[Cite as *State v. Hopkins,* 2011-Ohio-1591.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 10AP-11 (C.P.C. No. 09CR-08-4647)
Jimmy R. Hopkins,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 31, 2011

Ron O'Brien, Prosecuting Attorney, and *Sheryl L. Prichard*, for appellee.

Yeura R. Venters, Public Defender, and *Allen V. Adair*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Defendant-appellant, Jimmy R. Hopkins ("appellant"), appeals the judgment of the Franklin County Court of Common Pleas, which sentenced him to consecutive terms of four years of incarceration for his conviction for attempted felonious assault and two years for his conviction for abduction. For the reasons that follow, we affirm the judgment of the trial court.

{¶2} On August 4, 2009, appellant was indicted for one count of felonious assault in violation of R.C. 2903.11, a felony of the second degree, one count of domestic violence in violation of R.C. 2919.25, a felony of the fourth degree, one count of

kidnapping in violation of R.C. 2905.01, a felony of the first degree, and one count of abduction in violation of R.C. 2905.02, a felony of the third degree. All four counts related to events that occurred on July 26, 2009.

{¶3} On November 3, 2009, appellant entered guilty pleas to attempted felonious assault, a lesser included offense of count one of the indictment, and abduction. The trial court accepted appellant's guilty plea, ordered a presentence investigation, and scheduled the matter for sentencing.

{¶4} On December 9, 2009, the matter came before the court for sentencing. During this hearing, appellant's counsel argued that attempted felonious assault and abduction are allied offenses of similar import for purposes of sentencing. The trial court rejected this contention and sentenced appellant to be incarcerated for four years for the attempted felonious assault and two years for the abduction, to be served consecutively. Appellant has timely appealed and raises the following assignment of error for our review:

> Attempted felonious assault as charged in count one, and abduction as charged in court four, are allied offenses of similar import committed with a single animus. The court erred by imposing consecutive sentences for the two offenses when it should have directed the prosecutor to elect on which offense conviction would be entered and sentence pronounced.

{¶5} The Supreme Court of Ohio recently sought to redefine the analysis applicable to determining whether offenses are allied offenses of similar import and subject to merger. See *State v. Johnson*, ___ Ohio St.3d ___, 2010-Ohio-6314 (slip opinion). While the justices did not reach a majority opinion with regard to the specific analysis required, they uniformly emphasized the importance of considering the conduct of the accused in the allied-offenses analysis. Id. at ¶44; see also ¶68 (O'Connor, J., concurring in judgment); see also ¶78 (O'Donnell, J., separately concurring); see also,

State v. Washington, 9th Dist. No. 10CA009767, 2011-Ohio-1149, ¶21. In this regard, "the court must determine whether the offenses were committed by the same conduct, i.e., 'a single act, committed with a single state of mind.' " *Johnson* at ¶49, quoting *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, ¶50. When considering this issue, the court may consider the arguments presented and the evidence introduced. *State v. Maple*, 9th Dist. No. 25313, 2011-Ohio-1216, ¶6, citing *Johnson* at ¶54-57, 69-70.

{¶6} Because the analysis requires a consideration of the conduct of the accused, we begin by considering the statutory sections setting forth the proscribed conduct. See *State v. Ford*, ___ Ohio St.3d ___, 2011-Ohio-765, ¶10 (slip opinion), quoting *State v. Draggo* (1981), 65 Ohio St.2d 88, 91. R.C. 2903.11(A) defines felonious assault and provides:

> (A) No person shall knowingly do either of the following:
>
> (1) Cause serious physical harm to another or to another's unborn;
>
> (2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordinance.

R.C. 2905.02(A) defines abduction and provides:

> (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;
>
> (3) Hold another in a condition of involuntary servitude.

{¶7} Again, in the instant matter, appellant entered guilty pleas for the offenses of attempted felonious assault and abduction. During the plea hearing, the prosecutor provided a recitation of the facts underlying the offenses. Specifically, on July 26, 2009, appellant was the victim's live-in boyfriend. On that date, the victim and appellant got into an altercation because the victim had suspicions that appellant was cheating on her. The altercation turned physical, and appellant proceeded to beat the victim for around an hour. He punched her, kicked her in the head, and hit her in the head with a wrench. When she tried to leave, he would not allow it. At the conclusion of the prosecutor's recitation of these facts, the trial court inquired as to whether appellant had any objection to the facts. He did not.

{¶8} In this appeal, appellant argues that the abduction only involved restraint incidental to the assault. That is, appellant committed the attempted felonious assault and thereby committed the abduction. Based upon the facts recited by the prosecutor, we disagree. Again, according to the record, appellant engaged in conduct amounting to an attempted felonious assault during the hour-long beating. Additionally, appellant restrained the liberty of the victim inasmuch as he did not allow her to leave when she tried. Therefore, based upon the circumstances of this matter, the offenses were not committed by the same conduct. The trial court did not err in refusing to merge the two offenses for purposes of sentencing.

{¶9} Based upon the foregoing, we overrule appellant's sole assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN and TYACK, JJ., concur.