**[Cite as *State v. Craig*, 2011-Ohio-206.]**

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION
**No. 94455**

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## STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

## MICHAEL CRAIG

DEFENDANT-APPELLANT

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

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Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-518877-A

**BEFORE:** Jones, J., Blackmon, P.J., and Celebrezze, J.

**RELEASED AND JOURNALIZED:** January 20, 2011

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LARRY A. JONES, J.:

**{¶ 1}** Defendant-appellant, Michael Craig ("Craig"), appeals his conviction for aggravated burglary, felonious assault, aggravated robbery, kidnapping, and having weapons while under disability. Finding merit to the appeal, we affirm in part and reverse in part.

**{¶ 2}** In 2009, Craig was charged with having a weapon while under disability, two counts of aggravated burglary, four counts of felonious assault, and five counts each of aggravated robbery and kidnapping; all but the having a weapon while under disability charges were accompanied by firearm specifications. The matter proceeded to a jury trial, but Craig waived his right to a jury for the having a weapon while under disability charge.

**{¶ 3}** The following facts were adduced at trial.

**{¶ 4}** In 2008, Teresa Dickerson ("Dickerson") was sleeping in her home. Also present were Dickerson's four children and her daughter's live-in boyfriend, Luis Perez ("Perez"). Dickerson testified she awoke around five in the morning when two men broke into her apartment. One man pointed a gun at her and asked, "where is the fat white boy?" The gunman left the bedroom and told the other man to stay and watch her. That man eventually left and Dickerson was able to escape from the apartment. She ran to the end of her driveway and called 911 on her cell phone.

**{¶ 5}** At some point, Dickerson saw two men run out of the apartment and get into a car with a loud exhaust. She testified that she recognized the loud exhaust as belonging to a car that frequented the neighborhood.

**{¶ 6}** Perez, who was in bed with Dickerson's daughter, Kimberly, testified that he awoke when two men kicked in the locked bedroom door. Perez immediately recognized the man holding a gun as Craig, who Perez knew by the names "Will" and "New York." Perez testified that he knew Craig because Craig

played basketball with the neighbors that lived downstairs.

**{¶ 7}** Craig asked Perez where he hid his money and then struck Perez in the head with a gun. The other intruder began to rifle through the couple's belongings and tried to take a video game system, but dropped it when he could not get it unplugged. The men left to go downstairs, and Perez soon heard Kimberly's brother Joshua start to yell.

**{¶ 8}** Joshua testified that he awoke to a man sticking a gun in his face, demanding money. The man took $20. Joshua testified that he was certain it was Craig based on his voice and that he had met Craig before. Dickerson's other son, Raymond, testified he was sleeping on the couch when two men woke him by flipping him off the couch. Raymond tried to defend himself, and the intruders wrestled him back onto the couch and hit him with a gun. They then ordered him to lie on the floor while they went through his wallet.

**{¶ 9}** Perez and Raymond were taken by ambulance to the hospital. Perez received six stitches to his face for his injuries, and Raymond received three staples for the gash to his head. The Dickerson family and Perez were all able to identify Craig as someone from the neighborhood and chose him out of a police-made photographic line-up. They also identified him in court, although Joshua insisted he saw three intruders on the night of the robbery.

**{¶ 10}** The jury convicted Craig of all the charges except for one count of aggravated robbery. The trial court convicted him of the having a weapon while under disability charge and sentenced him to a total of 33 years in prison.

**{¶ 11}** Craig now appeals, raising the following 15 assignments of error, which will be combined when possible for review:

"I. Defendant was denied due process of law when the court allowed a witness to testify as to the truth as to whether another person was not telling the truth.

"II. Defendant was denied due process of law and his right of confrontation when the court permitted a police officer to testify as to his investigation and matters heard from other witnesses.

"III. Defendant was denied a fair trial through improper cross-examination of defense witnesses where facts not in evidence were assumed in the prosecutor's questions.

