[Cite as *State v. Nichols*, 2010-Ohio-5737.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO	C.A. No. 24900
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
BRESHAUN NICHOLS	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. CR 08 08 2755(B)

DECISION AND JOURNAL ENTRY

Dated: November 24, 2010

CARR, Judge.

{¶1} Appellant, Breshaun Nichols, appeals his conviction out of the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} On August 29, 2008, Nichols was indicted on one count of aggravated robbery in violation of R.C. 2911.01(A)(1), a felony of the first degree, with a firearm specification pursuant to R.C. 2941.145; one count of felonious assault in violation of R.C. 2903.11(A)(1)/(A)(2), a felony of the second degree, with a firearm specification pursuant to R.C. 2941.145; one count of attempted murder pursuant to R.C. 2903.02(A)/(B)/2923.02, a felony of the first degree, with a firearm specification pursuant to R.C. 2941.145; and one count of having weapons while under disability in violation of R.C. 2923.13(A)(3), a felony of the third degree. Two co-defendants were also charged with counts of aggravated robbery and

felonious assault. The trial court entered a technical plea of not guilty on Nichols' behalf at arraignment.

{¶3} On October 2, 2008, Nichols moved for a separate trial from his two co-defendants. The trial court took the motion to sever under advisement. Although there is no ruling in the record, Nichols proceeded to trial alone. On December 1, 2008, Nichols filed a motion to suppress. The trial court scheduled a hearing on the motion to suppress on December 22, 2008. It is unclear whether that hearing occurred on that day, but the trial court subsequently ordered that the motion to suppress be withdrawn. On December 30, 2008, Nichols filed a motion for a competency hearing. The trial court ordered a competency evaluation. After a hearing, the trial court found that Nichols was capable of understanding the nature and objectives of the proceedings against him; capable of presently assisting in his defense; not suffering from a severe mental disease or defect at the time of the alleged offenses; and had the capacity to understand the wrongfulness of his acts.

{¶4} On April 10, 2009, a supplemental indictment was filed, charging Nichols with one count of aggravated robbery in violation of R.C. 2911.01(A)(1)/(A)(3), a felony of the first degree, with a firearm specification pursuant to R.C. 2941.145. Nichols entered a plea of not guilty to the supplemental charges.

{¶5} On May 14, 2009, Nichols filed a motion in limine to exclude any reference by the State to polygraph results, anonymous informants, and nicknames of individuals in the absence of personal knowledge of same.

{¶6} Trial commenced on May 14, 2009. Immediately prior to trial, Nichols requested alternate counsel. The trial court held a hearing on the matter and denied Nichols' motion. As another preliminary matter, the State moved to dismiss the first count of aggravated robbery,

opting to proceed on the second count of aggravated robbery. The trial court granted the motion and dismissed the first count of aggravated robbery. At the conclusion of trial, the jury found Nichols guilty of all counts as well as the three firearm specifications. The trial court sentenced Nichols accordingly to a total of twenty-nine years in prison. Nichols appealed, raising four assignments of error for review.

II.

ASSIGNMENT OF ERROR I

"THE TRIAL COURT COMMITTED PLAIN ERROR IN INSTRUCTING THE JURY ON THE ISSUE OF 'FLIGHT'."

{¶7} Nichols argues that the trial court committed plain error in its flight instruction to the jury. This Court disagrees.

{¶8} Pursuant to Crim.R. 52(B), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." To constitute plain error, the error must be obvious and have a substantial adverse impact on both the integrity of, and the public's confidence in, the judicial proceedings. *State v. Tichon* (1995), 102 Ohio App.3d 758, 767. A reviewing court must take notice of plain error only with the utmost caution, and only then to prevent a manifest miscarriage of justice. *State v. Bray*, 9th Dist. No. 03CA008241, 2004-Ohio-1067, at ¶12. This Court may not reverse the judgment of the trial court on the basis of plain error, unless appellant has established that the outcome of the trial clearly would have been different but for the alleged error. *State v. Kobelka* (Nov. 7, 2001), 9th Dist. No. 01CA007808, citing *State v. Waddell* (1996), 75 Ohio St.3d 163, 166.

