[Cite as *State v. Holcomb*, 2021-Ohio-2352.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

DARIUS HOLCOMB,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 19 MA 0083

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 18 CR 1088

BEFORE:
Carol Ann Robb, Cheryl L. Waite, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed in Part; Reversed in Part and Remanded in Part.

Atty. Paul J. Gains, Mahoning County Prosecutor*, Atty. Ralph M. Rivera,* Assistant Prosecuting Attorney, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee and

Atty. Scott Essad, 5500 Market Street, Suite 99, Youngstown, Ohio 44512 for Defendant-Appellant.

Dated: June 22, 2021

Robb, J.

{¶1} Defendant-Appellant Darius Holcomb appeals the judgment of conviction entered in the Mahoning County Common Pleas Court after a jury trial. He alleges his two domestic violence and two felonious assault convictions must be reversed for a new trial. He claims it was improper to try him for two alternative ways of committing felonious assault based on the same act, even though the court agreed to merge the offenses at sentencing. His argument is without merit.

{¶2} For the following reasons, the jury verdicts are affirmed, and the sentences are upheld on the two domestic violence counts and on count three felonious assault. However, we sua sponte recognize the trial court erred when indicating a concurrent five-year sentence applied to the felonious assault in count four, instead of just the felonious assault count elected by the state. A concurrent sentence does not accomplish the merger of offenses. In accordance, the case is remanded for the trial court to issue a new sentencing entry to eliminate the sentence on count four.

STATEMENT OF THE CASE

{¶3} On December 20, 2018, Appellant was indicted on four counts related to the same victim. Counts one and two both involved domestic violence for knowingly causing or attempting to cause physical harm to a family or household member in violation of R.C. 2919.25(A) and were felonies of the fifth degree as Appellant knew the victim was pregnant. The first count was for conduct occurring on November 3, 2018, and the second count was for conduct occurring on November 4, 2018.

{¶4} Counts three and four each alleged felonious assault for conduct occurring on October 29, 2018. Both were second degree felonies. Count three alleged a violation of R.C. 2903.11(A)(1) for knowingly causing serious physical harm. Count four alleged a violation of R.C. 2903.11(A)(2) for knowingly causing or attempting to cause physical harm by means of a deadly weapon.

{¶5} The body of the indictment originally cited "(A)(2)(B)" after setting forth the elements for count four, while the caption correctly cited (A)(2) for this count. On the

state's motion and without objection, the trial court amended the body of the indictment so count four cited (A)(2) without the (B), as reflected in the caption.

{¶6} Open file discovery was provided. Additionally, a bill of particulars explained count three was committed when Appellant struck the victim in the head and caused a severe laceration (constituting serious physical harm) and count four was committed because he struck the victim in the head with the firearm (a deadly weapon).

{¶7} At the May 2019 jury trial, the victim testified she began living with Appellant in Youngstown in June 2018. Around the same time, she learned she was pregnant with his child. Within months, Appellant became very controlling. In explaining Appellant's knowledge of her pregnancy, the victim noted he went to pregnancy appointments with her and viewed sonograms. At the time of the first assault at issue, the victim was visibly more than six months pregnant.

{¶8} On October 29, 2018, the victim came home from work, and Appellant went through the prior locations on her phone. (Tr. 194). He apparently did not realize her work place was located in a certain locality and accused her of being somewhere besides work. (Tr. 195). He smashed her phone while yelling. (Tr. 198).

{¶9} The victim testified Appellant then came up behind her as she reclined on the couch and hit her in the top of the head with his gun. He then cocked the gun, put it against her head, and said he was going to kill her. (Tr. 195-196). While blood was flowing from the laceration he caused to her head, he threw a rag to her and said the wound was not that bad. (Tr. 197). Appellant moved a couch to block the door, laid on it while holding his gun, and said the victim was not going anywhere. (Tr. 198).

{¶10} On November 3, 2018, Appellant became upset after the victim spoke to her children, who lived with her grandmother. While the victim was sitting on the couch, Appellant pulled her by the hair over the back of the couch (causing it to flip over). (Tr. 200). She said a large chunk of hair was pulled from her head and her prior head laceration started bleeding again. (Tr. 200, 235). When she warned Appellant he was going to hurt the baby, he responded, "I don't care. It's probably not even mine." (Tr. 201).

{¶11} On November 4, 2018, Appellant became angry upon finding an unfamiliar screwdriver in the victim's vehicle. The victim testified Appellant punched her in the head

(the side/back of her head), hard enough that she had to "catch [her] balance after" the impact. Appellant forbade her from leaving for work and ran upstairs while yelling; she believed he was going for his gun. (Tr. 202-203). She fled to her car and drove to work where she told her supervisor about her situation.

