelled at a sufficient rate of speed. *State v. Brown* (1995), 101 Ohio App.3d 784, 788, 656 N.E.2d 741. Moreover, the courts agree that regardless of whether a BB or pellet is powerful enough to cause death, a BB gun can be a deadly weapon because the body of the gun itself can be used to bludgeon. *State v. Mills* (1991), 73 Ohio App.3d 27, 33, 595 N.E.2d 1045;

[1]The felonious assault, aggravated burglary, and aggravated robbery statutes separately state that the term "deadly weapon" has the same meaning as in R.C. 2923.11.

State v. Hicks (1984), 14 Ohio App.3d 25, 469 N.E.2d 992; *State v. Ginley*, 8th Dist. No. 90724, 2009-Ohio-4701.

{¶ 6} The trial testimony showed that White's brother, Aauston, had fathered a child with one of the victims. Earlier in the day in which the offenses were committed, Aauston had a confrontation with the child's mother that ended when she threw a water bottle at him and cut him below his eye. The next morning, at 3:00 a.m., White, Aauston, and two companions broke down the front door to the mother's house and entered. Aauston and the two companions ran upstairs and kicked open a bedroom door. The mother's father was in that room, and the three men demanded that he give them money. When he refused, they pistol-whipped him on the face and back of his head. White punched the mother's sister and others struck her in the back of the head and kicked her in the sides. Aauston took the sister's cell phone, her car keys and some jewelry, while one of the companions pointed a gun at the mother and her child. White told the mother that "you all brought this on yourself." The four men left in two vehicles: the truck they arrived in and the sister's car.

{¶ 7} A police detective who responded to the scene testified that a pellet or BB gun had been recovered from the scene. The detective stated that the gun "looked similar" to an actual firearm, but that it was made of "hard plastic."

{¶ 8} White does not contend that the BB gun did not qualify as a "weapon," but argues that the characterization of the BB gun as a *deadly* weapon is based purely on the speculation that it could be used as a bludgeon — he notes that the state did not offer the gun into evidence nor did it offer any testimony concerning weight or mass of the gun in order to show the extent of damage that might be inflicted upon a victim.[2] But the court heard testimony that the gun was made of "hard" plastic. And the state offered testimony and photographic evidence to show that the pistol-whipping the father received had caused bleeding and swelling on his face. If the gun could open cuts and bruise the father, the court could rationally have concluded that this evidence was sufficient to demonstrate the bludgeoning power of the BB gun, thereby confirming that the BB gun could be used as a deadly weapon.

C

{¶ 9} White next argues that the state failed to establish that the sister suffered "serious physical harm" as an element of felonious assault and aggravated robbery.

{¶ 10} Serious physical harm is defined in R.C. 2901.01(A)(5)(e) as "[a]ny physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable

[2]Pictures of the gun recovered on the scene showed a warning engraved on the gun stating: "Not a toy. Misuse may cause fatal injury."

pain." The Committee Comment to this definition describes the level of pain as "pain which is unbearable or nearly so, though short lived, and pain which is long lasting or difficult to relieve, though not as keen." Hence, the definition of "serious physical harm" can be said to encompass either intense pain of short duration or prolonged, dull pain. See *State v. King* (Mar. 14, 1991), 2nd Dist. No. 90-CA-17.

{¶ 11} The sister testified that she had been struck in the face and kicked in the ribs. She was transported by ambulance to a hospital and had a CT scan and x-rays, and she received a shot of morphine for the pain. When asked to describe on a ten-scale the amount of pain she was feeling after the attack, she said "I was about an eight or nine[.]"

{¶ 12} We believe that the kind of pain described by the victim — with the victim's subjective, numerical assessment of the pain as being close to unbearable and requiring the use of a potent pain killing medication like morphine — was sufficient to allow a rational trier of fact to conclude that the pain qualified as "acute pain." Moreover, the victim testified that she was in pain for "about a week and a half." This description of the sister's suffering is very similar to that described in *State v. Miller*, 8th Dist. No. 80999, 2003-Ohio-164, in which we found that the state established acute pain with evidence that the victim had been hit in the head several times with a gun and kicked in the jaw so hard that she was unable to eat solid food for several

weeks. Id. at ¶50. While the duration of the sister's pain did not persist for several weeks, it did last for over a week and thus constituted a period of prolonged pain as a result of the assault.