{¶9} "In considering whether a particular portion of a trial court's instructions was improper, the instructions must be viewed in their entirety." *State v. Brady*, 9th Dist. No. 22034, 2005-Ohio-593, at ¶7, quoting *State v. Pitts* (Sept. 30, 1997), 6th Dist. No. L-96-256, citing

Schade v. Carnegie Body Co. (1982), 70 Ohio St.2d 207, 210. "The instructions, as a whole, [must be] sufficiently clear to enable the jury to understand the law as it applied to the facts of [the] case." *Schade*, 70 Ohio St.2d at 210. "The charge should not be held erroneous merely because every condition to a recovery or defense is not embraced in each paragraph." *Youngstown Municipal Ry. Co. v. Mikula* (1936), 131 Ohio St. 17, 20.

{¶10} The trial court instructed the jury as follows:

> "Testimony has been admitted that the defendant fled the scene. You are instructed that the defendant's conduct of fleeing from the scene and attempting to conceal the crime alone does not raise a presumption of guilt, but it may tend to indicate the defendant's consciousness of guilt. If you find that the facts do not support that the defendant fled the scene or attempted to conceal the crime, or if you find that some other motive prompted the defendant's conduct, or if you are unable to decide the defendant's motivation, then you should not consider this evidence for any purpose.
>
> "However, if you find that the facts support the defendant engaged in such conduct and if you decide that the defendant was motivated by a consciousness of guilt, you may, but are not required to, consider that evidence in deciding whether the defendant is guilty of the crimes with which he is charged. You alone will decide what weight, if any, to give this evidence."

{¶11} It is an established principle of law that "[f]light from justice *** may be indicative of a consciousness of guilt." *State v. Taylor* (1997), 78 Ohio St.3d 15, 27; *Brady* at ¶9.

{¶12} Nichols argues, first, that the trial court instructed the jury that a fact essential to the conviction had been established by the evidence. By the plain language of the instruction, however, it is clear that the trial court emphasized repeatedly the jury's role as factfinder. Specifically, the trial court instructed that the jury must decide, first, whether Nichols in fact fled the scene; second, if so, whether or not he was motivated by a consciousness of guilt; and third, what weight, if any, to accord the evidence. This Court has repeatedly stated that "[i]t is presumed that the jury will obey the trial court's instructions." *State v. Fletcher*, 9th Dist. No.

23838, 2008-Ohio-3105, at ¶60, citing *State v. Warren* (May 26, 1993), 9th Dist. No. 16034; see, also, *State v. Manor* (May 30, 1990), 9th Dist. No. 14376; *State v. Dunkins* (1983), 10 Ohio App.3d 72, 73. Accordingly, as a whole, the trial court's flight instruction was sufficiently clear to enable the jury to understand its role, as well as the law as applied to the facts. See *Schade*, 70 Ohio St.2d at 210.

{¶13} Nichols next argues that the trial court's instruction "gave undue prominence to that one issue of fact over all others, thus depriving Appellant of a fair trial on all factual issues." The trial court read 17 pages of detailed instructions to the jury. The flight instruction comprised one-half of one page. The instruction emphasized the jury's role as factfinder and their discretion regarding the weight of any evidence tending to show that Nichols fled the scene. Nichols fails to explain how the trial court's flight instruction gives "undue prominence" to one factual issue, and this Court does not discern any such impropriety. Moreover, Nichols fails to explain how the outcome of the trial would have been different but for the alleged error. See *Kobelka*, supra. Accordingly, the trial court did not commit plain error by instructing the jury on the issue of flight as it did. Nichols' first assignment of error is overruled.

ASSIGNMENT OF ERROR II

"DEFENDANT NICHOLS WAS DENIED HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL."

{¶14} Nichols asserts that he was denied his constitutional right to the effective assistance of counsel. This Court disagrees.

{¶15} This Court uses a two-step process as set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 687, to determine whether a defendant's right to the effective assistance of counsel has been violated.

> "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id.

{¶16} To demonstrate prejudice, "the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph three of the syllabus. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691.

{¶17} This Court must analyze the "reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690. The defendant must first identify the acts or omissions of his attorney that he claims were not the result of reasonable professional judgment. This Court must then decide whether counsel's conduct fell outside the range of professional competence. Id.

