[Cite as *State v. Sarr*, 2019-Ohio-3398.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	Appellate Case No. 28187
	:	
v.	:	Trial Court Case No. 2018-CR-2347
	:	
SAMBA SARR	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 23rd day of August, 2019.

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TUCKER, J.

{¶ 1} Defendant-appellant Samba Sarr appeals from his conviction and sentence for kidnapping, gross sexual imposition and assault. Sarr contends that he was denied the effective assistance of counsel at trial. He further contends that his convictions were not supported by sufficient evidence and that they were against the manifest weight of the evidence. Finally, Sarr claims that the trial court erred in instructing the jury and in failing to merge the offenses of kidnapping and gross sexual imposition.

{¶ 2} We conclude that trial counsel did not render ineffective assistance. We further conclude that the convictions were supported by sufficient evidence and were not against the weight of the evidence. We find no error in the jury instructions. However, we agree that the trial court erred in failing to merge the offenses of kidnapping and gross sexual imposition.

{¶ 3} Accordingly, the judgment of the trial court is affirmed in part, reversed in part, and remanded for resentencing.

I. Facts and Procedural History

{¶ 4} The incident which forms the basis for Sarr's appeal occurred during the early morning hours of June 15, 2018, at Sarr's residence in Dayton. At that time, Sarr and the victim, T.W, had been acquaintances for approximately six years. Their relationship was sexual, and they would meet approximately every five or six months to engage in sexual relations. Their relationship was not exclusive. T.W. only knew Sarr as "Amir."

{¶ 5} On June 14, 2018, Sarr telephoned T.W. and asked her if she wanted to meet him. The two arranged to meet after T.W.'s work shift ended. At approximately 12:30

a.m. on June 15, T.W. drove from her workplace in Troy and met Sarr, who was in his own vehicle, in the parking lot of a store near Sarr's home. T.W. followed him to his residence on Brooklyn Avenue.[1] The two entered an alley and parked behind Sarr's home.

{¶ 6} The pair entered Sarr's home through the back door. T.W. had a purse as well as an overnight bag in which she had a change of clothes and some toiletries. T.W. asked to take a shower. After showering and putting on fresh clothes, T.W. walked into the living room where Sarr was watching television.

{¶ 7} Sarr asked T.W. to perform oral sex on him. After doing so, T.W. asked him if they could move to an adjacent room where Sarr had placed some sheets and blankets on the floor. The two moved into the other room and began engaging in vaginal intercourse. After approximately five minutes, Sarr stopped and his demeanor changed. He asked T.W. if she had been smoking crack with an individual named Dave.[2] T.W. denied doing so, but Sarr continued to accuse her. Sarr sat on top of T.W., who was lying on her back, and began to choke her. He also slapped her on the face multiple times.

{¶ 8} Eventually, T.W. was able to free herself. She then ran to the back door. As T.W. got to the door, Sarr grabbed her and forced her back onto the floor in the room where the blankets were located. Sarr forced T.W. onto her back and told her that he was going to sit on her face and make her lick his "ass." He then turned his back toward the top of her head and exposed his anus to her face. Sarr told her to lick his "ass," and

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[1] Sarr had moved to a different residence since T.W. had last seen him.

[2] Dave was an individual with whom Sarr had worked and whom T.W. knew from school.

his genitals. T.W. complied.

{¶ 9} T.W. was again able to escape Sarr's grasp, and she attempted to leave through the back door. Sarr caught up to her as she opened the door. As he began pulling her away from the door, the two fell to the floor. After wrestling away, T.W. was able to get to her feet and run out the door.

{¶ 10} T.W., who was naked, ran down the street screaming for help. She knocked on the doors of several homes, but no one answered. T.W. came upon a man who was standing in the yard of a home. She asked him for help and the man took her into the home where approximately ten other people were gathered. T.W. was provided with clothing. She asked the people to call 911, but no one complied. However, the people agreed to accompany her back to Sarr's home. When they returned to the house, T.W. found her purse, keys and cellular telephone sitting on top of her car. Sarr's vehicle was gone.

{¶ 11} T.W. drove herself to a gas station on Brown Street where she called her aunt. T.W. then drove to her aunt's home and the two proceeded to Good Samaritan Hospital. T.W. informed hospital staff of the assault, but was told that they could not help her.[3] T.W. and her aunt left the hospital. After dropping off her aunt, T.W. went home.

{¶ 12} T.W. was not sure she wanted to make a police report, but, she ultimately called the Dayton Police Department. She met with officers Bradon Halley and Brandon Morse as well as Sergeant Thomas Schloss. She informed them that her friend "Amir" had sexually assaulted her. Officer Halley took pictures of the visible injuries which

[3] T.W. cited the fact that the hospital was in the process of shutting down the facility and had minimal staff as the reason she was denied treatment.

included bruising and abrasions. T.W. provided the officers with Amir's address. T.W. was then escorted to Miami Valley Hospital.

