[Cite as *State v. Broomfield*, 2013-Ohio-1676.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 12AP-469 (C.P.C. No. 11CR-1929)
v.	:	(REGULAR CALENDAR)
Kwentel N. Broomfield,	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on April 25, 2013

Ron O'Brien, Prosecuting Attorney, and *Michael P. Walton*, for appellee.

Dustin M. Blake, for appellant.

APPEAL from the Franklin County Court of Common Pleas

DORRIAN, J.

{¶ 1} Defendant-appellant, Kwentel N. Broomfield ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas imposing prison sentences pursuant to his guilty plea. Because we conclude that the trial court correctly determined that appellant's convictions were not allied offenses of similar import subject to merger, but erred in calculating appellant's jail-time credit, we affirm in part and reverse in part.

{¶ 2} This case arises from two incidents that occurred on December 7, 2010. In the first incident, at approximately 11:15 a.m., K.W. and her mother, C.S., arrived at their residence. Appellant and Victore Wimbley ("Wimbley") approached them, and appellant forced C.S. into the residence at gunpoint. Wimbley held K.W. on the porch at gunpoint and then forced her into the residence. Once inside, appellant demanded money and threatened K.W. and C.S. Appellant also struck C.S. in the face. After K.W. stated that

there was money in the basement, Wimbley went to the basement while appellant held K.W. and C.S. at gunpoint. In the basement, Wimbley found C.S.'s husband, F.S., asleep. Wimbley struck F.S. multiple times with his gun and forced him upstairs. K.W., C.S., and F.S. were then placed on the floor while appellant and Wimbley searched the house. Appellant and Wimbley forced the victims into the basement and locked F.S. in a small closet. Appellant and Wimbley moved K.W. and C.S. into a bedroom, where appellant forced K.W. to perform fellatio on him while threatening to shoot her. Appellant and Wimbley then fled, taking jewelry, cash, and C.S.'s automobile.

{¶ 3} The second incident occurred after appellant and Wimbley fled the residence. At approximately 12:05 p.m., appellant and Wimbley approached Stacey Caster ("Caster") and Shelia Starre ("Starre"), employees of the Ohio State University Hospital East, who were taking a smoke break in an alley near the hospital. Appellant and Wimbley brandished their guns and demanded money. When Caster and Starre said they did not have any money, appellant and Wimbley forced them to the ground. Wimbley held his gun to Starre's head and searched her for money. Appellant held his gun to Caster's head and placed his hands up her shirt and in her pants searching for money. Caster gave appellant her debit card. Appellant and Wimbley then fled. A witness in a nearby building saw the robbery of Caster and Starre and called the police. Police officers located and arrested appellant and Wimbley shortly thereafter.

{¶ 4} Appellant was indicted on 13 charges arising from the two incidents: one count of aggravated burglary, three counts of aggravated robbery, one count of rape, one count of felonious assault, and three counts of kidnapping related to the first incident along with two counts of aggravated robbery and two counts of kidnapping related to the second incident, with firearm specifications attached to all charges. Appellant ultimately pled guilty to five charges: aggravated burglary, aggravated robbery of K.W., rape, kidnapping of K.W., and aggravated robbery of Starre, along with the firearm specifications attached to each of those charges. The trial court merged the firearm specifications,[1] but declined to merge any of the other charges for purposes of sentencing.

[1] We note that the state has not appealed the trial court's decision to merge the firearms specifications related to the convictions resulting from the first incident with the firearms specification related to the conviction resulting from the second incident. Accordingly, we do not review whether the trial court was correct in merging appellant's convictions on all firearms specifications.

The trial court sentenced appellant to three years of imprisonment on the firearms specifications, ten years of imprisonment on the rape conviction, and six years of imprisonment on each of the other convictions, with the jail term for the aggravated burglary conviction to be served concurrently with the other terms, for a total sentence of 31 years of imprisonment.

{¶ 5} Appellant appeals from the trial court's judgment, assigning three errors for this court's review:

> [1.] THE TRIAL COURT ERRED BY FAILING TO MERGE APPELLANT'S CONVICTIONS OF KIDNAPPING WITH RAPE, AGGRAVATED ROBBERY, AND AGGRAVATED BURGLARY PURSUANT TO *STATE V. JOHNSON*.
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> [2.] THE TRIAL COURT ERRED BY FAILING TO MERGE APPELLANT'S CONVICTIONS OF AGGRAVATED ROBBERY AND AGGRAVATED BURGLARY PURSUANT TO *STATE V. JOHNSON*.
>
> [3.] THE TRIAL COURT ERRED IN CALCULATING APPELLANT'S JAIL TIME CREDIT.