"IV. Defendant was denied a fair trial by reason of improper prosecutorial arguments which contained a potpourri of misstatements and other improper hortatory comments.

"V. Defendant was denied due process of law when the court assumed the existence of a disputed fact in instructing the jury.

"VI. Defendant was denied due process of law when the court gave a flight instruction.

"VII. Defendant was denied due process of law and a fair trial when the court permitted evidence and argument concerning flight for failure to appear at trial.

"VIII. Defendant was denied due process of law and a fair trial when the court allowed an amendment to discovery by the prosecutor.

"IX. Defendant was denied due process of law when the court instructed concerning the date of the offense as being 'on or about' when defendant filed a notice of alibi.

"X. Defendant was denied due process of law when the court overruled motions for judgment of acquittal concerning felonious assault alleging serious physical harm.

"XI. Defendant was denied due process of law when the court overruled his motions for judgment of acquittal as the verdicts are against the manifest weight of the evidence.

"XII. Defendant was denied due process of law and subjected to cruel and unusual punishment when the court sentenced defendant consecutively to a 33[-]year[-]sentence.

"XIII. Defendant was denied due process of law when he was convicted of a firearm specification.

"XIV. Defendant was unconstitutionally sentenced to multiple punishments when the court failed to merge the offenses occurring on one date at one location.

"XV. Defendant was denied effective assistance of counsel."

Witness Testimony

**{¶ 12}** In the first, second, and seventh assignments of error, Craig challenges the admission of certain witness testimony.

**{¶ 13}** The trial court has broad discretion in the admission or exclusion of evidence. *State v. Sage* (1987), 31 Ohio St.3d 173, 510 N.E.2d 343, paragraph two of the syllabus. Absent an abuse of discretion and a showing of material prejudice, a trial court's ruling on the admissibility of evidence will be upheld. *State v. Martin* (1985), 19 Ohio St.3d 122, 129, 483 N.E.2d 1157.

**{¶ 14}** We note that Craig failed to object at trial to the instances of which he now complains. Therefore, he waives all but plain error. In order to find plain error, it must be determined that, but for the error, the outcome of the proceeding clearly would have been different. *State v. Long* (1978), 53 Ohio St.2d 91, 96-97, 372 N.E.2d 804.

**{¶ 15}** Craig's initial complaint is that a police officer testified that when he interviewed Craig's girlfriend, she lied to him about Craig's identify. This, Craig

maintains, was an improper use of opinion testimony.

**{¶ 16}** The officer testified that the girlfriend told him that she did not know her boyfriend's given name — she only knew him by "New York." The officer then stated, "I figured she was lying."

**{¶ 17}** In *State v. Young*, Cuyahoga App. No. 79243, 2002-Ohio-2744, we found plain error in "instances where police officers usurp the role of the jury by testifying that the witness is 'truthful,' when a detective testified that a witness was 'telling the truth.'" But in *State v. Vales*, Cuyahoga App. No. 81788, 2003-Ohio-6631, we found that where an officer testified that she believed the victims and that she believed they were truthful, the officer was not vouching for the victim's credibility, but rather explaining the investigative procedure she had followed. In *Vales*, we found that the officer was merely explaining her investigative procedure that she followed after learning what occurred from a witness. Therefore, the officer was not vouching for the credibility of a witness, and the testimony was admitted for proper purposes. Id.

**{¶ 18}** In this case, although the officer should not have testified "I figured she was lying," we find that, given the context of the testimony and our plain error analysis, the trial court did not commit plain error in admitting that evidence. The officer testified as to the steps in his investigation and whether he could rely on the information Craig's girlfriend provided the officer about her boyfriend. Moreover, as explained infra, there was substantial evidence other than the officer's improperly admitted statement to convict Craig.

