

[Cite as *State v. Allen*, 2010-Ohio-9.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92482

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JAMES ALLEN

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Common Pleas Court
Case No. CR-512641

BEFORE: Boyle, J., Blackmon, P.J., and Jones, J.

RELEASED: January 7, 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), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

MARY J. BOYLE, J.:

{¶ 1} Defendant-appellant, James Allen, appeals his convictions for murder and aggravated robbery. He raises four assignments of error for our review:

{¶ 2} “[1.] The trial court erred in denying appellant’s motion for acquittal as to the charges when the state failed to present sufficient evidence against appellant.

{¶ 3} “[2.] Appellant’s convictions are against the manifest weight of the evidence.

{¶ 4} “[3.] Appellant was denied a fair trial by the detective’s improper comments while testifying.

{¶ 5} “[4.] The trial court erred by ordering convictions and a consecutive sentence for separate counts of murder and aggravated robbery because the offenses are allied offenses pursuant to R.C. 2941.25 and they are part of the same transaction under R.C. 2929.14.”

{¶ 6} Finding no merit to his appeal, we affirm his convictions.

Procedural History and Factual Background

{¶ 7} Allen was indicted on two counts of aggravated murder in violation of R.C. 2903.01(A) and 2903.02(B) with three-year firearm and felony-murder specifications, and two counts of aggravated robbery in violation of R.C.

2911.01(A)(1) and 2911.01(A)(3) with three-year firearm specifications. Prior to trial, the state dismissed the felony-murder specifications. The following evidence was presented at trial.

{¶ 8} On January 11, 2006, in the middle of the afternoon, Jimmy Joe Maynard was shot multiple times at his friend Larry Manzo's home on East 71st Street, Cleveland, Ohio. He was later pronounced dead at the hospital. Several people testified to the events that occurred that day, including Allen.

{¶ 9} Manzo lived with his girlfriend, Donna Schultz. Manzo testified to his long history of drug use; heroin was his "drug of choice." He said that Maynard had come to his house with crack cocaine the night before he was murdered. Manzo, Schultz, Maynard, and Walter Karpell "part[ied] through the night." The next day, in the afternoon of January 11, the four needed more drugs so Maynard "ran home and got more money." When Maynard came back, he had about \$1,000 in a white envelope. The group called "Rico" (later identified to be Kenyell Stewart) for drugs. Stewart came to Manzo's house with a man who went by the street name "C" (later identified to be Richard Fortson). Maynard paid Stewart for the drugs, and Stewart and Fortson left.

{¶ 10} Manzo said that the four of them smoked the drugs Stewart sold them. A while later, Stewart called Manzo and told Manzo that he had "something" for him to try, which Manzo understood to be heroin. Stewart and Fortson arrived at Manzo's house for the second time that day. Stewart told

Fortson to give Manzo the heroin, and then Stewart went in the living room to find Maynard. Fortson gave Manzo a “rock,” not heroin. Since Manzo was expecting heroin, he asked Fortson, “what is that?” As soon as he said it, Manzo testified that he heard Stewart yell in the living room, “give me the money.” He then heard multiple gunshots. Fortson grabbed the crack cocaine off the table and ran out the door, followed soon after by Stewart. As Stewart ran past Manzo, Manzo saw the barrel of a gun sticking out of Stewart’s pocket; the gun was underneath what appeared to be Maynard’s envelope of money. Manzo then ran into the living room and saw that Maynard had been shot.

{¶ 11} Manzo explained that because they had all been getting high, they were concerned about the police coming. They did not have any drugs left, but they hid their “pipe” before the police came. When the police arrived, Manzo said they told them that someone had come through the back door and robbed Maynard. Manzo explained that they lied to the police because they were afraid of Stewart and Fortson. But much later, on October 19, 2006, Manzo told the police Stewart’s name and telephone number.

{¶ 12} On November 7, 2006, Detective Raymond Diaz showed Manzo a photo array containing Stewart’s photo. Manzo testified that although he recognized Stewart in the photo, he lied to Detective Diaz and told him that he could not identify Stewart. But then on November 14, 2006, Manzo met with police officers again and positively identified Stewart as the man who shot

Maynard. Manzo gave the police a statement and positively identified Fortson in a photo array.