I. Allied Offenses of Similar Import

{¶ 6} In appellant's first assignment of error, he asserts that the trial court erred by not merging his kidnapping conviction with one or more of his convictions for aggravated burglary, aggravated robbery, and rape.[2] In appellant's second assignment of error, he asserts that the trial court erred by not merging his convictions for aggravated burglary and aggravated robbery. Because both of these assignments of error involve merger, we will address them together. We begin by undertaking a brief review of the law regarding merger before turning to appellant's specific arguments, which we will consider in turn.

A. Merger of Allied Offenses Generally

{¶ 7} Ohio's allied-offenses statute, R.C. 2941.25, "protects against multiple punishments for the same criminal conduct and is a codification of the common law

[2] Appellant's merger arguments all relate to the charges arising from the first incident. He does not argue that his conviction resulting from the second incident, for aggravated robbery of Starre, should merge with any of his other convictions. Our decision does not alter the sentence imposed for that aggravated robbery conviction.

doctrine of merger." *In re B.O.J.*, 10th Dist. No. 09AP-600, 2010-Ohio-791, ¶ 21. Under the allied-offenses statute, "[w]here 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." R.C. 2941.25(A). By contrast, "[w]here 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." R.C. 2941.25(B).

{¶ 8} The Supreme Court of Ohio addressed the test for determining whether two crimes are allied offenses of similar import in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314. There was no majority opinion in *Johnson*, but the plurality opinion and concurring justices emphasized the importance of considering the defendant's conduct. *State v. Hopkins*, 10th Dist. No. 10AP-11, 2011-Ohio-1591, ¶ 5. "Under the holding [of the plurality opinion] in *Johnson*, '[i]n 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. * * * 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.' " *State v. White*, 10th Dist. No. 10AP-34, 2011-Ohio-2364, ¶ 62, quoting *Johnson* at ¶ 48.

{¶ 9} If the 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." * * * If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged.' " (Emphasis sic.) *Id.* at ¶ 63, quoting *Johnson* at ¶ 49-50. "Conversely, if the court determines that 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, then, according to R.C. 2941.25(B), the offenses will not merge." (Emphasis sic.) *Johnson* at ¶ 51.

{¶ 10} At the sentencing hearing, appellant argued that the kidnapping conviction should merge with the rape conviction and that the aggravated burglary conviction should merge with the aggravated robbery conviction, but did not argue for merger of the kidnapping conviction with the aggravated burglary or aggravated robbery convictions. When a trial court makes a determination as to whether offenses should merge under R.C. 2941.25, we review that decision under a de novo standard. *State v. Williams*, 134 Ohio St.3d 482, 2012-Ohio-5699, ¶ 28. With respect to merger of the kidnapping conviction with the aggravated burglary or aggravated robbery convictions, by failing to argue for merger of these convictions at the sentencing hearing, appellant waived all but plain error. *See State v. Sidibeh*, 10th Dist. No. 10AP-331, 2011-Ohio-712, ¶ 55. "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." *Id*. Therefore, we review appellant's argument that the kidnapping conviction should have merged with the aggravated burglary or aggravated robbery convictions under a plain error standard, and his argument that the kidnapping conviction should have merged with the rape conviction under a de novo standard. We also review de novo appellant's argument that the aggravated burglary conviction should have merged with the aggravated robbery conviction.

B. Merger of Kidnapping and Aggravated Burglary

{¶ 11} In his first assignment of error, appellant asserts that the trial court erred by failing to merge his convictions for kidnapping and aggravated burglary. In relevant part, the statute defining aggravated burglary provides that "[n]o person, by force * * * shall trespass in an occupied structure * * * when another person other than an accomplice of the offender is present, with purpose to commit in the structure * * * any criminal offense, if * * * [t]he offender has a deadly weapon or dangerous ordnance on or about the offender's person or under the offender's control." R.C. 2911.11(A)(2). Appellant pled guilty to this charge, admitting that he trespassed in the residence while others were present with the intent to commit robbery and while in possession of a gun. Appellant also pled guilty to kidnapping K.W. R.C. 2905.01, which defines kidnapping, provides, in relevant part, that "[n]o person, by force [or] threat * * * shall remove another from the place where the other person is found or restrain the liberty of the other person * * * [t]o

facilitate the commission of any felony or flight thereafter." R.C. 2905.01(A)(2). Appellant admitted that he restrained K.W. to facilitate his other crimes.