{¶ 13} At the hospital, T.W. was examined by Kathryn Ball, a registered nurse who was working as a sexual assault examiner when T.W. reported to the emergency room. Ball examined T.W. and observed bruising and abrasions to her left cheek and below her mandible as well as bruising and burst capillaries all along her neck. T.W. also had bruising on her back, right posterior shoulder, both hips and her right shin. T.W.'s voice was very raspy and hoarse. T.W. indicated that her voice did not normally sound that way.

{¶ 14} After speaking to T.W., the officers went to Sarr's residence. The officers knocked on the door, but Sarr did not respond for approximately five minutes. When he did open the door, one of the officers stated that they were looking for Amir. Sarr indicated that Amir was his roommate and that he was not home. Sarr permitted the officers to enter the home to look for Amir. Sarr then asked them if they were there because of something that happened with "old girl." Tr. 281, 310. The officers informed Sarr that a woman had made allegations against Amir. Sarr then admitted that he was Amir. Sarr was arrested. He executed a written consent for a search of his home. The police found T.W.'s clothing, shoes and toiletries.

{¶ 15} Sarr was indicted on two counts of kidnapping, one count of gross sexual imposition and one count of assault. Following a trial, the jury convicted Sarr on all charges. At sentencing, the trial court merged the two kidnapping convictions and the State elected to proceed on the second count of kidnapping (sexual activity) for purposes of sentencing. The trial court imposed a four-year prison term for kidnapping and a six-

month term for gross sexual imposition; the two sentences were ordered to be served consecutively. The court imposed a concurrent 180-day sentence on the assault conviction for an aggregate prison term of four years and six months. Finally, the court designated Sarr as a Tier I and II sex offender. Sarr appeals.

II. Ineffective Assistance of Counsel

{¶ 16} Sarr's first assignment of error states as follows:

> COUNSEL FOR THE DEFENDANT WAS INEFFECTIVE AS TRIAL COUNSEL DUE TO HIS FAILURE TO MAKE PROPER OBJECTIONS.

{¶ 17} Under this assignment of error, Sarr contends that trial counsel rendered ineffective assistance for failing to object to statements made by the prosecutor during closing argument.

{¶ 18} "Claims of ineffective assistance of trial counsel are reviewed under the analysis set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and adopted by the Supreme Court of Ohio in *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989)." *State v. Sewell*, 2d Dist. Montgomery No. 27562, 2018-Ohio-2027, ¶ 63. "Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance." *Id.*, quoting *Bradley* at paragraph two of the syllabus. In order to establish prejudice, "the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." *Id.*, quoting *Bradley* at paragraph three of the syllabus.

{¶ 19} The sole issue before us relates to whether counsel improperly failed to object to alleged prosecutorial misconduct during closing argument.

{¶ 20} In Ohio, "[t]he test for prosecutorial misconduct is whether the conduct complained of deprived the defendant of a fair trial." *State v. Jackson*, 92 Ohio St.3d 436, 441, 751 N.E.2d 946 (2001), citing *State v. Apanovitch*, 33 Ohio St.3d 19, 24, 514 N.E.2d 394 (1987). When reviewing a claim of prosecutorial misconduct in the context of closing argument, we note that prosecutors are given "wide latitude in closing argument, and the effect of any conduct of the prosecutor during closing argument must be considered in light of the entire case to determine whether the accused was denied a fair trial." (Citation omitted.) *State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, ¶ 149. "[T]he touchstone of a due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips*, 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982).

{¶ 21} The specific portion of the prosecutor's argument to which Sarr objects occurred during rebuttal closing argument wherein the prosecutor stated, "Don't be afraid to go back into that room and do your job and find this man guilty." Tr. 472. Sarr argues that this statement indicated to the jurors that their only option following deliberation was to convict on all charges.

{¶ 22} The State, however, contends that Sarr fails to provide the context for the statement. Specifically, the State notes that, in his closing argument, Sarr's counsel made the following statement:

> So here's the deal. Rough sex was her secret. That was her secret life. That was her private life. When she went home or went to

work or met up with Dave and had these marks, these marks, she had to start explaining. She had to start explaining to somebody who went, where'd those come from? Now, I'm a victim.

* * *

The judge will tell you in a moment that in order to decide this case, you have to decide, if you can, what are the facts? What do we believe happened? Maybe you can, maybe you can't. You might go back and talk with each other and some of you might say I can't figure this out. I don't know what happened. I can't tell what happened. Guess what that is? It's called reasonable doubt.