{¶18} Nichols bears the burden of proving that counsel's assistance was ineffective. *State v. Hoehn*, 9th Dist. No. 03CA0076-M, 2004-Ohio-1419, at ¶44, citing *State v. Colon*, 9th Dist. No. 20949, 2002-Ohio-3985, at ¶49; *State v. Smith* (1985), 17 Ohio St.3d 98, 100. In this regard, there is a "strong presumption [] that licensed attorneys are competent and that the challenged action is the product of a sound strategy." *State v. Watson* (July 30, 1997), 9th Dist. No. 18215.

{¶19} The Ohio Supreme Court has recognized that a court need not analyze both prongs of the *Strickland* test, where the issue may be disposed upon consideration of one of the factors. *Bradley*, 42 Ohio St.3d at 143. Specifically,

> "'Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing in one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.'" *Bradley*, 42 Ohio St.3d at 143, quoting *Strickland*, 466 U.S. at 697.

{¶20} Nichols makes no argument that trial counsel was ineffective. Instead, he merely directs this Court to "consider whether defense counsel rendered ineffective assistance by failing to object to [the flight] instruction," in the event that we do not sustain his first assignment of error. Nichols neither argues that trial counsel's performance was deficient nor that he was prejudiced by counsel's performance. Moreover, Nichols fails to explain how, or even that, the results of the trial would have been different but for any alleged deficiency. Accordingly, he has failed to meet his burden of proving that trial counsel was ineffective. See *Hoehn* at ¶44. Nichols' second assignment of error is overruled.

ASSIGNMENT OF ERROR III

> "APPELLANT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶21} Nichols argues that his convictions are against the weight of the evidence. This Court disagrees.

> "In determining whether a criminal conviction is against the manifest weight of the evidence, an appellate court 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 trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Otten* (1986), 33 Ohio App.3d 339, paragraph one of the syllabus.

This discretionary power should be exercised only in exceptional cases where the evidence presented weighs heavily in favor of the defendant and against conviction. Id. at 340.

{¶22} Nichols was charged with aggravated robbery in violation of R.C. 2911.01(A)(1)/(A)(3), which states: "No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall *** [h]ave a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it *** [or] [i]nflict, or attempt to inflict, serious physical harm on another." R.C. 2923.11(A) defines "deadly weapon" 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." Firearms constitute deadly weapons. R.C. 2923.11(B)(1).

{¶23} Nichols was charged with felonious assault in violation of R.C. 2903.11(A)(1)/(2), which states, in relevant part: "No person shall knowingly *** [c]ause serious physical harm to another *** [or] [c]ause or attempt to cause physical harm to another *** by means of a deadly weapon or dangerous ordnance."

{¶24} R.C. 2901.22(B) states:

> "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist."

{¶25} R.C. 2901.01(5) defines "serious physical harm to persons" as any of the following:

> "(a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;
>
> "(b) Any physical harm that carries a substantial risk of death;

> "(c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;
>
> "(d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement;
>
> "(e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain."

{¶26} R.C. 2901.01(A)(3) defines "physical harm to persons" as "any injury, illness, or other physiological impairment, regardless of its gravity or duration."

{¶27} Nichols was also charged with attempted murder in violation of R.C. 2903.02(A)/(B) and 2923.02. The attempt statute provides: "No person, purposely or knowingly, and when purpose of knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense." R.C. 2923.02(A). R.C. 2903.02(A) states, in relevant part: "No person shall purposely cause the death of another ***." Pursuant to R.C. 2901.22(A):

> "A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature."

R.C. 2903.02(B) states: "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 and that is not a violation of section 2903.03 [voluntary manslaughter] or 2903.04 [involuntary manslaughter] of the Revised Code."

{¶28} The defendant was also charged with having a weapon while under disability in violation of R.C. 2923.13(A)(3), which states, in relevant part:

> "Unless relieved from a disability as provided in section 2923.14 of the Revised Code, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if *** [t]he person is under indictment for or has been convicted of any offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse ***."

{¶29} Finally, Nichols was charged with three gun specifications pursuant to R.C. 2941.145(A), which requires proof that the offender "had a firearm on or about the offender's person or under the offender's control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense."

{¶30} At trial, Kathleen Bislew testified that she is the manager of the Circle K gas station at Wilbeth and Arlington Roads in Akron, and that she was working during the early morning hours of June 13, 2008. Ms. Bislew testified that she is in charge of the store's video surveillance system which she described as a high tech system consisting of 16 cameras inside and outside the premises and which record live action 24 hours a day. She testified that she showed the videos to the police upon their request on June 13, 2008, and made a copy of the surveillance video from that morning for the police. The State played the video and Ms. Bislew authenticated it.

