[Cite as *State v. Ramirez*, 2011-Ohio-6531.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2010-11-305
	:	O P I N I O N
- vs -		12/19/2011
	:	
ALEXIS RAMIREZ,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2010-03-0542

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HUTZEL, J.

{¶1} Defendant-appellant, Alexis Ramirez, appeals the decision of the Butler County Court of Common Pleas, Juvenile Division (juvenile court), to relinquish jurisdiction over him and transfer the case to the General Division of the Butler County Court of Common Pleas (trial court) for criminal prosecution as an adult. Appellant also appeals his sentence in the trial court for rape and kidnapping.

{¶2} In January 2010, a delinquency complaint was filed against appellant in the

juvenile court. The complaint alleged the following: on January 11, 2010, appellant went to the residence of a Liberty Township, Ohio woman, brandishing a firearm and demanding money. Upon receiving $5, appellant then struck the victim on the back of the head with the firearm, demanded that she undress, and terrorized and raped her. The victim was 64 years old; appellant was 14 years old. The "firearm" was a pellet gun.

{¶3} The state moved to transfer the case to the general division of the common pleas court so that appellant could be tried as an adult. On March 19, 2010, following a probable cause hearing and a relinquishment hearing, the juvenile court transferred the case to the general division of the common pleas court to prosecute appellant as an adult.

{¶4} On April 28, 2010, a Butler County Grand Jury returned a nine-count indictment against appellant charging him with three counts of rape, two counts of kidnapping, and one count each of aggravated burglary, felonious assault, aggravated robbery, and tampering with evidence. With the exception of the felonious assault charge (a second-degree felony) and the tampering with evidence charge (a third-degree felony), all other charges are first-degree felonies.

{¶5} Appellant filed a written plea of not guilty by reason of insanity and moved for a competency evaluation on the ground he was not competent to stand trial. Appellant was evaluated by Dr. Kim Stookey who testified at appellant's competency hearing that appellant was competent to stand trial. On July 13, 2010, based on Dr. Stookey's competency report and her testimony at the competency hearing, the trial court found appellant competent to stand trial.

{¶6} Appellant subsequently withdrew his not guilty by reason of insanity plea and entered a no contest plea to all nine charges. The trial court accepted appellant's no contest plea, found him guilty as charged, and sentenced him to 28 years in prison. In sentencing appellant, the trial court found that the two kidnapping charges were allied offenses of similar

import and merged Count Six into Count Seven.

{¶7} Appellant appeals, raising three assignments of error.

{¶8} Assignment of Error No. 1:

{¶9} "THE JUVENILE COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT IN RULING THAT DEFENDANT-APPELLANT WAS NOT AMENABLE TO TREATMENT WITHIN THE JUVENILE SYSTEM AND IN TRANSFERRING THIS MATTER TO ADULT COURT."

{¶10} Appellant argues the juvenile court erred in determining he was not amenable to rehabilitation within the juvenile system. Appellant asserts that given his relatively young age, sufficient time exists to rehabilitate him within the juvenile system. Further, "the extent of his emotional, physical, and psychological immaturity weigh heavily against transfer to adult court."

{¶11} "Juv.R. 30 and R.C. 2152.12 govern the transfer of a child from the juvenile court to the general division of the common pleas court to be prosecuted as an adult." *State v. Allen*, Butler App. No. CA2007-04-085, 2008-Ohio-1885, ¶7. Specifically, R.C. 2152.12(B) provides that the juvenile court may transfer the case if it finds that the child was 14 years of age or older at the time of the offense; there is probable cause to believe the child committed the offense; and the "child is not amenable to care or rehabilitation within the juvenile system, and the safety of the community may require that the child be subject to adult sanctions." "To determine whether the child can be rehabilitated and whether adult sanctions are necessary for the safety of the community, the juvenile court must consider whether the factors in favor of a transfer listed in R.C. 2152.12(D) outweigh the factors against a transfer listed in R.C. 2152.12(E)." *Allen* at ¶7, citing R.C. 2152.12(B).

