

[Cite as *State v. Finley*, 2010-Ohio-5203.]

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-061052
	:	TRIAL NO. B-0509495
Plaintiff-Appellee,	:	
vs.	:	<i>OPINION ON</i>
	:	<i>RECONSIDERATION.</i>
CHARLES FINLEY,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Sentences Vacated and Cause Remanded

Date of Judgment Entry on Appeal: October 27, 2010

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Ronald W. Springman, Jr.*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Elizabeth E. Agar, for Defendant-Appellant.

CUNNINGHAM, Presiding Judge.

{¶1} Defendant-appellant Charles Finley appeals from his conviction upon jury verdicts finding him guilty of murder in violation of R.C. 2903.02(B) and felonious assault in violation of R.C. 2903.11(A)(1). He presents on appeal ten assignments of error. Because the trial court violated R.C. 2941.25 when it sentenced Finley for both murder and felonious assault, we vacate the sentences.

On Reconsideration

{¶2} Finley was convicted in 2006, and he appealed his convictions to this court.¹ In the fifth assignment of error presented in that appeal, Finley challenged, under R.C. 2941.25, the trial court's imposition of sentences for both felony murder and the predicate violent felony of serious-harm felonious assault. Although those charges arose from the murder of a single victim, we applied the Ohio Supreme Court's decision in *State v. Rance*² to hold that the trial court could, consistent with R.C. 2941.25, sentence Finley on both counts because the offenses were not allied offenses of similar import.³ And we rejected Finley's contention that the predicate serious-harm felonious-assault conviction had "merged" with the felony-murder conviction.⁴ Finding no merit to this or any other assignment of error, we affirmed Finley's convictions, and the Ohio Supreme Court declined to review our decision.⁵

{¶3} In March 2007, before we decided Finley's appeal, we had decided *State v. Cabrales*.⁶ In *Cabrales*, we held that, although the elements of drug possession

¹ See *State v. Finley*, 1st Dist. No. C-061052, 2008-Ohio-4904.

² 85 Ohio St.3d 632, 1999-Ohio-291, 710 N.E.2d 699.

³ See *Finley*, supra, at ¶42; accord *State v. Smith*, 1st Dist. No. C-080126, 2009-Ohio-3727, ¶67; *State v. Nesbitt*, 1st Dist. No. C-080010, 2009-Ohio-972, ¶31 (following *Finley* to hold that felony murder and serious-harm felonious assault are not allied offenses of similar import).

⁴ See *Finley*, supra, at ¶43, citing *State v. Pickett*, 1st Dist. No. C-000424, 2001-Ohio-4022.

⁵ *State v. Finley*, 121 Ohio St.3d 1408, 2009-Ohio-805, 902 N.E.2d 33.

⁶ 1st Dist. No. C-050682, 2007-Ohio-857.

under R.C. 2925.11(A) do not exactly align with the elements of drug trafficking under R.C. 2925.03(A)(2), the offenses are allied offenses of similar import, and that a defendant found guilty of possessing and trafficking in the same controlled substance could not, consistent with R.C. 2941.25, be sentenced for both offenses.⁷

{¶4} In April 2008, the Ohio Supreme Court affirmed our judgment in *Cabrales*.⁸ In so doing, the court rejected as “overly narrow” the “view of numerous Ohio appellate districts” that *Rance’s* allied-offenses analysis “ ‘requires a strict textual comparison’ of elements under R.C. 2941.25(A).”⁹ And the court singled out for disapproval our 2002 decision in *State v. Palmer*, in which we had applied *Rance* to hold that aggravated robbery and robbery are not allied offenses of similar import.¹⁰

{¶5} In the wake of the supreme court’s decision in *Cabrales*, we reconsidered *Palmer*.¹¹ And after our 2008 decision in Finley’s appeal, the supreme court, in *State v. Williams*, held that serious-harm felonious assault and attempted felony murder are allied offenses.¹² In turn, in our recent decision in *State v. Jackson*, we followed *Williams* to hold that serious-harm felonious assault and felony murder are allied offenses, and we overruled our 2008 decision in Finley’s appeal to the extent that we had there held to the contrary.¹³

{¶6} In June 2010, citing *Cabrales* and *Williams*, Finley applied under App.R. 26(A) for reconsideration of our 2008 decision in his case. The supreme court’s decision in *Williams* and our subsequent decision in *Jackson* had made apparent our

⁷ See *id.* at ¶36.