**{¶ 19}** Next, Craig complains that the officer should not have been allowed to testify to "hearsay matters" such as the fact the victims did not show any apprehension when they picked Craig out of a photo line-up; each victim's statement backed up what the other victims said; that an indictment had been obtained to extradite Craig from New York; and that Craig was unwillingly taken into custody. Again, Craig did not object to the admission of this testimony, but even if he had, we do not find error as to the admission of the challenged testimony.

**{¶ 20}** Therefore, the first and second, and seventh assignments of error are overruled.

Prosecutorial Misconduct

**{¶ 21}** In the third and fourth assignments of error, Craig argues that the state committed prosecutorial misconduct.

**{¶ 22}** The test for prosecutorial misconduct is whether the prosecutor's remarks were improper and, if so, whether they prejudicially affected the substantial rights of the accused. *State v. Bey* (1999), 85 Ohio St.3d 487, 493, 709 N.E.2d 484. The focus of that inquiry is on the fairness of the trial, not the culpability of the prosecutor. Id.

**{¶ 23}** Craig argues that the prosecutor improperly cross-examined his grandmother, improperly bolstered his (the prosecutor's) own credibility, vouched for the state's witnesses, improperly asked the jury to place itself in the victims' shoes, improperly commented on the defense's failure to call a witness, misstated the evidence, and argued improperly at closing argument. But contrary to Craig's

assertions, we find no error on the part of the lower court.

**{¶ 24}** First, we find no error in the prosecutor's attempt to discredit Craig's alibi by questioning Craig's grandmother, even if such questioning resulted in confusing the witness. Second, even though the prosecutor commented on witness credibility and the evidence, we find that the prosecutor easily could have been commenting on what he thought the evidence showed, which is not improper. We see nothing in the record that demonstrates that the prosecutor was referring to personal knowledge rather than to what the evidence presented at trial showed. See *State v. Cole*, Cuyahoga App. No. 93192, 2010-Ohio-5114.

**{¶ 25}** With regard to the prosecutor commenting on the defense's failure to call Craig's girlfriend or mother as a witness, "the comment that a witness other than the accused did not testify is not improper, *State v. D'Ambrosio* (1993), 67 Ohio St.3d 185, 193, 616 N.E.2d 909, since the prosecution may comment upon the failure of the defense to offer evidence in support of its case. *State v. Williams* (1986), 23 Ohio St.3d 16, 19-20, 490 N.E.2d 906; *State v. Bies* (1996), 74 Ohio St.3d 320, 326, 658 N.E.2d 754." *State v. Clemons*, 82 Ohio St.3d 438, 1998-Ohio-406, 696 N.E.2d 1009, certiorari denied by *Clemons v. Ohio* (1999), 525 U.S. 1077, 119 S.Ct. 816, 142 L.Ed.2d 675; see, also, *State v. Taylor* (June 7, 2001), Cuyahoga App. No. 78383. Moreover, defense counsel's objection was sustained, and the trial court immediately gave a curative instruction to the jury.

**{¶ 26}** Even if we were to assume, in arguendo, that there was error in any of the prosecutor's comments, we find any error harmless. Our review of the

prosecutor's statements, as well as the trial as a whole, demonstrates that Craig has failed to show that the outcome of the trial would have been different had the prosecutor not made any of the comments and in light of the overwhelming evidence of Craig's guilt. Accordingly, Craig was not prejudiced by the comments made by the prosecutor.

**{¶ 27}** Therefore, the third and fourth assignments of error are overruled.

Jury Instructions

**{¶ 28}** In the fifth, sixth, and ninth assignments of error, Craig challenges the jury instructions.

**{¶ 29}** "When reviewing a trial court's jury instructions, the proper standard of review for an appellate court is whether the trial court's issuance of the instruction constituted an abuse of discretion under the facts and circumstances of the case." *State v. Kilpatrick*, Cuyahoga App. No. 92137, 2009-Ohio-5555, ¶15, quoting *State v. Williams*, Cuyahoga App. No. 90845, 2009-Ohio-2026. For a trial court to abuse its discretion, there must be "more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

