[Cite as *State v. Damron*, 2012-Ohio-5977.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 12AP-209 (C.P.C. No. 08CR-4804)
v.	:	(REGULAR CALENDAR)
Jeremy S. Damron,	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 18, 2012

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for appellee.

William S. Ireland, for appellant.

APPEAL from the Franklin County Court of Common Pleas

BRYANT, J.

{¶1} Defendant-appellant, Jeremy S. Damron, appeals from a judgment of the Franklin County Court of Common Pleas convicting him, pursuant to a guilty plea, of one count of felonious assault and one count of domestic violence and imposing a term of incarceration in which the trial court did not merge the two counts under R.C. 2941.25. Defendant assigns a single error:

> THE COURT ERRED BY CONVICTING AND SENTENCING THE APPELLANT ON A SECOND DEGREE FELONIOUS ASSAULT COUNT ALONG WITH A THIRD DEGREE DOMESTIC VIOLENCE COUNT IN VIOLATION OF THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT OF THE U.S. CONSTITUTION AND ARTICLE 1, SECTION 10 OF THE OHIO CONSTITUTION AND OHIO'S MULTIPLE COUNT STATUTE.

Because the trial court properly refused to merge the two counts for purposes of sentencing, we affirm.

I. Facts and Procedural History

{¶2} By indictment filed June 27, 2008, defendant was charged with four counts: one count each of felonious assault in violation of R.C. 2903.11 and rape in violation of R.C. 2907.02, and two counts of domestic violence in violation of R.C. 2919.25. On May 5, 2009, defendant entered a guilty plea to felonious assault and one count of domestic violence; pursuant to the plea agreement, the prosecution requested a nolle prosequi on the rape charge and the remaining count of domestic violence.

{¶3} On July 27, 2009, the trial court held a sentencing hearing, prior to which both the state and defendant filed sentencing memoranda. Based on defendant's argument, the court determined the offenses must merge under *State v. Harris*, 122 Ohio St.3d 373, 2009-Ohio-3323, stating, "I would have found, if I did not think that Harris dictated that, that those would run consecutive to each other. * * * I feel I have no alternative but to run them concurrent. That's pursuant to * * * *State v. Harris*." (July 27, 2009 Tr. 16.) Although the court found defendant guilty of both domestic violence and felonious assault and concluded the offenses merged, the court's judgment entry nevertheless imposed the statutory maximum sentences for each offense but ordered them to be served concurrently.

{¶4} The state appealed, asserting the trial court erred by purporting to merge defendant's convictions for felonious assault and domestic violence. *State v. Damron*, 10th Dist. No. 09AP-807, 2010-Ohio-1821, ¶ 5 ("*Damron I*"). This court refused to reach the issue in the assigned error, concluding the trial court, contrary to the suggestion in the state's appeal, did not actually merge the two charges. *Id.* at ¶ 10. As a result, we overruled the state's assignment of error, stating: "Even if we were to conclude that the court's decision to impose concurrent sentences had been based on faulty reasoning, the fact remains that the court's order that the sentences be served concurrently resulted in a sentence authorized by the statutes governing sentencing." *Id.* at ¶ 11.

{¶5} The Supreme Court of Ohio subsequently granted discretionary review over the state's appeal. In addressing the trial court's sentence, the court concluded that when a defendant has been convicted of allied offenses, R.C. 2941.25 prohibits the imposition of

multiple sentences. *State v. Damron*, 129 Ohio St.3d 86, 2011-Ohio-2268, ¶ 17 ("*Damron II*"), citing *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, ¶ 12. Instead, upon determining that the offenses are allied offenses, the trial court must merge the crimes into a single conviction and impose a sentence based on that conviction, as "[t]he imposition of concurrent sentences is not the equivalent of merging allied offenses." *Damron II* at ¶ 17, citing *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, ¶ 41-43. Having determined the trial court erroneously sentenced defendant, the court vacated the sentence and remanded to the trial court for proper sentencing, including application of *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, syllabus. *Damron II* at ¶ 18.