⁸ 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181.

⁹ *Id.* at ¶21.

¹⁰ *Id.* (citing *State v. Palmer* [2002], 148 Ohio App.3d 246, 772 N.E.2d 726, ¶8-10).

¹¹ See *State v. Palmer*, 178 Ohio App.3d 192, 2008-Ohio-4604, 897 N.E.2d 224, ¶3-7, 15.

¹² See *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147, 922 N.E.2d 937, paragraphs one and two of the syllabus; accord *State v. Love*, 124 Ohio St.3d 560, 2010-Ohio-1421, 925 N.E.2d 137 (applying *Williams* to reverse this court’s holding that R.C. 2903.11[A][2] felonious assault and attempted murder under R.C. 2903.02[A] and 2923.02 are not allied offenses).

¹³ See *State v. Jackson*, 1st Dist. No. C-090414, 2010-Ohio-4312, ¶21-22.

error in rejecting Finley's challenge, in his fifth assignment of error, to the imposition of separate prison terms upon the verdicts finding him guilty of serious-harm felonious assault and felony murder.¹⁴ And those decisions provided the extraordinary circumstances that warranted enlarging the application time.¹⁵ For those reasons, we granted Finley's application for reconsideration. And we here reconsider, and substitute this decision for, our 2008 decision.

The Facts

{¶7} Finley was convicted of murder and felonious assault in connection with the death of one-year-old Christopher Beck, Jr. Christopher was the son of Diane Tucker and Christopher Beck, Sr. Tucker and Beck had attended high school together. Tucker was 18 and Beck was 17 when Christopher was born. Tucker and Beck ended their relationship after Christopher's birth, but both families remained involved in raising Christopher.

{¶8} In January 2005, Tucker, then 20 years old, had begun attending classes at the University of Cincinnati. She and Christopher lived with her mother, Sherri Lester, in an apartment in the Kennedy Heights neighborhood of Cincinnati. While Tucker attended classes and worked at Procter & Gamble's Winton Hills facility, Beck's grandfather would watch Christopher in the morning, and Lester would care for Christopher in the afternoon and in the evening.

{¶9} Tucker then met and began a relationship with Finley. Lester found letters Finley had sent to Tucker written while he was incarcerated in the Queensgate Correctional Facility. Lester disapproved of the relationship. In the summer of 2005, Finley was released from jail and began to see Tucker and Christopher. Lester noticed

¹⁴ See App.R. 26(A); *State v. Black* (1991), 78 Ohio App.3d 130, 132, 604 N.E.2d 171.

¹⁵ See App.R. 14(B).

that Finley had begun to exert control over her daughter. Finley began driving Tucker's car, chauffeuring her to school and to work. He checked Tucker's cellular phone, monitoring her calls. Finley would not allow Tucker to see her friends without his permission. He was particularly jealous of Tucker's ongoing relationship with Beck's family.

{¶10} Over time, Lester became more concerned about Tucker's relationship with Finley. She offered to quit her job and to remain home to care for Christopher. Tucker refused the offer.

{¶11} On September 20, 2005, Lester learned that, instead of leaving Christopher with the Beck family, Tucker had permitted Finley to care for Christopher. Lester told her daughter that if she left Christopher in Finley's care again, she would contact 241-KIDS, Hamilton County's hotline to report suspected cases of child abuse or neglect.

{¶12} That evening, Lester cared for Christopher in her apartment. Christopher was healthy and played until his bedtime. When Tucker returned home near midnight, she took Christopher into her bedroom. Lester fed Christopher at 4:00 a.m. She played with Christopher while Tucker prepared for work. Christopher played normally and had no visible signs of injury. As Tucker prepared to leave for work, she informed Lester that Lester's niece would be caring for Christopher that morning.

{¶13} Instead of taking Christopher to Lester's niece, Tucker met Finley outside the apartment. He had spent the night in the basement of Lester's apartment. He drove Tucker's car and delivered her to work at 7:00 a.m. Christopher remained in Finley's care. Finley and Christopher returned to Lester's apartment. Using keys provided by Tucker, Finley entered the apartment and spent two hours alone with Christopher.