* * *

[The judge] will tell you that you may not convict anyone of any crime unless and until you are firmly convinced of the truth of the charges. What's that mean? Firmly convinced. That means you don't convict him today or tomorrow and then go home and sit back and watch television and think you know, I wonder if there really was an aunt. I wonder if there really were ten people. I wonder if they really did have rough sex in the past. Too late. You found him guilty, too late.

If you have any doubts, it's right now. Now, or never. That's what firmly convinced means. Firmly convinced means you're so decisive, you can't change your mind. You can't wonder tomorrow night did I do the right thing. Too late for this man.

So you have more power right now than you'll ever have over another

> human being. Do you realize that? You are 12 judges. Each of you gets a vote and each vote is equal to every other vote. You decide for yourself what is the right thing to do here. You talk to each other, but you don't change your vote or change your mind or change your opinion or surrender just because you're outnumbered, just because someone tells you you don't know what you're talking about, just because someone tells you they know better than you. The judge will tell you that. He'll say don't surrender.

Tr. 454-456.

{¶ 23} The State contends that this argument was intended to scare the jurors and to make them doubt their ability to assess the reasonable doubt standard. Thus, the State contends that the prosecutor acted within proper bounds in making the following rebuttal:

> Defense counsel stood up here and gave all of you a speech on don't go home and regret your decision. Don't go home and think oh, but what about this. Ladies and gentlemen, don't be scared to be a juror. It's not a scary job to be a juror. Beyond a reasonable doubt in the jury instructions is just based on reason and common sense. It's not scary. Don't be afraid to find this Defendant guilty. That's what Defense counsel wants.
>
> You heard this victim sit up here. Her testimony is uncontroverted. She went over there to have sex. She had consensual sex and then things got violent and she was getting beaten. You've seen the photos of her injuries. You've heard her description of not being able to breathe. You've heard what she had to go through to get out of that house and run

away. You heard she had to go in a stranger's house with ten people buck-naked in order to get help.

She came in here and she shared all of those gritty details with all of you for one reason, for you to hold this man accountable for two counts of kidnapping, one count of gross sexual imposition, and one count of assault. Don't be afraid to go back into that room and do your job and find this man guilty. Thank you.

{¶ 24} We agree that the prosecutor could have been more artful and instead said something along the lines of "don't be afraid to go back into that room and do your job. And when you do, the evidence supports a finding of guilty." However, we cannot conclude that an isolated sentence in a three-volume trial transcript deprived Sarr of a fair trial. We note the jury was properly instructed that closing arguments did not constitute evidence. Further, the trial court properly instructed the jury on the reasonable doubt standard. It also instructed the jury that it could not convict Sarr unless the State produced evidence which convinced the jury, beyond a reasonable doubt, of every essential element of the charged offenses. Finally, the jury was instructed on the presumption of innocence. Thus, the jury was properly instructed on its duties, and we presume it followed those instructions.

{¶ 25} Therefore, trial counsel was not ineffective for failing to object to this statement. It is entirely possible that counsel, like us, did not believe the statement affected the fairness of the trial. It is also possible that counsel, for strategic reasons, thought it better not to object and draw attention to the statement. In any event, given that we conclude Sarr has failed to demonstrate prosecutorial misconduct depriving him

of a fair trial, we cannot say that trial counsel was ineffective for failing to object to the contested comment. *See State v. Gilliam*, 2d Dist. Montgomery No. 17491, 1999 WL 812335, *10 (Sept. 30, 1999) ("failure to make a meritless objection cannot be construed as ineffective assistance of counsel.").

{¶ 26} Sarr's first assignment of error is without merit and is overruled.

III. Sufficiency and Manifest Weight of the Evidence

{¶ 27} The second assignment of error asserted by Sarr states:

> THE TRIAL COURT ERRED WHEN IT FOUND THE DEFENDANT GUILTY OF KIDNAPPING (SEXUAL ACTIVITY), GROSS SEXUAL IMPOSITION (BY FORCE), AND ASSAULT AS SUCH FINDINGS ARE AGAINST THE MANIFEST AND/OR SUFFICIENT WEIGHT OF THE EVIDENCE AND THE EVIDENCE PRESENTED WAS INSUFFICIENT TO SUPPORT THE CONVICTION.

{¶ 28} Sarr contends that his convictions were not supported by sufficient evidence and that they were against the manifest weight of the evidence.

{¶ 29} "A sufficiency of the evidence argument disputes whether the State has presented adequate evidence on each element of the offense to allow the case to go to the jury or sustain the verdict as a matter of law." *State v. Wilson*, 2d Dist. Montgomery No. 22581, 2009-Ohio-525, ¶ 10, citing *State v. Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541 (1997). We apply the test from *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), which states that:

> An appellate court's function when 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. 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.

(Citation omitted.) *Id.* at paragraph two of the syllabus.