{¶31} Janet Meeks testified that she knows Nichols because of her relationship with his brother Brent, although she only knew Nichols as "Twok" at the time of the incident. She testified that Brent was driving her mother's maroon Dodge Neon, as she rode as a passenger in the front seat, during the early morning hours of June 13, 2008, after an evening of drinking. Ms. Meeks testified that they received a phone call requesting that they pick up a couple people. She testified that Brent and she picked up "Niko," whom she now knows as Denny Andrews, and Nichols around 5 a.m. She testified that the four of them then drove to the Circle K on Arlington.

{¶32} Ms. Meeks testified that Andrews and Nichols got out of the car at the Circle K, while she and Brent remained in the car. She testified that she heard a noise like a "pop" and

that Andrews and Nichols got back in the car, with Nichols sitting behind the driver. She testified that Andrews and Nichols yelled, "Go, go, go." Ms. Meeks testified that there was a "bunch of commotion [and] yelling" in the car as they drove to her house. She testified that Nichols blurted during the drive, "I think I popped him."

{¶33} The State again played the surveillance video from the Circle K. Ms. Meeks identified her mother's car in the video and identified Nichols as the person getting into the back seat of the car in the gas station lot.

{¶34} Ms. Meeks admitted that she initially lied to the police regarding the incident because she was drunk and knew she should not have been in a car because of a prior DUI.

{¶35} Denny Andrews testified that he and Nichols have been friends for more than ten years. He testified that he is known as "Niko" while Nichols is known as "Twok."

{¶36} Mr. Andrews testified that he and Nichols had been out drinking with friends one evening and into the early morning hours of June 13, 2008. He testified that he and Nichols left a friend's house around 5:00 a.m. to walk to a nearby Circle K to buy more alcohol. He testified that they ran into Brent Nichols and Janet Meeks who picked them up and drove them to Circle K.

{¶37} Mr. Andrews continued to testify as follows. At the Circle K, he and Nichols both got out of the car and walked to the cashier window. The victim, Richard Dawson, was in front of them. Mr. Dawson finished his transaction at the cashier window and walked past Andrews and Nichols. Nichols followed Mr. Dawson, leading Andrews to believe that Nichols knew Mr. Dawson. Nichols walked to Mr. Dawson's truck. Andrews heard a "pop" which he thought was the sound of a car backfiring. Both Andrews and Nichols returned to the car,

Nichols sat behind the driver, and the four drove away. They arrived at Ms. Meeks' house where Andrews saw Meeks putting a wallet in a plastic sandwich bag.

{¶38} Brent Nichols testified that Nichols is his brother who goes by the nickname "Twok." He testified that he and Janet Meeks were "having fun" at the homes of various friends during the evening and early morning hours of June 12 and 13, 2008. He testified that he was driving Meeks in her mother's car early in the morning on June 13, 2008, when he saw Andrews and Nichols on the street and picked them up. Brent continued to testify as follows.

{¶39} Brent drove to Circle K, where he gave Andrews money to buy cigarettes. Both Andrews and Nichols got out of the car, while Brent and Meeks stayed in the vehicle. Brent heard something he could not identify but thought it might have been the sound of a car backfiring. Andrews and Nichols returned to the car, with Nichols sitting behind Brent. Brent testified that there was a lot of "commotion" in the car as he drove to Meeks' house. Brent testified that he was "toasted" and "definitely intoxicated" that morning, and he did not remember whether Meeks handled a wallet or any money that morning.

{¶40} Richard Dawson testified that he stopped at the Circle K gas station on Arlington Road on his way to work in the early morning of June 13, 2008. He continued to testify as follows.

{¶41} Mr. Dawson pumped his gas and walked to the cashier window to pay. He noticed a maroon car pull up. A man got out of the car, approached the cashier window, and euphemistically asked where the cashier was. Mr. Dawson testified that "the one that shot me" walked up behind him, looked around, glanced inside the cashier window, and approached Andrews. Nichols and Andrews exchanged something that Mr. Dawson could not identify.

