[Cite as *State v. Dudley*, 2010-Ohio-3240.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	Appellate Case No. 22931
Plaintiff-Appellee	:	
	:	Trial Court Case No. 05-CR-3565
v.	:	
	:	(Criminal Appeal from
RONALD E. DUDLEY	:	Common Pleas Court)
	:	
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 9th day of July, 2010.

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FAIN, J.

{¶ 1} Defendant-appellant Ronald Dudley appeals from his conviction and sentence on one count of Rape, one count of Kidnapping, two counts of Attempted Rape, and one count of Gross Sexual Imposition. After a jury trial, Dudley was sentenced in August 2008 to a total sentence of a minimum of twenty years and a

maximum of fifty years, with the sentence on the Rape count to be served consecutively to the sentences on the remaining counts, which are to be served concurrently with each other. The trial court also designed Dudley as a Tier III sex offender, with commensurate registration and notification requirements under Senate Bill 10 (S.B. 10).

{¶ 2} Dudley contends that he was denied the effective assistance of counsel in two respects. First, his trial attorney failed to file a motion to suppress statements obtained from Dudley in violation of *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694. Second, Dudley's trial attorney failed to object when the trial court sentenced Dudley without merging the kidnapping conviction with the sex offenses, or without merging the sex offenses with each other, as required by R.C. 2941.25(A). In a supplemental brief, Dudley contends that: (1) retroactive application of S.B. 10 violates the prohibition on ex post facto laws in Article I, Section 10 of the Ohio Constitution; (2) retroactive application of S.B. 10 violates the prohibition against retroactive laws in Article II, Section 28 of the Ohio Constitution; (3) retroactive application of S.B. 10 violates the procedural due process protections of the United States and Ohio States Constitutions; and (4) the residency restrictions in S.B. 10 violate substantive due process protections of the United States Constitution and Article I, Sections One and 16 of the Ohio Constitution.

{¶ 3} We conclude that even if trial counsel should have filed a motion to suppress Dudley's statements to police, Dudley was not prejudiced by counsel's failure to do so, because the statements would have been admissible on rebuttal to impeach Dudley's claim of consent.

{¶ 4} We further conclude that the Rape and Kidnapping charges are allied offenses of similar import, and that a separate animus exists for each crime. In addition, we conclude that the Gross Sexual Imposition and Attempted Rape charges are allied offenses of similar import with the Rape charge, and that a separate animus does not exist with regard to these charges.

{¶ 5} Finally, we conclude that none of Dudley's arguments regarding S.B. 10 have merit. The judgment of conviction is, therefore, reversed, and this matter is remanded for a new sentencing hearing, at which the State may elect which allied offense it will pursue against Dudley.

I

{¶ 6} The alleged crimes in the case before us took place in the early morning hours of November 28, 1994. The victim, B.C., was sixteen years old, and was a high school student in Dayton, Ohio. B.C. had been born to a drug and alcohol-dependent mother, who lost custody when B.C. was eleven years old. After her mother lost custody, B.C. lived with her maternal aunt for five years, but ran away a day or two before Thanksgiving, 1994, due to repeated physical and emotional abuse by her aunt and cousins.

{¶ 7} B.C. stayed for several days with her friend, Melissa, and Melissa's father. However, on Sunday evening, Melissa's father told B.C. that she had to return home. He was unaware of the abuse. Instead of returning home, B.C. went to the home of another friend, Shannon. The plan was for B.C. to stay overnight with Shannon and return to Melissa's house after Melissa's father left for work on

Monday morning. B.C. planned to shower and dress at Melissa's house, and ride the bus to school.

{¶ 8} Because Shannon's mother did not have a car, B.C. had to walk between the two homes, which were some distance apart. The walk would have taken between a half-hour and an hour. On that morning, B.C. got up around 4:00 or 5:00 a.m., and left for Melissa's house. B.C. was wearing jeans as well as a dress that she had borrowed from Melissa the night before. B.C. was somewhat familiar with the area, but had not previously walked from one house to the other. She intended to walk to Main Street, and go down Ridge Avenue, to figure out the bridge she needed to take to cross the river and go towards Parkside Homes, which she knew as a landmark.

{¶ 9} As B.C. walked down Ridge, she heard someone yelling for her to wait. A man (later determined to be Ronald Dudley), approached, and apologized for yelling. Dudley stated that B.C. was not the person he had thought she was. B.C. asked Dudley if this particular bridge was the correct one to take to go to Parkside Homes. Dudley affirmed that the bridge was the correct one, and stated that he was actually going that way.