**{¶ 30}** Craig claims that it was error for the trial court to issue the jury an instruction on flight. This court has previously defined flight as "some escape or affirmative attempt to avoid apprehension." *Kilpatrick* at ¶16, citing *State v. Wesley*, Cuyahoga App. No. 80684, 2002-Ohio-4429. It has long been recognized that it is not an abuse of discretion for a trial court to provide a jury instruction on

flight if there is sufficient evidence presented at trial to support that the defendant attempted to avoid apprehension. *State v. Benjamin*, Cuyahoga App. No. 80654, 2003-Ohio-281, at ¶31, citing *United States v. Dillon* (C.A. 6, 1989), 870 F.2d 1200.

**{¶ 31}** First, Craig argues that by giving the flight instruction, the trial court in essence affirmatively identified Craig as being one of the persons who committed the home invasion. We find Craig's argument without merit. The flight instruction was proper as the evidence presented showed that the assailants fled the scene. Moreover, the trial court herein did not use language in its instruction to suggest that Craig had to be one of the intruders.

**{¶ 32}** Next, Craig argues that it was improper for the trial court to give the jury a flight instruction to infer that he fled Ohio after the crime had occurred. But the state presented evidence that Craig failed to appear for trial and that he had to be returned from New York to face charges. The state was free to make inferences from the evidence presented because in closing arguments, a prosecutor may comment freely on "what the evidence has shown and what reasonable inferences may be drawn therefrom." *State v. Lott* (1990), 51 Ohio St.3d 160, 165, 555 N.E.2d 293.

**{¶ 33}** Finally, Craig argues that it was improper for the trial court to instruct the jury that the crimes were committed "on or about August 6, 2009." He claims that the court should have required the state to be more specific because he had asserted an alibi defense. But we find no error in the trial court's instruction. The victims all testified that the crimes occurred on August 6, 2009. The trial court was

simply citing the language of the indictment.

**{¶ 34}** Accordingly, the fifth, sixth, and ninth assignments of error are overruled.

Admission of Evidence

**{¶ 35}** In the eighth assignment of error, Craig argues that it was improper for the trial court to allow in evidence in the form of a journal entry that was offered to show that Craig did not appear for trial.

**{¶ 36}** In *State v. Jones*, Montgomery App. No. 2005-CA-01, 2005-Ohio-5910, the court noted that the Ohio Supreme Court long has recognized that "the fact of an accused's flight, escape from custody, resistance to arrest, concealment, assumption of a false name, and related conduct are admissible as evidence of consciousness of guilt, and thus of guilt itself." Id. citing *State v. Eaton* (1969), 19 Ohio St.2d 145, 160, 249 N.E.2d 897, vacated in part on other grounds, *Eaton v. Ohio* (1972), 408 U.S. 935, 92 S.Ct. 2857, 33 L.Ed.2d 750. The court also noted:

"Ohio courts have also concluded that a defendant's failure to appear for trial may indicate consciousness of guilt. *State v. Hagwood* (June 2, 1995), Lake App. No. 94-L-016 (holding that evidence of a defendant's failure to appear for trial is admissible because it is probative of consciousness of guilt and that the prejudicial effect of such evidence does not substantially outweigh its probative value); *State v. Fain* (Aug. 22, 1990), Summit App. No. 14578 ('Flight from justice, and its analogous conduct, have always been indicative of a consciousness of guilt. * * * Therefore, we hold that the trial court did not err in overruling objections to the state questioning Fain in regard to Fain's failure to appear at the original arraignment hearing.'); *State v. Behun* (Sept. 20, 1985), Portage App. No. 1490, quoting McCormick, Evidence (2d Ed.1972), 655, Section 271 ('Many acts of the defendant after the crime seeking to escape the toils of the law are uncritically received as admissions

> by conduct constituting circumstantial evidence of consciousness of guilt and hence of the fact of guilt itself. In this class are * * * forfeiture of a bond by failure to appear * * *.')." *Jones* at ¶11; see, also, *State v. Collins* (Oct. 17, 1988), Montgomery App. No. 10818.