{¶6} Upon remand, the trial court held a resentencing hearing on January 30, 2012. The state filed a memorandum and argued as it had at the prior sentencing hearing that the offenses should not merge. Defendant responded that the state relied on the same conduct and animus for both offenses and, as a result, the convictions must merge. Following the parties' arguments and subsequent briefing from defendant, the trial court conducted another resentencing hearing on February 13, 2012 and concluded the offenses should not merge because they were completed with "two different animuses." (Feb. 13, 2012 Tr. 13.) Accordingly, the court imposed an eight-year prison sentence for the felonious assault offense and a three-year sentence for the domestic violence charge, to be served consecutively.

II. Assignment of Error

{¶7} Defendant's single assignment of error asserts the trial court's failure to merge his convictions resulted in multiple punishments for the same offense in violation of the Double Jeopardy Clause found in the Fifth Amendment to the United States Constitution and similar protections in Ohio Constitution, Article I, Section 10. We review a sentence for an allied-offenses error under a contrary-to-law standard. *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, ¶ 14, citing R.C. 2953.08(A)(4); *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, ¶ 26; *State v. Allen*, 10th Dist. No. 10AP-487, 2011-Ohio-1757, ¶ 19-21. Pursuant to R.C. 2953.08(G)(2), if the sentence is contrary to law, we may vacate the sentence and remand for a new sentencing hearing. *Wilson* at ¶ 14, citing *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, ¶ 4.

A. *R.C. 2941.25 and Merger of Allied Offenses*

{¶8} "The federal and state constitutions' double jeopardy protection guards citizens against cumulative punishments for the 'same offense.' " *State v. Hall*, 10th Dist. No. 05AP-957, 2006-Ohio-2742, ¶ 16, citing *State v. Moss*, 69 Ohio St.2d 515, 518 (1982). "Despite such constitutional protection, a state legislature may impose cumulative punishments for crimes that constitute the 'same offense' without violating double jeopardy protections." *Hall* at ¶ 16. In Ohio, R.C. 2941.25 codifies federal and state constitutional protections. *State v. White*, 10th Dist. No. 10AP-34, 2011-Ohio-2364, ¶ 60, citing *Underwood* at ¶ 23; *State v. Rance*, 85 Ohio St.3d 632, 634-35 (1999). "Under the 'cumulative punishment' prong, double jeopardy protections do 'no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.' " *Hall* at ¶ 16, quoting *Missouri v. Hunter*, 459 U.S. 359, 366 (1983). When determining "the constitutionality of imposing multiple punishments against a criminal defendant in one criminal proceeding for criminal activity emanating from one transaction, appellate courts are limited to assuring that the trial court did not exceed the sentencing authority the legislature granted to the judiciary." *Id.*, citing *Moss* at 518, citing *Brown v. Ohio*, 432 U.S. 161 (1977).

{¶9} R.C. 2941.25 provides that where a defendant's same conduct "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). Where, however, "the defendant's conduct constitutes two or more offenses of dissimilar import" or "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). R.C. 2941.25 is a legislative attempt "to codify the judicial doctrine of merger, i.e., the principle that 'a major crime often includes as inherent therein the component elements of other crimes and that these component elements, in legal effect, are merged in the major crime.' " *Brown*, 2008-Ohio-4569, at ¶ 42, quoting *Stat v. Botta*, 27 Ohio St.2d 196, 201 (1971).

{¶10} The Supreme Court of Ohio recently reviewed and revised its analysis under R.C. 2941.25. *Johnson* at ¶ 40 (summarizing the allied offenses jurisprudence prior to *Johnson*). Noting "the purpose of R.C. 2941.25 is to prevent shotgun convictions,

that is, multiple findings of guilt and corresponding punishments heaped on a defendant for closely related offenses arising from the same occurrence" (*Johnson* at ¶ 43, citing *Maumee v. Geiger*, 45 Ohio St.2d 238, 242 (1976)), the court held that, when a court determines whether two offenses "are allied offenses of similar import subject to merger under R.C. 2941.25, the conduct of the accused must be considered." *Johnson* at syllabus. *Johnson* thus overruled *Rance*, to the extent *Rance* instructed courts to compare the statutory elements of the two offenses in the abstract. *Id.* at ¶ 44. Under *Johnson*, "the court need not perform any hypothetical or abstract comparison of the offenses at issue in order to conclude that the offenses are subject to merger." *Id.* at ¶ 47. Rather, the court simply must ask whether the defendant committed the offenses by the same conduct. *Id.*