{¶ 10} B.C. and Dudley walked up Ridge Avenue and crossed the bridge. Dudley began making remarks that concerned B.C., and she also noticed that she had not seen Parkside Homes yet. When she inquired about this, Dudley offered to show her a shortcut through the woods. B.C. refused. Having realized that she was going in the wrong direction, B.C. decided to turn around. Just then, Dudley lunged at her, tackling her like a football player. They went over a guard rail and fell

down a hill. When they landed, they were at the corner of a tennis court, and Dudley was on top of B.C. Dudley picked up a bottle and held it over B.C. He also pulled something from his pocket and held it to her throat.

{¶ 11} Dudley put his hand over B.C.'s mouth, and told her before he removed it that he would kill her if she screamed. B.C. asked Dudley what she wanted, and he said she knew what he wanted. B.C. gave Dudley two rings, but he kept threatening her. Dudley decided that he wanted to walk to the woods, but B.C. told him that her ankle had been hurt during the fall. Dudley then grabbed B.C. by the hair and dragged her to the edge of the woods, about 50 or 60 feet away, where they would not be seen. When they got to the woods, Dudley told B.C. to take her pants down. She begged him not to do anything, but he told her to do as he said, or he would kill her. When B.C. did not act quickly enough, Dudley ripped off her left pants leg. He then crawled on top of her and tried to force his penis into her vagina. He was not successful, and then tried again. Dudley was still not successful, and told B.C. to put it in. B.C. put his penis in front of her vagina, and Dudley thrust very hard. He told B.C. to do it right or he would "fucking kill her." Dudley then thrust inside B.C.'s vagina and continued to do so. During the rape, Dudley put his hand up B.C.'s dress and fondled her nipple.

{¶ 12} Eventually, Dudley got up, took B.C.'s pants and a shoe away, and told her she could have her pants back once he got his hat, which had apparently fallen off. Dudley told B.C. that if she had even moved an inch when he came back, he would just kill her and get if over with. Dudley then left. B.C. sat on the cold ground for some time, but Dudley did not return. B.C. started walking back toward the

bridge on Ridge Avenue, holding one shoe. B.C. crossed the bridge and the river, and ended up on Riverside Drive. When B.C. approached the Helena Street Bridge, she was spotted by Bruce Butt, a firefighter, who was on his way to work. B.C. initially rebuffed Butt's attempts to help, because she was afraid. Butt parked his car in the Box 21 parking lot and approached B.C. on foot. Butt told B.C. that he was a fireman, and that he could see that something was not right. B.C. was crying, and said she had been raped. Butt took B.C. to Box 21, which is a rescue unit. One of the volunteers described B.C. as extremely distraught, shaking tremendously, and totally incoherent at times. 911 was called, and paramedics arrived shortly thereafter, to take B.C. to the hospital.

{¶ 13} Lisa Ward was the emergency room physician at Grandview Hospital that day. Ward had no independent recollection of the event, and all the medical records other than the sexual assault examination form had been destroyed by the time of the trial. Ward conducted a physical exam and noted signs of injury, including scratches on the posterior left shoulder, tenderness and swelling of the right ankle, bright red blood stains in the genital area, swollen and tender labia, an abrasion and laceration on the left vaginal wall, and tenderness of the uterus. The injuries were traumatic and not usually associated with consensual intercourse. Dr. Ward collected vaginal swabs, vaginal smears, and a vaginal aspirate and put these items into a sexual assault kit. Pursuant to standard rape exam protocol, the hospital personnel then either turned over the evidence directly to the police, or placed the material in a locked cabinet until the police arrived. The hospital also collected B.C.'s clothing and turned those materials over to the police.

{¶ 14} After B.C. was taken to the hospital, the police went to the location of the incident and located various items, including B.C.'s hairbrush and shoe, and a dark blue baseball cap, which fit B.C.'s description of her assailant. The police also took photos of the area.

{¶ 15} B.C. was able to describe her assailant only in general terms. She indicated that he was a medium-build African-American man between the ages of twenty and fifty, and was six to eight inches taller than she was. B.C. was shown photo spreads after the incident, but could not make an identification.

{¶ 16} In 1994, the Miami Valley Regional Crime Lab (MVRCL) was not conducting DNA testing. When the lab received B.C.'s sexual assault kit, the samples tested positive for the presence of seminal fluid and sperm. The lab also conducted blood typing and polymorphic enzyme testing. After the testing was finished, the lab retained samples in its freezer.