{¶12} The victim then went to the emergency room to ensure her pregnancy had not been affected by the assault. (Tr. 204). While there, she was informed they would have offered stitches for the head laceration if she had sought treatment on the day of the injury but it was too late for stitches as the healing process had started. (Tr. 208). The victim took a photograph of the laceration at the emergency room, which was displayed to the jury. (Tr. 206). She testified she still had a scar on her head at the time of trial and hair would not grow out of it. (Tr. 199).

{¶13} A nurse testified to observing the victim's healing head laceration. (Tr. 249, 254-255). She also noticed a bruised area on the victim's head. (Tr. 254). A Youngstown police officer testified the victim's head laceration was immediately noticeable when he arrived at the emergency room. (Tr. 261). Appellant was not at the residence when this officer went to arrest him. (Tr. 265).

{¶14} The victim went to a domestic violence shelter. She received texts from Appellant which were presented at trial. One contained a photograph of Appellant holding a gun to his head; she said the gun was the same one he used to hit her head. (Tr. 212). In other texts, he indicated he was in front of her grandmother's house (where her children lived). He described features of the house and threatened to shoot at the house if she did not return his call. (Tr. 213-215).

{¶15} The victim called the police in the location where her grandmother lived to report the threat and later to say Appellant was back at the Youngstown residence. (Tr. 215-216). A police officer from that locality asked a Youngstown detective to have Appellant arrested on an outstanding warrant. The detective discovered Appellant was a recent domestic violence suspect as well.

{¶16} The detective gathered multiple officers and went to arrest Appellant at the victim's residence. Appellant would not open the door and denied he was Darius Holcomb. A standoff situation lasted at least 45 minutes. (Tr. 277). Once in jail, Appellant continued to call the victim until the jail blocked access to her number. (Tr. 217-218).

{¶17} In closing arguments, the prosecution said counts three and four were "charged in the alternative" for one act of hitting the victim in the head with a gun. The prosecutor noted the jury could find Appellant committed the felonious assault by: serious physical harm, physical harm with a deadly weapon, or both. (Tr. 335-336).

{¶18} The court instructed the jury on both types of felonious assault: (1) knowingly cause serious physical harm for count three; and (2) cause or attempt to cause physical harm by means of a deadly weapon for count four. (Tr. 372-373). There was no objection to the jury instruction.

{¶19} The jury found Appellant guilty as charged. At the June 18, 2019 sentencing hearing, the state said counts three and four were subject to merger and asked the court to sentence Appellant on only one of the felonious assault counts, electing to proceed to sentencing on count three. The court agreed the felonious assault counts merged. The domestic violence counts did not merge with each other or with the felonious assault count as they were committed on different dates.

{¶20} The court imposed concurrent, maximum twelve-month sentences for each of the two domestic violence counts to run consecutive to the maximum five-year sentence imposed for felonious assault, for a total of six years.[1] However, as discussed sua sponte below, the trial court did not truly merge the felonious assault counts as the court said they merged but then entered five-year, concurrent sentences on each count. Appellant filed a timely notice of appeal from the June 24, 2019 sentencing entry.

ASSIGNMENT OF ERROR

{¶21} Appellant sets forth one assignment of error, which he says requires the elimination of one count of felonious assault and a new trial on the other felonious assault and the two domestic violence convictions. His sole assignment of error contends:

"Count 4 should have never made it to trial. It was prosecutorial misconduct for the state to bring it, and it was also error for the trial court to allow it to go forward."

{¶22} Appellant says it was improper to allow both felonious assault counts to proceed to trial before a jury as they were brought for the same event (hitting the victim in the head with a gun). He cites a case which stated: "Two indictments for the same offense are often pending at the same time. The state can only proceed upon one of

[1] Appellant was also sentenced to 90 days in jail for his contempt of court during trial.

them, but may elect upon which it will proceed." *O'Meara v. State*, 17 Ohio St. 515, 517 (1867).

{¶23} Appellant says the merger provided for in R.C. 2941.25 applies to multiple offenses but claims counts three and four essentially represented the same offense. He also believes count four represented an attempt to commit count three and cites the statutory provision in the uncharged attempt statute: "No person who is convicted of committing a specific offense, of complicity in the commission of an offense, or of conspiracy to commit an offense shall be convicted of an attempt to commit the same offense in violation of this section." R.C. 2923.02(C).