{¶ 13} Manzo explained that he also bought drugs from a man named “J” (later identified to be Allen). Manzo purchased drugs from Allen for about a year prior to the shooting. Manzo did not know Allen’s real name, but he identified him in court. Manzo said he spoke to Allen on the phone about 20 minutes prior to the shooting.

{¶ 14} Karpell testified that he was sitting next to Maynard in the living room when Stewart walked in the room holding a gun. Karpell said that Stewart demanded money from Maynard, but Maynard told him no. Karpell ran out of the room at that point and then heard the gunshots. Karpell knew Stewart as the drug dealer, “Rico.” Karpell said he lied to the police at first because he was afraid. But he eventually told them the truth in November 2006. He also identified Stewart in a photo array.

{¶ 15} Manzo’s neighbor, Regina Coleman, testified that at the time of the shooting, she had just walked to her aunt’s house. She was inside her aunt’s house when she heard the gunshots. But when she heard them, she immediately stepped outside onto her aunt’s porch and saw “two black males run to a green Caravan.”

{¶ 16} Police found four spent bullets and five .45 automatic shell casings. Another bullet was later found. Police experts determined that all five shell

casings were fired from the same semi-automatic handgun, and all five bullets were also fired from the same gun. Further, the bullets were “typical of a semi-automatic.”

{¶ 17} Sam Borsellino, co-owner of Atlantic Gun & Tackle, testified that on January 7, 2006, Allen purchased a .45 caliber semiautomatic handgun.

{¶ 18} Kiara Hinton, Allen’s girlfriend at the time of the murder, testified that she owned a 1996 teal-colored Oldsmobile Silhouette and that Allen regularly drove it in January 2006.

{¶ 19} A couple of hours after the shooting, Allen went to the police station to report that his .45 caliber, semiautomatic High Point gun and several pieces of jewelry had been stolen out of his car. Police officer Randy Jerse took the report. Allen told Officer Jerse that he left his car running while he went into a house. His gun was in a shoebox on his front seat. When he came back out several minutes later, the shoebox was gone. Allen told Officer Jerse that he saw a black male take the shoebox, but he could not say which direction he went. Officer Jerse found it highly unusual that Allen saw the male but could not say which way he ran.

{¶ 20} Officer John Lally testified he stopped Allen on January 24, 2006 for traffic violations. Allen was driving the green van.

{¶ 21} Detective Raymond Diaz testified that he was assigned to the case in August 2006. At that point, police had not arrested anyone for Maynard’s

murder. In October of that year, Detective Diaz learned that Manzo and Schultz had been arrested on narcotics charges so he went to talk to them. Based on his interview with Manzo, he learned “some street names of Rico and C as two possible suspects.” Through further investigation, he was able to learn who “Rico” and “C” were. Stewart and Fortson were ultimately arrested.

{¶ 22} Detective Diaz also learned that Allen had been to Manzo’s home earlier on the day of the shooting. He already knew from previous police investigation that Allen’s fingerprints were found on Manzo’s rear storm door. He also knew that calls were made from Allen’s cell phone to Manzo’s home on the day of the murder, and in particular, at the exact time of the murder. And he knew that Allen had purchased a .45 semiautomatic handgun a few days before the murder. Further, he talked to Hinton and discovered that Allen (her boyfriend) would drive her van often. Detective Diaz also knew that Allen had been picked up in the green van on January 24, 2006 regarding an unrelated matter. Based on all of this information, Detective Diaz interviewed Allen for the first time on March 7, 2007 while Allen was an inmate at North Coast Correctional Facility.

{¶ 23} Detective Diaz Mirandized Allen and asked Allen if he recalled the police report that he filed in January 2006. Allen told Detective Diaz that he remembered he reported “the van had gotten stolen.” Allen later said that he had gone to Manzo’s and Schultz’s home in his uncle’s Toyota around 9:30 p.m.

on the night of the murder. Detective Diaz asked him why he did not take the van, and Allen replied that his girlfriend had it. Detective Diaz then asked Allen “about the fact that he had told [him] earlier that the van was stolen.” (Detective Diaz did not testify to Allen’s response to that question.) Detective Diaz eventually showed Allen his original police report where Allen had only mentioned the gun and jewelry being stolen. Allen further denied that Stewart was the “black male” who stole his gun.