II

{¶ 13} White next argues that his convictions were against the manifest weight of the evidence. In doing so, however, he has simply restated his arguments set forth in part I that the BB gun was not a deadly weapon and that the sister did not suffer serious physical harm. We can summarily reject an argument on the manifest weight of the evidence when it merely reincorporates an earlier argument on the sufficiency of the evidence. See *State v. Smith*, 8th Dist. No. 88689, 2007-Ohio-3908, at ¶14; *State v. Judd*, 8th Dist. No. 89278, 2007-Ohio-6811, at ¶46.

{¶ 14} The only new argument offered within this assignment of error is White's claim that his conviction for grand theft motor vehicle is against the manifest weight of the evidence because "[a]ppellant was not involved in the taking or use of that vehicle, as agreed by all parties in Closing Arguments." Appellant's Brief at 11.

{¶ 15} When considering whether a judgment is against the manifest weight of the evidence in a trial to the court, we will not reverse a conviction where the trial court could reasonably conclude from substantial evidence that the state has proved the offense beyond a reasonable doubt. *State v. Eskridge*

(1988), 38 Ohio St.3d 56, 59, 526 N.E.2d 304. We must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trial court "clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386,1997-Ohio-52, 678 N.E.2d 541. Because the trier of fact has the authority to "believe or disbelieve any witness or accept part of what a witness says and reject the rest[,]" *State v. Antill* (1964), 176 Ohio St. 61, 67, 197 N.E.2d 548, our discretionary power to grant a new trial can be exercised only in exceptional cases where the evidence weighs heavily against the conviction.

{¶ 16} While it is true that White did not drive away in the stolen vehicle, the facts showing his participation in the events leading to the theft were compelling enough to establish his complicity in the theft. White participated in breaking into the house and assaulting the victims, with the sister describing him as moving back and forth between assaulting her and her father. White did not personally demand that the sister hand over her car keys, but he was present during the ongoing assault. The assault itself had clearly been planned by White and his companions, as shown by his remark that "you all brought this on yourself." These facts could have led the court to believe that the theft of the vehicle had been orchestrated as part of an overall

plan designed to avenge the mother's act of striking Aauston with a water bottle. We therefore find that the court did not lose its way by finding White guilty of grand theft motor vehicle.

III

{¶ 17} For his third assignment of error, White complains that although the court ran all of his sentences concurrently, the court committed plain error by sentencing him on separate counts of aggravated burglary, felonious assault, and aggravated robbery, which were charged under different subsections of the same statutes but were allied offenses of similar import because they arose from the same conduct and animus. He likewise argues that his kidnapping sentences should merge because they were committed with the same animus as the other charged offenses.

A

{¶ 18} As a matter of first principles, an analysis of allied offenses requires two considerations: the offender's right not to be placed twice in jeopardy for the same offense and the legislature's right to define the punishment for a stated offense. The interaction between these two considerations determines whether offenses are allied.

1

{¶ 19} Among the three kinds of prohibitions contained within the Double Jeopardy Clause of the United States Constitution is a ban on multiple

punishments for the same offense. *United States v. Halper* (1989), 490 U.S. 435, 440, 109 S.Ct. 1892, 104 L.Ed.2d 487, citing *North Carolina v. Pearce* (1969), 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656. But it is important to understand that the Double Jeopardy Clause only states the right not to be placed in jeopardy twice for the same *offense*, not the same conduct. *Burks v. United States* (1978), 437 U.S. 1, 11, 98 S.Ct. 2141, 57 L.Ed.2d 1. The Double Jeopardy Clause has long been understood to allow multiple convictions from the same conduct, as long as that conduct does not constitute the "same offense." *Blockburger v. United States* (1932), 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306. Different offenses stemming from the same conduct can stand if the one offense requires "proof of a fact which the other does not." Id.

{¶ 20} Even though conduct by an accused could constitutionally give rise to different offenses, the legislature nonetheless has the authority to define and fix the punishment for a crime. *Ex Parte United States* (1916), 242 U.S. 27, 37 S.Ct. 72, 61 L.Ed. 129; *Cleveland v. Scott* (1983), 8 Ohio App.3d 358, 359, 457 N.E.2d 351. So while convictions for multiple offenses can constitutionally result from the same conduct, the legislature has the authority to prescribe the kind of punishment for those offenses so allied in nature as to constitute, for all intents and purposes, the commission of a single offense.

{¶ 21} The General Assembly set forth its statement of when punishments for multiple offenses arising from the same conduct may be imposed in R.C. 2941.25. That section states:

{¶ 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} Double jeopardy prevents a court from "prescribing greater punishment than the legislature intended," *Missouri v. Hunter* (1983), 459 U.S. 359, 366, 103 S.Ct. 673, 74 L.Ed.2d 535, so the courts must look to the legislative intent to determine what the General Assembly intended to accomplish with R.C. 2941.25.