{¶14} After 10:00 a.m., Finley left Lester’s apartment with Christopher and travelled to his mother’s apartment in Mt. Auburn. As Finley carried Christopher into the apartment, Finley’s mother, Pam Slaughter, thought that Christopher was asleep. Finley placed Christopher on Slaughter’s couch. Slaughter cautioned Finley not to leave Christopher unattended. He picked Christopher up and carried him into the bedroom. Slaughter became alarmed because Christopher was not breathing.

{¶15} Slaughter called for emergency assistance by dialing 911. The emergency operator instructed Finley how to perform cardiopulmonary resuscitation on Christopher. Paramedics also attempted to revive Christopher, but he was pronounced dead shortly after his arrival at Cincinnati Children’s Hospital. The hospital staff reported to the police the suspicious nature of Christopher’s death.

{¶16} An autopsy revealed extensive injuries over his entire body. Christopher had suffered contusions to his spine, neck, chest, buttocks, thighs, and arms. And his injuries suggested that he had been shaken or swung by his arms or chest. Christopher also had an unusual mark on his right buttock. At trial, the state’s forensic dentist testified that the mark had been caused by a bite made by Finley.

{¶17} Christopher had also sustained a severe blunt-trauma injury to the right side of his head. The blow fractured his skull along the entire length of the right parietal bone. That injury resulted in brain hemorrhaging and was the cause of his death. The assistant coroner testified that these injuries could not have been caused by Christopher falling from a bed onto a floor. She compared the energy required to cause the fatal head wound to “a major impact like you’d swing a baseball bat.” Based on the nature of the head wound, the coroner opined that the wound had resulted when Christopher’s head

had been swung at a great rate and had struck a fixed object. The fatal injury would have resulted in immediate unconsciousness and had been inflicted within two hours of death.

{¶18} Police investigators interviewed Tucker, Lester, Slaughter, and Finley. In his initial statement to police, Finley stated that Christopher had behaved normally while in his care. In a subsequent statement, he told police that he remembered that Christopher had fallen off the bed during the morning.

{¶19} Finley was indicted for aggravated murder with a death-penalty specification, murder under R.C. 2903.02(B), and felonious assault under R.C. 2903.11(A)(1). The jury acquitted Finley of aggravated murder, but found him guilty of murder and felonious assault. The trial court sentenced Finley to a mandatory prison term of 15 years to life for murder and to an 8-year prison term for felonious assault, and it ordered that the sentences be served consecutively.

The Assignments of Error

{¶20} In ten assignments of error, Finley presents the following arguments: (1) the trial court erred by refusing to instruct the jury on the lesser-included offense of involuntary manslaughter; (2) the trial court erred in failing to exclude testimony of the state's forensic dentist; (3) the trial court erred in imposing multiple sentences; (4) Finley was denied the effective assistance of counsel and was harmed by prosecutorial misconduct; (5) the trial court abused its discretion in regulating the trial and in the admission of evidence; and (6) Finley's convictions were contrary to the manifest weight of the evidence and were based upon insufficient evidence. Because the trial court violated R.C. 2941.25 when it sentenced Finley for both murder and felonious assault, we vacate the sentences.

{¶21} *Weight and sufficiency of the evidence.* In his first assignment of error, Finley challenges the weight and the sufficiency of the evidence adduced to support his convictions.

{¶22} A review of the record fails to persuade us that the jury clearly lost its way and created such a manifest miscarriage of justice that the convictions must be reversed and a new trial ordered.¹⁶ The jury was entitled to reject Finley's theory that only circumstantial evidence had linked him to Christopher's death, and that Lester and Tucker had conspired to blame him. Finley's forensic pathologist testified that some of the injuries on Christopher's body were quite old, and that Christopher could have sustained the fatal blow up to seven hours before his death. But the state was entitled to use circumstantial evidence to prove its case.¹⁷ And the weight to be given the evidence and the credibility of the witnesses were primarily for the jury, as the trier of fact, to determine. In resolving conflicts in the testimony, the jury could have found that Christopher had been in good health when he left Lester's apartment in Finley's care, that he had been unconscious and near death when he arrived at Slaughter's home, and that Finley had caused those injuries.¹⁸ The jury's verdicts were, therefore, not contrary to the manifest weight of the evidence.