{¶24} Appellant believes allowing the jury to proceed on both felonious assault charges resulted in an "unreasonable multiplication of charges" which violated the "spirit of due process" and resulted in prejudice by placing an unwarranted burden on the defense, misdirecting the jury, and tainting the conviction on all offenses. He concludes the failure to make a pre-trial election represented prosecutorial misconduct and resulted in trial court error, claiming the trial court should have read the bill of particulars and sua sponte dismissed one of the felonious assault charges rather than allow both to be submitted to the jury and then merge them at sentencing.

{¶25} As he did not object below, Appellant must demonstrate plain error. "An appellate court need not consider an error that was not called to the attention of the trial court at a time when such error could have been avoided or corrected by the trial court." *State v. Carter*, 89 Ohio St.3d 593, 598, 734 N.E.2d 345 (2000). We also note: "On appeal, a party may not assign as error the giving or the failure to give any instructions unless the party objects before the jury retires to consider its verdict, stating specifically the matter objected to and the grounds of the objection." Crim.R. 30(A). *See also* Crim.R. 12(C)(2) (alleged defects in the indictment must be raised before trial, except lack of jurisdiction and failure to charge an offense).

{¶26} Where no objection is entered at a time when the error can be corrected, the reviewing court may recognize plain error if substantial rights are affected. Crim.R. 52(B). Plain error is a discretionary doctrine to be used with the utmost care by the appellate court and only in exceptional circumstances in order to avoid a manifest miscarriage of justice. *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044, 781 N.E.2d

88, ¶ 62. The doctrine can be employed only where there was an obvious error affecting substantial rights in that the plain error was outcome determinative. *Id.*

{¶27} Here, there is no indication substantial rights would have been affected, considering: the strength of the evidence presented; the clear notice of the elements differentiating the two felonious assault offenses charged in the indictment (even before amendment to delete an extraneous letter from one of the cites); the access to open file discovery in the county along with a bill of particulars; and the lack of indicators the defense was unable to prepare or the jury was misled as a result of the alternative counts.

{¶28} In any event, there was no error in allowing both counts to proceed through trial. Initially, we point out that count four was not merely an attempt to commit the offense in count three as suggested by Appellant. Count three was a violation of R.C. 2903.11(A)(1) for knowingly causing serious physical harm. Count four was a violation of R.C. 2903.11(A)(2) for knowingly causing or attempting to cause physical harm by means of a deadly weapon.

{¶29} As Appellant emphasizes, the statute defining the offense in count four allows the physical harm to be merely attempted, unlike count three which requires the described harm to be actually caused. We note count four had a cause option, and the state did not rely on mere attempt in proving count four. Regardless, there are major differences between count three and count four: count three has the additional element requiring the physical harm which was caused to be *serious*, while count four has the additional element requiring the (caused or attempted) physical harm to be "by means of a deadly weapon." *Compare* R.C. 2903.11(A)(1) *to* (A)(2).

{¶30} Contrary to Appellant's suggestion, the fact that the offenses were both contained in the same felonious assault statute and committed by a single act did not mean he could not be charged and tried under both (A)(1) and (A)(2). The evidence fully supported the elements of both subdivisions. If the prosecution is nevertheless uncertain the jury will agree the physical harm was serious, for (A)(1), but is also concerned the jury may not find the physical harm was caused by means of a deadly weapon, for (A)(2), then the prosecution appropriately (and commonly) charges the defendant with both types of felonious assault. It is not misconduct to proceed through trial on both while knowing they will merge at sentencing if there is a guilty verdict on both.

{¶31} This is permitted by statute: "Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one." R.C. 2941.25(A). We also note the next division of the statute, which explains: "Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them." R.C. 2941.25(B).

{¶32} The use of the term "conviction" in R.C. 2941.25 refers to the combined "guilt determination and the penalty imposition." *State v. Goff*, 82 Ohio St.3d 123, 135, 694 N.E.2d 916 (1998). *See also State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, at ¶ 13, 24. The statute thus applies prior to sentencing and does not prohibit a jury verdict or finding of guilt. *Id. See also State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, ¶ 12 (the statute is a codification of double jeopardy protections as to when "multiple punishments" can be imposed).

{¶33} Likewise, the statutory prohibition in R.C. 2923.03(C) against convicting a person of a crime and the attempt to commit the same crime is a proscription as to the combined finding of guilt and sentence and not a bar on the trial of the offenses.[2] Regardless, as explained supra, division (A)(2) in R.C. 2903.11 does not merely describe an attempt to commit to offense described in (A)(1).

{¶34} The existence of two different statutory ways a person can commit a named offense with "the same conduct" can be "construed to constitute" more than one offense for purposes of R.C. 2941.25(A), which allows indictment and trial but not sentencing on both offenses. The statute specifically speaks of offenses of the "same or similar kind" (if committed separately or with separate animus, they can receive separate sentences; but if not, they can be tried without receiving separate sentences). *See* R.C. 2941.25(B).

