[Cite as *State v. Stovall*, 2015-Ohio-3003.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. William B. Hoffman, P.J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	Hon. John W. Wise, J.
-vs-	:	
	:	
KENNETH STOVALL, JR.	:	Case No. 2015CA00054
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 2013CR1697
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	July 27, 2015

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JOHN D. FERRERO Prosecuting Attorney By: KATHLEEN O. TATARSKY 110 Central Plaza South, Suite 510 Canton, OH 44702-1413	KENNETH STOVALL, JR., Pro Se Inmate No. 660-470 R.I.C.I. P.O. Box 8107 Mansfield, OH 44901

Farmer, J.

{¶1} On December 16, 2013, the Stark County Grand Jury indicted appellant, Kenneth Stovall, Jr., on one count of kidnapping in violation of R.C. 2905.01, one count of felonious assault in violation of R.C.2903.11, and one count of intimidation in violation of R.C. 2921.04. Said charges arose from incidents involving Ashley Shellenberger.

{¶2} On August 4, 2014, appellant pled guilty as charged. By judgment entry filed August 12, 2014, the trial court sentenced appellant to an aggregate term of six years in prison.

{¶3} On March 9, 2015, appellant filed a motion to withdraw his guilty pleas pursuant to Crim.R. 32.1, claiming ineffective assistance of counsel as his counsel failed to advise him of allied offenses and failed to argue the issue to the trial court. By judgment entry filed March 17, 2015, the trial court denied the motion.

{¶4} Appellant filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

I

{¶5} "THE TRIAL COURT ABUSED ITS DISCRETION AS A MATTER OF LAW WHEN IT DENIED DEFENDANT'S 32.1 MOTION TO WITHDRAW HIS GUILTY PLEA."

I

{¶6} Appellant claims the trial court erred in denying his Crim.R. 32.1 motion to withdraw his guilty pleas. We disagree.

{¶7} Crim.R. 32.1 governs withdrawal of guilty plea and states "[a] motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed;

but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea." The right to withdraw a plea is not absolute and a trial court's decision on the issue is governed by the abuse of discretion standard. *State v. Smith,* 49 Ohio St.2d 261 (1977). In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore,* 5 Ohio St.3d 217 (1983).

{¶8} Appellant pled guilty to one count each of kidnapping, felonious assault, and intimidation. The trial court sentenced appellant on each count, to be served concurrently, for an aggregate term of six years in prison.

{¶9} We note appellant did not file a direct appeal of his convictions and sentences. As explained by our brethren from the Third District in *State v. Coats*, 3rd Dist. Mercer Nos. 10-09-04 and 10-09-05, 2009-Ohio-3534, ¶ 16:

> Furthermore, "under the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial, which resulted in that judgment of conviction, or on an appeal from that judgment." *State v. Szefcyk,* 77 Ohio St.3d 93, 671 N.E.2d 233, 1996-Ohio-337, syllabus. Accordingly, res judicata will serve to bar all claims raised in a Crim. R. 32.1 motion that were raised or could have been raised in a prior

> proceeding. *State v. Sanchez,* 3d Dist. No. 4-06-31, 2007-Ohio-218, ¶ 18; *State v. McDonald,* 11th Dist. No. 2003-L-155, 2004-Ohio-6332, ¶ 22, citing *State v. Young,* 4th Dist. No. 03CA782, 2004-Ohio-2711.

See also State v. Coats, 3rd Dist. Mercer Nos. 10-10-05 and 10-10-06, 2010-Ohio-4822.

{¶10} We also note appellant has not filed a transcript of the sentencing hearing for our review; therefore, we must presume the validity of the trial court's proceedings. *Knapp v. Edwards Laboratories,* 61 Ohio St.2d 197, 199 (1980) ("The duty to provide a transcript for appellate review falls upon the appellant. This is necessarily so because an appellant bears the burden of showing error by reference to matters in the record").