{¶23} The test for the sufficiency of the evidence required to sustain a conviction was enunciated by the United States Supreme Court in *Jackson v. Virginia*.¹⁹ The relevant question 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

¹⁶ See *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.

¹⁷ See *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492.

¹⁸ See *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus.

¹⁹ (1979), 443 U.S. 307, 99 S.Ct. 2781.

beyond a reasonable doubt.²⁰ The record before us contains substantial, credible evidence from which the jury could reasonably have concluded that all elements of the crimes charged had been proved beyond a reasonable doubt. Therefore, we overrule the first assignment of error.

{¶24} *Lesser-included-offense instruction.* In his second assignment of error, Finley contends that the trial court erred in denying his request for jury instructions on involuntary manslaughter as a lesser-included offense of felony murder.

{¶25} Finley was charged with felony murder under R.C. 2903.02(B), which proscribes causing the death of another as a proximate result of committing an offense of violence that is a felony of the first or second degree. The predicate offense of violence to Finley's felony-murder charge was felonious assault under R.C. 2903.11(A)(1), which proscribes knowingly causing serious physical harm to another.

{¶26} In his proposed jury instructions, Finley urged the trial court to instruct the jury on involuntary manslaughter under R.C. 2903.04(A), which proscribes causing the death of another as a proximate result of committing a felony. Finley offered child endangering under R.C. 2919.22(A) as the predicate felony for the involuntary-manslaughter charge. R.C. 2919.22(A) provides that “[n]o person, who is the parent, guardian, custodian, person having custody or control, or person in loco parentis of a child under eighteen years of age * * * shall create a substantial risk to the health or safety of the child, by violating a duty of care, protection, or support.”

{¶27} A trial court may enter a judgment of conviction on an offense that is a lesser-included offense, an offense of an inferior degree, or an attempt to commit the

²⁰ See *id.* at 319; see, also, *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, 842 N.E.2d 996, ¶36.

greater charged offense.²¹ This court follows a two-pronged test to determine whether a jury instruction on a lesser-included offense is warranted.

{¶28} First, the trial court must determine whether the offense in the requested instruction is a lesser-included offense of the charged crime by comparing their statutory elements. An offense may be a lesser-included offense of another only if (1) the offense carries a lesser penalty than the other, (2) the offense of the greater degree cannot, as statutorily defined, ever be committed without the offense of the lesser degree also being committed, and (3) some element of the greater offense is not required to prove the commission of the lesser offense.²² This portion of the lesser-included-offense analysis requires the offenses at issue to be examined “as statutorily defined and not with reference to specific factual scenarios.”²³

{¶29} The trial court rejected Finley’s proposed instruction after finding that involuntary manslaughter is not a lesser-included offense of felony murder. But in *State v. Brundage*,²⁴ we followed the Ohio Supreme Court’s decision in *State v. Lynch*²⁵ to hold that involuntary manslaughter under R.C. 2903.04(A) is a lesser-included offense of felony murder.²⁶ Thus, the trial court incorrectly concluded otherwise.

{¶30} Nevertheless, a lesser-included-offense instruction may be given “only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense.”²⁷ Here, under the

²¹ See *State v. Deem* (1988), 40 Ohio St.3d 205, 533 N.E.2d 294, paragraph one of the syllabus; see, also, R.C. 2945.74.

²² See *State v. Deem*, 40 Ohio St.3d 205, paragraph three of the syllabus; see, also, *State v. Smith*, 117 Ohio St.3d 447, 2008-Ohio-1260, 884 N.E.2d 595, ¶9.

²³ *State v. Barnes*, 94 Ohio St.3d 21, 26, 2002-Ohio-68, 759 N.E.2d 1240; see, also, *State v. Smith*, 117 Ohio St.3d 443, at ¶9.

²⁴ 1st Dist. No. C-030632, 2004-Ohio-6436.

²⁵ 98 Ohio St.3d 514, 2003-Ohio-2284, 787 N.E.2d 1185, ¶79.

²⁶ See *Brundage*, supra, at ¶9.