{¶42} Mr. Dawson testified that he paid for his gas and a soda and walked back to his truck. He testified that Nichols followed him. Realizing that he had to turn his vehicle around to access the gas tank at the pump, Mr. Dawson got in his truck. Before he could shut the door, Nichols placed his arm inside the truck and asked for change for a twenty dollar bill. Mr. Dawson testified that he told Nichols he did not have change. He testified that Nichols told him, "Well, give me your shit." Mr. Dawson refused and Nichols again demanded the victim's "shit." Mr. Dawson testified that when he again refused, Nichols told him to "get the fuck out of [the] truck and give me all [your] shit." Mr. Dawson testified that he informed Nichols that he would be "damned" if, after serving in Iraq and Afghanistan, he would let himself get robbed by some "punk-ass kid." Mr. Dawson testified that Nichols backed up, looked around, and pulled out a pistol. Fearing for his safety, Mr. Dawson told Nichols that he was a cop. Mr. Dawson testified that Nichols' eyes got big and he hesitated and looked around. Mr. Dawson testified that he then heard a "pop" and experienced a tingling sensation in his elbow and numbness in his fingers.

{¶43} Mr. Dawson testified that he suddenly felt a hard, round object pressed against the back of his ear. He testified that he heard and felt a "click" which he explained was "like a hammer [of a gun] striking on an empty chamber or – the firing pin that – the thud or click that you would get normally." He testified that he is familiar with firearms and how they work based on his military experience. Mr. Dawson testified that, after the "click," he turned around and saw Nichols pulling the pistol down. He testified that he then felt a sharp pain in the side of his stomach. He handed Nichols his wallet and realized then that he had a hole in his shirt. He testified that began to get short of breath.

{¶44} Mr. Dawson testified that Nichols took his wallet and ran towards the front of the victim's truck. The victim testified that he called 911 and was able to tell the operator that he

had been shot and to describe the vehicle of his assailant before the call was abruptly disconnected. He testified that was able to attract the attention of another man who called 911. Mr. Dawson testified that the police and an ambulance arrived. He testified that he was taken to the hospital and then quickly into surgery. He testified that he awoke a couple days later in the hospital. Mr. Dawson testified that he had been shot with a bullet that went through the back of his elbow, out the side of his arm and into his side, where it rested in his pelvis. He testified that he remained in the hospital from June 13 through July 4, 2008, and that he suffered from three infections due to the shooting. Medical records admitted into evidence substantiate this testimony.

{¶45} Mr. Dawson identified Nichols in court as the person who robbed and shot him and who put a gun to his head and pulled the trigger. He testified that the police showed him a photo array and that he picked out Nichols' photograph, identifying the defendant as the person who shot him. He admitted that he declined to circle Nichols' photograph and initial the array because he was only 99.9 percent certain that he had identified his assailant because the man in the photograph wore a large earring and had less facial hair than he remembered during the incident. Mr. Dawson explained that there is always a difference between the way people look in photographs and in person. He testified that, upon seeing Nichols in court at an earlier hearing, and before knowing what that person had been charged with, he "was over 100 percent sure that [Nichols] was the one that robbed and shot me."

{¶46} Officer Michael Orrand of the Akron Police Department ("APD") testified that he responded to a "robbery/shooting" call on June 13, 2008, at the Circle K at Arlington and Wilbeth Roads. He testified that the victim reported that a black male approached him, shot him, took his wallet, and rode off in a maroon Dodge.

{¶47} Detective Michael Fox of the APD testified that he also responded to the scene where he saw the victim in his truck, blood on the ground, and a hubcap in the lot. He testified that the police did not find any shell casings or slugs at the scene or any viable fingerprints on the victim's vehicle. He testified, however, that it is not unusual that the police are unable to retrieve useful fingerprints from a vehicle due to interference by natural elements like road dirt. He further testified that the nature of the crime did not necessitate contact with the victim's vehicle.

{¶48} Detective Fox testified that the police recovered and processed a maroon Dodge Neon matching the description of the getaway car. A photograph of the vehicle taken during processing was admitted into evidence. It appears that a hubcap is missing from one of the vehicle's tires.

{¶49} Detective John Ross of the APD testified that he follows up on investigations of initial crime scenes and that he did so in this case. He testified that, based on the victim's description of events and a review of the security video taken at the scene, the police issued an information report regarding the nature of the crime and the suspects and vehicle for which patrol officers should look. The detective testified that uniform patrol officers recovered the vehicle involved in the incident the next day. He testified that he was able to trace Nichols to the vehicle on the date and time of the incident.