{¶11} Contrary to the state's contention that we must return to the pre-*Johnson* decisions that focused on whether the commission of one offense "will necessarily result" in another offense to determine whether the two offenses have similar import, we have consistently applied the two-part test set forth in the *Johnson* plurality opinion when conducting allied-offense analysis. *State v. Carson*, 10th Dist. No. 11AP-809, 2012-Ohio-4501, ¶ 16. Under *Johnson*, we first examine whether the offenses are able to be committed with the same conduct. "In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), the question is whether it is possible to commit one offense *and* commit the other with the same conduct, not whether it is possible to commit one *without* committing the other." (Emphasis sic.) *Id.* at ¶ 48, citing *State v. Blankenship*, 38 Ohio St.3d 116, 119 (1988) (Whiteside, J., concurring). "If the offenses correspond to such a degree that the conduct of the defendant constituting commission of one offense constitutes commission of the other, then the offenses are of similar import." *Johnson* at ¶ 48.

B. *Felonious Assault and Domestic Violence as Allied Offenses*

{¶12} R.C. 2919.25(A) defines felony domestic violence to be knowingly causing or attempting to cause physical harm to a family or household member when the offender had previously been convicted of domestic violence. Felonious assault is defined as knowingly causing or attempting to cause serious physical harm to another. R.C. 2903.11(A)(1). Accordingly, when a person knowingly performs an act that causes serious

physical harm to a family or household member, the act could constitute both offenses. Since felonious assault and domestic violence may be committed with the same conduct, they are offenses of similar import. *Johnson* at ¶ 48; *State v. Craycraft*, 193 Ohio App.3d 594, 2011-Ohio-413, ¶ 15 (12th Dist.).

{¶13} Because "the multiple offenses can be committed by the same conduct, then [we] 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 *Brown*, 2008-Ohio-4569, at ¶ 50 (Lanzinger, J., concurring in judgment only). " '[I]f the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge.' " *White* at ¶ 63, quoting *Johnson* at ¶ 51.

1. The relevant facts

{¶14} The state did not in the indictment identify separate conduct that gave rise to the individual charges. Instead, the state simply recited the elements of the offense by stating the domestic violence occurred when defendant "did knowingly cause or attempt to cause physical harm to a family or household member, to wit: [the victim]" and the felonious assault occurred when defendant "did knowingly cause serious physical harm to [the victim]." (R. 49 at 1-2.) Similarly, in the bill of particulars filed on October 3, 2008, the state identified both the felonious assault and the domestic violence as occurring at "approximately 11:04 p.m., on or about the 21st day of June in the year of our Lord, 2008." (R. 49 at 1.) At the May 5, 2009 plea hearing and the subsequent sentencing hearings, however, the state presented the factual history of the case. Because the facts are significant to the issue to be resolved, we address them in some detail.

{¶15} According to the state's recitation, defendant repeatedly struck the victim on June 21, 2008, resulting in a concussion, nasal fracture, and cuts and contusions over her entire body. At the time of the incident, the victim's three children, two of whom were children in common with defendant, were present and witnessed defendant striking the victim. The state noted the blades of the ceiling fan in the room where the incident occurred had been removed and were found with blood on them.

{¶16} The state's facts revealed that, during the course of this incident, defendant repeatedly stopped his attack on the victim in order to respond to the children's actions.

In one instance, a child jumped on defendant's back and told him to stop beating the victim. Defendant picked up the child, sat him down on the bed in the same room, and resumed beating the victim. In a separate instance, another child retrieved a kitchen knife in an attempt to help the victim. Although the child was not able to use the knife against defendant, defendant threw a fan at the child. At that point, two children ran to seek help from other houses in the neighborhood, being unable to call emergency services from inside the house since defendant earlier broke all of the phones. Defendant stipulated to the facts presented for purposes of the plea.