²⁷ *State v. Thomas* (1988), 40 Ohio St.3d 213, 533 N.E.2d 286, paragraph two of the syllabus; see, also, *State v. Johnson*, 112 Ohio St.3d 210, 2006-Ohio-6404, 858 N.E.2d 1144, ¶269.

second prong of our analysis, the failure to instruct on involuntary manslaughter was not error. The evidence indicated that Christopher had been beaten from head to toe and had suffered a severe blunt-force injury to his head. Based on this evidence, no jury could reasonably have concluded that Finley had inflicted these injuries recklessly or carelessly, rather than knowingly. Because the evidence did not reasonably support an acquittal of felony murder and a conviction on the lesser-included offense of involuntary manslaughter, Finley was not entitled to the requested instruction.

{¶31} Thus, while the trial court incorrectly determined that involuntary manslaughter is not a lesser-included offense of felony murder, the court did not, given the evidence presented at trial, err in declining to instruct the jury on involuntary manslaughter as a lesser-included offense of felony murder. We, therefore, overrule the second assignment of error.

{¶32} *Admission of testimony of forensic-dentistry expert.* Finley contends, in his fourth assignment of error, that the trial court erred in failing to construe Evid.R. 702 to exclude the testimony of the state's forensic-dentistry expert. He claims that the state's expert witness, Franklin D. Wright, Jr., D.D.S., did not follow established forensic-dentistry protocols, and thus that his testimony that Christopher had human bite marks on his right buttock and that the marks had been made by Finley was unreliable.

{¶33} Finley raised this issue in a pretrial motion in limine. In a hearing on the motion to exclude Dr. Wright's proposed testimony, Finley's forensic-dentistry expert, Richard Souviron, D.D.S., testified that he would have employed a different protocol than that used by Dr. Wright. Following the hearing, the trial court determined that Dr. Wright's testimony was reliable and denied the motion.

{¶34} While announcing its ruling, the trial court noted the interlocutory nature of a motion in limine, informing Finley that it was “looking at this in a vacuum” and that its ruling was “preliminary only.” We note that, in the state’s case-in-chief, Dr. Wright’s evidence was offered without objection to its reliability.²⁸ As this court has noted, “[a] ruling on a motion in limine reflects the court’s anticipated treatment of an evidentiary issue at trial, and as such it is a tentative, interlocutory, and precautionary ruling. In deciding such motions, the trial court is at liberty to change its ruling on the disputed evidence in the actual context of the trial. * * * It is incumbent, therefore, upon the party aggrieved by a ruling on a motion in limine to raise the issue at trial, at which point finality attaches to the trial court’s decision and the issue is preserved for appeal.”²⁹ No reviewable error results from the denial of a motion in limine unless the proponent of the evidence later offers it at trial, the opponent objects, and the trial court erroneously overrules the objection.³⁰ Thus, absent plain error in the trial court’s admission of Dr. Wright’s testimony, this issue has been waived.³¹ An error rises to the level of plain error only where it is both obvious and outcome-determinative.³²

{¶35} “Trial courts have broad discretion in determining the admissibility of expert testimony, subject to review for an abuse of discretion. * * * In general, courts should admit such testimony when material and relevant, in accordance with Evid.R. 702 * * *.”³³ Evid.R. 702 permits a witness to testify as an expert when (1) the witness’s

²⁸ Finley’s only contemporaneous objection to Dr. Wright’s testimony was made to assert that the state had failed to disclose evidence used by Dr. Wright. This objection is the subject of our subsequent treatment of Finley’s third assignment of error.

²⁹ *State v. Clowers* (1999), 134 Ohio App.3d 450, 454, 731 N.E.2d 270; see, also, *State v. Brown* (1988), 38 Ohio St.3d 305, 528 N.E.2d 523, paragraph three of the syllabus; *State v. Grubb* (1986), 28 Ohio St.3d 199, 201-202, 503 N.E.2d 142, paragraph two of the syllabus.

³⁰ See *State v. Hill*, 75 Ohio St.3d 195, 203, 1996-Ohio-222, 661 N.E.2d 1068.

³¹ See Evid.R. 103(A)(1) and 103(D); Crim.R. 52(B).

³² See *State v. Lewis*, 1st Dist. Nos. C-050989 and C-060010, 2007-Ohio-1485, ¶39.