{¶11} In his Crim.R. 32.1 motion, appellant argued his trial counsel was ineffective for failing to advise him of allied offenses and failing to argue the issue to the trial court. The standard this issue must be measured against is set out in *State v. Bradley,* 42 Ohio St.3d 136 (1989), paragraphs two and three of the syllabus. Appellant must establish the following:

> 2. Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. (*State v. Lytle* [1976], 48 Ohio St.2d 391, 2

O.O.3d 495, 358 N.E.2d 623; *Strickland v. Washington* [1984], 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, followed.)

3. To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different.

{¶12} Notwithstanding the issue of res judicata, we find the counts pled to are not allied offenses. R.C. 2941.25 governs multiple counts and states the following:

(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.

{¶13} The Supreme Court of Ohio once again redefined "separate animus" in *State v. Ruff,* ___ Ohio St.3d ___, 2015 WL 1343062, 2015-Ohio-995, paragraph two of the syllabus and ¶ 30-31, respectively:

> Two or more offenses of dissimilar import exist within the meaning of R.C. 2941.25(B) when the defendant's conduct constitutes offenses involving separate victims or if the harm that results from each offense is separate and identifiable.
>
> ***
>
> Rather than compare the elements of two offenses to determine whether they are allied offenses of similar import, the analysis must focus on the defendant's conduct to determine whether one or more convictions may result because an offense may be committed in a variety of ways and the offenses committed may have different import. No bright-line rule can govern every situation.
>
> As a practical matter, when determining whether offenses are allied offenses of similar import within the meaning of R.C. 2941.25, courts must ask three questions when defendant's conduct supports multiple offenses: (1) Were the offenses dissimilar in import or significance? (2) Were they committed separately? and (3) Were they committed with separate animus or motivation? An affirmative answer to any of the above will permit separate convictions. The conduct, the animus, and the import must all be considered.

{¶14} Appellant pled guilty to kidnapping in violation of R.C. 2905.01(A)(3) which states: "No person, by force, threat, or deception,***by any means, shall remove another from the place where the other person is found or restrain the liberty of the other person***[t]o terrorize, or to inflict serious physical harm on the victim or another," felonious assault in violation of R.C. 2903.11(A)(1) which states: "No person shall knowingly***[c]ause serious physical harm to another or to another's unborn" and intimidation in violation of R.C. 2921.04(B)(1) which states: "No person, knowingly and by force or by unlawful threat of harm to any person or property or by unlawful threat to commit any offense or calumny against any person, shall attempt to influence, intimidate, or hinder***[t]he victim of a crime or delinquent act in the filing or prosecution of criminal charges or a delinquent child action or proceeding."

{¶15} The bill of particulars filed July 30, 2014 set forth the alleged conduct as follows:

Count One

To wit: On or about October 18, 2013 at or near 634 Scranton Avenue; Alliance, Stark County, Ohio, the Defendant refused to let the victim leave from the residence all awhile he terrorized her for several hours and causing her serious physical harm.

Count Two

To wit: On or about October 18, 2013 at or near 634 Scranton Avenue; Alliance, Stark County, Ohio, the Defendant did attempt to

strangle the victim, bit her several times and headbutted her causing her to lose consciousness. The victim suffered these bruises and bite marks for several weeks.

Count Three

To wit: On or about October 18, 2013 at or near 634 Scranton Avenue; Alliance, Stark County, Ohio, the Defendant threatened to release sexually explicit videos of the victim if she reported the incident.

{¶16} Using the template set forth in *Ruff, supra,* we find the offenses as alleged in the bill of particulars are not of similar import. The harm that resulted from the kidnapping, the harm that resulted from the felonious assault, and the harm that resulted from the intimidation are separate and identifiable. We do not find any ineffective assistance of counsel.

{¶17} Upon review, we find the trial court did not abuse its discretion in denying appellant's Crim.R. 32.1 motion to withdraw his guilty pleas.

{¶18} The sole assignment of error is denied.

{¶19} The judgment of the Court of Common Pleas of Stark County, Ohio is hereby affirmed.

By Farmer, J.

Hoffman, P.J. and

Wise, J. concur.

SGF/sg 720