{¶ 12} Appellant claims that the trial court should have merged his convictions for kidnapping and aggravated burglary because he committed these crimes through the same conduct with a single animus. However, we conclude that appellant's convictions for aggravated burglary and kidnapping should not have been merged because they were committed through separate conduct. The presentence investigation report indicated that appellant and Wimbley approached C.S. and K.W. as they arrived at the residence. Appellant then forced C.S. into the residence at gunpoint, while Wimbley briefly detained K.W. on the porch before also forcing her into the residence at gunpoint. Appellant and Wimbley then detained K.W. and C.S. (and later F.S., after he was found in the basement) at gunpoint while demanding and taking money and property from them. Appellant committed aggravated burglary when he entered the residence by force while in possession of a deadly weapon. However, at the time that he entered the residence, appellant was not restraining K.W. According to the facts in the presentence investigation, appellant only restrained K.W. after Wimbley forced her into the residence, when appellant and Wimbley held both women at gunpoint. Thus, appellant's act of aggravated burglary involved separate conduct from his act of kidnapping K.W. *See State v. Griffin*, 10th Dist. No. 10AP-902, 2011-Ohio-4250, ¶ 87 (concluding that kidnapping and felonious assault convictions were based on separate conduct when the defendant trapped the victim in a van before later punching and stabbing her). Because these convictions were based on separate conduct, the trial court did not err by not merging them for purposes of sentencing.

C. Merger of Kidnapping and Aggravated Robbery

{¶ 13} Appellant also claims in his first assignment of error that the trial court erred by failing to merge his convictions for kidnapping and aggravated robbery. The statute defining aggravated robbery provides in part that "[n]o person, in attempting or committing a theft offense * * * or in fleeing immediately after the attempt or offense, shall [h]ave a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it." R.C. 2911.01(A)(1). Appellant pled guilty to this charge, admitting that he

attempted to steal from K.W. and that he possessed and displayed a gun while committing this offense. Appellant argues that the trial court should have merged this conviction with his kidnapping conviction.

{¶ 14} The Supreme Court of Ohio acknowledged that kidnapping is implicit in every robbery in *State v. Logan*, 60 Ohio St.2d 126 (1979):

> Where an individual's immediate motive involves the commission of one offense, but in the course of committing that crime he must, *a priori*, commit another, then he may well possess but a single animus, and in that event may be convicted of only one crime. For example, when a person commits the crime of robbery, he must, by the very nature of the crime, restrain the victim for a sufficient amount of time to complete the robbery. Under our statutes, he simultaneously commits the offense of kidnapping (R.C. 2905.01[A][2]) by forcibly restraining the victim to facilitate the commission of a felony. In that instance, without more, there exists a single animus, and R.C. 2941.25 prohibits convictions for both offenses.

Id. at 131-32. This reasoning applies with equal force to the crimes of kidnapping and aggravated robbery. *State v. Jenkins*, 15 Ohio St.3d 164, 198, fn.29 (1984).

{¶ 15} The *Logan* decision provided guidelines for determining whether kidnapping and another offense of the same or similar kind are committed with the same animus:

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

Logan at syllabus.

{¶ 16} This court has issued several recent decisions analyzing merger of kidnapping and aggravated robbery. In the *Sidibeh* case, the defendant and two accomplices forced their way into a home. *Sidibeh* at ¶ 5. The defendant brandished a gun and forced three occupants of the home to lie down in a hallway; a fourth occupant initially hid in another room but was found and forced to join the others. *Id*. at ¶ 5-6. While defendant stayed with the occupants of the home, the other intruders then rummaged through the house. After approximately five to ten minutes, all of the intruders left, taking a video-game system and a television. *Id*. at ¶ 6. On appeal, this court concluded that the trial court erred by failing to merge kidnapping and aggravated robbery offenses. *Id*. at ¶ 61. Referring to the factors considered in *Logan*, the court held that the restraint lasted no longer than necessary to complete the aggravated robbery and that the movement of the victims to a common area was not substantial so as to indicate significance independent of committing the aggravated robbery. *Id*. at ¶ 59.

