[Cite as *State v. Stotts*, 2018-Ohio-3904.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. John W. Wise, P.J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	Hon. Earle E. Wise, Jr., J.
-vs-	:	
	:	Case No. CT2017-0071
	:	
BLAKE A. STOTTS	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Muskingum County Court of Common Pleas, Case No. CR2017-0154
JUDGMENT:	AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR RESENTENCING
DATE OF JUDGMENT ENTRY:	September 21, 2018

APPEARANCES:

For Plaintiff-Appellee:	For Defendant-Appellant:
D. MICHAEL HADDOX MUSKINGUM CO. PROSECUTOR GERALD V. ANDERSON 27 North Fifth St., P.O. Box 189 Zanesville, OH 43702-0189	NIKKI TRAUTMAN BASZYNSKI OHIO STATE PUBLIC DEFENDER 250 East Broad St. – Ste. 1400 Columbus, OH 43215

Delaney, J.

{¶1} Appellant Blake A. Stotts appeals from the September 27, 2017 Entry of the Muskingum County Court of Common Pleas. Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶2} The following evidence is adduced from the record of appellant's jury trial.

{¶3} Jane Doe was age 17 at the time of these events. Appellant was a few years older and two years ahead of her in school. The two had dated through fall 2014, the beginning of Doe's sophomore year of high school. After they broke up, they continued to be friends and had occasional contact in person and via text messages.

{¶4} The sporadic contact continued until the summer of 2016, when they began to see each other more often. Doe testified the two were not "dating" but their relationship was occasionally sexual. The contact came to an end in summer 2016 when appellant was incarcerated in a community-based corrections facility (CBCF). The two had some contact while appellant was in the facility and wrote letters to each other. Upon appellant's release, Doe visited him at his mother's house and although they had sex, their relationship remained as "friends" and sporadic.

{¶5} The instant case involves events of February 27, 2017. Doe asked appellant for a ride to work and the two planned to have lunch together first. Appellant picked Doe up from her grandparents' house in his Ford F-250 pickup truck and the two argued briefly over where to eat. Appellant drove through a Taco Bell drive-thru and both ordered meals.

{¶6} Upon receipt of the food from the drive-thru, appellant drove directly to the "Pick & Save" parking lot.[1] He pulled into a parking space on the side of the building.

{¶7} According to Doe's testimony, the two placed their meals between them on the center console of the truck's front seat and began to eat. They chatted, "catching up," and nothing about the interaction seemed strange to Doe at first. When asked whether this conversation had anything to do with sex, she replied, "Absolutely not."

{¶8} Appellant then moved the food to the back seat of the truck and raised the center console. He "scooted over" to the middle seat beside Doe and started rubbing her leg and trying to kiss her. Doe told him to stop and to "get off of her." She testified he was laying over her in the truck and she was held in place by him.

{¶9} Appellant did not comply and grabbed Doe's breast over her shirt. She repeatedly told him to stop, and to get off; he kept trying to kiss her and when she refused, said "Oh, come on, please." Appellant touched Doe's legs, her stomach, and her vagina over her clothes. He grabbed her hand and placed it on his erect penis. Doe said, "No, I already told you I wasn't having sex with you." Appellant tried to unbutton her jeans and to pull them down.

{¶10} Doe continued to say "No," "Stop," and "What is wrong with you?" Eventually appellant stopped. He replaced the console in the center of the front seat and finished his meal.

[1] The business has since changed names but was referred to throughout trial as "the Pick'n Save."

{¶11} Appellant then drove Doe to her workplace. Doe testified that when he pulled in, appellant laughed and said, "You could have just gotten me for rape charges" and she said, "I know."

{¶12} Appellant texted her later that day and said he was sorry about the whole situation, to which she responded she was used to it. Doe testified that she meant she was used to appellant pressuring her for sex and "[not] taking no for an answer," but never to this extent. The following is the text conversation between appellant and Doe entered at trial as appellee's exhibit F2, *sic* throughout:

APPELLANT	DOE
	***food and taking me to work.
Thanks you too sorry for the whole thing i really do feel bad	
	it's okay
	i'm used to it
At least the last time we actually did it it was consensual	
	true
	i'm not mad at you so it's fine
Okay i just feel weird for doing it tbh like that's not who i want to be	
	so don't be that guy [emoji]
Don't plan on it	
Doesn't mean im not going to try but just not go anywhere close to that far	
	thank you i appreciate it
	* * * *.