{¶ 17} B.C. had no further contact with the police until 2005, when she was contacted by Detective Olinger. The case had been an inactive cold case, due to the lack of a suspect. In 2003, however, MVRCL had submitted the samples in a number of cases, including B.C.'s, to a private lab for DNA testing. A male profile was obtained from the sperm fraction of the vaginal swabs, and was put into a database. Subsequently, in June 2005, MVRCL received notice that an individual, Ronald Dudley, matched the sperm fraction from B.C.'s vaginal swab.

{¶ 18} Detective Olinger verified the results, and then tried to obtain the old files. He found that the property room had destroyed the clothing and other crime scene items in 1997. Olinger located B.C., and reviewed the case with her. He

also showed B.C. a photo-spread of six individuals, one of whom was Dudley. B.C. was unable to positively identify her assailant, but indicated that it looked like pictures one and three. Dudley's picture was number three.

{¶ 19} Olinger subsequently interviewed Dudley. Olinger told Dudley about the subject of the interview, and showed Dudley two photographs of the victim. One was a photo of B.C. when she was 16, and the other was a copy of B.C.'s current driver's license. Dudley immediately stated that he did not know the person, and had not done anything. At this point, Olinger advised Dudley of his rights. Dudley then waived his rights, and agreed to speak with Olinger. Dudley again stated he did not know the person in the photograph, and denied having any type of sexual relations with her. Dudley picked up the photograph and commented that she was not his type of girl. He explained that he did not have sex with white girls, because he had no interest in them. The girl in the photograph also looked like a kid. Dudley stated a number of times that he did not know B.C., had no knowledge of Parkside Homes, had never been to that area, and had done nothing. The interview ended when Olinger asked Dudley for a DNA sample. Dudley refused to provide a sample.

{¶ 20} Dudley was indicted in October 2005, on six charges, including Rape, Aggravated Robbery, Kidnapping, two counts of Attempted Rape, and Gross Sexual Imposition. In November 2005, the trial court ordered Dudley to submit a saliva sample. After performing a DNA analysis, MVRCL concluded that Dudley was the sperm donor on B.C.'s vaginal swabs. MVRCL conducted further analysis in March 2008, and again concluded within a reasonable degree of scientific certainty that

Dudley was the sperm donor. The forensic scientist who conducted the tests explained the standard applied in his lab for this degree of certainty is approximately one in 6.8 trillion individuals. All the tests performed regarding Dudley rose to this degree of certainty.

{¶ 21} After hearing the evidence, the jury found Dudley guilty of Rape, Kidnapping, two counts of Attempted Rape, and Gross Sexual Imposition. The jury found Dudley not guilty of Aggravated Robbery. Dudley was sentenced accordingly, and now appeals.

II

{¶ 22} Dudley's First Assignment of Error is as follows:

{¶ 23} "RONALD DUDLEY WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I SECTION 10 OF THE OHIO CONSTITUTION."

{¶ 24} Under this assignment of error, Dudley makes two contentions, which we will separately address. Dudley's first contention is that he was denied the effective assistance of counsel, because his attorney failed to file a motion to suppress statements that Detective Olinger obtained in violation of *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694. Dudley contends that he was in custody for *Miranda* purposes when he was interrogated in prison about the alleged rape, which was not the crime for which he was imprisoned. Accordingly to Dudley, Detective Olinger knew that Dudley's DNA matched, and that he only

needed to obtain a statement that would deprive Dudley from defending on the issue of consent. Olinger, therefore, should have administered *Miranda* warnings. Dudley notes that he made similar statements after waiving his rights, but contends that these statements are simply a continuance of the improperly obtained statements, because nothing incriminating remained to be said.

{¶ 25} "To prevail on a claim of ineffective assistance of trial counsel, a defendant must show both deficient performance, and resulting prejudice." *In re J.W.*, Montgomery App. No. 19869, 2003-Ohio-5096, at ¶ 8, citing *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674.

{¶ 26} "To show deficiency, the defendant must show that counsel's representation fell below an objective standard of reasonableness. * * * Trial counsel is entitled to a strong presumption that his conduct falls within the wide range of effective assistance. * * * The adequacy of counsel's performance must be viewed in light of all of the circumstances surrounding the trial court proceedings. * * * Hindsight may not be allowed to distort the assessment of what was reasonable in light of counsel's perspective at the time.

{¶ 27} "Even assuming that counsel's performance was ineffective, the defendant must still show that the error had an effect on the judgment. * * * Reversal is warranted only where the defendant demonstrates that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *State v. Jackson*, Champaign App. No. 2004-CA-24, 2005-Ohio-6143, at ¶ 29-30 (citations omitted).