{¶ 25} The Committee Comment to this section shows that R.C. 2941.25 is intended to do more than simply restate the constitutional ban on multiple punishments for the same offense — it states that the purpose of R.C. 2941.25 is to prevent "shotgun convictions" of a kind that arise when the accused's

conduct encompasses two or more distinct criminal offenses, but are of "similar import." The Ohio Supreme Court noted that R.C. 2941.25 thus expresses a purpose beyond that prohibited by the multiple punishment for the same offense aspect of the Double Jeopardy Clause of the United States Constitution, for there would be no purpose in using R.C. 2941.25 to simply legislate that which already applied.

{¶ 26} "If the General Assembly, by the enactment of [section] 2941.25, had not intended to prohibit more than one conviction and sentences in cases other than where the offenses are the same for purposes of double jeopardy, there could be no purpose in the enactment of the statute. Clearly, the General Assembly intended to extend the prohibition against multiple convictions and sentences beyond the concept of double jeopardy * * *." *State v. Baer* (1981), 67 Ohio St.2d 220, 226, 423 N.E.2d 432.

{¶ 27} Likewise, in *State v. Logan* (1979), 60 Ohio St.2d 126, 131, 397 N.E.2d 1345, the supreme court stated:

{¶ 28} "It is apparent that * * * [R.C. 2941.25] has attempted to codify the judicial doctrine sometimes referred to as the doctrine of merger, and other times as the doctrine of divisibility of offenses which holds that 'a major crime often includes as inherent therein the component elements of other crimes and that these component elements, in legal effect, are merged in the major crime.'" (Footnotes and citation omitted.)

{¶ 29} It follows that "[b]ecause 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." *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, paragraph three of the syllabus. Hence, "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." *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, at ¶17, citing *State v. Rance*, 85 Ohio St.3d 632, 636, 1999-Ohio-291, 710 N.E.2d 699.

{¶ 30} These principles have led to the evolution of two different lines of analysis for reviewing questions of allied offenses of similar import. The first line of analysis follows the *Blockburger* test: to determine whether two offenses are the same for double jeopardy purposes, we look to see "whether each offense requires proof of an element that the other does not." *State v. Rance*, 85 Ohio St.3d 632, 634-635, 1999-Ohio-291, 710 N.E.2d 699, citing *Blockburger*, 284 U.S. at 299.

{¶ 31} In *Brown*, the supreme court stated:

{¶ 32} "A two-step analysis is required to determine whether two crimes are allied offenses of similar import. See, e.g., *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117, 526 N.E.2d 816; [*State v. Rance*, 85 Ohio St.3d 632, 636, 1999-Ohio-291, 710 N.E.2d 699]. Recently, in *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, we 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. 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."

{¶ 33} The second line of analysis was recently set forth in *Brown* and addressed whether offenses committed by alternative means under the same criminal code section constituted the same criminal offense for purposes of R.C. 2941.25. The state charged Brown with two counts of felonious assault under R.C. 2903.11(A)(1) and (2), both of which stemmed from the act of

stabbing the victim one time and leaving one wounded. The elements of each offense were different in that felonious assault under R.C. 2903.11(A)(1) required the offender to cause serious physical harm, while felonious assault under R.C. 2903.11(A)(2) required the offender to cause or attempt to cause physical harm by means of deadly weapon. Under a strict application of the *Rance* test, the elements of each charged offense did not align as there is a difference between "serious physical harm" and "physical harm" and one subsection requires the use of a deadly weapon while the other subsection does not. Id. at ¶34. But the supreme court held that "the General Assembly did not intend [each charged offense] to be separately punishable when the offenses result from a single act undertaken with a single animus." Id. at ¶2. The supreme court deemed this interpretation of R.C. 2941.25 to be consistent with legislative history showing that the General Assembly did not intend to punish conduct "where the same conduct by the defendant technically amounts to two or more related offenses * * *." Id. at ¶16 (footnote omitted).

