[Cite as *State v. Swiergosz*, 2013-Ohio-4625.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio	Court of Appeals Nos. L-12-1293
Appellee	Trial Court Nos. CR0200901948
v.	
Michael P. Swiergosz	**DECISION AND JUDGMENT**
Appellant	Decided: October 18, 2013

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Ian B. English, Assistant Prosecuting Attorney, for appellee.

Kenneth J. Rexford, for appellant.

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YARBROUGH, J.

I. Introduction

{¶ 1} Appellant, Michael Swiergosz, appeals his prison sentence entered by the Lucas County Court of Common Pleas following a resentencing hearing. We affirm.

A. Factual and Procedural Background

{¶ 2} This is Swiergosz's second appeal from his conviction and sentence. In the first appeal, we set forth the facts supporting his conviction as follows:

> The core facts from the trial record are undisputed. In the early morning of April 28, 2009, Swiergosz broke into a friend's home in Wood County and stole two firearms. One was a Glock semi-automatic pistol loaded with a full magazine, and the other a revolver, later determined to be inoperable. He then drove to his wife's place of employment in the village of Ottawa Hills, a retirement community-home known as Sunset House. An acrimonious divorce was underway, and Swiergosz's wife, Barb, had recently left their home with the couple's four children. Swiergosz entered Sunset House armed with the Glock pistol and a zippered duffel bag containing a hatchet, three rolls of masking tape, scissors, a tire iron, and the revolver. He immediately went to the office of Marilyn Sharkey, one of Barb's co-workers. Sharkey testified that Swiergosz brandished the Glock and told her he would not kill her if she cooperated. Then he ordered her to call Barb to the office. Hearing footsteps near the door, he reached for the tire iron.
>
> When Barb appeared Swiergosz struck her twice on the head with the tire iron, causing a scalp laceration that bled profusely. Sharkey fled the room as Barb began screaming, and though Barb also started to run,

> Swiergosz caught her and pulled her into another room. He closed the door and told her to remove her clothes. After she did so, he bound her hands behind her with the tape. From there Swiergosz moved her to a different room with a bed and a bathroom. He testified that he only wanted to talk, but after getting Barb on the bed he removed his clothes and unsuccessfully attempted intercourse. They then went into the bathroom. Swiergosz made Barb sit on the toilet, still bound, and engage briefly in oral sex. But he quickly returned her to the bed where, she testified, forcible intercourse occurred. *State v. Swiergosz*, 197 Ohio App.3d 40, 2012-Ohio-830, 965 N.E.2d 1070, ¶ 2-3 (6th Dist.).

{¶ 3} Based on this incident, the jury found Swiergosz guilty of one count of aggravated burglary, three counts of kidnapping, one count of felonious assault, two counts of rape, and one count of having a weapon under disability, along with attendant firearm specifications for each count. At sentencing, the court merged all but two of the firearm specifications, but did not merge any other counts. On appeal, we affirmed the determination of Swiergosz's guilt, but vacated the sentences and remanded the matter to the trial court to conduct a merger analysis under the recent Ohio Supreme Court decision in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061.

{¶ 4} At the resentencing hearing, the state conceded that the count of having a weapon under disability (Count VIII) should merge with the remaining counts, and that the two counts of kidnapping pertaining to Barb (Counts IV and V) should merge, with

the state electing to proceed to sentencing on Count IV. The state argued that the remaining counts were committed by separate acts and thus were not subject to merger.

{¶ 5} Swiergosz, for his part, argued that conducting the merger analysis in this case was a violation of his constitutional rights because it was impossible from the indictment and the general verdict forms to determine what part of his conduct the jury found to be a violation of the law. As an example, Swiergosz pointed to the count of felonious assault (Count III). The jury verdict form referred to the crime as charged in the indictment, which simply parroted the language of the statute and required the jury to find that Swiergosz "did knowingly cause or attempt to cause physical harm to another by means of a deadly weapon or dangerous ordnance." Swiergosz argued that multiple acts could have constituted the offense of felonious assault—holding Sharkey at gunpoint, striking Barb with the tire iron, or having forcible sexual intercourse with Barb—but it was impossible to know which act the jury found to have constituted the offense. Swiergosz contended that without clarification from the jury, the court necessarily had to apply what *it believed* to be the offending act when it conducted the merger analysis. However, the court's belief may or may not have been in accord with the jury's findings. Essentially, he concluded that the court, not the jury, would be deciding the factual circumstances of his guilt, and then utilizing those findings to determine whether the multiple offenses were committed by separate acts.