{¶17} At the original sentencing hearing on July 27, 2009, the state described another instance in which defendant interrupted his beating the victim. According to the state, defendant forced one of the children to say, "Mommy, suck my dick." (July 27, 2009 Tr. 6.) When the child refused to comply, defendant told the child, "If you don't say it, I'll murder you next." (July 27, 2009 Tr. 6.) Defendant did not dispute the fact but instead characterized the incident as one in a series of mutual combat between him and the victim.

{¶18} At the sentencing hearing on January 30, 2012 following the Supreme Court of Ohio's remand to apply *Johnson*, the state argued "you certainly have physical harm here that is separate and distinct from the injuries that the Defendant inflicted that caused serious physical harm resulting in a Felonious Assault conviction." (Jan. 30, 2012 Tr. 5.) The state then identified the victim's nasal fracture and concussion as the source of the serious physical harm required for felonious assault. (Jan. 30, 2012 Tr. 6.) The state, however, additionally pointed to several instances where breaks in the action had occurred, including not only when the children attempted to intervene but also when defendant "rip[ped] the fan blades down from the ceiling and beat her with those as well, and that indicated a separate escalation of the Domestic Violence that led to Felonious Assault that's separate and apart." (Jan. 30, 2012 Tr. 6.) The state contended that, based on the record, "there is more than enough here to convict the Defendant of both Felonious Assault and felony Domestic Violence." (Jan. 30, 2012 Tr. 6.) The trial court summarized the state's argument, stating, "[T]here [were] basically two acts even though in a continuous set of abuse. [Defendant] had already committed the Domestic Violence before he engaged in the felonious behavior, if I understood [the state's] argument

correctly." (Jan. 30, 2012 Tr. 8-9.) The state agreed with the manner in which the court characterized its argument.

{¶19} In response to the state's argument, defendant asserted the state was advancing a "blow-by-blow analysis" following remand. Defendant supported his contention by stating that were such an analysis appropriate, "there should have been multiple indictments for each swing, each miss, each incident * * * [a]nd that's not what happened here." (Jan. 30, 2012 Tr. 10.) Although defendant admitted the fan blades were broken, he argued nothing in the record indicated they were used to cause bodily harm. Instead, he asserted the offenses must merge because the convictions were based upon the same "continuous act." (Jan. 30, 2012 Tr. 8, 9.)

{¶20} At the February 13, 2012 sentencing hearing, the state contended the facts defendant recited in his sentencing memorandum filed on February 9, 2012 differed from the facts to which he stipulated at the plea hearing. The state also noted the victim's injuries were not isolated to one location, but spread over her entire body. The state argued the "serious physical harm has to do with her face" while the injuries to her body supported the charge of domestic violence. (Feb. 13, 2012 Tr. 7.) Following the parties' arguments, the court stated, "Under the Johnson analysis -- there are two different analyses here. He committed domestic violence. He's got domestic violence before, even though it was reduced to domestic assault. So that was basically a completed act. Then he went under the beating frenzy of taking her and literally almost killing her." (Feb. 13, 2012 Tr. 13.) The court found "two separate animuses" since defendant "basically completed the one act and then went on to continue on with an absolute beating." (Feb. 13, 2012 Tr. 13.)

2. No merger under the facts presented

{¶21} The state contends separate instances of conduct, namely inflicting multiple blows separated by time and space, support defendant's two convictions. Indeed, the state contends as it did in its final sentencing memorandum before the trial court, that each separate punch defendant threw is sufficient to support an independent conviction and sentence. In response, defendant contends the offenses were committed at the same time and place against the same victim with the same conduct and animus.

