[Cite as *State v. Davic*, 2012-Ohio-952.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 11AP-555
v.	:	(C.P.C. No. 10CR-11-6766)
Bradford S. Davic,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 6, 2012

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

Yeura R. Venters, Public Defender, and *Paul Skendelas*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶ 1} Defendant-appellant, Bradford S. Davic ("appellant"), appeals the judgment of the Franklin County Court of Common Pleas, which convicted him of one count of importuning, four counts of rape, and one count of gross sexual imposition. For the following reasons, we affirm.

I. BACKGROUND

{¶ 2} The Franklin County Grand Jury indicted appellant on one count of importuning, five counts of rape, and one count of gross sexual imposition. Appellant

agreed to plead guilty to four of the rape counts. Two counts were for rape by cunnilingus and two were for rape by digital vaginal penetration. Appellant also agreed to plead guilty to the importuning and gross sexual imposition counts. He signed a guilty plea form indicating that the defense and prosecution were not recommending a sentence. The form also explained that he could receive a maximum sentence of ten years to life in prison for each rape count, eight years in prison for the importuning count, and five years in prison for the gross sexual imposition count. In addition, it stated that he could receive a maximum total sentence of 53 years to life in prison.

{¶ 3} At the plea hearing, the court asked appellant if he understood the plea form, and appellant said, "The only thing I questioned * * * just because it wasn't on there, was that I am agreeing today to a plea deal that was going to be a sentence of ten years with * * * life on the back side." The court responded, "Well, we will go over that in just a minute." (Tr. 3.) The court next asked appellant, "Did you sign this [plea form] voluntarily? In other words, no one forced you, threatened you or promised you anything to get you to sign this?" (Tr. 4.) Appellant indicated that he signed the plea form voluntarily and that he was not promised anything. After explaining the maximum sentences on each count, the court asked appellant, "The total maximum possible sentence you could receive in all of these would be 53 years to life. Do you understand that?" (Tr. 6-7.) Appellant answered, "Yes, sir." (Tr. 7.) The court asked appellant if he had any questions, and appellant said that he did not.

{¶ 4} Afterward, the prosecutor recited the facts of the case as follows. Appellant, a man in his mid-40s from Pittsburgh, befriended a 12-year-old Columbus girl on the internet. He drove to Columbus and had sex with the girl in a park. He digitally penetrated her vagina and performed cunnilingus. The police came and arrested him, and he admitted to them that he raped the girl.

{¶ 5} The court accepted appellant's guilty plea and continued the case for sentencing. At sentencing, the prosecutor argued that appellant's rape offenses do not merge because "they are four distinct sex acts." The prosecutor said that, based on appellant's confession, "cunnilingus occurred, then digital vaginal penetration occurred, then cunnilingus occurred again, then digital vaginal penetration." (Tr. 14.) The court

concluded that appellant's rape offenses do not merge, and appellant did not object. The court sentenced him to ten years to life in prison on each of the four rape counts. The court ordered him to serve the rape sentences consecutively to each other and concurrently to eight years in prison on the importuning count and five years in prison on the gross sexual imposition count. The total sentence was 40 years to life.

II. ASSIGNMENTS OF ERROR

{¶ 6} Appellant filed a timely notice of appeal and assigns the following as error:

> [I.] Appellant's guilty plea was invalid as it was not entered in a knowing, voluntary, and intelligent manner as required by Crim. R. 11(C)(1) and due process guarantees under the state and federal Constitutions.
>
> [II.] The trial court abused its discretion in imposing consecutive sentences on rape charges that involved the same conduct.

III. DISCUSSION

A. First Assignment of Error: Appellant's Guilty Plea

{¶ 7} In his first assignment of error, appellant argues that his guilty plea was not knowing, intelligent, and voluntary. We disagree.

{¶ 8} The federal and state constitutions require that a guilty plea be knowing, intelligent, and voluntary. *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, ¶ 7. Appellant argues that his guilty plea did not meet this standard because, when the trial court accepted it, he did not understand what sentence he was facing.

{¶ 9} During the plea hearing, appellant questioned the plea form he signed because it did not say that he was "agreeing today to a plea deal that was going to be a sentence of ten years with * * * life on the back side." (Tr. 3.) The trial court said that it would discuss the matter later in the hearing, and, contrary to appellant's assertions, it did, in fact, do so. Specifically, the court asked appellant if he understood that he faced a maximum total sentence of 53 years to life in prison, and appellant indicated that he did. The court also asked appellant if he was promised anything in exchange for his plea, and appellant said that there were no promises. Lastly, the court asked if appellant

had any questions. Appellant asked no questions and brought up no issues about his sentence.