{¶12} A juvenile court enjoys wide latitude in determining whether it should retain or relinquish jurisdiction over a juvenile, and its decision will not be reversed absent an abuse of

discretion. *State v. Watson* (1989), 47 Ohio St.3d 93, 95; *Allen* at ¶8. "As long as the court considers the appropriate statutory factors and there is some rational basis in the record to support the court's findings when applying those factors, we cannot conclude that the juvenile court abused its discretion in deciding whether to transfer jurisdiction." *State v. Phillips*, Clinton App. No. CA2009-03-001, 2010-Ohio-2711, ¶39.

{¶13} Dr. Stookey first evaluated appellant in February 2010 to determine whether he could be rehabilitated within the juvenile system. Following the evaluation and four psychological tests, Dr. Stookey issued a report (the bindover report). In the report, based on the results of three of the tests (a fourth test, the Jesness Inventory-Revised test, was considered invalid because of appellant's inconsistent and untruthful answers), Dr. Stookey expressed concerns that:

{¶14} "The results of the current evaluation suggest that, although he has had only limited previous contact with the juvenile authorities, [appellant] presents with a host of psychological symptoms of significant severity. * * *

{¶15} "[Appellant's] presentation in interview and the results of psychological testing suggest he suffers from an affective disturbance (anxiety/depression/agitation/irritability), paranoid ideation, intrusive, disturbing and obsessive thoughts, possible undisclosed hallucinations, social withdrawal and alienation, and generally impaired social skills. It remains unclear whether this group of symptoms is best accounted for as a temporary stress reaction, or if it represents the prodromal phase of a more severe and chronic illness like Schizophrenia or Schizotypical Personality Disorder.

{¶16} "With regard to his risk for re-offending, several factors are present that suggest [appellant] is at high risk for sexual re-offending * * *. Of additional and particular concern is the level of deviance associated with his sexual offense. * * *

{¶17} "The results of the present evaluation suggest [appellant] is in serious need of

intensive, likely long term and highly structured, mental health treatment at the same time that his prognosis for success in treatment and ultimate rehabilitation remain poor. * * * Even under ideal treatment circumstances, [appellant's] risk for future criminal offending and violent sexual offending will remain high.

{¶18} "In summary, it is my opinion, within a reasonable degree of professional certainty, that [appellant] is not amenable to care or rehabilitation in any facility designed for the care, supervision and treatment of delinquent children."

{¶19} During the relinquishment hearing, Dr. Stookey reiterated her opinion that appellant was not amenable to rehabilitation within the juvenile system. Dr. Stookey explained that her opinion was based on the fact that appellant was (1) in a high risk sexual offender group, for which there is no effective treatment, and (2) was diagnosed with Oppositional Defiant Disorder and developing an anti-social personality, which were very difficult to treat.

{¶20} Based on the evidence presented at the relinquishment hearing, the juvenile court found that the factors in favor of transfer were: (1) as a result of the felonious assault and rapes, the victim suffered physical and psychological harm; (2) the victim continues to suffer psychological harm; (3) the psychological harm is exacerbated by the victim's age; (4) appellant was physically, emotionally, and psychologically mature enough for transfer; and (5) appellant was not amenable to care or treatment within the juvenile setting. See R.C. 2152.12(D)(1), (2), (8), and (9). The juvenile court also considered as a factor in favor of transfer the fact appellant brandished a pellet gun which he used "to crack [the victim] in the head and caused the injury and the bleeding."

{¶21} With regard to the factors against transfer, the juvenile court found that appellant had never been adjudicated a delinquent child. However, "[w]hether there's sufficient time to rehabilitate the child within the Juvenile System, and the level of security

available in the Juvenile System, provides a reasonable assurance of public safety. Well, that factor is not really clear. * * * Assuming [appellant] stayed in the Juvenile System, the minimum number of years that he could be committed to the Ohio Department of Youth Services in this particular case * * * would be a minimum of five years, and he could not be held longer than his [21st] birthday. * * * So, there could be an argument that there is not time to rehabilitate the child until age [21], especially in the wake of what the Court sees as very serious charges involving [the victim]. * * * The court is not only a guardian of the rehabilitation and treatment of juveniles within the system, but the law mandates that we are guardians in this particular hearing of public safety."