{¶ 34} The supreme court reached this conclusion by noting that the General Assembly had intended to protect certain "societal interests" in the way it defined different criminal offenses. By way of example, it offered the offenses of theft and aggravated burglary — offenses that are often charged together when an accused breaks into an occupied structure and steals something. Although the aggravated burglary might be thought to be

conceptually indistinct from the theft (the theft could not be accomplished without the trespass into the occupied structure), the court found the two statutes served different purposes. It noted that the theft statute is intended to prevent the non-consensual taking of another's property; while aggravated burglary, with its focus on a trespass in an occupied structure, is intended to prevent harm to persons. Id. at ¶36, citing *State v. Mitchell* (1983), 6 Ohio St.3d 416, 419, 6 OBR 463, 453 N.E.2d 593. Because aggravated burglary and theft served different societal purposes, they could be punished separately.

{¶ 35} Applying that standard, the supreme court held that these same societal concerns were not present in *Brown* when the state charged felonious assault under separate subsections of the statute. The supreme court held that the different subsections of the felonious assault statute served the same interest: "preventing harm to persons." Id. at ¶39. The supreme court made it clear, however, that this line of analysis is still subject to the R.C. 2941.25(B) "separate animus" language relating to individual counts charged under the different subsections of the same revised code section — 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. Id. at ¶19, citing *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, ¶14.

{¶ 36} Even though the court imposed White's sentences concurrently, we must nonetheless acknowledge that "even when the sentences are to be served concurrently, a defendant is prejudiced by having more convictions than are authorized by law." *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, at ¶31 (citations omitted). We therefore consider the arguments raised within this assignment of error under a plain error analysis.

{¶ 37} Plain error exists when there is a deviation from a legal rule, the error is obvious on the face of the record, and the error affects a substantial right. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642,873 N.E.2d 306, at ¶15-17.

B

{¶ 38} Count 1 charged White with aggravated burglary under R.C. 2911.11(A)(1); count 2 charged White with aggravated burglary under R.C. 2911.11(A)(2). As applicable to this case, both subsections required that White, by force, stealth, or deception, trespass in an occupied structure when another person other than an accomplice of the offender is present, with purpose to commit in the structure any criminal offense. The distinction is that subsection (A)(1) required that White inflict or attempt to inflict physical

harm on another while subsection (A)(2) required that White have a deadly weapon on his person or under his control.

{¶ 39} We take it as a given that an abstract comparison of the elements of aggravated burglary in R.C. 2911.11(A)(1) and (A)(2) show that they do not correspond such that commission of one subsection will necessarily result in the commission of the other subsection — for there would be no difference between the sections if they did correspond to that degree. A person trespassing in an occupied structure for the purpose of committing a criminal offense can have a deadly weapon without inflicting or attempting to inflict physical harm to an occupant; and a person trespassing in an occupied structure can cause physical harm to an occupant without the use of a deadly weapon. White has therefore failed to establish the first step of the two-part *Rance* test.

{¶ 40} This does not end our analysis, however, as *Brown* commands us to identify the societal interests behind the aggravated burglary statute and determine whether different subsections of the statute serve those same interests. As we previously noted, the supreme court has found that the aggravated burglary statute "seeks to minimize the risk of harm to persons." *Brown*, 119 Ohio St.3d at ¶36. In *Mitchell*, the supreme court stated:

{¶ 41} "Aggravated burglary is classified as the most serious of these offenses precisely because it carries the greatest potential threat that an

individual might be harmed. Unlike the offense of theft, it involves inflicting or attempting or threatening to inflict harm on another, the use of a deadly weapon or dangerous ordnance, or the intrusion into a permanent or temporary habitation of a person at a time in which any person is present or likely to be present." *Mitchell*, 6 Ohio St.3d at 419.

{¶ 42} Subsections (A)(1) and (A)(2) of R.C. 2911.11 protect the same societal interests in reducing the risk of harm to persons present in a dwelling during a burglary. The increased risk of harm to the occupants of a structure is what characterizes the "aggravated" forms of trespassing: subsection (A)(1) relates to inflicting or attempting to inflict physical harm on another while subsection (A)(2) relates to the possession of a deadly weapon on a person or under a person's control. With both subsections designed to protect the same societal interest, we find that they were allied offenses.

{¶ 43} Having found that the offenses were allied, we proceed to the next step of the analysis and consider whether the offenses were committed separately or with a separate animus. The state offered no proof to show that White trespassed more than once into the dwelling occupied by the victims. The number of victims present inside the house was immaterial to the trespass count — there was one house, so only one trespass.

{¶ 44} We therefore find that aggravated burglary under R.C. 2911.11(A)(1) and (A)(2) were allied offenses of similar import and that White could only be sentenced on one of those two counts.