{¶ 28} In arguing that counsel's performance was deficient, Dudley relies on

Missouri v. Seibert (2004), 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643, which addresses a law enforcement technique that attempts to circumvent *Miranda* by "interrogating in successive, unwarned and warned phases." 542 U. S. at 609. In *Seibert*, the Supreme Court of the United States observed that:

{¶ 29} "Although we have no statistics on the frequency of this practice, it is not confined to Rolla, Missouri. An officer of that police department testified that the strategy of withholding *Miranda* warnings until after interrogating and drawing out a confession was promoted not only by his own department, but by a national police training organization and other departments in which he had worked. * * * Consistently with the officer's testimony, the Police Law Institute, for example, instructs that 'officers may conduct a two-stage interrogation . . . . At any point during the pre-*Miranda* interrogation, usually after arrestees have confessed, officers may then read the *Miranda* warnings and ask for a waiver. If the arrestees waive their *Miranda* rights, officers will be able to repeat any subsequent incriminating statements later in court.' Police Law Institute, Illinois Police Law Manual 83 (Jan. 2001-Dec. 2003) * * * The upshot of all this advice is a question-first practice of some popularity, as one can see from the reported cases describing its use, sometimes in obedience to departmental policy." Id. at 609-11 (footnotes omitted).

{¶ 30} The Supreme Court of the United States went on to note that:

{¶ 31} "By any objective measure, applied to circumstances exemplified here, it is likely that if the interrogators employ the technique of withholding warnings until after interrogation succeeds in eliciting a confession, the warnings will be ineffective in preparing the suspect for successive interrogation, close in time and similar in

content. After all, the reason that question-first is catching on is as obvious as its manifest purpose, which is to get a confession the suspect would not make if he understood his rights at the outset; the sensible underlying assumption is that with one confession in hand before the warnings, the interrogator can count on getting its duplicate, with trifling additional trouble. Upon hearing warnings only in the aftermath of interrogation and just after making a confession, a suspect would hardly think he had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground again. * * * A more likely reaction on a suspect's part would be perplexity about the reason for discussing rights at that point, bewilderment being an unpromising frame of mind for knowledgeable decision. What is worse, telling a suspect that 'anything you say can and will be used against you,' without expressly excepting the statement just given, could lead to an entirely reasonable inference that what he has just said will be used, with subsequent silence being of no avail. Thus, when Miranda warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and 'depriv[e] a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.' * * * By the same token, it would ordinarily be unrealistic to treat two spates of integrated and proximately conducted questioning as independent interrogations subject to independent evaluation simply because *Miranda* warnings formally punctuate them in the middle." Id. at 613-14 (citation and footnote omitted).

{¶ 32} In *Seibert*, the Supreme Court of the United States also distinguished its former decision in *Oregon v. Elstad* (1985), 470 U.S. 298, 105 S.Ct. 1285, 84

L.Ed.2d 222. In *Elstad*, officers had briefly spoken with a young suspect at his home before taking him into custody and administering warnings. The Court noted that:

{¶ 33} "The contrast between *Elstad* and this case reveals a series of relevant facts that bear on whether *Miranda* warnings delivered midstream could be effective enough to accomplish their object: the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first. In *Elstad*, it was not unreasonable to see the occasion for questioning at the station house as presenting a markedly different experience from the short conversation at home; since a reasonable person in the suspect's shoes could have seen the station house questioning as a new and distinct experience, the *Miranda* warnings could have made sense as presenting a genuine choice whether to follow up on the earlier admission.

{¶ 34} "At the opposite extreme are the facts here, which by any objective measure reveal a police strategy adapted to undermine the *Miranda* warnings. * * * The unwarned interrogation was conducted in the station house, and the questioning was systematic, exhaustive, and managed with psychological skill. When the police were finished there was little, if anything, of incriminating potential left unsaid. The warned phase of questioning proceeded after a pause of only 15 to 20 minutes, in the same place as the unwarned segment. When the same officer who had conducted the first phase recited the *Miranda* warnings, he said nothing to counter the probable misimpression that the advice that anything Seibert said could be used

against her also applied to the details of the inculpatory statement previously elicited. In particular, the police did not advise that her prior statement could not be used. * * * nothing was said or done to dispel the oddity of warning about legal rights to silence and counsel right after the police had led her through a systematic interrogation, and any uncertainty on her part about a right to stop talking about matters previously discussed would only have been aggravated by the way Officer Hanrahan set the scene by saying 'we've been talking for a little while about what happened on Wednesday the twelfth, haven't we?' App. 66. The impression that the further questioning was a mere continuation of the earlier questions and responses was fostered by references back to the confession already given. It would have been reasonable to regard the two sessions as parts of a continuum, in which it would have been unnatural to refuse to repeat at the second stage what had been said before. These circumstances must be seen as challenging the comprehensibility and efficacy of the *Miranda* warnings to the point that a reasonable person in the suspect's shoes would not have understood them to convey a message that she retained a choice about continuing to talk." Id. at 615-17 (footnotes and citations omitted).