{¶ 30} When reviewing a weight of the evidence challenge, a court reviews "the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist. 1983).

{¶ 31} Further, while "sufficiency and manifest weight are different legal concepts, manifest weight may subsume sufficiency in conducting the analysis; that is, a finding that a conviction is supported by the manifest weight of the evidence necessarily includes a finding of sufficiency." (Citations omitted.) *State v. McCrary*, 10th Dist. Franklin No. 10AP-881, 2011-Ohio-3161, ¶ 11. Accordingly, "a determination that a conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency." *Id.*

{¶ 32} Additionally, "[b]ecause the factfinder * * * has the opportunity to see and

hear the witnesses, the cautious exercise of the discretionary power of a court of appeals to find that a judgment is against the manifest weight of the evidence requires that substantial deference be extended to the factfinder's determinations of credibility. The decision whether, and to what extent, to credit the testimony of particular witnesses is within the peculiar competence of the factfinder, who has seen and heard the witness." *State v. Lawson*, 2d Dist. Montgomery No. 16288, 1997 WL 476684, *4 (Aug. 22, 1997). "The fact that the evidence is subject to different interpretations does not render the conviction against the manifest weight of the evidence." (Citation omitted.) *State v. Adams*, 2d Dist. Greene Nos. 2013-CA-61 and 2013-CA-62, 2014-Ohio-3432, ¶ 24.

{¶ 33} Sarr was convicted of kidnapping in violation of R.C. 2905.01(A)(4), which provides that "[n]o person, by force, threat, or deception, * * * shall remove another from the place where the other person is found or restrain the liberty of the other person, [in order] [t]o engage in sexual activity, as defined in section 2907.01 of the Revised Code, with the victim against the victim's will.

{¶ 34} "Sexual activity" is defined as "sexual conduct or sexual contact, or both." R.C. 2971.01(C). Sexual conduct means "vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another." R.C. 2907.01(A). Sexual contact includes "any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person." R.C. 2907.01(B).

{¶ 35} Sarr was also convicted of gross sexual imposition in violation of R.C. 2907.05(A)(1), which provides that "[n]o person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when * * * [t]he offender purposely compels the other person, or one of the other persons, to submit by force or threat of force."

{¶ 36} Finally, Sarr was convicted of assault in violation of R.C. 2903.13(A). That statute states that "[n]o person shall knowingly cause or attempt to cause physical harm to another * * *."

{¶ 37} Sarr's arguments primarily focus on the weight of the evidence and the credibility of T.W. He contends the evidence presented was consistent with his theory of the case portraying a consensual, albeit rough, sexual encounter with T.W., and that, by contrast, the version of events provided by T.W. was not believable. He further argues that there was no evidence to support T.W.'s claims because there was no physical evidence, including DNA, and no eyewitnesses to corroborate T.W.'s account of the events. Finally, he argues that the record was not clear as to when the encounter became non-consensual.

{¶ 38} We begin by noting that under Ohio law, there is no requirement that a victim's testimony be corroborated as a condition precedent to conviction. Indeed, courts have specifically held that the testimony of a rape or assault victim alone, if believed, is enough evidence for a conviction. *State v. Blankenship*, 8th Dist. Cuyahoga No. 77900, 2001 WL 1617225, *4 (Dec. 13, 2001); *see also State v. Landers*, 2d Dist. Greene No. 2015-CA-74, 2017-Ohio-1194, ¶ 96; *State v. West*, 10th Dist. Franklin No. 06AP-11,

2006-Ohio-6259, ¶ 16.

{¶ 39} T.W. testified that she and Sarr were engaged in consensual intercourse when his behavior changed and he became violent. She testified that he choked and slapped her and that she struggled to get away. T.W. testified that Sarr choked her so badly that she had trouble breathing. T.W. testified that she managed to break free and run for the back door, but Sarr grabbed her by the neck and dragged her back into the room with the blankets. He then told her that because she tried to get away, she was going to have to lick his anus and genitals. He then sat on her face and held her down while she complied. T.W. testified that she was afraid not to comply and that she thought she might be released if she did comply. T.W. testified that after she complied, she was able to escape again and get to the back door. However, Sarr caught up to her before she could open the door. T.W. testified that Sarr was pulling and wrestling with her and that they both fell to the floor with Sarr on top of her. Afterward, she was again able to wrestle her way free at which time she ran out the back door.

{¶ 40} Given that T.W. testified, and Sarr did not dispute, that the two initially engaged in consensual intercourse, the claim that the lack of DNA requires reversal of the conviction lacks merit. Further, as indicated, the nurse examiner and police noted, and took photographs of, multiple bruises and abrasions on T.W., including broken capillaries all along her neckline consistent with T.W.'s testimony that Sarr choked her. The nurse examiner also testified that T.W.'s voice was raspy and that T.W. indicated that was not how she normally sounds. There was also testimony from two officers who observed bruising and scratches to various parts of T.W.'s body, face and neck.