³³ *Terry v. Caputo*, 115 Ohio St.3d 351, 2007-Ohio-5023, 875 N.E.2d 72, ¶16-22; see, also, *Miller v. Bike Athletic Co.*, 80 Ohio St.3d 607, 611, 1998-Ohio-178, 687 N.E.2d 735.

testimony relates to matters beyond the knowledge or experience of a layperson, (2) the witness has specialized knowledge, skill, experience, training, or education regarding the subject matter of his or her testimony, and (3) the witness's testimony is based on reliable scientific, technical, or specialized information. "When applying the third prong of Evid.R. 702, the court must act as a 'gatekeeper' to ensure that the proffered scientific, technical, or other specialized information is sufficiently reliable."³⁴ Whether an expert's opinion is admissible depends on whether the principles and methods employed by the expert to reach that opinion are reliable, and not on "whether his conclusions are correct."³⁵ The credibility to be afforded the expert's conclusions remains a matter for the trier of fact.³⁶

{¶36} It is beyond dispute that Dr. Wright had the specialized knowledge, experience, training, and education to qualify him as an expert on forensic dentistry. There is also no dispute that his testimony related to matters beyond the knowledge and experience of a layperson. And since Dr. Souviron was unable to testify that Dr. Wright's protocols were unreliable, the trial court did not commit plain error in admitting Dr. Wright's testimony identifying Finley as the person who had inflicted the bite on Christopher's body. While Finley's trial counsel failed to object to this testimony, they offered Dr. Souviron's testimony at trial and vigorously cross-examined Dr. Wright. The fourth assignment of error is overruled.

{¶37} Finley argues, in his third assignment of error, that the trial court erred in failing to exclude Dr. Wright's testimony because the state had not disclosed a PowerPoint presentation that Dr. Wright used to illustrate for the jury his conclusion that Finley had inflicted the bite mark on Christopher's buttock. We disagree.

³⁴ *State v. Rangel* (2000), 140 Ohio App.3d 291, 295, 747 N.E.2d 291.

³⁵ *Miller v. Bike Athletic Co.*, 80 Ohio St.3d at 611.

³⁶ *State v. Nemeth*, 82 Ohio St.3d 202, 211, 1998-Ohio-376, 694 N.E.2d 1332.

{¶38} Crim.R. 16(B)(1)(c) generally requires disclosure of all documents and tangible objects in the possession of the state “which * * * are intended for use by the prosecuting attorney as evidence at the trial.” And Crim.R. 16(B)(1)(d) requires disclosure of “any results or reports of physical or mental examinations, and of scientific tests or experiments, made in connection with the particular case, * * * within the possession, custody or control of the state.”

{¶39} “The Ohio Rules of Criminal Procedure give the trial court discretion to fashion a remedy for discovery violations that occur during trial. Since the trial court is in the best position to determine whether a mistrial is needed, the decision to grant or deny a motion for a mistrial rests within the sound discretion of the trial court.”³⁷

{¶40} Finley maintains that the state had not provided a copy of Dr. Wright’s PowerPoint presentation, marked and initially admitted as state’s exhibit 20, before he used the presentation on direct examination in conjunction with properly admitted acetate overlays to match Finley’s bite pattern to the marks on Christopher. The state contended that it had complied with Crim.R. 16 when it had disclosed all the information that Dr. Wright had used to prepare the presentation.

{¶41} The trial court conducted a thorough hearing, outside the presence of the jury. It entertained extensive argument by counsel, continued the matter over a weekend to permit counsel to review the material actually disclosed by the state, and conducted a separate voir dire of Dr. Wright. The trial court found that the state had disclosed all the information that Dr. Wright had used to prepare the presentation. It concluded that the presentation was not a separate report or tangible document discoverable under Crim.R. 16, but was, in effect, demonstrative evidence used to aid the jury’s consideration of Dr.

³⁷ *State v. Person*, 174 Ohio App.3d 287, 2007-Ohio-6869, 881 N.E.2d 924, ¶12 (internal citations omitted).

Wright's testimony. The trial court then reversed its prior ruling admitting the presentation as evidence and ordered that it not be given to the jury during its deliberations.

{¶42} Here, Finley was adequately informed of the bite-mark-comparison evidence that would be used against him at trial. "Crim. R. 16(B) does not require the prosecution to disclose to the defendant the significance to the * * * information sought * * * by the defendant," or "how it intends to use [the] work sought to be discovered by the defense."³⁸ The trial court did not err in permitting Dr. Wright to testify by using the presentation as demonstrative evidence or in fashioning a remedy for any perceived unfairness to Finley by limiting the jury's access to the presentation. The third assignment of error is overruled.