{¶ 35} The situation in the case before us is more like *Seibert* than *Elstad*. Detective Olinger was an experienced detective and was aware of the DNA results before he interviewed Dudley. Olinger did not administer *Miranda* warnings at the outset of the discussion, nor did he inform Dudley about the DNA results. Olinger showed Dudley photographs of the victim and elicited Dudley's statement that he did not know B.C., and had done nothing. The interview also took place in prison,

where Dudley was not free to leave. After eliciting Dudley's statements, the same detective, Olinger, proceeded directly to the Miranda warnings, the waiver of such, and a second round of questions, which elicited answers similar to those Dudley had already provided. Furthermore, while Dudley was not subjected to the exhaustive type of pre-interview that the officers conducted in *Seibert*, there is no doubt that Dudley's interrogations were not independently conducted. There is also no indication that Olinger told Dudley that his prior statements could be used against him. Accordingly, trial counsel should have filed a motion to suppress Dudley's statements.

{¶ 36} Counsel's error, however, did not affect the judgment, because Dudley would have been required to testify in order to establish consent. The victim denied knowing Dudley, and Dudley's testimony would have been the only way to establish that the sexual contact was consensual, rather than the result of force. In that situation, the State would have been permitted to introduce Dudley's prior inconsistent statements on rebuttal, despite any *Miranda* violation. See, *e.g.*, *Harris v. New York* (1971), 401 U.S. 222, 225-26, 91 S.Ct. 643, 28 L.Ed.2d 1 (noting that "The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances"). Accord, *United States v. Havens* (1980), 446 U.S. 620, 100 S.Ct. 1912, 64 L.Ed.2d 559; *State v. Hill* (1996), 75 Ohio St.3d 195, 207; and *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, at ¶ 90 (noting that defendant's recorded statements, although obtained in violation of the Sixth Amendment right to counsel, are admissible to impeach defendant's untruthful trial testimony).

Accordingly, Dudley's first contention under the First Assignment of Error is without merit.

{¶ 37} Dudley's second contention is that is that he was denied the effective assistance of counsel, because his trial lawyer failed to object when the trial court sentenced Dudley without merging the kidnapping conviction with the sex offenses or the sex offenses with each other as required by R.C. 2941.25(A).

{¶ 38} R.C. 2941.25 provides that:

{¶ 39} "(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.

{¶ 40} "(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."

{¶ 41} The basic purpose of R.C. 2941.25 is " 'to prevent "shotgun" convictions' " *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, at ¶ 16, quoting from Legislative Service Commission Summary of Am.Sub.H.B. 511, The New Ohio Criminal Code (June 1973) 69. A two-prong test is used to decide whether two or more offenses constitute allied offenses of similar import under R.C. 2941.25(A). The statutory elements of the crimes are first compared in the abstract, without reference to the facts of the case or to the conduct constituting the offense.

If the offenses are found to be so similar that commission of one offense necessarily results in the commission of the other, then the offenses are allied offenses of similar import. *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, at paragraph one of the syllabus.

{¶ 42} In the second part of the test, the defendant's conduct is reviewed to decide if the defendant can be convicted of both crimes. If the court finds either that the crimes were committed separately, or that a separate animus existed for each crime, the defendant may be convicted of both offenses. Id. at ¶ 14.

{¶ 43} Dudley contends that the rape and kidnapping charges should have been merged, because his alleged movement and restraint of B.C. had no significance apart from facilitating the rape. We disagree.

{¶ 44} In *State v. Logan* (1979), 60 Ohio St.2d 126, the Supreme Court of Ohio concluded that rape and kidnapping are allied offenses of similar import under R.C. 2941.25(A), because "implicit within every forcible rape * * * is a kidnapping." Id. at 130. After making this comment, the Supreme Court of Ohio then considered the second prong of the test, which evaluates a defendant's conduct. In this context, the court observed that:

{¶ 45} "The primary issue, however, is whether the restraint or movement of the victim is merely incidental to a separate underlying crime or, instead, whether it has a significance independent of the other offense. In the instant case, the restraint and movement of the victim had no significance apart from facilitating the rape. The detention was brief, the movement was slight, and the victim was released immediately following the commission of the rape. In such circumstances, we

cannot say that appellant had a separate animus to commit kidnapping.