{¶ 24} Detective Diaz asked Allen if he wanted to give a written statement and told him that he needed to be truthful. Allen told him that he was being truthful. Detective Diaz then testified, “I told him he wasn’t.” Detective Diaz told Allen that he had a warrant for his arrest and gave Allen his business card and said that he told Allen, “when he wanted to talk again and wanted to be truthful to give [him] a call.”

{¶ 25} On March 14, Detective Diaz received a telephone call from a corrections officer at North Coast telling him that Allen wanted to speak to him. Detective Diaz went to North Coast the following day and obtained a written statement from Allen. Allen told Detective Diaz, “I was over at my house on East 80th when Rico and Face [Fortson] came to my house. Rico told me, ‘I need a favor and you can make some money, too.’ Rico then said, ‘I have this lick [robbery] that we can hit and I do not even have to shoot the dude.’ Before this, Rico said to me, ‘I need to use your gun.’ I then asked Rico where his lick was

at. Rico said, 'Over at Donna's house, this dude got an envelope full of money like he just came from the bank.' Rico then said, [']The nigga at the house is sweet and that he and Face can go hit the lick and bring me my gun and some money back.['] I told Rico [']No['] and that I would take them down there because I was not going to give them my gun and because there was no guarantee that they would show back up. So I took them down there and I parked the van on East 70th and Ivy. Rico and Face got out the van and they went into Donna's house. After they got out the van I called Donna's house from my cell phone. Donna answered the phone and I asked Donna what was going on down there. Donna said, '*** we are waiting for someone to bring some heroin down to the house.' *** I was still talking to Donna on the phone and then I could hear gunshots being fired. I could hear the shots through the phone. Donna then said to me, 'Oh my God.' Donna then hung the phone up on me. The next thing I know Rico and Face came running back to my van. They got into the van and we drove off. After we left Ivy, Rico went into the envelope and he gave Face some money. Rico then gave me some money from the envelope. I believe Rico gave me like \$100 or more at that time. Rico then asked me about my gun. Rico told me that I was going to have give him the gun and I told him no. Rico then asked me, 'How much for the gun?' I told Rico that I paid \$300 for the gun and Rico said, 'Alright' and he gave me some more money. I drove them back to East 81st Street and I dropped them off. I turned around and I then

drove to the police station. When I got to the police station I filed a report saying that my gun was stolen out of my van. After I made the police report I went to [Kiara Hinton's] house ***. That was it." Allen further stated that Stewart had given him approximately \$500 out of the envelope, and that he had been to Manzo's earlier on January 11, just after midnight, to sell drugs.

{¶ 26} After answering detailed questions about the events leading up to and after the murder, Allen told Detective Diaz, "The intentions on that day were not for that man to get killed. I want to tell his family that I apologize for what had happened and I pray to God that he forgives us for what happened. Let the word get out I'm very sorry for what had happened and apologize."

{¶ 27} Keith Martin, technical support supervisor for Revol Wireless, testified that Allen had a cell phone account with Revol. Through Allen's call records on the day of the murder, Martin identified several calls made from Allen's cell phone to Manzo's home phone. The calls were made at 7:18 a.m., 4:53 p.m., 5:00 p.m., and 6:13 p.m. Martin explained that for the call placed at 4:53 p.m. (the time of the murder), "*67" was dialed before Manzo's telephone number. He explained that "*67" blocks the number from someone's caller ID. This was the only time "*67" was used.

{¶ 28} Martin explained that when a call is dialed from a cell phone, it is processed from a "cell site." In urban areas, cell sites are typically located within "three-quarters of a mile to a mile." He testified that the call placed at 4:53 p.m.

was processed through cell site "158/258," which is the closest cell site to Manzo's home, .685 miles away.