{¶13} Doe was upset and crying the next day on her way to school and told two friends what happened. At school, she was crying and visibly upset and another student asked what was wrong. Doe eventually told the student what happened. The school resource officer, Deputy Howe, became aware Doe was upset and called her to his office to speak to her. Howe is not trained to interview sexual assault victims so he obtained

only the basic information from Doe and referred Doe and her mother to a forensic interviewer at Nationwide Children's Hospital. Howe also spoke to the other students who were aware of the allegations.

{¶14} In the meantime, Doe was interviewed at Nationwide and a rape kit was performed. During the examination she became aware of visible bruising on her thighs. Photos of the bruising were introduced as appellee's exhibits C1 through C3 and G1 through G4.

{¶15} Investigators told Doe she was to have no contact with appellant and if he attempted to contact her, she should keep a record of it. On March 5, 2017, appellant sent her a Snapchat which was a photo of himself with a filter over his face, captioned "Does this rag smell like chloroform to you?" A still photograph taken from the video of Doe opening the Snapchat was entered at trial as appellee's exhibit J2.

{¶16} Appellant testified on his own behalf at trial. He admitted he is a convicted felon who violated probation, resulting in his incarceration in the CBCF. Appellant's felony conviction was marijuana trafficking with a juvenile specification but appellant stated he is drug-free now. He denied kidnapping and assaulting Doe, stating he has pled guilty in the past to offenses he was guilty of, but he was not guilty of this.

{¶17} Upon direct examination, appellant described the incident as follows:

> * * * *.
>
> [APPELLANT]: Well, we got in the—she mentioned she was hungry and we got in a little dispute of where to eat at, and after going back and forth we decided on Taco Bell. And we went to Taco Bell, went to the

drive-thru and went to—stopped in the Pick'n Save parking lot to eat and catch up.

[DEFENSE COUNSEL]: Okay. Once you entered the Pick'n Save parking lot did you eat?

[APPELLANT]: Yeah. I ate mine and I think she ate about half of hers.

[DEFENSE COUNSEL]: Okay. Then what happened?

[APPELLANT]: I put up the center console and I scooted over to the middle seat and we began to make out. I was touching on her breasts, feeling her crotch on the outside of her pants, and I began to unbutton her pants and she grabbed my hand and said no, but we continued to make out.

[DEFENSE COUNSEL]: Was that the end of the touching at that point?

[APPELLANT]: I mean, I had my hand on her shoulder—like her shoulder and back area from where we were making out.

[DEFENSE COUNSEL]: Was the kissing mutual?

[APPELLANT]: Yeah. Everything was mutual up until I tried to unbutton her pants.

[DEFENSE COUNSEL]: Did you stop trying when she told you no?

[APPELLANT]: I stopped trying to unbutton her pants.

[DEFENSE COUNSEL]: But the two—was the kissing still mutual at that point?

[APPELLANT]: Yeah. She didn't object to that.

[DEFENSE COUNSEL]: Well, how did this conclude?

[APPELLANT]: I realized that it wasn't going to go anywhere so I got back in the driver's seat and took her to [her workplace].

* * * *.

T.II, 368-369.

{¶18} Appellant denied placing Doe's hand on his penis. He said his text later that day stating "At least the last time we actually did it it was consensual" meant only that the last time they were together, "she consented that we could have sex." T.II, 370. His apology was merely for attempting to have sex with Doe in a parking lot on her way to work. He denied laying on Doe or restraining her in any way, and said she never asked to be let out of the truck. Regarding the Snapchat, he sent it to everyone in his "friends list," not just Doe, and he was merely quoting a movie and making a joke because he "thought the filter reminded somebody of a pedophile, I guess you could say." T.II, 373. Appellant claimed Doe was upset and made up the allegations because she was upset that he had a new girlfriend who was pregnant.

{¶19} Upon cross-examination, appellant again acknowledged touching Doe's breasts and vagina outside her clothes, and further admitted that he touched her for the purpose of his own sexual gratification.