[2] R.C. 2923.03(C) and its use of the word "convicted" prohibits the final judgment of sentencing on both the attempt and the commission of (or conspiracy to commit) the same crime; it does not prohibit simultaneous trials on both and the submission of both to the jury for verdicts. *State v. Friedlander*, 8th Dist. Cuyahoga No. 90084, 2008-Ohio-2812, ¶ 29-31; *State v. Dapice*, 9th Dist. Summit No. 14013 (Oct. 18, 1989).

{¶35} As to Appellant's cite to the 1867 *O'Meara* case, we note the statutory provisions of R.C. 2941.25 did not exist then. Even before the statute's enactment (and after *O'Meara*), the Supreme Court held: "Where * * * in substance and effect but one offense has been committed, a verdict of guilty by the jury under more than one count does not require a retrial but only requires that the court not impose more than one sentence." *State v. Botta*, 27 Ohio St.2d 196, 203, 271 N.E.2d 776 (1971). In any event, the *O'Meara* case involved two separate indictments, each with the exact same elements for the exact same offense, and merely found there was no issue with proceeding on one and dismissing the other. The case did not involve an indictment with counts corresponding to the different ways of committing a named offense.

{¶36} In a capital case, the defendant was indicted with "alternate counts of capital aggravated murder" for killing one victim. *Goff*, 82 Ohio St.3d at 127. "Both counts alleged aggravated felony murder under R.C. 2903.01(B); however, count one included aggravated burglary as the felony and count two relied on aggravated robbery." *Id.* at 135 (both counts were charged under the same subdivision). The defendant unsuccessfully filed a motion before trial asking the court to order the state to elect which count it would proceed on before trial (and renewed the motion at the start of the capital penalty phase). The trial court agreed the state was not required to elect a count until sentencing, at which time the trial court imposed a death sentence on only the count chosen by the state. On appeal, the defendant argued that it was error to allow the jury to consider both counts. *Id.*

{¶37} The Supreme Court rejected "the proposition that the prosecution must elect, before the penalty phase, which count shall be submitted to the jury for sentencing." *Id.* at 136. The Court observed: "Case precedent establishes that the state may submit to the jury two crimes that are allied offenses of similar import. However, the law prohibits a conviction of both crimes." *Id.* at 135 ("Only one penalty of death was given to appellant. Thus, only one conviction actually occurred."), quoting *State v. Brown*, 38 Ohio St.3d 305, 317, 528 N.E.2d 523 (1988) (the trial court can submit two capital charges of aggravated murder to the jury for the death of one victim and allow the jury to return a guilty verdict on both, but cannot sentence on both).

{¶38} Pursuant to statutory and case law, the state was permitted to prosecute Appellant for both types of felonious assault, and the trial court did not err in failing to dismiss a count or force an election prior to trial. Accordingly, there was no error, plain or otherwise, in allowing the jury to return a verdict on counts three and four. Additionally, substantial rights were not affected as the evidence was overwhelming and there was no indication the jury was misled by submission of verdict forms on both types of felonious assault. Appellant's assignment of error is overruled.

SUA SPONTE RECOGNITION OF PLAIN ERROR

{¶39} As pointed out in the statute and the case law, the submission of both felonious assault offenses to the jury was not improper, but sentencing on both would be improper where they were subject to merger. *See Goff*, 82 Ohio St.3d at 135; R.C. 2941.25(A). Although Appellant's brief does not raise an issue with the method of merger occurring at sentencing, an observation in the factual section of his brief prompts this court to further consider the statements at the sentencing hearing and in the sentencing entry. The brief observes: "The trial court noted that counts 3 and 4 merged, and ordered Holcomb to serve five years on both counts (not each) of those counts. The one-year sentence of counts 1 and 2 were to be served concurrently to the five years of counts 3 and 4, for a total of six years." (Apt.Br. 3).

{¶40} If true, this describes a glaring error. Considering the fact that an underlying reason we found Appellant's assignment of error lacked merit was based upon his acknowledgement the offenses were merged at sentencing, we shall delve into a consideration of whether merger was accomplished by the trial court's characterization.

{¶41} The state elected count three for conviction and sentencing and advised the court a sentence should only be imposed on count three. (Sent.Tr. 4). The election of count three for sentencing was the state's right, which the trial court was required to accept after finding merger appropriate. *Whitfield*, 124 Ohio St.3d 319 at ¶ 20-21, 24. The trial court agreed the felonious assault offenses merged. (Sent.Tr. 23).