{¶50} Detective Ross testified that he interviewed Janet Meeks three times. He testified that she originally denied knowing "Twok" but later admitted that she knew Nichols as "Twok." The detective testified that Meeks requested a third interview during which she admitted being in the car during the incident but asserted that she had no prior knowledge regarding what was

going to happen that morning. Detective Ross testified that Meeks identified Nichols as the shooter during the incident and signed and dated a photo array containing Nichols' picture.

{¶51} Detective Ross testified that he presented the photo array to the victim and told him to look at each picture individually and not to guess. The detective testified that Mr. Dawson pointed at Nichols' picture and said, "I am almost positive that this is the guy."

{¶52} This is not the exceptional case, where the evidence weighs heavily in favor of Nichols. The weight of the evidence supports the conclusion that Nichols committed aggravated robbery, felonious assault, attempted murder, and having a weapon while under disability. In addition, the weight of the evidence supports the conclusion that he had a firearm and displayed, brandished, or used it, or indicated its possession. Moreover, this Court will not overturn the trial court's verdict on a manifest weight of the evidence challenge only because the trier of fact chose to believe certain witness' testimony over the testimony of others. *State v. Crowe*, 9th Dist. No. 04CA0098-M, 2005-Ohio-4082, at ¶22.

{¶53} A thorough review of the record compels this Court to find no indication that the trier of fact lost its way and committed a manifest miscarriage of justice in convicting Nichols of aggravated robbery. Mr. Dawson identified Nichols as the person who stole his wallet at gunpoint and then fled in a car. There was evidence that a passenger in the getaway car, who never left the car at the scene, was later observed with the wallet taken from the scene. Accordingly, Nichols' conviction for aggravated robbery, along with a gun specification, is not against the manifest weight of the evidence.

{¶54} A thorough review of the record compels this Court to find no indication that the trier of fact lost its way and committed a manifest miscarriage of justice in convicting Nichols of felonious assault. Mr. Dawson identified Nichols as the person who shot him, causing a bullet to

pass through his elbow and enter his abdomen. He testified as to his pain and incapacity, and his medical records substantiated his claims. The three other people in the getaway car testified to hearing a "pop" before Nichols returned to the car. Ms. Meeks testified that Nichols told his brother who was driving the car to "Go, go, go." She also testified that Nichols exclaimed while leaving the scene that he thought he "popped him." Accordingly, Nichols' conviction for felonious assault, along with a gun specification, is not against the manifest weight of the evidence.

{¶55} A thorough review of the record compels this Court to find no indication that the trier of fact lost its way and committed a manifest miscarriage of justice in convicting Nichols of attempted murder. Mr. Dawson testified that after Nichols shot him the first time he felt a hard round object pressed against the back of his head behind his ear. The victim, a military veteran who has recently served tours in Iraq and Afghanistan and is familiar with firearms and how they work, testified that he heard and felt a "click" which he believed was the firing of a handgun without a bullet. The victim testified that he turned and saw Nichols lowering the pistol. Nichols had already shot Mr. Dawson once. Mr. Dawson had the opportunity to see his assailant. Mr. Dawson led Nichols to believe that he was a police officer. It is reasonable that the trier of fact would infer that Nichols purposely tried to get rid of a police officer-victim who could identify him. It is also reasonable that the trier of fact would infer that, but for the misfire, hangfire, or absence of a bullet in the chamber, Nichols would have been successful in causing Mr. Dawson's death as a result of a gunshot to the head. Moreover, the evidence established that Nichols attempted to shoot Mr. Dawson in the head while committing an offense of violence, specifically aggravated robbery and felonious assault. Accordingly, Nichols' conviction for

attempted murder, along with a gun specification, is not against the manifest weight of the evidence.

{¶56} Finally, a thorough review of the record compels this Court to find no indication that the trier of fact lost its way and committed a manifest miscarriage of justice in convicting Nichols of having a weapon while under disability. The parties stipulated that Nichols had a prior conviction for possession of cocaine. Nichols was identified by the victim as the person who shot him once and attempted to shoot him a second time. Accordingly, Nichols' conviction for having a weapon while under disability is not against the manifest weight of the evidence. Nichols' third assignment of error is overruled.