{¶ 41} We view this evidence most strongly in favor of the state, as we are required

to do in considering a sufficiency challenge, and we conclude the State presented sufficient evidence to prove the elements of kidnapping, gross sexual imposition and assault beyond a reasonable doubt. Further, we conclude that the convictions were not against the manifest weight of the evidence, as the jury was free to believe T.W.'s account over the theory of consensual rough sex raised by Sarr's counsel.

{¶ 42} Sarr's second assignment of error is overruled.

IV. Consent Jury Instruction

{¶ 43} Sarr's third assignment of error is as follows:

> THE TRIAL COURT ERRED IN DENYING TO PROVIDE THE CONSENT DEFENSE AND INSTRUCTION TO THE JURY, ESPECIALLY GIVEN THAT THE DEFENDANT ASSERTED HIS FIFTH AMENDMENT RIGHT NOT TO TESTIFY. SUCH A FAILURE AMOUNTS TO ABUSE OF DISCRETION AND A FAILURE TO PROVIDE THE DEFENDANT WITH A FAIR AND IMPARTIAL TRIAL, IN VIOLATION OF THE SIXTH AMENDMENT.

{¶ 44} Sarr contends that the trial court abused its discretion by failing to give a requested jury instruction on consent. Specifically, Sarr asserts the trial court should have instructed the jury that "the Defendant believed his sexual contact(s) with the complainant occurred with her consent. If you should have any reasonable doubt as to whether Defendant reasonably believed that such contact(s) occurred with her consent, you must find the defendant not guilty."

{¶ 45} "The purpose of jury instructions is to properly guide the jury" in deciding

questions of fact based on the applicable substantive law. (Citation omitted.) *Griffis v. Klein*, 2d Dist. Montgomery No. 19740, 2005-Ohio-3699, ¶ 48. "A defendant is entitled to have his instructions included in the charge to the jury only when they are a correct statement of the law, pertinent and not included in substance in the general charge." *State v. Frazier*, 9th Dist. Summit No. 25338, 2011-Ohio-3189, ¶ 17, quoting *State v. Theuring*, 46 Ohio App.3d 152, 154, 546 N.E.2d 436 (1st Dist.1988). A trial court's decision to deliver or to withhold any specific instruction is reviewed for abuse of discretion. (Citation omitted.) *State v. Ramey*, 2d Dist. Montgomery No. 27636, 2018-Ohio-3072, ¶ 27. A "trial court abuses its discretion when it makes a decision that is unreasonable, unconscionable, or arbitrary." (Citation omitted.) *State v. Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971, ¶ 34.

{¶ 46} Sarr claims that by failing to give the requested affirmative defense instruction on consent, the trial court denied him the ability to present a complete defense. In support, he argues that the practice of "rough sex," in which he claims T.W. willingly engaged, presents a unique challenge under the law and that the instructions given by the trial court did not adequately address the issue in terms of consent.

{¶ 47} Sarr cites *State v. D.E.M.*, 10th Dist. Franklin No. 15AP-589, 2016-Ohio-5638, for the proposition that a trial court must give an instruction on consent if requested by the defendant. However, we note that the court in *D.E.M.* did not mandate such an instruction. Instead, it merely stated that the trial court did not err in giving such an instruction. *Id.* at ¶ 138. Indeed, the *D.E.M.* court cited our case, *State v. Farler*, 2d Dist. Montgomery No. 12377, 1991 WL 227057 (Aug. 28, 1991), for the proposition that "Ohio courts have rejected the claim that a separate instruction on consent must be

provided where the court defined force under the statutory language, i.e., 'any violence, compulsion or constraint physically exerted by any means upon a person or thing.' " *Id.* at ¶ 137.

{¶ 48} In *State v. Gilliam*, 2d Dist. Montgomery No. 17491, 1999 WL 812335, this court held that consent is not an affirmative defense to a charge of rape. We explained that the Revised Code defines an "affirmative defense" as "[a] defense expressly designated as affirmative" or "[a] defense involving an excuse or justification peculiarly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence." R.C. 2901.05(D)(1)(a) and (b).[4] *Id.* at *7. We further explained that because the rape statute does not "designate consent as an affirmative defense[,]" it must, "if it is an affirmative defense at all * * * fall within the second definition." *Id.*

{¶ 49} Ultimately, we concluded that consent did not fall within the second definition:

> The burden of proving an affirmative defense rests with the party asserting the defense. * * * Were Gilliam's argument successful, the burden of proving consent would rest with the defendant in a rape case, whereas at present the defendant has no such burden. Instead, the burden of showing force or threat of force, which can also be called 'nonconsent,' is with the State. Placing opposing burdens on the defendant and State to prove consent and nonconsent, respectively, would also be nonsensical since one precludes the other. We have recognized as much in *State v. Farler*, 2d Dist. Montgomery No. 12377, 1991 WL 227057, where we stated

[4] This definition was previously codified at R.C. 2901.05(C).

as follows:

> In our estimation, there was no need to include a separate instruction on consent because the instruction, as given, adequately covered the consent "defense" by implication. Farler was not required to prove that Neal [the victim] consented to sexual conduct with him. The State was required to prove that Farler compelled Neal to submit to sexual conduct by force or threat of force. Such proof would have, by definition, negated consent. Absent such proof, Farler was entitled to acquittal. Thus, the court's instruction included the substance of the requested instruction.

Id. at *7.

{¶ 50} We further stated that:

> [A]n affirmative defense is not in the nature of a challenge to the State's evidence on one or more of the elements of the offense charged, as is consent to force or threat of force in the case of rape. In other words, an affirmative defense is one that can coexist with the State's satisfaction of its burden of proving each and every element of an offense beyond a reasonable doubt.

Id.

{¶ 51} We conclude that the same reasoning applies in cases involving gross sexual imposition. As previously noted, R.C. 2907.05(A)(1) requires the State to prove that Sarr purposely compelled T.W. to submit to sexual contact by force or threat of force.

In instructing the jury on this offense, the trial court properly instructed the jury regarding the elements of gross sexual imposition as well as the definitions of force, threat and purpose. As in *Farler*, we conclude that the instructions adequately informed the jury of "the consent 'defense' by implication." *Farler* at *8. In other words, if the State sustained its burden to prove that Sarr caused T.W. to submit to sexual contact by force or threat of force, the evidence negated consent.

{¶ 52} We conclude Sarr was not entitled to an instruction on the claimed affirmative defense of consent and therefore, the trial court did not abuse its discretion in denying the requested instruction.

{¶ 53} Sarr's third assignment of error is overruled.

V. Merger/Lesser Included Offenses

{¶ 54} The fourth assignment of error states as follows:

> THE TRIAL COURT ERRED IN ENTERING JUDGMENT OF CONVICTION ON BOTH KIDNAPPING AND GROSS SEXUAL IMPOSITION COUNTS IN THE INDICTMENT DUE TO [ITS] FAILURE TO PROPERLY MERGE OFFENSES OF SIMILAR IMPORT AND DENYING TO PROVIDE THE JURY WITH INSTRUCTIONS ON LESSER INCLUDED OFFENSES OF ABDUCTION AND UNLAWFUL RESTRAINT.

{¶ 55} In this assignment of error, Sarr contends the trial court erred in failing to merge the offenses of kidnapping and gross sexual imposition for purposes of sentencing. Included within his argument, Sarr raises the claim that the trial court erred by failing to instruct the jury on the lesser included offenses of abduction and unlawful restraint.

{¶ 56} We begin with the issue of merger. Sarr argues that the restraint or movement of T.W. for purposes of the kidnapping offense was only incidental to the underlying gross sexual imposition offense, and that there was only a single animus shown.

{¶ 57} "The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution protect criminal defendants against multiple prosecutions for the same offense." *State v. Brewer*, 121 Ohio St.3d 202, 2009-Ohio-593, 903 N.E.2d 284, ¶ 14. In Ohio, R.C. 2941.25 codifies the constitutional protections against double jeopardy. *State v. Ollison*, 2016-Ohio-8269, 78 N.E.3d 254, ¶ 33 (10th Dist.). R.C. 2941.25 states:

> (A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
>
> (B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

{¶ 58} In *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, the Ohio Supreme Court clarified this statutory standard and held that if a defendant's conduct supports multiple offenses, the defendant can be convicted of all of the offenses if any one of the following is true: "(1) the conduct constitutes offenses of dissimilar import, (2)

the conduct shows the offenses were committed separately, or (3) the conduct shows the offenses were committed with separate animus." *Id.* at paragraph three of the syllabus, citing R.C. 2941.25(B). Two or more offenses are of dissimilar import within the meaning of R.C. 2941.25(B) "when the defendant's conduct constitutes offenses involving separate victims or if the harm that results from each offense is separate and identifiable." *Id*. at paragraph two of the syllabus.