{¶ 46} "We adopt the standard which would require an answer to the further question of whether the victim, by such limited asportation or restraint, was subjected to a substantial increase in the risk of harm separate from that involved in the underlying crime. If such increased risk of harm is found, then the separate offense of kidnapping could well be found. For example, prolonged restraint in a bank vault to facilitate commission of a robbery could constitute kidnapping. In that case, the victim would be placed in substantial danger." Id. at 135.

{¶ 47} In *Logan,* the victim was accosted at the entrance to an alley, and was forced down the alley, around a corner and down a flight of stairs, where she was raped. She was then immediately released. Id. at 126-27. Under these circumstances, the Supreme Court of Ohio concluded that the detention and asportation were incidental, and that no separate animus existed. Id. at 136-37.

{¶ 48} In contrast, in *State v. Craig*, 110 Ohio St.3d 306, 2006-Ohio-4571, the Supreme Court of Ohio concluded that a separate animus existed, where the defendant abducted the victim while she was walking home and took her to a nearby apartment, where he raped and killed her. Id. at ¶ 118.

{¶ 49} In *State v. Greathouse*, Montgomery App. No. 21536, 2007-Ohio-2136, we found the existence of a separate animus for kidnapping and rape, where the defendant forced the victim to drive around for some time in an automobile before the rape. We noted that the detention posed a substantial risk of harm to the victim, as the defendant threatened to crash and burn the car with the victim inside. The defendant also threatened to shoot and kill the victim. And finally, the hazard of

traveling in the car increased the risk of harm to the victim. Id. at ¶ 46. Conversely, in *State v. Winn,* 173 Ohio App.3d 202, 2007-Ohio-4327, we found no separate animus in an aggravated robbery and kidnapping situation, where the defendant moved the victim only a few steps from the hallway to her bedroom, and only briefly restrained her. We additionally observed that the restraint was not secretive, and did not involve a substantial movement, or increase in risk to the victim. Id. at ¶ 33.

{¶ 50} In the case before us, Dudley first restrained B.C. when he tackled her, caused both parties to fall over a guardrail, and landed on top of B.C. These actions posed a substantial risk of harm to B.C., and, did, in fact, cause harm to her ankle. Dudley then grabbed B.C. by the hair and dragged her fifty or sixty feet to the woods. This again posed a substantial risk of harm to B.C., was more than a brief restraint, and was secretive. While Dudley restrained B.C., he also threatened to kill her. And finally, when Dudley left, he told her that if she moved before he came back, he would kill her. He also took B.C.'s pants and shoe, subjecting her to a risk of harm due to the cold and damp weather. Under the circumstances, we conclude that a separate animus existed for the kidnapping and rape. Dudley's counsel, therefore, did not act ineffectively by failing to object to separate sentences for the rape and kidnapping convictions.

{¶ 51} Dudley also contends that counsel acted ineffectively, because counsel did not object to the court's failure to merge the rape and gross sexual imposition convictions, nor to the court's failure to merge the rape conviction and the two convictions for attempted rape.

{¶ 52} In *State v. Roy* (June 21, 1991), Montgomery App. No. 12525, we

concluded that Rape, Gross Sexual Imposition in violation of R.C. 2907.05(A)(1), and Attempted Rape in violation of R.C. 2907.02(A)(2), are allied offenses of similar import, because a review of the elements of these statutory offenses indicates that their elements correspond to such a degree that commission of one crime will result in the commission of the other. See, also, *State v. Evans,* 122 Ohio St.3d 381, 2009-Ohio-2974, at ¶ 30 (noting that gross sexual imposition is both a lesser included offense and an allied offense of similar import to rape), and *State v. Jones*, 78 Ohio St.3d 12, 14, 1997-Ohio-38 (holding that rape and attempted rape are allied offenses of similar import).

{¶ 53} The issue remains, however, whether the alleged crimes were committed with a separate animus. With respect to the Gross Sexual Imposition charge, B.C. testified that Dudley put his hand up her dress and fondled her nipple, once he laid on top of her and "started thrusting." Trial Transcript, pp. 292-93.