ASSIGNMENT OF ERROR IV

> "THE TRIAL COURT ERRED IN FAILING TO FIND FELONIOUS ASSAULT AND ATTEMPTED MURDER ALLIED OFFENSES AND GIVING APPELLANT CONSECUTIVE SENTENCES."

{¶57} Nichols argues that the trial court erred by sentencing him on both attempted murder and felonious assault because they are allied offenses of similar import. Nichols' argument is not well taken.

{¶58} R.C. 2941.25(A) provides that "[w]here 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." The proscription arises out of the Fifth Amendment's Double Jeopardy Clause, which prohibits the imposition of cumulative punishments. *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147, at ¶12, citing *United States v. Halper* (1989), 490 U.S. 435, 440. The *Williams* court added:

> "However, both this court and the Supreme Court of the United States have recognized that the Double Jeopardy Clause does not entirely prevent sentencing

> courts from imposing multiple punishments for the same offense, but rather prevent[s] the sentencing court from prescribing greater punishment than the legislature intended. Thus, in determining whether offenses are allied offenses of similar import, a sentencing court determines whether the legislature intended to permit the imposition of multiple punishments for conduct that constitutes multiple criminal offenses." (Internal citations and quotations omitted.) Id. at ¶12.

{¶59} The Ohio Supreme Court has established a two-part test to determine whether two crimes are allied offenses of similar import. *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117.

> "In the first step, the elements of the two crimes are compared. If the elements of the offenses correspond to such a degree that the commission of one crime will result in the commission of the other, the crimes are allied offenses of similar import and the court must then proceed to the second step. In 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." (Emphasis omitted.) Id., citing *State v. Mughni* (1987), 33 Ohio St.3d 65, 67; *State v. Talley* (1985), 18 Ohio St.3d 152, 153-154; *State v. Mitchell* (1983), 6 Ohio St.3d 416, 418; *State v. Logan* (1979), 60 Ohio St.2d 126, 128.

Moreover,

> "[i]n determining whether offenses are allied offenses of similar import under R.C. 2945.25(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 imports." *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, paragraph one of the syllabus.

{¶60} Nichols was convicted of felonious assault in violation of R.C. 2903.11(A)(1)/(A)(2) and of attempted murder in violation of R.C. 2903.02(A)/(B) and 2923.02. The Ohio Supreme Court recently held that (1) felonious assault in violation of R.C. 2903.11(A)(1) and attempted murder in violation of R.C. 2903.02(B) and 2923.02 are allied of offenses of similar import, and (2) felonious assault in violation of R.C. 2903.11(A)(2) and

attempted murder in violation of R.C. 2903.02(A) and 2923.02 are allied offenses of similar import. *Williams*, at paragraphs one and two of the syllabus. The State concedes that Nichols' charges constitute allied offenses of similar import, but argues that there was a separate animus for each crime. This Court agrees that there existed a separate animus for each crime in this case.

{¶61} Nichols argues that the crimes of felonious assault and attempted murder merged when he fired one shot which struck the victim in the abdomen. Nichols, however, completely ignores the second time he pulled the trigger of the pistol he had placed against the back of the victim's head.

{¶62} The evidence established that Nichols fired twice at Mr. Dawson. The first time, after hesitating and looking around, Nichols shot the victim at close range in his elbow, a shot reasonably intended to impair or disable the victim, but not a location indicating an intention to cause death. Nichols was in a position to shoot the victim in the head or chest with the first shot but he did not, giving rise to the inference that he did not act with purpose to kill, but rather with the knowledge that the shot would injure the victim. This first shot reasonably gave rise to the charge of felonious assault. The evidence established that Nichols then redirected his aim, placing the barrel of the pistol behind the victim's ear, execution-style, and pulled the trigger a second time. Because Mr. Dawson had told Nichols that he was a police officer, it is reasonable to infer that Nichols acted with purpose to kill the "police officer" he had just wounded and who could identify him. Nichols' second shot, if successful, would have resulted in the commission of the crime of murder. Based on a review of the evidence in this case, the evidence demonstrates a separate animus for felonious assault as compared to attempted murder. Nichols' fourth assignment of error is overruled.

III.

{¶63} Nichols' assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

DONNA J. CARR
FOR THE COURT

MOORE, J.
DICKINSON, P. J.
CONCUR

APPEARANCES:

JEFFREY N. JAMES, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.