{¶22} Based on the foregoing, the juvenile court found that the factors in favor of transfer outweighed the factors against transfer; appellant was not amenable to further cure, or rehabilitation, within the juvenile system; and the safety of the community required that appellant be subject to adult sanctions.

{¶23} Upon thoroughly reviewing the record, we cannot say the juvenile court abused its discretion in relinquishing jurisdiction over appellant and transferring the case to the general division of the common pleas court. Given the seriousness of appellant's offenses and the fact they were all felonies, and in light of Dr. Stookey's bindover report and her testimony at the relinquishment hearing, it was within the juvenile court's discretion to find that there was not sufficient time to rehabilitate appellant. See *Watson*, 47 Ohio St.3d at 96 (a juvenile who has demonstrated the ability to commit a major felony may require more time for rehabilitation; further, the greater the culpability for the offense, the less amenable will the juvenile be to rehabilitation). Further, the juvenile court clearly considered and weighed the statutory factors in R.C. 2152.12(D) and (E). Lastly, there is a rational basis in the record to support the juvenile court's findings.

{¶24} Appellant's first assignment of error is accordingly overruled.

{¶25} Assignment of Error No. 2:

{¶26} "THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FOUND THE JUVENILE DEFENDANT-APPELLANT COMPETENT TO STAND TRIAL."

{¶27} Appellant argues that given Dr. Stookey's competency report and her testimony at the competency hearing, the trial court erred in finding he was competent to stand trial. We disagree.

{¶28} The conviction of an accused not legally competent to stand trial is a violation of due process. See *State v. Berry*, 72 Ohio St.3d 354, 1995-Ohio-310; *In re McWhorter* (Dec. 5, 1994), Butler App. No. CA94-02-047. Juv.R. 32(A)(4) provides that a court may order a mental or physical examination where a party's competence to participate in the proceedings is at issue. However, there is no statutory basis for a juvenile to plead incompetence to stand trial. *In re Stone*, Clinton App. No. CA2002-09-035, 2003-Ohio-3071, ¶7. This court has held that the standards applied to determine the competency of adults under R.C. 2945.37 govern the competency evaluations of juveniles, as long as the standards are applied in light of juvenile, rather than adult, norms. See *In re McWhorter*.

{¶29} Pursuant to R.C. 2945.37(G), a defendant is presumed competent to stand trial unless it is proved by a preponderance of the evidence in a hearing that because of his present mental condition, he is incapable of understanding the nature and objective of the proceedings against him or of assisting in his defense. "The test for competency is whether the defendant has a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of proceedings against him." *In re Kristopher F.*, Stark App. No. 2006CA00312, 2007-Ohio-3259, ¶25.

{¶30} An appellate court will not disturb a competency determination if there is "some reliable, credible evidence supporting the trial court's conclusion that [the defendant]

understood the nature and objective of the proceedings against him." *State v. Williams* (1986), 23 Ohio St.3d 16, 19**.**

{¶31} By entry filed on July 13, 2010, based on Dr. Stookey's competency report and her testimony at the competency hearing, the trial court found that appellant was "capable of understanding the nature and objective of the proceedings against him and of presently assisting in his defense, and that [he was], therefore, competent for the purpose of standing trial[.]"

{¶32} Dr. Stookey's competency report states, in relevant part, that:

{¶33} "In a discussion of courtroom procedures in general and his case in particular, [appellant] demonstrated an adequate understanding of the roles of courtroom officials and the legal procedures he is likely to encounter. * * * [Appellant] was familiar with his plea options and the potential ramifications of entering each plea. He understood the purpose of a trial with possible outcomes associated with being found guilty or not guilty. He appeared to comprehend an explanation of plea bargaining during the first session of the evaluation and he could recall this explanation during the second session five days later. [Appellant] was able to recall all the charges against him. He knew these charges to be all felonies with potential lengthy sentences.