**{¶ 37}** Based on the foregoing, we find no error in the court's admission of this testimony. We also find no error when the trial court allowed the state to amend discovery during trial to include the journal entry that showed that Craig did not appear for trial. Craig now asserts that the trial court should have allowed a continuance so his counsel could prepare for this new information. Our review of the record, however, shows that the state offered the court the option of granting defense counsel a continuance, but defense counsel did not request the remedy. Instead, counsel just asked the trial court to exclude the journal entry from evidence. Moreover, we note that the journal entry was part of the lower court record and cannot be considered new information.

**{¶ 38}** Therefore, we find no error in the admission of the journal entry as evidence. The eighth assignments of error is overruled.

Sufficiency and Manifest Weight of the Evidence

**{¶ 39}** In the tenth, eleventh, and thirteenth assignments of error, Craig argues that there was insufficient evidence to support his convictions and his convictions were against the manifest weight of the evidence.

**{¶ 40}** When an appellate court reviews a record upon a sufficiency challenge, "'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. Leonard*, 104 Ohio St.3d 54, 67, 2004-Ohio-6235, 818 N.E.2d 229, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

**{¶ 41}** In reviewing a claim challenging the manifest weight of the evidence, the question to be answered is whether "there is substantial evidence upon which a jury could reasonably conclude that all the elements have been proved beyond a reasonable doubt. In conducting this review, we must examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether 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." (Internal quotes and citations omitted.) *Leonard*, at 68

**{¶ 42}** Craig argues that the state did not prove the element of serious physical harm to sustain convictions for felonious assault. We disagree.

**{¶ 43}** The elements of felonious assault are set forth in R.C. 2903.11, which provides in pertinent part:

"(A) No person shall knowingly do either of the following:

"(1) Cause serious physical harm to another or to another's unborn;

"(2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance* * *."

**{¶ 44}** "Serious physical harm to persons" as defined in R .C. 2901.01(A)(5)(c) is defined as "[a]ny physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial

incapacity."

**{¶ 45}** Perez testified that he suffered a cut to his face that required stitches to close. Raymond testified that he needed three staples to close the wound to his head. Based on the testimony presented, we find the state produced sufficient evidence upon which the jury could find that Craig caused serious harm to the victims within the meaning of R.C. 2901.01(A)(5)(c).

**{¶ 46}** Next, Craig claims that there was insufficient evidence to convict him of the firearm specifications because there was no evidence that the gun was operable. Concerning operability, "the trier of fact may rely upon circumstantial evidence, including, but not limited to, the representations and actions of the individual exercising control over the firearm." R.C. 2923.11(B)(2). "The [s]tate can prove that the weapon was operable or could readily have been rendered operable at the time of the offense in a variety of ways without admitting the firearm allegedly employed in the crime into evidence." *State v. Gains* (1989), 46 Ohio St.3d 65, 545 N.E.2d 68, syllabus.

**{¶ 47}** In *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541, the Ohio Supreme Court held that "the trier of fact may consider all relevant facts and circumstances surrounding the crime, which include any implicit threat made by the individual in control of the firearm" when determining whether a weapon was operable. Id. at paragraph one of the syllabus. The *Thompkins* court found a defendant could be convicted of a firearm specification when he told a clerk that he was committing a "holdup," pointed a gun at the clerk, and told the clerk to

be “quick, quick,” finding that these actions contained an implicit threat to discharge the weapon. Id. at 383-384.