{¶ 6} The trial court heard Swiergosz's argument, acknowledged the issue, but proceeded to find that the remaining counts not noted by the state were committed by

separate acts and did not merge. Therefore, the trial court sentenced Swiergosz to four years in prison on the count of aggravated burglary (Count I), four years on the count of kidnapping Sharkey (Count II), four years on the count of felonious assault (Count III), six years on the first count of kidnapping Barb (Count IV), eight years on the first count of rape (Count VI), eight years on the second count of rape (Count VII), and six years on the firearm specifications. The court ordered that the sentences for Counts I and II be served concurrently to each other, but consecutively to the remaining sentences, which also were to be served consecutively to each other for a total prison term of 36 years. Finally, the court ordered the sentence to be served consecutively to sentences imposed in two other cases for an aggregate prison term of 44 years.

B. Assignments of Error

{¶ 7} Swiergosz has timely appealed, raising six assignments of error:

I. The Trial Court erred by not merging Count VI (Rape) with Count VII (Rape).

II. The Trial Court erred by not merging Counts VI (Rape) and VII (Rape), whether merged together or not, with the three counts of Kidnapping, namely Count II, Count IV, and Count V.

III. The Trial Court erred by not merging Count I (Aggravated Burglary) with one or all of the remaining Counts II, III, IV, V, VI, VII, and/or VIII.

IV. The Trial Court erred by not merging Count III (Felonious Assault) with Count VI (Rape) and/or with Count VII (Rape), whether the latter are or are not merged with each other.

V. The Trial Court erred by not merging Counts II, IV, and or V with each other into one (or at most two) Kidnapping convictions.

VI. The Trial Court violated Mr. Swiergosz' (sic) right to Trial by Jury, to Presentment to a Grand Jury, and to Proof Beyond a Reasonable Doubt, in violation of the Ohio Constitution and of the United States Constitution.

II. Analysis

{¶ 8} We will address Swiergosz's sixth assignment of error first. In that assignment, Swiergosz reiterates the argument he presented to the trial court, namely that it is a violation of his constitutional rights for the trial court to determine the factual circumstances supporting his guilt for the purpose of conducting a merger analysis. We disagree with Swiergosz's argument for three reasons.

{¶ 9} First, Swiergosz contends that the issue of whether offenses were committed by separate conduct or with separate animus is a question of fact that must be resolved by the jury. However, this view has been dismissed by the Supreme Court of Ohio in the context of determining that merger is a question of law, and is thus subject to de novo review:

> Appellate courts apply the law to the facts of individual cases to make a legal determination as to whether R.C. 2941.25 allows multiple convictions. That facts are involved in the analysis does not make the issue a question of fact deserving of deference to a trial court: "[A] review of the evidence is more often than not vital to the resolution of a question of law. But the fact that a question of law involves a consideration of the facts or the evidence does not turn it into a question of fact. Nor does that consideration involve the court in weighing the evidence or passing upon its credibility." *State v. Williams*, 134 Ohio St.3d 482, 2012-Ohio-5699, 983 N.E.2d 1245, ¶ 25, quoting *O'Day v. Webb*, 29 Ohio St.2d 215, 219, 280 N.E.2d 896 (1972).

{¶ 10} Second, Swiergosz argues that it is unclear whether the burden of proving merger, or lack of merger, falls on the prosecution or the defense. He proposes that because the statutory default is to merge offenses, and because the prosecution would seem to be the party in position to argue the exception of "separate animus," the burden should be with the state. Assuming this is true, Swiergosz concludes that the law should require the state (1) to provide notice in the indictment or the bill of particulars of its intention to argue that the offenses were committed with separate animus or separate conduct, (2) to present the questions of separate animus and separate conduct to the jury, and (3) to prove separate animus and separate conduct beyond a reasonable doubt.

{¶ 11} Contrary to Swiergosz's assumption, it is "[t]he *defendant* [that] bears the burden of establishing his entitlement to the protection, provided by R.C. 2941.25, against multiple punishments for a single criminal act," not the state. (Emphasis added.) *State v. Mughni*, 33 Ohio St.3d 65, 67, 514 N.E.2d 870 (1987). Thus, it is incumbent on the defendant to request clarification of the specific conduct that the state believes constituted each crime charged in the indictment. To that end, it is well settled that although an indictment is sufficient where it tracks the language of a statute, "[a]n accused is not foreclosed from securing specificity of detail * * * for R.C. 2941.07 provides that upon a request for a bill of particulars, '* * * the prosecuting attorney shall furnish a bill of particulars setting up specifically the nature of the offense charged and the conduct of the defendant which is alleged to constitute the offense.'" *State v. Sellards*, 17 Ohio St.3d 169, 171, 478 N.E.2d 781 (1985). Notably, no request for a bill of particulars was made in this case.

{¶ 12} Finally, it is evident from the trial transcript that the parties, and the jury, knew and understood which conduct allegedly constituted each crime. As to the felonious assault count, the state in its opening and closing statements described the count as arising from Swiergosz striking Barb over the head with the tire iron. Moreover, Swiergosz admitted on the witness stand that he committed felonious assault because he struck his wife. As to the kidnapping charges, the state again separately refers to kidnapping Sharkey and Barb, and the jury instructions also separately identify the victim in each count. Lastly, as to the rape charges, in addition to the state describing the oral

sex and vaginal sex as the two separate bases for the two counts in its opening and closing statements, Swiergosz admitted that those were the two sex acts that took place. Therefore, during the trial there was no uncertainty as to the specific alleged conduct that supported each offense.