{¶34} "[Appellant] easily recalled the name of his attorney and described previous consultations with him. He noted he has no difficulties understanding his attorney but indicated he gets nervous during courtroom appearances and does not listen. * * *

{¶35} "* * *

{¶36} "The results of the current evaluation suggest [appellant] does not suffer from any mental disease or defect and, despite his relatively young age, appears to be capable of understanding the nature and purpose of the legal proceedings against him and of assisting in his own defense. [Appellant] demonstrated a good understanding of the roles of important

courtroom officials and the legal proceedings he is likely to encounter including entering a plea, plea bargaining, and basic trial procedures. He was aware of the seriousness of the charges against him and he appears capable of providing necessary information to his attorney. He also demonstrated adequate and self-protective reasoning skills which will allow him to make decisions in his own best interest with the assistance of his attorney. He demonstrated the ability to assist his attorney in the cross examination of witnesses and could evaluate legal advise [sic]. Finally, [appellant] appears to be capable of managing the stress of courtroom appearance and legal consultation if he chooses to do so.

{¶37} "In summary, it is my opinion, within a reasonable degree of scientific certainty that [appellant] does not suffer from a serious mental illness (disease) or mental retardation (defect) and he is capable of understanding the nature and purpose of the legal proceedings against him and is also capable of assisting in his defense. Therefore, I recommend he be found Competent to Stand Trial."

{¶38} During the competency hearing, Dr. Stookey reiterated that appellant: did not suffer from a serious mental illness or from mental retardation, was capable of understanding the nature and purpose of the legal proceedings against him, and was capable of assisting in his defense. Dr. Stookey explained that appellant "has the capacity to pay attention and listen" during court proceedings, but "chooses not to listen" out of "avoidance [and] obstinance." Dr. Stookey also stated that while appellant "could shut down" during his trial, "it would be a voluntary action," and that this type of behavior is in fact chosen by many defendants regardless of their age. Dr. Stookey testified they talked about the dangers of shutting down during trial and appellant understood the problems this behavior would create. Dr. Stookey also testified that while appellant did not have a complete understanding, he had a good enough understanding of the ramifications of entering a plea, the risks of going to trial, and the seriousness and impact on his life of a prison sentence.

{¶39} Appellant nevertheless argues the trial court erred in finding him competent to stand trial in light of his hallucinations and the fact he may suffer from schizophrenia. Appellant's arguments are based on the bindover report Dr. Stookey wrote following her very first evaluation of appellant in February 2010 (a few weeks after his crimes). The report states that "incident reports from the Juvenile Detention Center indicate [appellant] was 'stating something about demons and being upset' and 'aliens and UFOs' and 'ghosts in his mind' but he was not assessed to be experiencing auditory or visual hallucinations." The report further states that:

{¶40} "[Appellant's] presentation in interview and the results of psychological testing suggest he suffers from an affective disturbance (anxiety/depression/agitation/irritability), paranoid ideation, intrusive, disturbing and obsessive thoughts, possible undisclosed hallucinations, social withdrawal and alienation, and generally impaired social skills. It remains unclear whether this group of symptoms is best accounted for as a temporary stress reaction, or if it represents the prodromal phase of a more severe and chronic illness like Schizophrenia or Schizotypical Personality Disorder."

{¶41} However, during the competency hearing, Dr. Stookey testified that while appellant may have undisclosed hallucinations, she now believed that appellant's behavior at the juvenile center and the above-described "group of symptoms" were caused by immaturity and a reaction to stress and were not a developing mental illness. She further testified that after seeing appellant twice for his competency evaluation, she did not believe he has schizophrenia. She also testified she now believed the results of appellant's MMPI-A test (Minnesota Multiphasic Personality Inventory-Adolescent) were incorrect. See R.C. 2945.37(G) (a defendant is presumed competent to stand trial unless because of his *present* mental condition, he is incapable of understanding the nature and objective of the proceedings against him or of assisting in his defense).

{¶42} Upon a thorough review of the record, we find no error in the trial court's determination that appellant was competent to stand trial. The court's decision is supported by reliable, credible evidence in the record. Specifically, the decision is supported by the competency report and testimony of Dr. Stookey. Appellant's second assignment of error is overruled.

{¶43} Assignment of Error No. 3:

{¶44} "THE TRIAL COURT ERRED IN CONVICTING DEFENDANT-APPELLANT OF BOTH RAPE AND KIDNAPPING WHEN THEY ARE ALLIED OFFENSE[S] OF SIMILAR IMPORT."