{¶43} *Ineffective assistance of counsel.* In his sixth assignment of error, Finley asserts that he was denied the effective assistance of counsel for various claimed deficiencies, including admitting autopsy photos into evidence to support the testimony of the defense's own forensic pathologist, failing to object to Lester's testimony that she had informed Tucker that she would contact 241-KIDS if Tucker placed Christopher in Finley's care, attempting to admit and then withdrawing a report from a witness who ultimately did not testify at trial, and failing to introduce the curriculum vitae of Dr. Souviron. The assignment of error is feckless.

{¶44} To prevail on a claim of ineffective assistance of trial counsel, an appellant must show, first, that trial counsel's performance was deficient and, second, that the deficient performance was so prejudicial that he was denied a reliable and fundamentally

³⁸ *State v. Parker* (1990), 53 Ohio St.3d 82, 87, 558 N.E.2d 1164.

fair proceeding.³⁹ A reviewing court will not second-guess trial strategy and must indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance.⁴⁰

{¶45} Here, both of Finley's experienced trial counsel worked vigorously to discredit the state's theory of the case and conducted a spirited defense. They succeeded to a large degree, in that Finley was acquitted of aggravated murder. After reviewing the entire record, we hold that counsel's efforts were not deficient, and that Finley was not prejudiced in any way. The result of the trial was reliable and fundamentally fair. The sixth assignment of error is overruled.

{¶46} *Other evidentiary issues.* Finley's seventh assignment of error, in which he claims that the admission of a photograph of Christopher taken during his birthday party was inflammatory and deprived Finley of a fair trial, is overruled. Evid.R. 403 excludes relevant evidence if its "probative value is substantially outweighed by the danger of unfair prejudice." Whether to exclude evidence is consigned to the sound discretion of the trial court.⁴¹ The trial court did not abuse its discretion in this case. In light of the graphic evidence introduced at trial, the admission of this single photo was not unfairly prejudicial to Finley.

{¶47} *Prosecutorial misconduct.* In his eighth assignment of error, Finley asserts that the prosecutor engaged in numerous violations of Finley's right to a fair trial by withholding discovery material relating to Dr. Wright's testimony, in eliciting hearsay

³⁹ See *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052; *Lockhart v. Fretwell* (1993), 506 U.S. 364, 369-370, 113 S.Ct. 838; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph three of the syllabus.

⁴⁰ See *State v. Mason*, 82 Ohio St.3d 144, 157-158, 1998-Ohio-370, 694 N.E.2d 932.

⁴¹ See *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, 819 N.E.2d 215, ¶107.

testimony from Lester, in informing the jury of Finley's criminal past, and in admitting prejudicial photos of Christopher's birthday party.

{¶48} The test for whether prosecutorial misconduct mandates reversal is whether the state's remarks or actions were improper, and if so, whether they prejudicially affected a substantial right of the accused.⁴² The central element of prosecutorial-misconduct analysis is "whether the conduct complained of deprived the defendant of a fair trial."⁴³

{¶49} In light of our resolution of the third and seventh assignments of error, the failure to disclose discovery material and the admission of the birthday photo were not improper. Since Finley did not object to Lester's testimony that she had threatened to call 241-KIDS, our review is limited to whether the prosecutor's actions rose to the level of plain error.⁴⁴ We are not convinced that, but for the admission of this testimony, Finley would not have been convicted. As the jury had already learned that Tucker and Finley had met while he was incarcerated in the Queensgate facility, Finley was not harmed by the prosecutor's remarks. Since the trial court sustained Finley's objections to the other challenged testimony or remarks, the eighth assignment of error is overruled.

{¶50} ***Other trial errors.*** Finley contends, in his ninth assignment of error, that the trial court erred by refusing the jury's request during deliberations for a reading of the trial testimony of Lester and Tucker. After discussing the request with counsel for Finley and the state, the trial court instructed the jurors to rely on their collective recollection of the testimony. The question whether to reread testimony to the jury is consigned to the

⁴² See *State v. Bey*, 85 Ohio St.3d 487, 493, 1999-Ohio-283, 709 N.E.2d 484.

⁴³ *State v. Fears*, 86 Ohio St.3d 329, 332, 1999-Ohio-111, 715 N.E.2d 136, citing *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 24, 514 N.E.2d 394.

