[Cite as *State v. Haynes*, 2010-Ohio-944.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
STATE OF OHIO	:	Julie A. Edwards, P.J.
	:	W. Scott Gwin, J.
Plaintiff-Appellee	:	Patricia A. Delaney, J.
	:	
-vs-	:	Case No. 2009 CA 0031
	:	
	:	
JAMES HAYNES	:	O P I N I O N

Defendant-Appellant

CHARACTER OF PROCEEDING:	Criminal Appeal from Richland County Court of Common Pleas Case No. 2007 CR 386D
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	March 9, 2010

APPEARANCES:

For Plaintiff-Appellee

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For Defendant-Appellant

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Edwards, P.J.

{¶1} Appellant, James A. Haynes, appeals a judgment of the Richland County Common Pleas Court convicting him of felonious assault (R.C. 2903.11(A)(1)), attempted rape (R.C. 2923.02(A)(2), R.C. 2907.02(A)(2)), and aggravated arson (R.C. 2909.02(A)(2)) upon a plea of guilty. Appellee is the State of Ohio.

STATEMENT OF FACTS AND CASE

{¶2} On April 13, 2007, appellant attended a barbecue at the victim's apartment in Mansfield, Ohio. Throughout the day appellant was drinking, and at some point he left the apartment to use drugs. He later returned to the apartment and broke open a locked screen door.

{¶3} Appellant made sexual advances toward the victim, which she rejected. Appellant then strangled the victim, punched her in the face, and threw her on the floor. Appellant overturned a barbecue grill onto a rug, causing a small fire. He took the victim's cell phone and left the apartment.

{¶4} The victim could not call for help because appellant took her cell phone. The next morning she walked to a neighborhood store to call for help. She was transported to the hospital by ambulance for treatment. The victim's eyes were black and blue and swollen shut. She had deep lacerations on the bridge of her nose and upper lip, and several of her teeth had been knocked out. At the hospital the victim was diagnosed with multiple complex facial fractures, multiple missing teeth, severe anemia, a left breast contusion, a left back contusion and hyponatremia. She was transferred to Grant Hospital in Columbus due to the severity of her injuries, where cranial bone grafts

were done to repair the bridge of her nose and plastic surgery was performed on her lip and nose.

{¶5} When police entered the apartment to investigate the incident, they found an area rug that had been burned. They also found blood on the floor, a bloody t-shirt, a belt from the victim's pants, a pair of broken eyeglasses and several teeth. They noted blood on the couch and in the kitchen and bathroom, and pieces of glass on the floor.

{¶6} Appellant was indicted by the Richland County Grand Jury with attempted rape, aggravated burglary, aggravated robbery, felonious assault with a sexual motivation specification, and aggravated arson. In exchange for appellant's plea to attempted rape, felonious assault and aggravated arson, the State dismissed the charges of aggravated burglary and aggravated robbery, as well as the sexual motivation specification. Appellant entered a guilty plea to felonious assault. He entered Alford pleas to attempted rape and aggravated arson because due to his voluntary intoxication, appellant was not in a position to recall the attempted rape or turning over the barbecue grill. Tr. (plea hrg.) 8.

{¶7} At the sentencing hearing, appellant claimed that he assaulted the victim because she overturned the grill and set the rug on fire, and while he was attempting to put out the fire she "spazzed out" on him. Tr. (sentencing hrg.) 8. He also claimed that he committed the assault because she called him a racial name. Id.

{¶8} The court sentenced appellant to eight years incarceration for felonious assault, two years incarceration for attempted rape and two years incarceration for aggravated arson. Appellant's appeal from this sentence was dismissed by this Court

on February 17, 2009, for want of a final, appealable order pursuant to *State v. Baker*, 119 Ohio St. 3d 197, 893 N.E.2d 163, 2008-Ohio-3330. The court filed an amended sentencing entry in compliance with the requirements of *Baker* on February 23, 2009, to which appellant assigns two errors:

{¶9} "I. THE COURT COMMITTED PLAIN ERROR BY SENTENCING DEFENDANT/APPELLANT TO SEPARATE SENTENCES FOR ATTEMPTED RAPE AND FELONIOUS ASSAULT.

{¶10} II. TRIAL COUNSEL WAS INEFFECTIVE IN VIOLATION OF THE SIXTH AMENDMENT FOR FAILURE TO OBJECT TO THE TRIAL COURT'S SENTENCING ON THE ALLIED OFFENSES OF SIMILAR IMPORT."

I

{¶11} Appellant argues that the court erred in sentencing him on both attempted rape and felonious assault because the offenses are allied offenses of similar import. He argues that the violence occurred because she refused to have sex with him, and the assault was "an effort to persuade the victim to have sex with him." Brief of appellant, p. 5.