{¶42} Yet, the court then said at the sentencing hearing, "With respect to Counts Three and Four * * * the court imposes a sentence on each one of those counts. They merge for a total of five years." (Sent.Tr. 24). Unfortunately, the state did not interject its

earlier warning that only one five-year sentence could be entered and this sentence would be on count three.

{¶43} Thereafter, the sentencing entry repeated the error by stating: "Counts Three (3) and Four (4) were merged for purposes of sentencing and the Defendant is ordered to serve a term of five (5) years in [prison]. Count One (1) and Two (2) are to be served concurrent to one another but consecutive to Counts Three (3) and Four (4) for a total of six (6) years."

{¶44} The court mentioned "a term of five (5) years" (in the singular). However, the court failed to memorialize the state's election to proceed to sentencing on only count 3. And, the court said the concurrent sentences on the first two counts would run consecutive to both "Counts Three (3) and Four (4)" demonstrating a prison term was imposed on both of the merged felonious assault counts.

{¶45} Since a "conviction," as the term is used in R.C. 2941.25(A), can only be entered on one offense after the merger of two offenses, the trial court must memorialize which count the state has elected and thus which count received the court's sentence. *See Whitfield*, 124 Ohio St.3d 319 at ¶ 13, 24 ("for purposes of R.C. 2941.25(A), a conviction is a determination of guilt and the ensuing sentence. * * * The defendant is not 'convicted' for purposes of R.C. 2941.25(A) until the sentence is imposed."). When a trial court merges two offenses, only one offense remains for sentencing and a sentence can only be entered on that remaining offense. *Id.* at ¶ 17-18.

{¶46} Merging offenses is not accomplished by running the sentences concurrently, and thus, concurrent sentences cannot be imposed on merged offenses. *State v. Damron*, 129 Ohio St.3d 86, 2011-Ohio-2268, 950 N.E.2d 512, ¶ 17 ("the imposition of concurrent sentences is not the equivalent of merging allied offenses"); *State v. Tapscott*, 2012-Ohio-4213, 978 N.E.2d 210, ¶ 48 (7th Dist.) (sentencing concurrently on merged counts does not satisfy the merger doctrine as no sentence at all should be entered on one of the two merged counts).

{¶47} The error of entering a sentence on a merged count is not harmless due to the imposition of concurrent sentences. "[E]ven when the sentences are to be served concurrently, a defendant is prejudiced by having more convictions than are authorized by law." *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶ 31

(plain error even where it is a jointly recommended sentence), citing *State v. Yarbrough*, 104 Ohio St.3d 1, 2004-Ohio-6087, 817 N.E.2d 845, ¶ 96-102. *See also State v. Smith*, 7th Dist. Mahoning No. 11 MA 120, 2013-Ohio-756, ¶ 74 ("As this court and the Ohio Supreme Court have stated multiple times, two merged counts cannot both receive sentences, even concurrent sentences. This is said to constitute plain error."). Under the circumstances, the issue can be resolved by a new sentencing entry and does not require a new sentencing hearing. *See State v. Williams*, 148 Ohio St.3d 403, 2016-Ohio-7658, 71 N.E.3d 234, ¶ 31-32 (no need to remand for new sentencing hearing where the state elected an offense at the prior hearing and the trial court had no discretion to impose sentences on both of the merged offenses).[3]

{¶48} In sum, the trial court's imposition of a five-year sentence on count four was an obvious error that affected the right to be convicted of only one of the two merged offenses. Accordingly, the sentence on count four was improper and subject to reversal as the sentence resulted in a prohibited final conviction on count four, which was not negated by the fact that the sentence was run concurrent with count three.

{¶49} For the foregoing reasons, the trial court's judgment is affirmed in part and reversed and remanded in part with instructions to issue a new sentencing entry in conformity with this opinion to eliminate the conviction and five-year sentence on count four as the trial court agreed this offense merged into count three on the state's election at sentencing.

Waite, J., concurs.

D'Apolito, J., concurs.

[3] A different holding in *Williams* was recently abrogated. *See State v. Henderson*, 161 Ohio St.3d 285, 2020-Ohio-4784, 162 N.E.3d 776 (merger issue does not result in a void sentence and is subject to the post-conviction res judicata bar). As the case at bar is a direct appeal, this is not relevant.

For the reasons stated in the Opinion rendered herein, it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed in part and reversed in part. We hereby remand this matter to the trial court in part with instructions to issue a new sentencing entry in conformity with this opinion to eliminate the conviction and five-year sentence on count four as the trial court agreed this offense merged into count three on the state's election according to law and consistent with this Court's Opinion. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.