⁴⁴ See Crim.R. 52(B).

sound discretion of the trial court.⁴⁵ We find no abuse of that discretion in the trial court's refusal to reread testimony to the jury. The ninth assignment of error is overruled.

{¶51} *Allied offenses of similar import.* In his fifth assignment of error, Finley argues that he could not, consistent with R.C. 2941.25, have been sentenced for both felony murder and felonious assault. We agree.

{¶52} Under R.C. 2941.25, a defendant may, in a single proceeding, be found guilty of and sentenced for two offenses, having as their genesis the same criminal conduct or transaction, if the offenses (1) are not allied offenses of similar import, (2) were committed separately, or (3) were committed with a separate animus as to each offense.⁴⁶ Two offenses are allied offenses of similar import if, upon a comparison of the elements of the offenses in the abstract, without consideration of the facts of the case or the need for an exact alignment of elements, the offenses are so similar that the commission of one offense will necessarily result in the commission of the other.⁴⁷

{¶53} As we noted *supra*, in *State v. Jackson*, this court followed the supreme court's decision in *State v. Williams* to hold that felony murder and serious-harm felonious assault are allied offenses of similar import. And we overruled our original decision in Finley's appeal to the extent it held to the contrary.⁴⁸ Further, the record of the proceedings at trial does not permit a conclusion that the offenses were committed separately or with a separate animus as to each offense. Therefore, the trial court could not, consistent with R.C. 2941.25, have sentenced Finley for both felony murder and felonious assault. Accordingly, we sustain the fifth assignment of error.

⁴⁵ See *State v. Berry* (1971), 25 Ohio St.2d 255, 267 N.E.2d 775, paragraph four of the syllabus; see, also, *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶123.

⁴⁶ See *State v. Bickerstaff* (1984), 10 Ohio St.3d 62, 461 N.E.2d 892.

⁴⁷ See *Cabrales*, 118 Ohio St.3d 54, 886 N.E.2d 181, paragraph one of the syllabus.

⁴⁸ See *Jackson*, *supra*, at ¶21-22.

{¶54} **Cumulative error.** Finally, in his tenth assignment of error, Finley contends that the cumulative effect of those errors deemed harmless deprived him of a fair trial. The assignment of error is without merit. We conclude that, even when considered in the aggregate, the harmless errors did not “become prejudicial by sheer weight of numbers” and thus deprive Finley of his right to a fair trial.⁴⁹ The tenth assignment of error is overruled.

Conclusion

{¶55} Because the trial court violated R.C. 2941.25 when it sentenced Finley for both felony murder and serious-harm felonious assault, we vacate the sentences and remand the case for resentencing.⁵⁰ In all other respects, we affirm the judgment of the court below.

Sentences vacated and cause remanded.

HILDEBRANDT and HENDON, JJ., concur.

Please Note:

The court has recorded its own entry on the date of the release of this opinion.

⁴⁹ *State v. Yarbrough*, 104 Ohio St.3d 1, 2004-Ohio-6087, 817 N.E.2d 845, ¶112, quoting *State v. Hill*, 75 Ohio St.3d 195, ¶12, 1996-Ohio-222, 661 N.E.2d 1068.

⁵⁰ See *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, paragraph two of the syllabus (citing *Maumee v. Geiger* [1976], 45 Ohio St.2d 238, 344 N.E.2d 133, *State v. Harris*, 122 Ohio St.3d 373, 2009-Ohio-3323, 911 N.E.2d 882, and *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, to hold that “[u]pon finding reversible error in the imposition of multiple punishments for allied offenses, a court of appeals must reverse the judgment of conviction and remand for a new sentencing hearing at which the state must elect which allied offense it will pursue against the defendant”); see, e.g., *State v. Bohannon*, 1st Dist. Nos. C-070859 and C-070860, 2010-Ohio-4596; *State v. Gandy*, 1st Dist. No. C-070152, 2010-Ohio-2873; *State v. North*, 1st Dist. No. 090406, 2010-Ohio-2766; *State v. Godfrey*, 183 Ohio App.3d 344, 2009-Ohio-3726, 916 N.E.2d 1143 (vacating sentences imposed for allied offenses and remanding for resentencing on offenses to be elected by the prosecution).