

[Cite as *State v. Bozeman*, 2015-Ohio-616.]

**IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
CLARK COUNTY**

STATE OF OHIO

Plaintiff-Appellee

v.

BRANDON BOZEMAN

Defendant-Appellant

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C.A. CASE NO. 2014-CA-38

T.C. NO. 12CR435

(Criminal appeal from  
Common Pleas Court)

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**OPINION**

Rendered on the 20th day of February, 2015.

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DONOVAN, J.

{¶ 1} Defendant-appellant Brandon Bozeman appeals his conviction and sentence for one count of kidnapping, in violation of R.C. 2905.01(B)(1), a felony of the first degree, and one count of rape, in violation of R.C. 2907.02(A)(2), a felony of the first degree. Bozeman filed a timely notice of appeal with this Court on March 14, 2014.

**{¶ 2}** On June 18, 2012, Bozeman was indicted for one count of abduction, in violation of R.C. 2905.02(A)(2); one count of abduction, in violation of R.C. 2905.02(A)(1), accompanied by both a firearm and sexual motivation specification; two counts of aggravated burglary, in violation of R.C. 2911.01(A)(1); one count of kidnapping, in violation of R.C. 2905.01(B)(1); one count of kidnapping, in violation of R.C. 2905.01(A)(2); one count of kidnapping, in violation of 2905.01(A)(4); two counts of rape, in violation of R.C. 2907.02(A)(2); four counts of complicity to commit rape, in violation of R.C. 2907.02(A)(2) and 2923.03(A)(2); and one count of intimidation of an attorney, victim, or witness in a criminal case, in violation of R.C. 2921.04(B). All of the counts in the indictment were accompanied by a firearm specification.

**{¶ 3}** On February 18, 2014, Bozeman pled guilty to one count of kidnapping, in violation of R.C. 2905.01(B)(1), a felony of the first degree, and one count of rape, in violation of R.C. 2907.02(A)(2), a felony of the first degree. In exchange for Bozeman's plea, the State agreed to dismiss all of the remaining counts and all of their attendant specifications. Additionally, the trial court imposed an agreed sentence of seven years for the kidnapping count and eight years for the rape count, to be served consecutively, for an aggregate sentence of fifteen years in prison. Bozeman was also classified as a Tier III sex offender.

**{¶ 4}** It is from this judgment that Bozeman now appeals.

**{¶ 5}** Because they are interrelated, Bozeman's first and second assignments of error will be discussed as follows:

**{¶ 6}** "THE TRIAL COURT MUST MAKE A DETERMINATION WHETHER RAPE AND KIDNAPPING ARE ALLIED OFFENSES OF SIMILAR IMPORT REQUIRING

MERGER.”

{¶ 7} “IN THE ALTERNATIVE, MR. BOZEMAN’S OFFENSES ARE ALLIED OFFENSES OF SIMILAR IMPORT REQUIRING MERGER.”

{¶ 8} In his assignments, Bozeman essentially contends that the trial court erred when it failed to sua sponte find that his convictions for rape and kidnapping were allied offenses of similar import, thus requiring merger. Specifically, Bozeman argues that the restraint of the victim was incidental to the rape and that no separate conduct or animus existed.

{¶ 9} Initially, we note that Bozeman has waived all but plain error by failing to object to the failure of the trial court to merge his convictions at his sentencing hearing. See *State v. Rogers*, 2d Dist. Greene No. 2011 CA 0057, 2012-Ohio-4451, ¶ 5. Failure to merge allied offenses of similar import is plain error. *Id.* In order to prevail under the plain error standard, an appellant must demonstrate both that there was an obvious error in the proceedings and that but for the error, the outcome of the trial clearly would have been otherwise. *Id.*, citing *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044, 781 N.E.2d 88.

{¶ 10} R.C. 2941.25, Ohio’s allied offense statute, provides that:

(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

(B) Where the defendant’s conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of

the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

{¶ 11} “When determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25, the conduct of the accused must be considered.” *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, syllabus. The Ohio Supreme Court explained:

\* \* \* [T]he 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.

If the multiple offenses can be committed by the same conduct, then the court must determine whether the offenses were committed by the same conduct, i.e., “a single act, committed with a single state of mind.” \* \* \*

If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged.

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.

(Citations and quotations omitted.)

*Johnson* at ¶ 48-51.

{¶ 12} All rapes inherently involve a restraint on the liberty of another, and where the act of rape is the sole unlawful exercise of restraint on the physical liberty of another person, the law is clear that any accompanying kidnapping charge should merge with the rape charge. *State v. Logan*, 60 Ohio St.2d 126, 397 N.E.2d 1345 (1979). A separate animus for kidnapping exists where (1) “the restraint is prolonged, the confinement is secretive, or the movement is substantial so as to demonstrate a significance independent of the other offense,” or (2) “the asportation or restraint of the complainant subjects the complainant to a substantial increase in risk of harm separate and apart from that involved in the underlying crime.” *Logan* at syllabus; see also *State v. Rucker*, 2d Dist. Montgomery No. 24340, 2012-Ohio-4860, ¶ 52. Although focused on the animus aspect of the allied offense analysis, these factors are also reasonable considerations for determining whether the defendant committed kidnapping as separate conduct from other offenses. See *State v. Lovato*, 2d Dist. Montgomery No. 25683, 2014-Ohio-2311, ¶ 13, citing *State v. Ware*, 63 Ohio St.2d 84, 406 N.E.2d 1112 (1980).