**{¶ 48}** Since *Thompkins*, Ohio courts have routinely found sufficient evidence to support a firearm specification when the defendant brandished a firearm and implicitly threatened to fire it by pointing it at the victim. See *State v. Hayes*, Cuyahoga App. No. 93785, 2010-Ohio-5234; *State v. Brooks*, Cuyahoga App. No. 92389, 2009-Ohio-5559; *State v. Robinson*, Cuyahoga App. No. 80718, 2003-Ohio-156; *State v. Pierce*, Franklin App. Nos. 02AP-1133 and 02AP-1134, 2003-Ohio-4179; *State v. Macias*, Drake App. No. 1562, 2003-Ohio-1565.

**{¶ 49}** In this case, we find that the state offered sufficient evidence of operability through testimony that Craig pointed the gun at Perez, Kimberly, Joshua, and Raymond, demanded money, and assaulted two of the victims.

**{¶ 50}** We also do not find that Craig’s convictions were against the manifest weight of the evidence. Craig argues that he was incorrectly fingered as the gunman and the victims’ testimony was suspect because it was based solely on voice identification. But the victims, four of whom knew Craig, all testified that Craig was the intruder carrying the gun. They were able to each separately pick him out of a photo line-up and identify him in court. Joshua also testified that he recognized Craig’s face, even though it was partially covered.

**{¶ 51}** Therefore, we find that the evidence was sufficient to sustain Craig’s convictions, and his convictions were not against the manifest weight of the evidence.

**{¶ 52}** The tenth, eleventh, and thirteenth assignments of error are overruled.

Sentencing

**{¶ 53}** In the twelfth and fourteenth assignments of error, Craig challenges his sentence.

**{¶ 54}** We review felony sentences using the *Kalish* framework. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124. The *Kalish* court declared that in applying *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, to the existing statutes, appellate courts "must apply a two-step approach." *Kalish* at ¶4.

**{¶ 55}** Appellate courts must first "examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law." Id. at ¶4, 14, and 18. If this first prong is satisfied, then we review the trial court's decision under an abuse-of-discretion standard. Id. at ¶4 and 19.

**{¶ 56}** In the first step of our analysis, we review whether the sentence is contrary to law as required by R.C. 2953.08(G).

**{¶ 57}** As the *Kalish* court noted, post-*Foster*, "trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings and give reasons for imposing maximum, consecutive or more than the minimum sentence." Id. at ¶11; *Foster*, paragraph seven of the syllabus; *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1, paragraph three of the syllabus. The *Kalish* court declared that although *Foster* eliminated mandatory

judicial fact-finding, it left R.C. 2929.11 and 2929.12 intact. *Kalish* at ¶13. As a result, the trial court must still consider these statutes when imposing a sentence. Id., citing *Mathis* at ¶38.

**{¶ 58}** R.C. 2929.11(A) provides:

> "[A] court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing[,] * * * to protect the public from future crime by the offender and others and to punish the offender. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both."

**{¶ 59}** R.C. 2929.12 provides a nonexhaustive list of factors a trial court must consider when determining the seriousness of the offense and the likelihood that the offender will commit future offenses. R.C. 2929.11 and 2929.12 are not fact-finding statutes. Rather, they "serve as an overarching guide for trial judges to consider in fashioning an appropriate sentence." *Kalish* at ¶17. Thus, "[i]n considering these statutes in light of *Foster*, the trial court has full discretion to determine whether the sentence satisfies the overriding purposes of Ohio's sentencing structure." Id.

**{¶ 60}** In the case at bar, we do not find Craig's sentence contrary to law as it is within the permissible statutory range for his convictions. In the sentencing journal entry, the trial court acknowledged that it had considered all factors of law

and found that prison was consistent with the purposes of R.C. 2929.11, and it is axiomatic that a court speaks through its journal entries. See *State v. El-Berri*, Cuyahoga App. No. 92388, 2010-Ohio-146, citing *State v. Brooke*, 113 Ohio St.3d 199, 2007-Ohio-1533, 863 N.E.2d 1024, ¶47.

**{¶ 61}** We next consider whether the trial court abused its discretion. *Kalish* at ¶4 and 19. Again, an abuse of discretion is "more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." Id. at ¶19, citing *Blakemore* at 219.