{¶45} As stated earlier, during the sentencing hearing, the trial court found that the two kidnapping charges were allied offenses of similar import and merged Count Six into Count Seven. Appellant argues the trial court erred in subsequently sentencing him on Count Seven and all three counts of rape because the offenses are allied offenses of similar import under R.C. 2941.25.

{¶46} R.C. 2941.25, Ohio's multiple-count statute, prohibits the imposition of multiple punishments for the same criminal conduct. *State v. Craycraft*, Clermont App. Nos. CA2009-02-013 and CA2009-02-014, 2011-Ohio-413, ¶8. The statute provides that:

{¶47} "(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.

{¶48} "(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."

{¶49} In *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, the Ohio Supreme Court established a new two-part test for determining whether offenses are allied offenses of similar import under R.C. 2941.25 (thereby overruling *State v. Rance*, 85 Ohio St.3d 632, 1999-Ohio-291). The first inquiry focuses on "whether it is possible to commit one offense *and* commit the other with the same conduct." Id. at ¶48. (Emphasis sic.) It is not necessary that the commission of one offense will always result in the commission of the other. Id. Rather, the question is whether it is possible for both offenses to be committed by the same conduct. Id. If it is possible to commit both offenses with the same conduct, the court must next determine whether the offenses were in fact committed by a single act, performed with a single state of mind. Id. ¶49. If so, the offenses are allied offenses of similar import and must be merged. Id. at ¶50. On the other hand, if the offenses are committed separately or with a separate animus, the offenses will not merge. Id. at ¶51; *Craycraft*, 2011-Ohio-413 at ¶12.

{¶50} Applying the *Johnson* analysis, we first determine whether it is possible for rape and kidnapping to be committed with the same conduct.

{¶51} Under Count Seven, appellant was charged with violating R.C. 2905.01(A)(4) (kidnapping), which states in relevant part: "[n]o 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 to engage in sexual activity with the victim against the victim's will." Appellant was also charged with three counts of rape in violation of R.C. 2907.02(A)(2), which states: "[n]o person shall engage in sexual conduct with another when the offender purposely compelled the other person to submit by force or threat of force."

{¶52} The Ohio Supreme Court has held that "it is clear from the plain language of the statute that no movement is required to constitute the offense of kidnapping; restraint of the victim by force, threat, or deception is sufficient. Thus, implicit within every forcible rape * * *

is a kidnapping." *State v. Winn*, 121 Ohio St.3d 413, 2009-Ohio-1059, ¶23, quoting *State v. Logan* (1979), 60 Ohio St.2d 126, 130. See, also, *State v. Torres*, Cuyahoga App. No. 94003, 2010-Ohio-3615; *State v. Butts*, Summit App. No. 24517, 2009-Oho-6430. We therefore conclude it is possible to commit kidnapping and rape with the same conduct.

{¶53} We next determine whether appellant in fact committed kidnapping under Count Seven and all three rapes by way of a single act, performed with a single state of mind, or whether he had separate animus for each offense. *Johnson*, 2010-Ohio-6314 at ¶49, 51; R.C. 2941.25(B). In *Logan*, in establishing whether kidnapping and another offense of the same or similar kind are committed with a separate animus, the Ohio Supreme Court adopted the following guidelines:

{¶54} "Where the restraint or movement of the victim is merely incidental to a separate underlying crime, there [is] no separate animus * * *; 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[.]" *Logan*, 60 Ohio St.2d 126, syllabus. Further, "[w]here 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[.]" Id.

{¶55} According to the state, in the early hours of January 11, 2010, appellant, armed with a black pellet gun, knocked on the door of the victim's house, demanded money, walked inside the residence, and told her to take off her clothes. When the victim refused, appellant struck her in the back of the head with the pellet gun, causing a laceration which required several "staples" to close. After the victim subsequently undressed, appellant told her to perform oral sex on him. The first rape occurred when the victim performed oral sex on appellant while he was holding the pellet gun. The rape occurred in the front "family room

area right as you walk into the [residence.]"