{¶ 13} At the plea and sentencing hearing, the following facts were read into the record by the State:

The facts to which the defendant will be entering a plea of guilty to count four is that on or about December 11, 2010[,] in Clark County, Ohio, Brandon Bozeman, did by force, threat or deception under the circumstances creating a substantial risk of serious physical harm to the victim, remove the said victim from the place where the other person was found, and he did not release the said victim in a safe place, unharmed.

As to count seven[,] Brandon Bozeman on or about December 11, 2010[,] in Clark County, Ohio, did engage in sexual conduct with another when the offender purposely compels the other to submit by force or threat of force.

More specifically[,] in various locations throughout Springfield, Clark County, Ohio, while brandishing a firearm, Brandon Bozeman forced her, the victim, into her vehicle. He forced her to remain in that vehicle. He stole items from her purse, including money and a cellphone.

Bozeman took the victim's keys and drove away in the victim's vehicle with her inside. He acted to facilitate the flight after robbing her. He removed her under the circumstances that created a substantial risk of serious physical harm, and he moved her to engage in sexual activity.

Bozeman forced the victim to engage in oral sex and vaginal sex, and while brandishing the firearm[,] aided two other males to engage in oral sex and vaginal sex with the victim by force. Bozeman stole the victim's wedding rings and threatened harm to her and her family should she report the incident to police.

Plea Hrg. & Disposition, pgs. 4-5.

**{¶ 14}** In light of the facts placed on the record at the plea hearing, Bozeman asserts that the trial court erred in failing to merge the count of kidnapping with the count of rape. Bozeman argues that the rape was committed with the same animus and same conduct as the rape.

**{¶ 15}** In cases considering whether rapes and kidnappings are allied offenses of

similar import, kidnapping has been found to be separate from rape where the complainant was held for a substantial period of time apart from a rape, where the complainant was transported to another location, or where the circumstances surrounding the complainant's detention substantially increased the risk of harm to her. See *State v. Greathouse*, 2d Dist. Montgomery No. 21536, 2007-Ohio-2136 (involving prolonged detention of the complainant, forcing the complainant to drive around for some time in an automobile before the rape while threatening to crash and burn the car with the complainant inside, and threatening to shoot and kill the complainant); *State v. Smith*, 7th Dist. Mahoning No. 12 MA 168, 2014-Ohio-1398 (where the complainant testified that she was held captive for six hours); *State v. Freeman*, 7th Dist. Mahoning No. 12 MA 112, 2014-Ohio-1013 (where defendant surprised his complainant from behind, held an object to her back, forced her into a car, restrained her within the car for over three hours, and transported her across county lines against her will and in fear for her life, before raping her hours later); *State v. Rivera*, 10th Dist. Franklin No. 12AP-691, 2014-Ohio-842 (where restraint was prolonged and secretive and there was substantial movement of the complainant, which subjected her to a substantial increase in the risk of harm, separate and apart from the rape).

**{¶ 16}** Conversely, where the restraint is incidental to the rape, the offenses of kidnapping and rape have been found to be allied offenses of similar import. See *State v. Jack*, 8th Dist. Cuyahoga No. 99499, 2014-Ohio-380 (where defendant got into bed with sleeping complainant, grabbed her, told her to be quiet and threatened to shoot her, before raping her); *Logan*, 60 Ohio St.2d 126, 397 N.E.2d 1345 (victim was forced into an alley and down a flight of stairs prior to rape).

{¶ 17} Recently, in *State v. Portman*, 2d Dist. Clark No. 2013-CA-68, 2014-Ohio-4343, we addressed a case in which the defendant claimed that kidnapping was incidental to the rapes he committed. In *Portman*, the defendant led the victim through the store to a lounge-type area in the basement, which could not be seen from the parking lot and was more isolated than other parts of the store. *Id.* at ¶ 42. The defendant put a gun to her head when she expressed her desire to leave, asking her about the friend waiting in her car and preventing her from leaving. *Id.* After the rapes, the defendant again attempted to prevent her from leaving the basement, through physical restraint and brandishing the gun. *Id.* We found that although the additional aspects of time, distance, and danger that related to the kidnapping in *Portman*, as separate from the rape, were not as significant as those found in some of the other cases we discussed, we specifically noted that the defendant threatened the victim with a gun and prevented her from leaving, before and after the rapes occurred. *Id.* Ultimately, we found that the trial court did not err in failing to merge the kidnapping count with the rape counts.

{¶ 18} In the instant case, the facts adduced at the plea hearing establish that the kidnapping and subsequent rape of the victim were committed with a separate animus, and therefore not allied offenses of similar import. Specifically, the victim was kidnapped at gunpoint, robbed, and then transported in her own stolen vehicle to various locations throughout the City of Springfield. The victim was then raped multiple times in another undisclosed location. After the rapes occurred, Bozeman robbed the victim of her wedding rings and threatened her, again at gunpoint, not to report the incident to police or he would harm her and her family. Due to the prolonged nature of the detention of the



victim prior to the rape, the additional aspect of travel to several different locations, and the danger related to the actual kidnapping (i.e. threats made at gunpoint), we find that the offenses were committed with a separate animus, and the trial court did not err when it failed to merge the kidnapping with the rape.

**{¶ 19}** Bozeman's first and second assignments of error are overruled.

**{¶ 20}** Both of Bozeman's assignments of error having been overruled, the judgment of the trial court is affirmed.

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FROELICH, P.J. and FAIN, J., concur.

Copies mailed to:

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