{¶22} Since this case originated prior to the Supreme Court of Ohio's opinion in *Johnson*, the state pursued the charges collectively under the subsequently overruled analysis in *Rance*. *See Craycraft* at ¶ 19 (noting that "[f]ollowing *Johnson*, it is likely that criminal cases will proceed differently from the indictment forward"). As a result, the state listed the charges both in the indictment and the bill of particulars without specifying the conduct giving rise to the separate charges. Although other courts have merged a defendant's convictions where the state fails to delineate the separate conduct supporting each charge in the bill of particulars, the record in this case supports defendant's separate sentence for each charge. *See State v. Seymore*, 12th Dist. No. CA2011-07-131, 2012-Ohio-3125, ¶ 24-27 (merging defendant's convictions for domestic violence, aggravated burglary, and violating a protection order based on the defendant's conduct as stipulated to in the bill of particulars).

{¶23} A defendant's convictions must merge where the convictions are based upon a single, uninterrupted act. *Johnson* at ¶ 56; *State v. Overton*, 10th Dist. No. 09AP-858, 2011-Ohio-4204, ¶ 15; *State v. H.H.*, 10th Dist. No. 10AP-1126, 2011-Ohio-6660, ¶ 13 (merging defendant's convictions for rape and forcible rape because they arose from a "single, uninterrupted act"). In *Johnson*, the court divided the defendant's conduct into two instances of abuse, separated by time and the intervention of the victim's mother. *Id.* at ¶ 56. Although the state based one conviction entirely upon the first instance of abuse, the court found the state relied on the defendant's conduct in the second "sequence of events" to support multiple convictions and thus merged the offenses arising out of the second sequence of events. *Id.* In doing so, *Johnson* expressly refused to engage in a "blow-by-blow" analysis to subdivide a single incident into discrete acts to avoid merger. *Overton* at ¶ 13, quoting *Johnson* at ¶ 56 (refusing to merge charges because the record contained sufficient evidence for the jury to have found the defendant committed child endangering by striking the victim in the head and separate conduct of striking the victim's chest as the basis for the felonious assault charge).

{¶24} Contrary to defendant's contentions, his directing his actions against a single victim at one location over one evening does not resolve a conduct-based analysis. Instead, the court must examine whether the defendant engaged in separate conduct, or acted with a separate state of mind. *Johnson* at ¶ 54; *Carson* at ¶ 19. Here, the state

pointed to defendant's committed multiple acts, punctuated by interruptions as he addressed the children present in the room and separated the blades from the ceiling fan. At the sentencing hearings on January 30 and February 13, 2012, the state more specifically suggested defendant's using the ceiling fan and the injuries to the victim's face supported the conviction for felonious assault, whereas the injuries to the rest of her body supported the conviction for domestic violence.

{¶25} As in *Johnson* and *Overton*, the record supports the state's contention that defendant committed two separate instances of abuse, with blows to the victim's face and blows to her body. *Johnson* at ¶ 56; *Overton* at ¶ 15. Since intervals of time separated defendant's blows to the victim, the trial court properly could ascertain that a separate animus motivated the instances of violence. *White* at ¶ 67, citing *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147, ¶ 24; *State v. Davic*, 10th Dist. No. 11AP-555, 2012-Ohio-952, ¶ 16 (holding that multiple rape offenses do not merge when a defendant commits them between " 'intervening acts' "), quoting *State v. Jones*, 78 Ohio St.3d 12, 14 (1997).

{¶26} Other courts have determined domestic violence and felonious assault should merge. *Craycraft* at ¶ 20; *State v. Weathers*, 12th Dist. No. CA2011-01-013, 2011-Ohio-6793, ¶ 24; *State v. Sutphin*, 8th Dist. No. 96015, 2011-Ohio-5157, ¶ 62; *State v. Carner*, 8th Dist. No. 96766, 2012-Ohio-1190, ¶ 45. *Johnson*, however, acknowledged that applying a conduct-based test may produce varying results in different cases involving the same offenses. *Johnson* at ¶ 52. Although domestic violence and felonious assault arise out of the same conduct, in this case, defendant did not commit them with the same conduct. Since the " ' "offenses [were] committed separately * * * the offenses will not merge." ' " *Overton* at ¶ 16, quoting *White* at ¶ 63, quoting *Johnson* at ¶ 51.

{¶27} Defendant's single assignment of error is overruled.

III. Disposition

{¶28} Having overruled defendant's single assignment of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

TYACK and FRENCH, JJ., concur.