**{¶ 62}** Craig argues that the trial court abused its discretion because the sentence involved only one event. In this case, the trial court considered the presentence investigation report, Craig's criminal history, and the crime's incredible impact to the victims. Based on the wide latitude the trial court has been given in sentencing offenders within the statutory limit set on each offense, we cannot say that the court abused its discretion.

**{¶ 63}** Next, Craig argues that the trial court failed to merge allied offenses.

**{¶ 64}** R.C. 2941.25, which governs when punishments for multiple offenses arising from the same conduct may be imposed, provides:

> "(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.
>
> "(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."

**{¶ 1}** Recently, the Ohio Supreme Court clarified how to analyze whether two or more offenses are allied offenses of similar import. *State v. Johnson*, Slip Opinion No. 2010-Ohio-6314:

"Under R.C. 2941.25, the court must determine prior to sentencing whether the offenses were committed by the same conduct. Thus, the court need not perform any hypothetical or abstract comparison of the offenses at issue in order to conclude that the offenses are subject to merger.

"In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), the question is whether it is possible to commit one offense and commit the other with the same conduct, not whether it is possible to commit one without committing the other. * * * If the offenses correspond to such a degree that the conduct of the defendant constituting commission of one offense constitutes commission of the other, then the offenses are of similar import.

"If the multiple offenses can be committed by the same conduct, then the court must determine whether the offenses were committed by the same conduct, i.e., 'a single act, committed with a single state of mind.' * * *

"If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged.

"Conversely, if the court determines that the commission of one offense will never result in the commission of the other, or if the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge." (Internal citations omitted).

**{¶ 65}** In the instant case, Craig was convicted on 16 out of 17 counts. The trial court merged Craig's convictions for kidnapping into his convictions for aggravated robbery pursuant to *State v. Winn*, 121 Ohio St.3d 413, 2009-Ohio-1059, 905 N.E.2d 154, and then proceeded to sentence Craig to a total

of 33 years in prison. The court specifically found that the felonious assault convictions did not merge into the aggravated robbery convictions because the animus for each crime was different. We agree with the trial court albeit for different reasons.

**{¶ 66}** This court has repeatedly held that aggravated robbery and felonious assault are not allied offenses of similar import. See *State v. Hamilton*, Cuyahoga App. No. 91896, 2009-Ohio-3595, ¶32, citing *State v. Preston* (1986), 23 Ohio St.3d 64, 491 N.E.2d 685; *State v. Allen* (1996), 115 Ohio App.3d 642, 685 N.E.2d 1304; *State v. Collins*, Cuyahoga App. No. 89529, 2008-Ohio-578. Our analysis, however, does not end there.

**{¶ 67}** In Counts 3 and 4, Craig was convicted of felonious assault against Perez, in violation of R.C. 2903.11(A)(1) and R.C. 2903.11(A)(2). The trial court did not merge these convictions. In Counts 5 and 6, Craig was convicted of felonious assault against Raymond, in violation of R.C. 2903.11(A)(1) and R.C. 2903.11(A)(2). The trial court did not merge these convictions either.

**{¶ 68}** Although not raised at the trial court level or specifically on appeal, we note that we have previously held that felonious assault pursuant to R.C. 2903.11(A)(1) and R.C. 2903.11(A)(2) are allied offenses of similar import. *State v. Goldsmith*, Cuyahoga App. No. 90617, 2008-Ohio-5990, affirmed by 123 Ohio St.3d 162, 2009-Ohio-4906, 914 N.E.2d 1052, citing *State v. Smith*, Hamilton App. No. C-070216, 2008-Ohio-2469; *State v. Harris*, 122 Ohio St.3d 373, 2009-Ohio-3323, 911 N.E.2d 882. Because Craig used a gun to assault Perez

and Raymond and did not have a separate animus for each count of felonious assault, Counts 3 and 4 merge and Counts 5 and 6 merge.