C

{¶ 45} Count 3 charged White with felonious assault of the sister under R.C. 2903.11(A)(1); while count 4 charged White with felonious assault of the sister under R.C. 2903.11(A)(2). Subsection (A)(1) requires a showing that the offender caused serious physical harm, while subsection (A)(2) requires a showing that the offender caused or attempted to cause physical harm by means of a deadly weapon. The state maintained that count 3 related to the victim being kicked, while count 4 related to the victim being struck with the BB gun.

{¶ 46} In *State v. Harris*, 122 Ohio St.3d 373, 2009-Ohio-3323, 911 N.E.2d 882, paragraph two of the syllabus states: "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. (*State v. Cotton*, 120 Ohio St.3d 321, 2008-Ohio-6249, 898 N.E.2d 959, followed.)"

{¶ 47} Because the offenses are allied, we next consider whether they were committed separately or with a separate animus. The sister testified

that she heard a commotion and saw the men beating her father. She moved to protect her brother and was struck in the face with a hard object — the BB gun. She fell to the ground as a result of being struck, and said that she was kicked in the ribs. Saying the kicking "happened right away" after being struck in the face, she described the time interval between the two events as "couldn't have been much longer than ten seconds."

{¶ 48} With no more than ten seconds elapsing between being struck with the BB gun, falling to the ground and being kicked in the ribs, we conclude that the felonious assault counts occurred so close in time that they were committed with the same animus in a continuing course of conduct. By the sister's own description, the two events were part of an overall melee inside the house, and there were no facts offered from which the court could plausibly distinguish between the pistol-whipping and kicking.

{¶ 49} We therefore find that felonious assault as charged under both R.C. 2903.11(A)(1) and (A)(2) were allied offenses of similar import and that White could only be sentenced on one of those two counts.

D

{¶ 50} Count 6 charged White with aggravated robbery under R.C. 2911.01(A)(1); count 7 charged White with aggravated robbery under R.C. 2911.01(A)(3).

{¶ 51} The elements of aggravated robbery under subsections (A)(1) and (A)(3) of R.C. 2911.01 do not align: R.C. 2911.01(A)(1) requires the offender to have a deadly weapon and either use or brandish it while committing or attempting to commit a theft offense; R.C. 2911.01(A)(3) requires the offender to inflict or attempt to inflict serious physical harm while committing or attempting to commit a theft offense. One can brandish a deadly weapon during the commission of a theft offense without causing serious physical harm, while one can cause or attempt to cause serious physical harm during the commission of a theft offense without using a deadly weapon.

{¶ 52} Applying *Brown*, however, leads us to conclude that counts 6 and 7 were allied offenses. As with the aggravated burglary counts, the societal interest in the aggravated form of robbery is to protect the public from harm and from the potential of harm caused by a deadly weapon or dangerous ordnance during the commission of a robbery. As alleged in this case, the counts were simply alternative theories of culpability under the same statute, so they were allied offenses.

{¶ 53} Under the second-step of the *Rance* test, we find that the aggravated robbery offenses were committed with the same animus. Using the same analysis we applied to the felonious assault counts, we find that brandishing the deadly weapon and using the deadly weapon to cause physical harm to the sister were actions committed with the same animus. The

evidence showed that the gun had been both brandished and used as a bludgeon to cause serious physical harm during the commission of a theft offense.

{¶ 54} We therefore find that aggravated robbery as charged under both R.C. 2911.01(A)(1) and (A)(2) were allied offenses of similar import and that White could only be sentenced on one of those two counts.

E

{¶ 55} Finally, White complains that the court should have merged all six kidnapping counts. Those counts corresponded to the six persons inside the house at the time of the offenses. Because those counts were committed against different individuals, they constituted distinct counts that were not allied offenses. See *State v. Jones* (1985), 18 Ohio St.3d 116, 117, 480 N.E.2d 408; *State v. Turner*, 105 Ohio St.3d 331, 342, 2005-Ohio-1938, 826 N.E.2d 266, fn. 2.

F

{¶ 56} In summary, we find that the aggravated burglary charges in counts 1 and 2 are allied offenses of similar import; the felonious assault charges in counts 3 and 4 are allied offenses of similar import; and the aggravated robbery charges in counts 6 and 7 are allied offenses of similar import. The kidnapping charges in counts 11-16 are not allied offenses of similar import.

G

{¶ 57} Having found allied offenses of similar import and that were committed with the same animus, we remand this case to the trial court for the limited purpose of resentencing, at which time the state has the right to elect which of the allied offenses to pursue. *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147, 922 N.E.2d 937, paragraph three of the syllabus.