{¶ 29} At 6:22 p.m., a call was placed to 9-1-1 from Allen's cell phone. Martin testified that the cell site that originally processed this call was the one closest to Manzo's address, but that the call ended at another cell site. This indicated that the person using the phone was traveling away from one cell site towards another, called a "hand off."

{¶ 30} Allen's cellular records further indicate that his phone received calls from Manzo's home telephone on January 11, 2006 at 4:04 a.m., 6:45 a.m., 7:14 a.m., 7:28 a.m., 7:33 a.m., 12:42 a.m., 10:13 p.m., and 10:35 p.m.

{¶ 31} At the close of the state's case, Allen moved for a Crim.R. 29 acquittal, which was denied by the trial court.

{¶ 32} Allen then testified on his own behalf. He stated that the statement that he gave to Detective Diaz on March 15, 2007 was a lie. He explained that he gathered the details of the murder from reading Fortson's written statement. He admitted that he sold drugs to Manzo, Schultz, and Karpell many times, including on the day of the murder. But he denied that he was involved with Maynard's murder. He said his van and his gun were stolen, and explained that he got his van back soon after it was stolen.

{¶ 33} The jury found Allen not guilty of both counts of aggravated murder, but guilty of the lesser included offense of murder under Count 2, with the firearm

specification. The jury also found Allen guilty of both counts of aggravated robbery with the firearm specifications. The trial court merged the firearm specifications and the aggravated robbery convictions and sentenced Allen to fifteen years to life for the murder, ten years for the aggravated robbery, and three years for the firearm specification, for an aggregate of 28 years to life in prison.

Sufficiency of the Evidence

{¶ 34} Allen argues that the state failed to present sufficient evidence “linking [him] to the crimes.” He maintains that there was no direct evidence linking him to the robbery and murder, nor was there “evidence of planning” to support complicity to the crimes. Specifically, he contends that the state failed to present evidence that he was driving the van, that he owned the gun that shot Maynard, and that he had motive to kill Maynard.

{¶ 35} An appellate court’s function in reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant’s guilt beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. “In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law.” *State v. Thompkins* (1997), 78 Ohio

St.3d 380, 386. 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. *Jenks* at 273.

{¶ 36} Allen is mistaken that there is no direct evidence linking him to the aggravated robbery and murder of Maynard. In his March 15, 2007 statement, Allen told Detective Diaz of his involvement in the “plan” to rob Maynard; that he knew about “an envelope full of money”; that he was driving the van; that Stewart used his gun; that he actually heard the gunshots because he was talking to Schultz on the phone; and that Stewart and Fortson came running back to the van after the shots, and he drove them away. Allen further stated that Stewart paid him approximately \$500 for his involvement in the “plan” out of the envelope taken from Maynard.

{¶ 37} In addition to the direct evidence, the state also presented circumstantial evidence that Allen’s cell phone was used to call Manzo’s home several times that day, and particularly at the time of the murder, and that the call was processed at the cell site closest to Manzo’s home. Further, Allen drove his girlfriend’s green van often in January 2006 (also evidenced by the fact that he was stopped by police in it a couple of weeks after the murder). And Maynard

was killed with a .45 caliber, semiautomatic gun, the exact kind of gun that Allen had purchased a few days before the murder.

{¶ 38} We find that the state’s evidence, if believed, is sufficient to link Allen to the aggravated robbery and murder of Maynard.

{¶ 39} Allen’s first assignment of error is overruled.

Manifest Weight of the Evidence

{¶ 40} In his second assignment of error, Allen maintains that his convictions were against the manifest weight of the evidence because “the jury simply lost its way” in convicting him. We disagree.

{¶ 41} The *Thompkins* court further “distinguished between sufficiency of the evidence and manifest weight of the evidence, finding that these concepts differ both qualitatively and quantitatively. *Id.* at 386. The court held that sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, but weight of the evidence addresses the evidence’s effect of inducing belief. *Id.* at 386-387. In other words, a reviewing court asks whose evidence is more persuasive — the state’s or the defendant’s? [The court] went on to hold that although there may be sufficient evidence to support a judgment, it could nevertheless be against the manifest weight of the evidence. *Id.* at 387. ‘When a court of appeals reverses a judgment of a trial court on the basis that

the verdict is against the weight of the evidence, the appellate court sits as a “thirteenth juror” and disagrees with the factfinder’s resolution of the conflicting testimony.’ *Id.* at 387, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42.” *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶25.