**{¶ 69}** In counts 1 and 2, Craig was convicted of aggravated burglary against Perez, in violation of R.C. 2911.11(A)(1) and R.C. 2911.11(A)(2). The trial court did not merge these convictions. Although we have not specifically dealt with the aggravated burglary statute subsections (A)(1) and (A)(2), in looking at the Ohio Supreme Court's trend towards finding subsections of other similar offenses to be allied, and in analyzing the offenses pursuant to *Johnson*, we find that the offenses are allied. The victim named in each charge is the same, the crimes occurred with the same animus, and the charges both arose from the same conduct. See *State v. Cotton*, 120 Ohio St.3d 321, 2008-Ohio-6249, 898 N.E.2d 959 (holding that felonious assaults in violation of R.C. 2903.11(A)(1) and (2) are allied offenses of similar import under R.C. 2941.25(A)); *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, (holding that aggravated assault[s] in violation of R.C. 2903.12(A)(1) and (A)(2) are allied offenses of similar import).

**{¶ 70}** That being said, the felonious assault and aggravated robbery convictions that name different victims do not merge because they involved three distinct victims. See *State v. Garcia*, Cuyahoga App. No. 79917, 2002-Ohio-4179.

**{¶ 71}** Thus, "although the aggregate sentence should remain the same, by law, the convictions should be merged." *Goldsmith* at ¶38, quoting *State v. Crowley,* 151 Ohio App.3d 249, 2002-Ohio-7366, 783 N.E.2d 970.

**{¶ 72}** Therefore the twelfth and fourteenth assignments of error are

overruled in part and sustained in part. The case is remanded for merger of Counts 1 and 2, Counts 3 and 4, and Counts 5 and 6. Craig must also be resentenced on those counts that remain after merger.

Ineffective Assistance of Trial Counsel

**{¶ 73}** In the fifteenth assignment of error, Craig argues that he was afforded the ineffective assistance of trial counsel.

**{¶ 74}** In order to substantiate a claim of ineffective assistance of counsel, the appellant is required to demonstrate that (1) the performance of defense counsel was seriously flawed and deficient, and (2) the result of the appellant's trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Brooks* (1986), 25 Ohio St.3d 144, 495 N.E.2d 407. "Judicial scrutiny of counsel's performance is to be highly deferential, and reviewing courts must refrain from second-guessing the strategic decisions of trial counsel." *State v. Carter*, 72 Ohio St.3d 545, 558, 1995-Ohio-104, 651 N.E.2d 965. Further, "trial counsel is entitled to a strong presumption that all decisions fell within the wide range of reasonable, professional assistance." *State v. Sallie*, 81 Ohio St.3d 673, 675, 1998-Ohio-343, 693 N.E.2d 267, citing *State v. Thompson* (1987), 33 Ohio St.3d 1, 10, 514 N.E.2d 407; *State v. Mondie*, Cuyahoga App. No. 91668, 2009-Ohio-3070.

**{¶ 75}** Craig maintains that counsel was ineffective for failing to: request a jury instruction on identification, request an identification expert, object to hearsay

evidence, request an instruction on assault, and failing to file a motion to suppress.

**{¶ 76}** Our review of the record shows that Craig was afforded the effective assistance of trial counsel. Counsel was not required to request instructions or file motions that had no chance of success. Craig fails to support his argument that had defense counsel requested such instructions or filed a motion to suppress or for appointment of an identification expert, the outcome of the trial would have been different.

**{¶ 77}** Therefore, the fifteenth and final assignment of error is overruled.

**{¶ 78}** Accordingly, judgment is affirmed in part and reversed in part. Case remanded for proceedings consistent with this opinion.

It is ordered that appellant and appellee split the 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 common pleas court 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 execution of sentence.

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

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LARRY A. JONES, JUDGE

PATRICIA A. BLACKMON, P.J., and

FRANK D. CELEBREZZE, JR., J., CONCUR