{¶ 17} By contrast, in *State v. Davis*, 10th Dist. No. 09AP-869, 2011-Ohio-1023, and *State v. Vance*, 10th Dist. No. 11AP-755, 2012-Ohio-2594, this court held that kidnapping did not merge with aggravated robbery. In *Davis*, the defendant and two accomplices held multiple victims at gunpoint while demanding money. *Davis* at ¶ 2. The victims were then bound and forced into a van. They were driven around for several hours while the defendant continued to demand money before ultimately being released. *Id*. After noting that the defendant failed to raise the issue of merger before the trial court, the court noted that the facts demonstrated a separate animus for the kidnapping and aggravated robbery charges because the victims were held at gunpoint, tied up, and driven around for several hours. *Id*. at ¶ 23.

{¶ 18} The defendant in *Vance* entered the victim's minivan when she was in a store. *Vance* at ¶ 10. After the victim got back in the car, the defendant forced her into the passenger seat. He then demanded the victim's valuables and drove her to an ATM, where he withdrew money from her account. *Id*. at ¶ 11-12. The defendant then drove the victim to another location, which was a suspected drug house, and forced her to remain in the car while he went inside. Ultimately, the defendant returned to the car, drove to another location, and then exited the car and ordered the victim to drive away. *Id*. at ¶ 13. The entire incident lasted approximately one hour and fifteen minutes. *Id*. at ¶ 16. The

defendant pled guilty to kidnapping, aggravated robbery, and having a weapon under disability. *Id.* at ¶ 3. The trial court declined to merge the convictions for kidnapping and aggravated robbery, concluding that the defendant had a separate animus for each crime. *Id.* at ¶ 4. On appeal, this court affirmed, holding that, unlike in *Sidibeh*, the kidnapping was prolonged and involved transporting the victim over a considerable distance. *Id.* at ¶ 16. The court further held that the kidnapping exposed the victim to an increased risk of substantial harm, particularly when she was left outside the suspected drug house. *Id.*

{¶ 19} In the present case case, appellant admitted at the guilty plea hearing that he restrained K.W. to facilitate his other crimes. The presentence investigation indicated that appellant and Wimbley held K.W. and the other victims at gunpoint as they demanded money and searched the house looking for things to steal. Therefore, appellant committed both kidnapping and aggravated robbery through the same act, restraining K.W.'s liberty while committing a theft offense and while possessing and displaying a deadly weapon. Because both crimes were committed through the same act, we must determine whether appellant had the same animus for both offenses. With respect to the factors discussed in *Logan*, we conclude that the restraint was not merely incidental to the crime of aggravated robbery. Unlike the five-to-ten minute home invasion in *Sidibeh*, the restraint in this case appears to have lasted longer than necessary to complete the robbery. Moreover, in addition to forcing K.W. to the ground at gunpoint, appellant and Wimbley forced her to move to multiple locations within the house. Finally, appellant forced K.W. into a bedroom before sexually assaulting her. This suggests that the movement had "significance independent of" the aggravated robbery. *Logan* at syllabus. Under the facts presented in this case, we conclude that appellant had a separate animus for the continued restraint of K.W. Therefore, kidnapping and aggravated robbery were not allied offenses of similar import, and the trial court did not err by refusing to merge these convictions.

D. Merger of Kidnapping and Rape

{¶ 20} Finally, in his first assignment of error, appellant also argues that the trial court erred by failing to merge his convictions for kidnapping and rape. Appellant was convicted of rape in violation of R.C. 2907.02(A)(2), which provides that "[n]o person shall engage in sexual conduct with another when the offender purposely compels the

other person to submit by force or threat of force." The definition of "sexual conduct" for purposes of the statute includes fellatio. R.C. 2907.01(A). Appellant violated this statute by compelling K.W. to perform fellatio on him through the use of force and the threat of force while holding her at gunpoint and threatening to shoot her.