{¶12} Appellant failed to raise this claim in the trial court. Appellant's failure to raise a claim that offenses are allied offenses of similar import in the trial court constitutes a waiver of the claimed error. *State v. Comen* (1990), 50 Ohio St.3d 206, 553 N.E.2d 640, 646. An error not raised in the trial court must be plain error in order for an appellate court to reverse. *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804; Crim.R. 52(B). In order to prevail under a plain error analysis, appellant bears the burden of demonstrating that the outcome of the trial clearly would have been different

but for the error. *Long*, supra. Notice of plain error "is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." Id. at paragraph three of the syllabus.

{¶13} R.C. 2941.25 defines allied offenses of similar import:

{¶14} "(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.

{¶15} "(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."

{¶16} In *State v. Rance*, 85 Ohio St.3d 632, 710 N.E.2d 699, 1999-Ohio-291, the Ohio Supreme Court held that offenses were of similar import if the offenses "correspond to such a degree that the commission of one crime will result in the commission of the other." Id. The *Rance* court further held that courts should compare the statutory elements in the abstract, which would produce clear legal lines capable of application in particular cases. Id. at 636. If the elements of the crime so correspond that the offenses are of similar import, the defendant may be convicted of both only if the offenses were committed separately or with a separate animus. Id. at 638-39.

{¶17} However, in 2008 the court clarified *Rance*, because the test as set forth in *Rance* had produced inconsistent, unreasonable and, at times, absurd results. *State v. Cabrales*, 118 Ohio St.3d 54, 59, 886 N.E.2d 181, 2008-Ohio-1625. In *Cabrales*, the

court held that, in determining whether offenses are of similar import pursuant to 2941.25(A), courts are required to compare the elements of the offenses in the abstract without considering the evidence in the case, but are not required to find an exact alignment of the elements. Id. at syllabus 1. "Instead, if, in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in the commission of the other, then the offenses are allied offenses of similar import." Id. The court then proceeds to the second part of the two-tiered test and determines whether the two crimes were committed separately or with a separate animus. Id. at 57, citing *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117.

{¶18} The *Cabrales* court noted that Ohio courts had misinterpreted *Rance* as requiring a "strict textual comparison," finding offenses to be of similar import only when all the elements of the compared offenses coincide exactly. Id. at 59. The Eighth Appellate District has described the *Cabrales* clarification as a "holistic" or "pragmatic" approach, given the Supreme Court's concern that *Rance* had abandoned common sense and logic in favor of strict textual comparison. *State v. Williams*, Cuyahoga No. 89726, 2008-Ohio-5286, ¶ 31, citing *State v. Sutton*, Cuyahoga App. No. 90172, 2008-Ohio-3677. This court has referred to the *Cabrales* test as a "common sense approach." *State v. Varney*, Perry App. No. 08-CA-3, 2009-Ohio-207, ¶ 23.

{¶19} The Ohio Supreme Court revisited the issue of allied offenses of similar import in *State v. Brown*, 119 Ohio St.3d 447, 895 N.E.2d 149, 2008-Ohio-4569. The court first found that aggravated assault in violation of R.C. 2903.12(A)(1) and (A)(2) are not allied offenses of similar import when comparing the elements under *Cabrales*, but

did not end the analysis there. The court went on to note that the tests for allied offenses of similar import are rules of statutory construction designed to determine legislative intent. Id. at 454. The court concluded that while the two-tiered test for determining whether offenses constitute allied offenses of similar import is helpful in construing legislative intent, it is not necessary to resort to that test when the intent of the legislature is clear from the language of the statute. Id. In the past, the court had looked to the societal interests protected by the relevant statutes in determining whether two offenses constitute allied offenses. Id., citing *State v. Mitchell* (1983), 6 Ohio St.3d 416. The court concluded in *Brown* that the subdivisions of the aggravated assault statute set forth two different forms of the same offense, in each of which the legislature manifested its intent to serve the same interest of preventing physical harm to persons, and were therefore allied offenses. Id. at 455.

{¶20} The Ohio Supreme Court again addressed this issue in *State v. Winn*, 2009-Ohio-1059. In *Winn*, the court considered whether kidnapping and aggravated robbery are allied offenses of similar import. The court compared the elements of each in the abstract. The elements for kidnapping, R.C. 2905.01(A)(2), are the restraint, by force, threat, or deception, of the liberty of another to facilitate the commission of any felony, and the elements for aggravated robbery, R.C. 2911.01(A)(1), are having a deadly weapon on or about the offender's person or under the offender's control and either displaying it, brandishing it, indicating that the offender has it, or using it in attempting to commit or in committing a theft offense. The court found that in comparing the elements, it is difficult to see how the presence of a weapon, which has been shown or used, or whose possession has been made known to the victim during

the commission of a theft offense, does not at the same time forcibly restrain the liberty of another. Id. at ¶ 21. Accordingly, the court found that the two offenses are so similar that the commission of one necessarily results in the commission of the other, citing *Cabrales*, supra. Id. The court held, "We would be hard pressed to find any offenses allied if we had to find that there is no conceivable situation in which one crime can be committed without the other." Id. at ¶ 24.

