**[Cite as *State v. Bryant*, 2014-Ohio-4661.]**

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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| STATE OF OHIO | : | JUDGES: |
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| | : | Hon. W. Scott Gwin, P.J. |
| Plaintiff - Appellee | : | Hon. Patricia A. Delaney, J. |
| | : | Hon. Craig R. Baldwin, J. |
| | : | |
| -vs- | : | |
| | : | |
| DONYELL BRYANT | : | Case No. 14CA23 |
| | : | |
| | : | |
| Defendant - Appellant | : | O P I N I O N |

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| CHARACTER OF PROCEEDING: | Appeal from the Richland County Court of Common Pleas, Case No. 2013 CR 0393 |
| JUDGMENT: | Affirmed |
| DATE OF JUDGMENT: | October 15, 2014 |

APPEARANCES:

| For Plaintiff-Appellee | For Defendant-Appellant |
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| JAMES J. MAYER, JR.<br>Prosecuting Attorney | JOHN C. O'DONNELL, III<br>10 West Newlon Place<br>Mansfield, OH 44902 |
| By: JOHN C. NIEFT<br>Assistant Prosecuting Attorney<br>38 South Park Street<br>Mansfield, OH 44902 | |

*Baldwin, J.*

{¶1} Appellant Donyell Bryant appeals a judgment of the Richland County Common Pleas Court convicting him of abduction (R.C. 2905.02(A)(2)), two counts of gross sexual imposition (R.C. 2907.05(A)(1)), and sexual battery (R.C. 2907.03(A)(5)) upon a negotiated plea of guilty. Appellee is the State of Ohio.

STATEMENT OF FACTS AND CASE

{¶2} During the afternoon of April 14, 2013, appellant approached a thirteen-year-old female family member while she was sitting in a chair. He placed his hand on her breast. She tried to push his hand away, but he continued fondling her breast. He sent the younger children in the home outside to play. The victim got up and tried to go to her bedroom to get away from appellant. He followed her to the doorway, pinned her against the doorway, put his hands in her pants, and digitally penetrated her. He lifted her shirt and put his mouth on her breast. He then pushed her into the bedroom and climbed on top of her, asking for cunnilingus or sexual intercourse. At this point, the other children came back inside the house.

{¶3} Appellant was indicted by the Richland County Grand Jury with rape (R.C. 2907.02(A)(2)), unlawful sexual conduct with a minor (R.C. 2907.04(A)(3)), two counts of gross sexual imposition (R.C. 2907.05(A)(1)), sexual battery (R.C. 2907.03(A)(5)), and kidnapping (R.C. 2905.01(A)(4)). Appellant entered a plea of guilty to two counts of gross sexual imposition and one count of sexual battery. The State dismissed the charges of rape and unlawful sexual conduct with a minor. The State amended the charge of kidnapping to a charge of abduction, and appellant entered a plea of guilty to abduction. He was sentenced to 12 months incarceration on each count of gross

sexual imposition, 60 months incarceration for sexual battery, and 36 months incarceration for abduction, with all sentences to run consecutively. He assigns three errors to this Court on appeal:

{¶4} "I. THE TRIAL COURT COMMITTED PLAIN ERROR IN SENTENCING DEFENDANT/APPELLANT FOR ABDUCTION CONTRARY TO ORC 2941.25(B) AS THE ABDUCTION WAS NOT A SEPARATE ANIMUS.

{¶5} "II. IT WAS PLAIN ERROR FOR THE COURT TO GIVE CONSECUTIVE SENTENCES IN VIOLATION OF 2929.41.

{¶6} "III. THE DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION."

I.

{¶7} In his first assignment of error, appellant argues that the court erred in sentencing him separately for abduction, as it was an allied offense of sexual battery pursuant to R.C. 2941.25(B).

{¶8} A sentence jointly recommended by the parties and entered by the court as a part of a negotiated plea is appealable on the issue of whether the offenses are allied pursuant to R.C. 2941.25(B). *State v. Underwood*, 124 Ohio St.3d 365, 922 N.E.2d 923, 2010-Ohio-1, ¶26. However, the parties may stipulate in the plea agreement that the crimes were committed with a separate animus, thus subjecting the defendant to more than one conviction and sentence. *Id*. at ¶29.

{¶9} At the sentencing hearing, the following colloquy took place between counsel and the court:

{¶10} "THE COURT: Are there any issues that any of these offenses are allied offenses of similar import for purposes of sentencing?

{¶11} "MR. POTTS: It's my understanding that the way that plea was arranged is that no, there would not be any allied offenses based upon the way that the amendments and/or reductions were done.

{¶12} "MR. BISHOP: That is correct, Judge. That was established both at the time of the plea and it was also reflected in the bill of particulars." Sent. Tr. 18-19.