{¶ 21} In the *Logan* decision, the Supreme Court stated that "implicit within every forcible rape * * * is a kidnapping" because the victim's liberty is restrained during the act of forcible rape. *Logan* at 130. In this case, appellant restrained K.W.'s liberty by force and threat of force while engaging in sexual conduct. Therefore, under the first part of the *Johnson* test, appellant's actions were sufficient to constitute both rape and kidnapping. However, under the facts in the present case, we conclude that appellant's rape conviction was not an allied offense of similar import to the kidnapping conviction because it was committed with a separate animus. At the guilty plea hearing, the state asserted that appellant restrained K.W. for the purposes of committing the aggravated burglary and aggravated robbery. In a colloquy with the judge at the guilty plea hearing, appellant explained that his intent upon entering the residence was to "[s]teal stuff." (Mar. 6, 2012 Tr. 14.) This statement demonstrates appellant's animus when committing the aggravated burglary and aggravated robbery and when restraining his victims to accomplish those crimes. It appears that, at some point during the robbery, appellant formed a new intent to force K.W. to engage in sexual conduct. This constitutes a separate animus for the act of rape different from the animus for the kidnapping charge to which appellant pled guilty. Because appellant had a separate animus for kidnapping and rape, they were not allied offenses of similar import, and the trial court did not err by not merging these offenses. *See Johnson* at ¶ 51.

{¶ 22} With respect to the issues raised in the first assignment of error, we conclude that, under the facts of this case, the offense of kidnapping was not an allied offense of similar import with the offenses of aggravated burglary, aggravated robbery, or rape. Accordingly, we overrule appellant's first assignment of error.

E. Merger of Aggravated Burglary and Aggravated Robbery

{¶ 23} In his second assignment of error, appellant argues that the trial court erred by failing to merge his convictions for aggravated burglary and aggravated robbery. Applying the *Johnson* decision to similar facts, this court has previously concluded that

aggravated burglary and aggravated robbery were not allied offenses of similar import because they were committed through separate conduct. *See State v. McClurkin*, 10th Dist. No. 11AP-944, 2013-Ohio-1140, ¶ 51-55; *State v. West*, 10th Dist. No. 11AP-548, 2013-Ohio-942, ¶ 22-27. In *McClurkin*, the defendant entered the victim's home while carrying a knife, threatened her with the knife, repeatedly sexually assaulted her, and then stole her purse before leaving the home. *McClurkin* at ¶ 2. The defendant argued on appeal that the trial court erred by failing to merge several of his convictions, including aggravated robbery and aggravated burglary. *Id*. at ¶ 51. The court noted that aggravated burglary is committed by entering a victim's house, while aggravated robbery is committed when a defendant attempts or attempts to commit a theft offense under certain circumstances. Thus, separate conduct is required to commit each of the crimes and, therefore, they would not merge. *Id*. at ¶ 55. The facts are similar in this case. Appellant committed aggravated burglary by forcing his way into the residence. He committed aggravated robbery against K.W. by demanding and taking money or property from her. Thus, these offenses were committed through separate conduct and they do not merge. *See Johnson* at ¶ 51.

{¶ 24} Accordingly, we overrule appellant's second assignment of error.

II. Jail-Time Credit Calculation

{¶ 25} In his third assignment of error, appellant asserts that the trial court erred in calculating his jail-time credit. In its judgment, the trial court gave appellant 479 days of jail-time credit. Appellant asserts that he was entitled to credit for 513 days because he was arrested on December 7, 2010 and remained in custody until the sentencing hearing on May 2, 2012. The state notes that appellant was originally scheduled to be sentenced on March 28, 2012, at which time he would have been entitled to 479 days of jail-time credit. The state concedes that the trial court appears to have failed to add credit for the additional time between March 28 and May 2, 2012, and that appellant is entitled to 513 days of jail-time credit. Accordingly, we sustain appellant's third assignment of error.

{¶ 26} For the foregoing reasons, we overrule appellant's first and second assignments of error and sustain his third assignment of error. The judgment of the Franklin County Court of Common Pleas is affirmed in part and reversed in part, and this

matter is remanded to that court for resentencing in accordance with law and consistent with this decision.

Judgment affirmed in part and reversed in part; case remanded for resentencing.

SADLER and CONNOR, JJ., concur.

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