{¶ 58} We take the opportunity to clarify the procedure the sentencing court must employ when sentencing involves allied offenses, particularly in light of finality concerns.

{¶ 59} R.C. 2941.25(A) states that where the same conduct by defendant constitutes two or more allied offenses of similar import "the defendant may be *convicted* of only one." (Emphasis added). In *Whitfield,* the supreme court made it clear that "for purposes of R.C. 2941.25, a 'conviction' consists of a guilty verdict *and* the imposition of a sentence or penalty." *Whitfield*, 124 Ohio St.3d at ¶12 (emphasis sic and citations omitted). *Whitfield*, however, contains contradictory language, stating for example that "[i]n fact, our precedent, including cumulative-punishment cases that predate the 1972 enactment of R.C. 2941.25(A), makes clear that a defendant may be found guilty of allied offenses *but not sentenced on them*." Id. at ¶17 (emphasis added). *Whitfield* also quoted from *State v. Botta* (1971), 27 Ohio St.2d 196, 203, 271 N.E.2d 776, emphasizing the following language: "'Where * * * in

substance and effect but one offense has been committed, a verdict of guilty by the jury under more than one count does not require a retrial but only requires *that the court not impose more than one sentence*[.]'" Id.

{¶ 60} So *Whitfield* says that for purposes of R.C. 2941.25, there is no "conviction" without a sentence, but that a sentence cannot be imposed following a guilty finding on an allied offense. This contradiction implicates concerns about the finality of a judgment of conviction. Crim.R. 32(C) states in part that "[a] judgment of conviction shall set forth the plea, the verdict or findings, and *the sentence*." (Emphasis added). In *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163, the supreme court held that the requirements of Crim.R. 32(C) are jurisdictional and that absent compliance with Crim.R. 32(C), there can be no final, appealable order under R.C. 2505.02. Id. at syllabus. *Baker* did not affect long-standing precedent that says a criminal action is not final for purposes of appeal until the court has separately disposed of each count in the indictment. *State v. Waters*, 8th Dist. No. 85691, 2005-Ohio-5137; *State v. Cooper*, 8th Dist. No. 84716, 2005-Ohio-754. See, also, *State v. Goldsberry*, 3rd Dist. No. 14-07-06, 2009-Ohio-6029 (collecting cases).

{¶ 61} If the trial court cannot sentence a defendant on an allied offense, there can be no "conviction" for purposes of Crim.R. 32(C) and hence no final, appealable order. The answer to this dilemma lies in the doctrine of merger.

In *Whitfield*, the supreme court emphasized that regardless of whether a defendant has committed an allied offense, "the determination of the defendant's guilt for committing allied offenses remains intact, both before and after the merger of allied offenses for sentencing." *Whitfield*, 124 Ohio St.3d at paragraph three of the syllabus. It might be more accurate to say, however, that it is not the "offenses" that merge, but the "sentences" that merge. As best we can tell, this would be the only way to reconcile the supreme court's holding that the guilty finding on the allied offense "remains intact" while at the same time remaining true to *Whitfield's* admonition that R.C. 2941.25 applies only to sentences. Merger thus does not mean that no sentence is announced for the allied offense — that would violate Crim.R. 32(C). Instead, merger of sentences implies that a sentence is announced for the allied offense but literally merged into another offense so that the defendant serves a single term. This conclusion is consistent with the supreme court's finding that the imposition of a concurrent sentence for an allied offense causes prejudice because it constitutes a second conviction in violation of R.C. 2941.25. See *State v. Underwood*, 2010-Ohio-1, at ¶31 (citations omitted).

{¶ 62} When there has been a guilty finding on an allied offense, the sentencing judge must comply with Crim.R. 32(C) by announcing a sentence on all counts for which the defendant has been found guilty, including the

allied offense. It must then allow the state to elect on which of the two allied offenses it wishes to proceed. The court must clearly note the election both in court at the time of sentencing and in its judgment of conviction. It must further state that the sentence on the non-elected count has been "merged" into the elected count pursuant to R.C. 2941.25. By announcing a sentence for the allied offense, the court will comply with Crim.R. 32(C). By merging the sentence for the non-elected allied offense into the elected offense, the court will comply with R.C. 2941.25.

Judgment affirmed in part, reversed in part and remanded for resentencing.

It is ordered that the parties bear their own costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for resentencing.

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

MELODY J. STEWART, PRESIDING JUDGE

ANN DYKE, J., CONCURS;

MARY J. BOYLE, J., CONCURS IN JUDGMENT ONLY