{¶56} Appellant subsequently forced the victim into her bedroom where he told her to lay down on the bed and "suck his penis." The second rape occurred in the bedroom when the victim performed oral sex on appellant and when he subsequently inserted his fingers into her vagina. Appellant then told the victim to go to the bathroom where he laid down on the floor. The third rape occurred in the bathroom when the victim performed oral sex on appellant.

{¶57} Thereafter, appellant and the victim got into her car to drive to an ATM machine on State Route 747. While en route, after the victim refused to let him drive the car, appellant swung the car door open, grabbed the victim's purse, and "took off running." The overall ordeal suffered by the victim at the hands of appellant lasted one hour and 20 minutes. Appellant was holding the pellet gun at all times. As a result of being struck in the head by the pellet gun, the victim bled; photos of her residence show blood in the front family room, in her bedroom and on her bed, and in the bathroom, including on the toilet seat and in the bathtub.

{¶58} Appellant was charged with kidnapping the victim with a motive to engage in sexual activity with her against her will. We find that appellant committed kidnapping and the first rape with the same animus as to each offense. The first rape occurred in the front family room area where appellant found the victim after she opened her front door. The force used to compel the victim into performing oral sex on appellant, that is, striking her in the head with the pellet gun and thereafter holding the gun, was a single course of action, committed with a single state of mind. See *State v. Hernandez*, Warren App. No. CA2010-10-098, 2011-Ohio-3765. Appellant's restraint of the victim was incidental to the underlying rape, and had no significance independent of the rape. See *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845 (no evidence of separate animus for kidnapping where the victim was not moved to or

from the bedroom in which the defendant found her or restrained in any way other than what was necessary to rape her).

{¶59} Both offenses are therefore allied offenses of similar import and must be merged. *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, ¶26 (allied offenses of similar import must be merged at sentencing). Thus, the trial court's failure to merge kidnapping (Count Seven) and the first rape (Count Three) at sentencing and its imposition of individual sentences for both offenses constitute plain error. Id. at ¶26, 31.

{¶60} We find, however, that appellant committed the kidnapping and the second rape with a separate animus as to each offense. Likewise, we find that appellant committed the kidnapping and the third rape with a separate animus as to each offense. In both incidents, the restraint was somewhat prolonged and the victim was not released after the second rape nor was she released immediately following the third rape. In both incidents, the confinement was secretive as the crimes occurred in the victim's house in the middle of the night. The asportation was admittedly limited. But see *State v. Ortiz*, Cuyahoga App. No. 95026, 2011-Ohio-1238 (movement from one location to another, even at times in the same house or apartment, may demonstrate that kidnapping was committed with a separate animus from the rape). However, appellant's restraint of the elderly victim and his moving her from one room to another as she was bleeding from her head wound substantially increased the risk of harm to her.

{¶61} We therefore find that the kidnapping and the second rape are not allied offenses of similar import; nor are the kidnapping and the third rape allied offenses of similar import. See *State v. Kenney* (Sept. 30, 1998), Summit App. No. 18870 (kidnapping in violation of R.C. 2905.01(A)(4) and rape in violation of R.C. 2907.02(A)(2) were committed with separate animus where the offender struck the victim in the head, prevented her from leaving the apartment, moved her from one room to another, and between and following the

rapes, restrained her while at all times she was bleeding from a head wound). The trial court, therefore, properly sentenced appellant for kidnapping, the second rape (Count Four), and the third rape (Count Five) under *Johnson*, 2010-Ohio-6314, and R.C. 2941.25.

{¶62} Insofar as the trial court failed to merge the offense of kidnapping and the first rape at sentencing, the judgment of the trial court imposing individual sentences for these offenses is reversed and this matter is remanded for further proceedings according to law and consistent with this opinion. We note that pursuant to *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, the state retains the right to elect which allied offense of similar import to pursue at sentencing following a remand to the trial court, and the trial court is still bound by the state's election. *Whitfield* at ¶20, 24; *State v. Clay*, Madison App. No. CA2011-02-004, 2011-Ohio-5086, ¶27.

{¶63} Appellant's third assignment of error is accordingly sustained in part and overruled in part.

{¶64} Judgment affirmed in part, reversed in part, and remanded.

POWELL, P.J., and RINGLAND, J., concur.