{¶ 59} In *State v. Logan*, 60 Ohio St.2d 126, 397 N.E.2d 1345 (1979)[5], the Supreme Court of Ohio held:

> In establishing whether kidnapping and another offense of the same or similar kind are committed with a separate animus as to each pursuant to R.C. 2941.25(B), this court adopts the following guidelines:
>
> (a) Where the restraint or movement of the victim is merely incidental to a separate underlying crime, there exists no separate animus sufficient to sustain separate convictions; however, where the restraint is prolonged, the confinement is secretive, or the movement is substantial so as to demonstrate a significance independent of the other offense, there exists a separate animus as to each offense sufficient to support separate convictions;
>
> (b) Where the asportation or restraint of the victim subjects the victim to a substantial increase in risk of harm separate and apart from that involved in

[5] Although *Logan* predates *Ruff*, Ohio courts have continued to use the *Logan* guidelines to determine "whether kidnapping and another offense were committed with a separate animus, in accordance with the third prong of the *Ruff* test." (Citations omitted.) *State v. Mpanurwa*, 2017-Ohio-8911, 102 N.E.3d 66, ¶ 22 (2d Dist.).

> the underlying crime, there exists a separate animus as to each offense sufficient to support separate convictions.

Id. at syllabus.

{¶ 60} We first note that Sarr did not ask the trial court to merge the convictions, nor did he object to the trial court's decision not to merge. Accordingly, we review his claims under a plain error standard. *State v. Setty*, 2d Dist. Clark No. 2017-CA-28, 2017-Ohio-9059, ¶ 16, citing *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 3. "Under this review, the trial court's judgment is not reversible 'unless [the error] affected the outcome of the proceeding and reversal is necessary to correct a manifest miscarriage of justice.' " *Id.*, quoting *Rogers* at ¶ 3.

{¶ 61} As previously noted, Sarr was convicted of gross sexual imposition in violation of R.C. 2907.05(A)(1), which prohibits an offender from having sexual contact with another or causing another to have sexual contact with the offender when "[t]he offender purposely compels the other person, or one of the other persons, to submit by force or threat of force." He was also convicted of, and sentenced for, kidnapping in violation of R.C. 2905.01(A)(4), which prohibits a person from restraining another person, or removing another person from where they are found, for the purpose of engaging in sexual activity.

{¶ 62} The State argues that a separate animus existed for the kidnapping because Sarr's restraint of T.W. subjected her to a substantial increase in risk of harm separate and apart from the sexual contact constituting gross sexual imposition.

{¶ 63} Based on the facts of this case, we cannot agree with the State's argument that a separate animus existed for the kidnapping and gross sexual imposition. After

engaging in consensual sex, Sarr accosted T.W. by the back door and moved her back into the room with the blankets on the floor. Sarr, at this point, forced T.W. onto her back, sat on her face and forced her to lick his genitals and anus. When that act was complete, T.W. was able to get away.

{¶ 64} There is nothing in this record upon which we can rely to conclude that the restraint was done for any purpose other than the sexual assault. Although T.W. and Sarr struggled, there was no showing that any of the bruising and abrasions that occurred during the restrain had a separate animus. Nor can it be concluded from this record that the bruising and abrasions occurred solely during this portion of the encounter. The damage to T.W.'s throat and face occurred during the initial phase of the encounter prior to her first attempt at escape. And T.W. testified that when she escaped the second time, she and Sarr wrestled and fell to the floor where there were metal objects, indicating that some of her injuries could have occurred at that point.

{¶ 65} From the evidence in this record, the asportation was slight and the restraint was not prolonged. Further, there was no evidence to support a finding that the asportation was done in such a manner so as to subject T.W. to a substantially increased risk of harm separate and apart from that involved in the underlying crime. There was no evidence that Sarr used a weapon or that he gagged T.W. or otherwise covered her mouth or nose in the commission of the offense. There was no evidence that he used any form of restraints, such as handcuffs or rope, which caused her any separate injuries. T.W. did not claim to have been dragged on the floor during the asportation.

{¶ 66} There was no basis to conclude that Sarr's restraint and asportation of T.W. at this point was motivated by something other than the intended sexual assault.

Additionally, there was nothing to support a finding that the restraint and asportation had any significance apart from facilitating the gross sexual imposition. Thus, we conclude that Sarr was entitled to a merger of the offenses of gross sexual imposition and kidnapping. A trial court's failure to merge allied offenses of similar import is plain error. (Citation omitted.) *State v. Estes*, 12th Dist. Preble No. 2013-04-001, 2014-Ohio-767, ¶ 11.

{¶ 67} We now turn to the issue of whether the trial court erred by failing to include jury instructions on the offenses of abduction and unlawful restraint.