{¶21} Having found the offenses to be of similar import under the *Cabrales* test, the Ohio Supreme Court in *Winn* did not consider the societal interests underlying the statutes to determine legislative intent, and determined legislative intent solely by applying R.C. 2941.25. The *Winn* court stated that, in Ohio, we discern legislative intent on this issue by applying R.C. 2941.25, as the statute is a "clear indication of the General Assembly's intent to permit cumulative sentencing for the commission of certain offenses." Id. at ¶ 6.

{¶22} Recently, the Ohio Supreme Court again applied the *Cabrales* test in *State v. Williams*, 2010-Ohio-147. The court first looked at the elements of attempted felony murder, which required that the offender engage in conduct which, if successful, would result in the death of another as a proximate result of committing or attempting to commit an offense of violence. Because felonious assault is an offense of violence, the court concluded that felonious assault and attempted felony murder are allied offenses. Id. at ¶23. The court then considered whether attempted murder, defined as engaging in conduct which if successful would result in purposely causing the death of another, and felonious assault, defined as causing or attempting to cause physical harm by means of a deadly weapon, are allied offenses. While the elements considered in the

abstract do not align exactly, the court concluded that when the defendant in that case attempted to cause harm with a deadly weapon, he also engaged in conduct which, if successful, would have resulted in the death of a victim, and the offenses were therefore allied. Id. at ¶26. The court then went on to consider whether the offenses were committed with a separate animus. Id. at ¶27.

{¶23} In the instant case, appellant was convicted of attempted rape and felonious assault. Rape is defined in R.C. 2907.02(A)(2):

{¶24} "No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force."

{¶25} Appellant also was convicted of felonious assault in violation of R.C. 2903.11(A)(1):

{¶26} "(A) No person shall knowingly do either of the following:

{¶27} "(1) Cause serious physical harm to another or to another's unborn;"

{¶28} Appellant appears to argue that because the felonious assault was the force by which he attempted to compel the victim to engage in sexual conduct with him, the offenses are allied in this case.

{¶29} Comparing the statutory definitions of the two crimes, the elements do not so closely align as to be allied. The "force" element of rape need not rise to the level of "serious physical harm" as required for the commission of felonious assault. However, in *Williams*, supra, the Ohio Supreme Court did look at the specific conduct of the defendant in concluding that felonious assault and attempted murder are allied offenses.

{¶30} Even if the offenses are allied, the record does not demonstrate plain error. From the limited facts in the record at the plea hearing and sentencing hearing, appellant has not demonstrated that the two crimes, even if allied, were not committed with a separate animus.

{¶31} The record reflects that appellant claimed that he assaulted the victim because she overturned the grill and set the rug on fire, and while he was attempting to put out the fire she "spazzed out" on him. Tr. (sentencing hrg.) 8. He also claimed that he committed the assault because she called him a racial name. Id. In addition, counsel for appellant affirmatively represented that there was possibly a separate animus:

{¶32} "These events do grow out of one occurrence. I don't think they quite meet the definition of allied offenses because of some possible separate animus in them, but they do all grow out of one event." Tr. (plea hearing) 5.

{¶33} Further, the facts as presented by the prosecutor represent that after the victim rejected appellant's sexual advances, he committed the felonious assault. From the limited record, we cannot conclude that the assault was committed solely in furtherance of the attempted rape and, therefore, we cannot conclude that appellant committed the offenses with a single animus.

{¶34} Appellant has not demonstrated plain error in the separate convictions and sentences for rape and felonious assault. The first assignment of error is overruled.

II

{¶35} In his second assignment of error, appellant claims counsel was ineffective for failing to object to separate convictions and sentences for rape and felonious assault because they are allied offenses of similar import.

{¶36} A properly licensed attorney is presumed competent. *State v. Hamblin* (1988), 37 Ohio St.3d 153, 524 N.E.2d 476. Therefore, in order to prevail on a claim of ineffective assistance of counsel, appellant must show counsel's performance fell below an objective standard of reasonable representation and but for counsel's error, the result of the proceedings would have been different. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136. In other words, appellant must show that counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. Id.

{¶37} As we discussed in appellant's first assignment of error, from the limited record, we cannot conclude that assault was committed solely in furtherance of the attempted rape and, therefore, we cannot conclude that appellant committed the offenses with a single animus. Appellant, therefore, cannot demonstrate that had counsel objected, the result of the proceeding would have been different.

{¶38} The second assignment of error is overruled.

{¶39} The judgment of the Richland County Common Pleas Court is affirmed.

By: Edwards, P.J.

Gwin, J. and

Delaney, J. concur

s/Julie A. Edwards

s/W. Scott Gwin

s/Patricia A. Delaney

JUDGES

JAE/r0127

[Cite as *State v. Haynes*, 2010-Ohio-944.]

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
JAMES A. HAYNES	:	
Defendant-Appellant	:	CASE NO. 2009 CA 0031

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Richland County Court of Common Pleas is affirmed. Costs assessed to appellant.

s/Julie A. Edwards

s/W. Scott Gwin

s/Patricia A. Delaney

JUDGES