Indictment, Trial, and Conviction

{¶20} Appellant was charged by indictment with three counts of gross sexual imposition (G.S.I.) pursuant to R.C. 2907.05(A)(1), all felonies of the fourth degree [Counts I through III] and one count of kidnapping pursuant to R.C. 2905.01(A)(4), a felony of the first degree [Count IV].

{¶21} Appellant entered pleas of not guilty and the matter proceeded to trial by jury. The jury was instructed that each count of gross sexual imposition applied to the following conduct: Count I, touching Doe's breasts; Count II, touching Doe's vagina; and Count III, placing Doe's hand on his erect penis. Appellant was found guilty upon Counts I, II, and IV. He was found not guilty upon Count III. The trial court sentenced appellant to an aggregate term of five years in prison.

{¶22} Appellant now appeals from the judgment entry of his conviction and sentence.

{¶23} Appellant raises two assignments of error:

ASSIGNMENTS OF ERROR

{¶24} "I. THE TRIAL COURT FAILED TO MERGE ALLIED OFFENSES OF SIMILAR IMPORT AND THUS IMPOSED MORE PRISON TERMS THAN AUTHORIZED BY LAW."

{¶25} "II. THE TRIAL COURT ASSESSED, AND THE CLERK OF COURTS COLLECTED, UNAUTHORIZED COURT COSTS."

ANALYSIS

I.

{¶26} In his first assignment of error, appellant argues that his three convictions must merge for purposes of sentencing. We agree.

{¶27} A defendant may be indicted upon and tried for allied offenses of similar import, but may be sentenced on only one of the allied offenses. *State v. Carr,* 2016-Ohio-9, 57 N.E.3d 262, ¶ 42 (5th Dist.), citing *State v. Brown,* 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, ¶ 42. R.C. 2941.25 states as follows:

> (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.

{¶28} The question of whether offenses merge for sentencing depends upon the subjective facts of the case in addition to the elements of the offenses charged. *State v. Hughes*, 5th Dist. Coshocton No. 15CA0008, 2016-Ohio-880, 60 N.E.3d 765, ¶ 21. In a plurality opinion, the Ohio Supreme Court modified the test for determining whether offenses are allied offenses of similar import. *State v. Johnson,* 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061. The Court directed us to look at the elements of the

offenses in question and determine whether or not it is possible to commit one offense and commit the other with the same conduct. *Id.* at ¶ 48. If the answer to such question is in the affirmative, the court must then determine whether or not the offenses were committed by the same conduct. *Id.* at ¶ 49. If the answer to the above two questions is yes, then the offenses are allied offenses of similar import and will be merged. *Id.* at ¶ 50. If, however, the court determines that commission of one offense will never result in the commission of the other, or if there is a separate animus for each offense, then the offenses will not merge. *Id.* at ¶ 51.

{¶29} *Johnson's* rationale has been described by the Court as "incomplete." *State v. Earley,* 145 Ohio St.3d 281, 2015-Ohio-4615, 49 N.E.3d 266, ¶ 11. The Court has further instructed us to ask three questions when a defendant's conduct supports multiple offenses: (1) were the offenses dissimilar in import or significance? (2) were they committed separately? and (3) were they committed with separate animus or motivation? *State v. Ruff,* 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, ¶ 31. An affirmative answer to any of the above will permit separate convictions. *Id.* The conduct, the animus, and the import must all be considered. *Id.*

{¶30} Appellate review of an allied-offense question is *de novo*. *State v. Miku*, 2018-Ohio-1584, --N.E.3d--, ¶ 70 (5th Dist.), citing *State v. Williams,* 134 Ohio St.3d 482, 2012-Ohio-5699, 983 N.E.2d 1245, ¶ 12.

{¶31} In the instant case, appellant argues his convictions for G.S.I. should merge with the kidnapping conviction. He was found guilty upon two counts of G.S.I. pursuant to R.C. 2907.05(A)(1), which states, "No person shall have sexual contact with another, not the spouse of the offender * * * when any of the following applies: [t]he offender

purposely compels the other person, or one of the other persons, to submit by force or threat of force." Appellant was also found guilty upon one count of kidnapping pursuant to R.C. 2905.01(A)(4), which states, "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, for any of the following purposes: [t]o engage in sexual activity, as defined in section 2907.01 of the Revised Code, with the victim against the victim's will[.]" Appellant's conduct supports the offenses of kidnapping and two counts of G.S.I.