{¶13} Therefore, the record reflects that the parties agreed as a part of the plea agreement that none of the offenses would be allied for purposes of sentencing, and appellant has waived any error.

{¶14} Further, it appears from the recitation of facts that the offense of sexual battery was completed before the offense of abduction began, and the offenses were therefore committed separately.

{¶15} R.C. 2941.25 reads as follows:

> (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.

{¶16} In *State v. Johnson,* 128 Ohio St.3d 153, 2010–Ohio–6314, 942 N.E.2d 1061, the Ohio Supreme Court held: "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." *Id.,* at the syllabus.

{¶17} Appellant was convicted of sexual battery in violation of R.C. 2907.03(A)(5), which prohibits sexual conduct when the offender is the other person's natural or adoptive parent, or a stepparent, guardian, custodian, or person in loco parentis of the other person. This crime was complete when appellant pushed the victim against the door frame and digitally penetrated her vagina. Appellant then pushed the victim into the bedroom and on to the bed, where he attempted to engage her in oral sex or sexual intercourse. This conduct supported the conviction of abduction pursuant to R.C. 2905.05(A)(2), which prohibits a person from knowingly, by force or threat, restraining the liberty of another person under circumstances that create a risk of physical harm to the victim or place the other person in fear. Therefore, the conduct relied upon to support the two crimes was separate and distinct, and the crimes were committed separately.

{¶18} The first assignment of error is overruled.

II.

{¶19} Appellant argues that the court erred in sentencing him consecutively, as the facts of the case do not support the court's finding that the harm caused by the

multiple offenses was so great or unusual that no single prison term adequately reflects the seriousness of his conduct.

{¶20} Appellant does not argue that the sentence was contrary to law, but rather that the court erred in sentencing him consecutively based on the facts of this case. We therefore review the sentence under an abuse of discretion standard. *State v. Kalish*, 120 Ohio St. 3d 23, 2008-Ohio-4912, 896 N.E.2d 124. An abuse of discretion implies that the court's attitude was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶21} Appellant approached a thirteen-year-old female family member while she was sitting in a chair. He placed his hand on her breast. She tried to push his hand away, but he continued fondling her breast. He sent the younger children in the home outside to play. The victim got up and tried to go to her bedroom to get away from appellant. He followed her to the doorway, pinned her against the doorway, put his hands in her pants, and digitally penetrated her. He lifted her shirt and put his mouth on her breast. He then pushed her into the bedroom and climbed on top of her, asking for cunnilingus or sexual intercourse.

{¶22} At the sentencing hearing, the prosecutor represented to the court that the victim was very traumatized by the crimes, and had been under observation due to suicide ideation over the incident. The transcript of the sentencing hearing further reflects that the victim was troubled at the time of the incident due to the death of her grandmother.

{¶23} The court did not abuse its discretion in finding that consecutive sentences were necessary to protect the public, and that consecutive sentences were not

disproportionate to the seriousness of appellant's conduct and to the danger he posed to the public. The court did not abuse its discretion in finding that the harm caused by the multiple offenses was so great or unusual that no single person term adequately reflected the seriousness of his conduct and that consecutive sentences were appropriate.

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

III.

{¶25} In his final assignment of error, appellant argues that counsel was ineffective for failing to request a competency hearing and for waiving his allied offense argument by stipulating that abduction and sexual battery were not allied offenses of similar import, without informing him that this would be the effect of his guilty plea.

{¶26} A properly licensed attorney is presumed competent. *State v. Hamblin*, 37 Ohio St.3d 153, 524 N.E.2d 476 (1988). Therefore, in order to prevail on a claim of ineffective assistance of counsel, appellant must show that counsel's performance fell below an objective standard of reasonable representation and that but for counsel's error, the result of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674(1984); *State v. Bradley* , 42 Ohio St.3d 136, 538 N.E.2d 373 (1989). 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*.

{¶27} Although appellant represented to the court at the plea hearing that he was taking antipsychotic medication, he also told the court that the drug did not interfere with his ability to understand the plea process. Tr. 15. Nothing in his responses to the

court throughout the transcript gives any indication that he was incompetent to enter a plea. Appellant therefore has not demonstrated that counsel was ineffective for failing to request a competency hearing.

{¶28} The record further does not support appellant's claim that counsel failed to inform him that he would waive his right to raise the issue of allied offenses of similar import as a part of the plea agreement. Further, as discussed in the first assignment of error, the facts of the case as presented to the court reflect that the crimes of sexual battery and abduction were committed separately. Counsel was not ineffective for stipulating that the offenses were not allied offenses.

{¶29} The third assignment of error is overruled. The judgment of the Richland County Common Pleas Court is affirmed. Costs are assessed to appellant.

By: Baldwin, J.

Gwin, P.J. and

Delaney, J. concur.