{¶ 68} "The question of whether a particular offense should be submitted to the finder of fact as a lesser included offense involves a two-tiered analysis." (Citation omitted.) *State v. Deanda*, 136 Ohio St.3d 18, 2013-Ohio-1722, 989 N.E.2d 986, ¶ 6. "The first tier, also called the 'statutory-elements step,' is a purely legal question, wherein we determine whether one offense is generally a lesser included offense of the charged offense." *Id.*, citing *State v. Kidder*, 32 Ohio St.3d 279, 281, 513 N.E.2d 311 (1987). When considering the first tier analysis, a court must consider that " '[a]n offense is a lesser-included offense of another where: (1) the offense carries a lesser penalty; (2) the greater offense cannot, as statutorily defined, * * * be committed without the lesser offense, as statutorily defined, also being committed; and (3) some element of the greater offense is not required to prove commission of the lesser offense.' " *State v. Crockett*, 10th Dist. Franklin Nos. 14AP-242 and 14AP-248, 2015-Ohio-2351, ¶ 25, quoting *State v. Hubbard*, 10th Dist. Franklin No. 11AP-945, 2013-Ohio-2735, ¶ 37, citing *State v. Deem*, 40 Ohio St.3d 205, 209, 533 N.E.2d 294 (1988). (*State v. Deem* was clarified in *State v. Smith*, 117 Ohio St.3d 447, 2008-Ohio-1260, 884 N.E.2d 595, and *State v. Evans*,

122 Ohio St.3d 381, 2009-Ohio-2974, 911 N.E.2d 889, ¶ 25-26).

{¶ 69} "The second tier looks to the evidence in a particular case and determines whether ' "a jury could reasonably find the defendant not guilty of the charged offense, but could convict the defendant of the lesser included offense." ' " *Deanda* at ¶ 6, quoting *Evans* at ¶ 13. (Other citation omitted.) "Only in the second tier of the analysis do the facts of a particular case become relevant." *Id.* "The mere fact that an offense is a lesser included offense of the charged offense does not mean that the trial court must instruct on both offenses." (Citations omitted.) *State v. Simonis*, 3d Dist. Seneca No. 13-14-05, 2014-Ohio-5091, ¶ 32. A party is only entitled to such an instruction if "the evidence presented at trial would reasonably support both an acquittal of the crime charged and a conviction on the lesser included offense." *State v. Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961, 911 N.E.2d 242, ¶ 192. "In determining whether lesser-included-offense instructions are appropriate, 'the trial court must view the evidence in the light most favorable to the defendant.' " *State v. Wine*, 140 Ohio St.3d 409, 2014-Ohio-3948, 18 N.E.3d 1207, ¶ 21, quoting *State v. Monroe*, 105 Ohio St.3d 384, 2005-Ohio-2282, 827 N.E.2d 285, ¶ 37.

{¶ 70} In requesting the instruction for lesser-included offenses, Sarr did not argue that the first tier statutory-elements step was met. Rather, he argued that under the second tier, considering the evidence presented, the jury could reasonably find him not guilty of kidnapping, but could convict him of either lesser offense. The trial court found, relying solely on the second tier step, that the facts did not support the inclusion of instructions on abduction or unlawful restraint.

{¶ 71} The State charged and convicted Sarr with kidnapping under R.C.

2905.01(A)(4), which provides that no "person, by force, threat, or deception, * * * shall remove another from the place where the other person is found or restrain the liberty of the other person," in order to "engage in sexual activity against the victim's will."

{¶ 72} Abduction is defined in R.C. 2905.02, which states in pertinent part:

> (A) No person, without privilege to do so, shall knowingly do any of the following:
>
> (1) By force or threat, remove another from the place where the other person is found;
>
> (2) By force or threat, restrain the liberty of another person under circumstances that create a risk of physical harm to the victim or place the other person in fear;
>
> * * *
>
> (B) No person, with a sexual motivation, shall violate division (A) of this section.

{¶ 73} Unlawful restraint, as proscribed in R.C. 2905.03, states as follows:

> (A) No person, without privilege to do so, shall knowingly restrain another of the other person's liberty.
>
> (B) No person, without privilege to do so and with a sexual motivation, shall knowingly restrain another of the other person's liberty.

{¶ 74} Since the trial court focused on the second tier, case-specific analysis, we will do the same. We conclude, based upon the evidence presented at trial and viewing the evidence in the light most favorable to Sarr, that the trial court did not err by concluding that the evidence would not support a rejection of the kidnapping charge, yet support a

conviction for either abduction or unlawful restraint with a sexual motivation.

{¶ 75} Sarr's fourth assignment of error is overruled in part and sustained in part.

II. Conclusion

{¶ 76} Sarr's first, second and third assignments of error are overruled. Sarr's fourth assignment of error is sustained in part and overruled in part. Accordingly, the judgment of the trial court is reversed in part and remanded to the trial court for merger of the kidnapping and gross sexual imposition convictions and resentencing thereon. The judgment of the trial court is otherwise affirmed.

. . . . . .

FROELICH, J. and HALL, J., concur.

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