{¶ 54} In *State v. Butts*, Summit App. No. 24517, 2009-Ohio-6430, the Ninth District Court of Appeals concluded that the defendant had a separate animus for the crime of Gross Sexual Imposition, because he first grabbed the victim's breasts while forcibly holding a pillow over her face, and only later committed rape after forcing the victim into a seated position. Id. at ¶ 26. In contrast, no separate animus existed in the case before us, because Dudley's action occurred during the rape. Accordingly, trial counsel should have objected to imposition of separate sentences for both Rape and Gross Sexual Imposition. The error was prejudicial, because imposing multiple sentences for allied offenses of similar import is plain error affecting a defendant's substantial rights. *State v. Yarbrough*, 104 Ohio St.3d 1, 2004-Ohio-6087, at ¶

96-102.

{¶ 55} The next issue for consideration relates to the Attempted Rape charges. The State contends that the trial court properly imposed separate sentences for the two counts of Attempted Rape, because a separate animus exists for all the alleged crimes. The State points out that Dudley twice tried to put his penis into B.C.'s vagina and failed. Dudley then told B.C. to put his penis into her vagina, but she only put it in front of her vagina. On the third attempt, Dudley succeeded, and that is when the rape occurred.

{¶ 56} In *Jones*, *supra*, the Supreme Court of Ohio considered whether two acts of oral rape should be merged with each other, and also whether an act or attempted vaginal rape should be merged with an act of vaginal rape. The court concluded that the two oral rapes were allied offenses and that the attempted vaginal rape was an allied offense of vaginal rape. However, the court rejected merger, stating that:

{¶ 57} "The second act of oral rape increased the risk of physical injury to the victim, as well as the chances that the victim would contract a venereal disease. Further, while the two acts of oral rape were committed within a short period of time of each other, there were significant intervening acts, namely vaginal penetration, loss of an erection, withdrawal from the vagina, and removal of the tampon. We find these factors sufficient to justify a jury verdict that the first act of oral rape was separate from the second act of oral rape.

{¶ 58} "The act of attempted vaginal rape increased the risk of physical injury to the victim, as well as the chances that the victim would contract a venereal

disease or become pregnant. Further, while the act of vaginal rape and the act of attempted vaginal rape were committed within a short period of time of each other, there were significant intervening acts, namely, loss of an erection, withdrawal from the vagina, removal of a tampon, and oral rape. We find these factors sufficient to justify a jury verdict that the act of vaginal rape was separate from the act of attempted vaginal rape." 78 Ohio St.3d at 14.

{¶ 59} Dudley argues that the acts of attempted rape occurred very close in time to the rape and that, unlike *Jones*, there were no intervening acts. The State concedes that the acts of rape and attempted rape were very close in time, but contends that each act created a separate risk of physical injury and other types of harm. The State does not point out what specific risk of injury occurred in connection with the attempted rapes.

{¶ 60} In contrast to *Jones*, the evidence in the case before us fails to reveal independent intervening acts like loss of an erection, removal of a tampon, withdrawal from the vagina, or oral sex. We, therefore, agree with Dudley that trial counsel should have objected to the imposition of separate sentences for the two counts of Attempted Rape and the Rape count. Again, this failure is plain error, affecting Dudley's substantial rights. *Yarbrough*, 2004-Ohio-6087, at ¶ 96-102.

{¶ 61} In a recent decision, the Supreme Court of Ohio held as follows:

{¶ 62} "Upon finding reversible error in the imposition of multiple punishments for allied offenses, a court of appeals must reverse the judgment of conviction and remand for a new sentencing hearing at which the state must elect which allied offense it will pursue against the defendant.

{¶ 63} "Because R.C. 2941.25(A) protects a defendant only from being punished for allied offenses, the determination of the defendant's guilt for committing allied offenses remains intact, both before and after the merger of allied offenses for sentencing." *State v. Whitfield*,124 Ohio St.3d 319, 2010-Ohio-2, at paragraphs two and three of the syllabus.

{¶ 64} Based on *Whitfield*, the judgment of conviction will be reversed, and this matter will be remanded for a new sentencing hearing, where the State will elect which allied offense it will pursue against Dudley.

{¶ 65} Dudley's First Assignment of Error is sustained in part, and overruled in part.

III

{¶ 66} Dudley's Second Assignment of Error, asserted in a supplement brief, is as follows:

{¶ 67} "APPLICATION OF S.B. 10 TO RONALD DUDLEY IS UNCONSTITUTIONAL." Under this assignment of error, Dudley contends that retroactive application of S.B. 10 violates the prohibition on ex post facto laws in Article I, Section 10 of the Ohio Constitution; (2) retroactive application of S.B. 10 violates the prohibition against retroactive laws in Article II, Section 28 of the Ohio Constitution; (3) retroactive application of S.B. 10 violates the procedural due process protections of the United States and Ohio States Constitutions by imposing registration and notification requirements without providing any opportunity to be heard; and (4) the residency restrictions violate substantive due process protections

of the United States Constitution, Article I, Sections One and 16 of the Ohio Constitution.