{¶ 42} Allen contends that the jury lost its way because “certainly the jury did not appreciate [his] character, and therefore the jury felt compelled to return a guilty verdict for the homicide of Mr. Maynard.” The jury heard Allen testify that he lied in his March 15, 2007 statement to Detective Diaz. The jury listened to his alternative version of the events — that he had nothing to do with the aggravated robbery and murder and that his van and gun were stolen. But the jury chose to believe the other evidence presented, as they were free to do.

{¶ 43} Based on the evidence presented, we cannot find that the jury lost its way in convicting Allen of murder and aggravated robbery. This is not the exceptional case that should be reversed for a new trial.

{¶ 44} Allen’s second assignment of error is overruled.

Vouching for the Credibility of a Witness

{¶ 45} In his third assignment of error, Allen argues that he was deprived of a right to a fair trial because the trial court permitted the prosecutor, over his objection, to ask Detective Diaz if he believed Allen was being truthful in his investigation. He maintains this was “outrageous governmental conduct.”

{¶ 46} The admission or exclusion of evidence rests within the sound discretion of the trial court and will not be overturned absent an abuse of that discretion. *State v. Hamilton*, 8th Dist. No. 86520, 2006-Ohio-1949, ¶19. A trial court has broad discretion to determine the admissibility of lay witness opinion testimony. *State v. Auerbach* (1923), 108 Ohio St. 96, 98. Accordingly, a reviewing court will not disturb a trial court's determination on the admissibility of lay witness opinion testimony absent an abuse of discretion. *Id.* at 99. An abuse of discretion connotes more than an error in law or judgment; it suggests that a decision is unreasonable, arbitrary, or unconscionable. *State v. Adams*, 62 Ohio St.2d 151, 157-58.

{¶ 47} In *State v. Boston* (1989), 46 Ohio St.3d 108, the Ohio Supreme Court held, “[a]n expert may not testify as to the expert’s opinion of the veracity of the statements of a child declarant.” *Id.* at the syllabus. In *Boston*, a 2 ½-year-old child was allegedly sexually abused by her father; the parents of the child were involved in a custody dispute. The child’s treating pediatrician testified that the child “had not fantasized her abuse” and had not “been programmed to make accusations against her father.” Further, the child’s counselor, a specialist in child sexual abuse, testified that the child was telling the truth.

{¶ 48} The Ohio Supreme Court held that “we have little difficulty in finding that the admission of this testimony was not only improper — it was egregious,

prejudicial and constitutes reversible error.” *Id.* at 128. The Supreme Court further explained that “[i]n our system of justice it is the fact finder, not the so-called expert or lay witnesses, who bears the burden of assessing the credibility and veracity of witnesses.” *Id.* at 129, quoting *State v. Eastham* (1988), 39 Ohio St.3d 307. The court found the error was not harmless and reversed for a new trial. *Id.*

{¶ 49} The rule set forth in *Boston* also applies to lay witnesses testifying to the truthfulness of another witness, which includes a police officer’s testimony that an accused was untruthful. See *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2 (police officer’s testimony that accused was being “very deceptive” was erroneously admitted); *State v. Young*, 8th Dist. No. 79243, 2002-Ohio-2744 (police officer’s testimony that he believed a witness was being truthful in his investigation “divested the jury of its ability and right to decide the credibility of [the defendant] herself”); *State v. Kovac*, 150 Ohio App.3d 676, 2002-Ohio-6784; *State v. Potter*, 8th Dist. No. 81037, 2003-Ohio-1338 (officer’s testimony that defendant’s version of events was untruthful was improper).

{¶ 50} Here, Detective Diaz testified that after his first interview with Allen, he told Allen “when he wanted to talk again and wanted to be truthful to give [him] a call.” The prosecutor then asked Detective Diaz, “[s]o you didn’t believe that he was being truthful during this interview?” Detective Diaz replied over Allen’s

objection, “[n]ot based on our investigation.” It is clear that Detective Diaz’s testimony — that he did not believe Allen was being truthful — violated *Boston*.