{¶32} We turn, then, to the three-part test set forth in *Ruff* to determine if the offenses are dissimilar in import, were committed separately, or were committed with a separate animus. *State v. Robertson*, 8th Dist. Cuyahoga No. 105562, 2018-Ohio-1640, ¶ 57, appeal not allowed, --Ohio St.3d--, 2018-Ohio-3450. Applying the first two questions in the instant case, there was a single victim, the offenses were not committed separately, and the resulting harm from each offense was the same. *Robertson*, supra, 2018-Ohio-1640 at ¶ 58. We find appellant restricted Doe's movement to commit the acts of G.S.I. *Id*. He held her inside the truck, lay on top of her, groped her breasts and vaginal area, and unsuccessfully tried to loosen her belt and pull her pants down. Thus, the offenses are similar in import and were not committed separately. *Id*.

{¶33} To determine whether the offenses of G.S.I. and kidnapping were committed with separate animus or motivation, we turn to the factors discussed in *State v. Logan,* 60 Ohio St.2d 126, 397 N.E.2d 1345 (1979). Although *Logan* is both a pre-*Johnson* and *Ruff* case, it remains relevant to analysis of the third prong in *Ruff. State v. Williams*, 2015-Ohio-4100, 43 N.E.3d 797, ¶ 18 (7th Dist.).

{¶34} Relevant to the instant case, *Logan* held that when kidnapping is one of the applicable offenses and there is prolonged restraint, secret confinement, and movement which causes a substantial risk of harm to the victim, the offenses do not require merger. *Williams, supra,* citing *Logan* at 135. *See also, State v. Pore*, 5th Dist. Stark No. 2011-CA-00190, 2012-Ohio-3660, ¶ 35, appeal not allowed, 134 Ohio St.3d 1419, 2013-Ohio-158, 981 N.E.2d 885 [restraint and movement had no significance apart from facilitating sexual assault]; *State v. Small*, 5th Dist. Delaware No. 10CAA110088, 2011-Ohio-4086, ¶ 95 [kidnapping merely incidental to aggravated burglary, restraint and movement had no significance apart from facilitating commission of aggravated burglary, did not subject victims to substantial increase in risk of harm separate from that involved in the underlying crime] *State v. Bolton*, 8th Dist. Cuyahoga No. 96385, 2012-Ohio-169, ¶ 94 [convictions for G.S.I. and kidnapping merge because movement of victim incidental to crime of G.S.I.].

{¶35} In the instant case, we find the restraint of the victim was incidental to the acts of gross sexual imposition. Although the confinement was “secretive” in that it was in the remote area of the parking lot, the restraint was not prolonged and the movement was not substantial. *Robertson*, supra, 2018-Ohio-1640, ¶ 60. Doe was not subjected to a substantial risk of harm separate and apart from the gross sexual imposition. *Compare*, *e.g.*, *State v. Echols*, 8th Dist. Cuyahoga No. 102504, 2015–Ohio–5138 [movement significant and encompassed increased risk of harm to victim which is separate crime for which appellant may be separately punished]; *State v. Dunn*, 4th Dist. Jackson No. 15CA1, 2017-Ohio-518, ¶ 112 [victim kidnapped by deception and transported significant distance to location of separate assault are separate crimes deserving separate

punishment]; *State v. Sylvester*, 8th Dist. Cuyahoga No. 103841, 2016-Ohio-5710, ¶ 37, appeal not allowed, 149 Ohio St.3d 1418, 2017-Ohio-4038, 75 N.E.3d 236 [demand to victim did not involve overt force but victim under compulsion to comply which was enough to establish kidnapping as conduct committed separately from GSI]; *State v. Lindsay*, 5th Dist. Richland No. 10-CA-62, 2011-Ohio-1708, ¶ 34 [repeatedly terrorizing victim, prohibiting her from leaving after attempted rape, and luring to apartment under false pretenses constitute kidnapping separate and distinct from the attempted rape]; *State v. James*, 5th Dist. Stark No. 2016CA00144, 2017-Ohio-7861, ¶ 89 [restraint not "merely incidental" to rape where sexual assault was five minutes of a prolonged, lengthy ordeal subjecting victim to substantial increase in risk of harm separate and apart from underlying crime].