{¶ 10} Appellant has sent the trial court a letter from prison in which he claimed that he was promised a sentence totaling ten years to life imprisonment. We will not consider that letter, however, because it was not made part of the record during proceedings in the trial court. *See State v. Ishmail*, 54 Ohio St.2d 402, 405-06 (1978). And, while the parties have suggested that res judicata would not prohibit appellant from seeking post-conviction relief based on that letter, we express no opinion on that issue now.

{¶ 11} For all these reasons, we concluded that appellant failed to establish that he did not understand what sentence he was facing when the trial court accepted his guilty plea. Therefore, we conclude that his plea was knowing, intelligent, and voluntary. We overrule appellant's first assignment of error.

B. Second Assignment of Error: Merger

{¶ 12} In his second assignment of error, appellant argues that the trial court should have merged his rape offenses. We disagree.

{¶ 13} At sentencing, appellant's counsel said that he saw "no advantage in stacking up year after year on top of a life sentence." (Tr. 20.) He did not, however, object to the trial court's decision not to merge the rape offenses. Therefore, the plain error standard applies. *See State v. Elmore*, 111 Ohio St.3d 515, 2006-Ohio-6207, ¶ 127; Crim.R. 52(B). Plain error exists when a trial court was required to, but did not, merge a defendant's offenses because the defendant suffers prejudice by having more convictions than authorized by law. *State v. Sidibeh*, 192 Ohio App.3d 256, 2011-Ohio-712, ¶ 55 (10th Dist.).

{¶ 14} R.C. 2941.25, Ohio's multiple count statute, provides:

> (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.

{¶ 15} To determine whether offenses merge under R.C. 2941.25, we apply the test established in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314. Pursuant to *Johnson*, "[i]f the multiple offenses can be committed by the same conduct, then 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.' " *Id.* at ¶ 49, quoting *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, ¶ 50 (Lanzinger, J., concurring in judgment only). "If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged." *Id.* at ¶ 50. The offenses will not merge, however, if "the commission of one offense will *never* result in the commission of the other, or if the offenses are committed separately, or if the defendant has separate animus for each offense." (Emphasis sic.) *Id.* at ¶ 51.

{¶ 16} Multiple rape offenses do not merge when a defendant commits them between "intervening acts." *State v. Jones*, 78 Ohio St.3d 12, 14 (1997). Merger does not apply because the defendant has a separate specific intent to commit each rape, and the victim suffers a separate risk of harm from each rape. *State v. Hayes*, 10th Dist. No. 93AP-868 (Mar. 1, 1994). Here, an intervening act separated each of appellant's multiple rapes because he was alternating between cunnilingus and digital penetration. Each rape was, therefore, a separate offense being committed with a separate specific intent and causing separate harm to the victim. Consequently, the trial court did not commit error, let alone plain error, by not merging appellant's rape offenses. We overrule appellant's second assignment of error.

IV. CONCLUSION

{¶ 17} Having overruled each of appellant's assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT, J., concurs.
TYACK, J., concurring separately.

TYACK, J., concurring separately.

{¶ 18} I concur separately. The record before us contains contradictory information. Bradford S. Davic at one point in the plea proceedings indicated his understanding that he was entering into a plea agreement that would result in a sentence of ten years to life of incarceration. Since Davic was 46 years old on the date he entered his plea, this agreement would provide him a realistic opportunity to be returned to free society at some point in time.

{¶ 19} There is no reason to believe that the trial judge assigned to the case communicated with Davic off the record. Nor is there any reason to believe that the assistant prosecutor assigned to the case communicated with Davic directly, as opposed to communication through Davic's court-appointed counsel.

{¶ 20} As a result, the belief held by Davic, at least part way through the plea proceedings, in all likelihood, was grounded in something his lawyer said. The record before us does not tell us what the lawyer said, except via a letter sent by Davic after he had been received at the Corrections Reception Center in Orient, Ohio. That letter may be support for a petition for post-conviction relief, but cannot provide insight as to what the lawyer said to encourage Davic to plead guilty.

{¶ 21} Both appellate counsel for Davic and the assistant prosecuting attorney representing the State of Ohio at oral argument agreed that a petition for post-conviction relief based on the issues arising from whatever Davic's trial counsel told him to encourage him to plead guilty is not barred and would not be barred by the doctrine of res judicata. That agreement is clearly correct.

{¶ 22} With that understanding, the contradictory statements in the present record must be resolved in favor of upholding the plea. That being said, I agree with result reached by the majority of this panel.