{¶ 51} Nonetheless, we must determine whether such error was harmless. Pursuant to Crim.R. 52(A), “any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.” In order to find an error harmless, a reviewing court must be able to declare a belief that the error was harmless beyond a reasonable doubt. *State v. Lytle* (1976), 48 Ohio St.2d 391, 403. A reviewing court may overlook an error where the admissible evidence comprises “overwhelming” proof of a defendant’s guilt. *State v. Williams* (1983), 6 Ohio St.3d 281, 290. “Where there is no reasonable possibility that unlawful testimony contributed to a conviction, the error is harmless and therefore will not be grounds for reversal.” *State v. Brown*, 65 Ohio St.3d 483, 485, 1992-Ohio-61.

{¶ 52} We agree with the state that when reviewing the record in its totality, that Allen was not prejudiced by the admission of Detective’s Diaz’s opinion regarding his truthfulness. First, unlike the child victim in *Boston* who was not competent to testify, Allen testified on his own behalf. Therefore, the jury was able to perceive his credibility firsthand and decide for themselves whether Allen was being truthful. *State v. Burchett*, 12th Dist. Nos. 2003-09-017 and 2003-09-018, 2004-Ohio-4983, ¶20, citing *State v. Profitt* (1991), 72 Ohio App.3d 807.

{¶ 53} Second, there was other cumulative evidence (discussed supra) presented besides Allen’s statement — albeit circumstantial — to support Allen’s convictions. Thus, “the determinative issue for the trier of fact” was not only the truthfulness and credibility of Allen. See *State v. Hart*, 8th Dist. No. 79564, 2002-Ohio-1084 (trial court’s admission of police officer’s testimony vouching for the credibility of the victim was not harmless error because the only evidence supporting the fact that the defendant was the wrongdoer was the victim’s testimony; thus, her credibility was a key issue in the case). See, also, *Davis*, 116 Ohio St.3d at ¶123 (police officer’s testimony that the defendant “was being very deceptive” was improper, but this “isolated comment did not result in plain error” as there was other evidence corroborating defendant’s guilt).

{¶ 54} Thus, we find that the evidence presented at trial, reviewed in its entirety supra, overwhelmingly proves that Allen took part in the plan to rob Maynard, resulting in his murder, and therefore, the admission of Detective Diaz’s opinion that Allen was not truthful was harmless error.

{¶ 55} Allen’s third assignment of error is overruled.

Allied Offenses

{¶ 56} In his fourth assignment of error, Allen argues that his convictions for murder under R.C. 2903.02(B) and aggravated robbery under R.C. 2911.01(A)(1) should merge because the offenses are allied offenses of similar import.

{¶ 57} The state cites two cases from this court holding that murder and aggravated robbery are not allied offenses: *State v. Kincaid*, 8th Dist. No. 88362, 2007-Ohio-2228, and *State v. Marshall*, 8th Dist. No. 87334, 2006-Ohio-6271. Both of these cases, however, were decided before the Ohio Supreme Court released *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625.

{¶ 58} In *Cabrales*, the Supreme Court held: “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. (*State v. Rance* (1999), 85 Ohio St.3d 632 clarified.)” *Id.* at paragraph one of the syllabus.

{¶ 59} The *Cabrales* court explained that the application of R.C. 2941.25 involves, as it always has, a two-tiered analysis. *Id.* at ¶14. In the first step, courts must compare the elements of the two crimes to determine if the offenses are allied offenses of similar import under R.C. 2941.25(A). *Id.* But in doing so, *Cabrales* clarified that “courts are required to compare the elements of offenses in the abstract without considering the evidence in the case, but are not required to find an exact alignment of the elements. Instead, if, in comparing the

elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in commission of the other, then the offenses are allied offenses of similar import.” (Emphasis added.) *Id.* at paragraph one of the syllabus, ¶24.