{¶ 68} We have previously rejected these contentions in other sexual offender classification cases. See, *e.g.*, *State v. Desbiens*, Montgomery App. No. 22489, 2008-Ohio-3375; *State v. Barker*, Montgomery App. No. 22963, 2009-Ohio-2774; *Dobson*, 2010-Ohio-279; and *State v. Heys*, Miami App. No. 09-CA-04, 2009-Ohio-5397.

{¶ 69} In *Desbiens*, we held that "S.B. 10 sets forth a civil and non-punitive reclassification and registration scheme." Id. at ¶ 26, citing *State v. King*, Miami App. No. 08-CA-02, 2008-Ohio-2594. We therefore rejected the petitioner's claims that "S.B. 10 violates several constitutional rights, including his right to protection from ex post facto laws, his right to substantive due process, his right to contract, and his right to procedural due process." Id. at ¶ 18.

{¶ 70} In *Barker*, we noted that:

{¶ 71} "In July 2008, this court held that S.B. 10 did not offend the ex post facto clause of the United States Constitution because S.B. 10 is civil and non-punitive. * * * In November, 2008, we held S.B. 10 did not violate the ex facto clause or retroactive clause of the Ohio Constitution. * * * Having determined * * * that S.B. 10 is civil and non-punitive, Barker's claim that the legislation violates the cruel and unusual punishment clauses and the double jeopardy clauses of the United States and Ohio Constitutions must fail as well." 2009-Ohio-2774, at ¶ 3 (citations omitted).

{¶ 72} Subsequently, in *Heys*, we rejected the petitioner's contention that S.B.

10 deprived him of substantive and procedural due process rights. We concluded that the petitioner, Heys,

{¶ 73} "has no vested interest or settled expectation in his previous classification and requirements because ' "a convicted felon has no reasonable expectation that his or her criminal conduct will not be subject to further legislation," ' including the registration requirements of R.C. Chapter 2950. * * *

{¶ 74} "Furthermore, no liberty interest is implicated. * * * 'A constitutionally protected liberty interest has been defined as freedom from bodily restraint and punishment.' * * * The Ohio Supreme Court held that the previous registration requirements involved no bodily restraint or punishment; they are neither criminal nor punitive in nature. * * * Similarly, the S.B. 10 requirements have also been found to be non-punitive." 2009-Ohio-5397, at ¶ 11-12 (citations omitted).

{¶ 75} Finally, regarding residency restrictions, we commented in *Dobson* as follows:

{¶ 76} "Heys, like Dobson, had further claimed that he was denied substantive due process, because his property interest is hindered by the residency requirements. We noted, initially, that an individual must actually suffer a deprivation of property rights in order to have standing to challenge the constitutionality of the residency restriction. * * * Because Dobson has not alleged, much less established, that he has been deprived of his property rights, he lacks standing to challenge the residency restrictions. However, even if Dobson had standing, we have previously rejected his assertion that the residency restrictions impose an unconstitutional restraint and infringe on a fundamental right. * * * "

2010-Ohio-279, at ¶ 15, citing *Heys*, 2009-Ohio-5397 (other citations omitted).

{¶ 77} In the case before us, Dudley has neither alleged nor established that he has been deprived of property rights. Dudley, therefore, lacks standing to pursue this claim. Furthermore, as noted in *Dobson*, we have rejected the contention that residency restrictions infringe upon a fundamental right.

{¶ 78} On June 3, 2010, the Supreme Court of Ohio decided *State v. Bodyke*, ___ Ohio St.3d ___, 2010-Ohio-2424, holding that the scheme of reclassification of sexual offenders by the Ohio Attorney General, mandated by R.C. 2950.031 and 2950.032, violates the separation of powers doctrine. We note that this decision has no application to Dudley. Dudley was not reclassified by the Ohio Attorney General under R.C. 2950.031 and R.C. 2950.032. Because his sentencing hearing took place after January 1, 2008, he was originally classified by the sentencing judge.

{¶ 79} Dudley's constitutional challenges to S.B. 10 are without merit, and are overruled.

{¶ 80} Dudley's Second Assignment of Error is overruled.

IV

{¶ 81} Dudley's First Assignment of error having been sustained in part and overruled in part, and Dudley's Second Assignment of Error having been overruled, the judgment of the trial court is Reversed, and this cause is remanded for a new sentencing hearing.

. . . . . .

DONOVAN, P.J., and BROGAN, J., concur.

Copies mailed to:

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