{¶36} Appellant's first assignment of error is sustained. We therefore reverse the judgment of conviction and remand for a new sentencing hearing at which appellee must elect which allied offense it will pursue against appellant. *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, ¶ 25. "Because R.C. 2941.25(A) protects a defendant only from being punished for allied offenses, the determination of the defendant's guilt for committing allied offenses remains intact, both before and after the merger of allied offenses for sentencing." *Id*. at ¶ 27. Thus, the trial court should not vacate or dismiss the guilt determination. *Id*.

II.

{¶37} In his second assignment of error, appellant argues the trial court improperly assessed $240 as court costs for "microfilming." On this record, we disagree.

{¶38} The expenses which may be taxed as costs in a criminal case are those directly related to the court proceedings and are identified by a specific statutory authorization. *State v. Christy*, 3rd Dist. Wyandot No. 16-04-04, 2004-Ohio-6963, ¶ 22. Appellant argues he was billed $240 for "microfilming" absent statutory authorization.

{¶39} The trial court's sentencing Entry of September 17, 2017 is the entry appealed from and states in pertinent part, "Defendant is assessed all court costs in regard to this matter."

{¶40} We note appellant cites repeatedly to a "Cost Bill." (Brief, 9; Reply, 5). On January 31, 2018, appellant moved to supplement the record with a "Cost Bill." We granted the motion, ordering the record to be supplemented with the "current cost bill in this case on or before March 2, 2018." Appellant's reply was filed on March 20, 2018, but the record is devoid of any "Cost Bill." Nor is any "Cost Bill" attached as an exhibit to appellant's brief or reply.

{¶41} We further note that Entry Number 59 in the Clerk of Court's itemized docket states, "09/28/17 Microfilming," "Amount Owed/Amount Dismissed 240.00," "Balance Due 240.00." This information is contained in the certified copy of the docket provided pursuant to Ohio App.R. 10(B).[2] It is not evident from the docket alone that this amount

[2] Ohio App. R. 10(B) states in pertinent part:

> *** * * *.** The clerk of the trial court shall prepare the certified copy of the docket and journal entries, assemble the original papers, (or in the instance of an agreed statement of the case pursuant to App.R. 9(D), the agreed statement of the case), and transmit the record upon appeal to the clerk of the court of appeals within the

was assessed against appellant as court costs and we decline to speculate in the absence of the cited "Cost Bill."

{¶42} In reviewing assigned error on appeal we are confined to the record that was before the trial court as defined in App.R. 9(A). This rule provides that the record on appeal consists of "[t]he original papers and exhibits thereto filed in the trial court, the transcript of proceedings, if any, including exhibits, and a certified copy of the docket and journal entries prepared by the clerk of the trial court." App.R. 9(B) also provides in part " * * *[w]hen portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court's proceedings, and affirm." In *Knapp v. Edwards Laboratories* the Ohio Supreme Court stated: "The duty to provide a transcript for appellate review falls upon the appellant. This is necessarily so because an appellant bears the burden of showing error by reference to matters in the record." 61 Ohio St.2d 197, 199, 400 N.E.2d 384 (1980).

{¶43} Appellant failed to provide the "Cost Bill" referenced repeatedly in his argument. Absent this portion of the record, we must presume the regularity of the trial court's sentencing entry. See, *State v. Ellis*, 5th Dist. No. 11-COA-015, 2011-Ohio-5646, *2.

{¶44} Appellant's second assignment of error is overruled.

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time stated in division (A) of this rule. The clerk of the trial court shall number the documents comprising the record and shall transmit with the record a list of the documents correspondingly numbered and identified with reasonable definiteness. * * * *.

CONCLUSION

{¶45} Judgment affirmed in part, reversed in part, and cause remanded for resentencing in accord with this opinion.

By: Delaney, J.,

Wise, John, P.J. and

Wise, Earle, J., concur.