{¶ 60} “If the offenses are allied, then ‘[i]n the second step, the defendant’s conduct is reviewed to determine whether the defendant can be convicted of both offenses. If the court finds either that the crimes were committed separately or that there was a separate animus for each crime, the defendant may be convicted of both offenses.’” *Cabrales* at ¶14, quoting *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117.

{¶ 61} In *State v. Miniffee*, 8th Dist. No. 91017, 2009-Ohio-3089, appeal not accepted for review by 123 Ohio St.3d 1426, 2009-Ohio-5340, this court recently explained the test as follows:

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

{¶ 63} “It may be helpful to state the test another way. When comparing the offenses, if either offense could not be committed without also committing the other (for example, as in *Cabrales*, one cannot commit trafficking by knowingly preparing for shipment, transporting, or preparing for distribution, etc., without also possessing the drugs), then the offenses are allied. But if both offenses require ‘proof of an element that the other does not,’ meaning both offenses can be committed without committing the other (for example, as in *Cabrales*, one does not have to ever possess drugs to commit trafficking by knowingly selling or offering to sell), then the offenses are not allied. *Cabrales* at ¶28 (Fain, J., concurring in judgment), citing *State v. Palmer*, 148 Ohio App.3d 246, 2002-Ohio-3536, ¶11. And if the offenses are allied, then courts must then address the second prong of the two-tiered test, i.e., whether the offender committed the offenses with a separate animus.” *Miniffee* at ¶88-89.

{¶ 64} Applying the *Cabrales* test in *Miniffee*, we held that murder under R.C. 2903.02(B) and felonious assault under R.C. 2903.11(A)(1) and (A)(2) were allied offenses. *Id.* at ¶113. In *Miniffee*, the defendant shot the victim; the victim died from a single shot to the thigh. For that one act to a single victim *Miniffee* was convicted of felony murder and two counts of felonious assault. We reasoned:

{¶ 65} “In the instant case, we fail to see how a person could commit felony murder based on the predicate offense of felonious assault without also

committing the felonious assault. If the convictions for felony murder and felonious assault are not merged here, Minifee would be convicted of causing serious physical harm to — which is death of the victim in this case — and killing the victim based on a single incident. This is exactly the type of result the *Cabrales* court sought to avoid in the future by clarifying *Rance*. Further, as we stated, there is no evidence of a separate act or animus, as there was one shot that led to the death of the one victim. Accordingly, we find the trial court should have merged the felonious assault convictions with the felony murder conviction, resulting in a single conviction, that of felony murder.”

{¶ 66} But here, with respect to felony murder and aggravated robbery, we do not reach the same conclusion.

{¶ 67} Felony murder under R.C. 2903.02(B) provides that “[n]o person shall cause the death of another as a proximate result of the offender’s committing or attempting to commit an offense of violence that is a felony of the first or second degree ***.”

{¶ 68} Aggravated robbery under R.C. 2911.01(A)(1) provides that “[n]o person, in attempting or committing a theft offense ***, 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.”

{¶ 69} Applying the *Cabrales* test to these offenses, we find that they are not allied. When we compare the elements, even if we do not exactly align them, we cannot find that “the offenses are so similar that the commission of one will necessarily result in the commission of the other.” *Cabrales* at paragraph one of the syllabus. Stated another way, “both offenses require proof of an element that the other does not.” *Miniffee* at ¶89. Felony murder requires “death of another person.” Aggravated robbery requires theft while displaying a deadly weapon, brandishing it, indicating possession of it, or using it; but it does not require the death of the person. Thus, we cannot say that either crime is “wholly subsumed within the other.” *Cabrales* at ¶39 (Fain J., concurring in judgment).

{¶ 70} Moreover, in this case, we do not have the single act that we had in *Miniffee*. Here, Stewart and Fortson went into Manzo’s home to rob Maynard of his envelope of money, while Allen waited in the van. When Maynard would not give up the money, Stewart shot him, causing his death. These were two distinct acts, resulting in two distinct offenses, murder and robbery.

{¶ 71} Allen’s fourth assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant 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.

MARY J. BOYLE, JUDGE

PATRICIA ANN BLACKMON, P.J., and
LARRY A. JONES, J., CONCUR