{¶ 13} Accordingly, Swiergosz's sixth assignment of error is not well-taken.

{¶ 14} The remaining assignments of error all pertain to whether particular offenses should have merged. Whether offenses should merge is a question of law that we review de novo. *Williams*, 134 Ohio St.3d 482, 2012-Ohio-5699, 983 N.E.2d 1245 at ¶ 28. The Ohio Supreme Court has established a two-step test to determine whether offenses are allied offenses of similar import under R.C. 2941.25(A). First, we must examine "whether it is possible to commit one offense *and* commit the other with the same conduct." (Emphasis sic.) *Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061 at ¶ 48. If the answer is yes, we must then determine "whether the offenses were committed by the same conduct, i.e., 'a single act, committed with a single state of mind.'" *Id.* at ¶ 49, quoting *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, ¶ 50 (Lanzinger, J., dissenting). Here, the issue centers on the second prong of the analysis—whether the offenses were committed by the same conduct.

{¶ 15} In his first assignment of error, Swiergosz argues that the two counts of rape should have merged because the oral sex and the vaginal penetration were both part of single, ongoing event. We disagree. First, Swiergosz forced Barb to perform oral sex in the bathroom. That act having been completed, Swiergosz then moved Barb to the

bedroom where he engaged in vaginal penetration. Thus, because the offenses were not committed by the same conduct, merger of the two rape counts (Counts VI and VII) is not appropriate. *See State v. Edwards*, 6th Dist. Wood No. WD-11-078, 2013-Ohio-519, ¶ 11 (rubbing fake penis over victim's "private parts" before she went to the bathroom, and placing fake penis on her bare genitalia after she returned from the bathroom constituted two different, distinct acts); *State v. Gonzalez*, 193 Ohio App.3d 385, 2011-Ohio-1542, 952 N.E.2d 502, ¶ 52 (6th Dist.) (appellant committed each of four rapes with a separate animus where he performed oral sex on the victim, forced the victim to perform oral sex on him, placed a toy inside the victim's vagina, and placed a toy inside the victim's rectum). Therefore, Swiergosz's first assignment of error is not well-taken.

{¶ 16} As his second assignment of error, Swiergosz contends that the rape counts should have merged with the kidnapping counts. In determining whether kidnapping and another offense are committed with a separate animus, the Ohio Supreme Court has adopted the following guidelines:

> (a) Where the restraint or movement of the victim is merely incidental to a separate underlying crime, there exists no separate animus sufficient to sustain separate convictions; however, where the restraint is prolonged, the confinement is secretive, or the movement is substantial so as to demonstrate a significance independent of the other offense, there exists a separate animus as to each offense sufficient to support separate convictions;

(b) Where the asportation or restraint of the victim subjects the victim to a substantial increase in risk of harm separate and apart from that involved in the underlying crime, there exists a separate animus as to each offense sufficient to support separate convictions. *State v. Logan*, 60 Ohio St.2d 126, 397 N.E.2d 1345 (1979), syllabus.

{¶ 17} Initially, we note that the first count of kidnapping (Count II) pertained to Sharkey, with whom he did not engage in any sexual conduct. Thus, the rape offenses would not merge with that kidnapping offense. As to the remaining count of kidnapping (Count IV), Swiergosz was found guilty for forcing Barb to remove her clothes, taping her wrists behind her back, and moving her at gunpoint down the hall to an empty apartment. Swiergosz's conduct was not merely incidental to the rape, but rather constituted a substantial movement of her independent of the rape. Therefore, because the offenses were not committed by the same conduct, the offenses do not merge. Swiergosz's second assignment of error is not well-taken.

{¶ 18} In his third assignment of error, Swiergosz argues that the aggravated burglary count should have merged with any of the remaining counts. The threshold issue is what conduct caused Swiergosz to trespass.[1] Here, the state presented two theories: either, Swiergosz trespassed when he entered the locked facility through the

[1] Aggravated burglary is defined as: "No person, by force, stealth, or deception, shall trespass in an occupied structure * * * when another person other than an accomplice of the offender is present, with purpose to commit in the structure * * * any criminal offense, if * * * (2) The offender has a deadly weapon or dangerous ordnance on or about the offender's person or under the offender's control." R.C. 2911.11(A).

door as another person was leaving, or he trespassed when his permission to be in the facility was revoked when he committed a criminal offense inside. *See State v. Hill*, 8th Dist. Cuyahoga No. 95379, 2011-Ohio-2523, ¶ 25, quoting *State v. Steffen*, 31 Ohio St.3d 111, 115, 509 N.E.2d 383 (1987) ("Although a person may have permission to enter the premises, permission 'can be revoked upon an act of violence against a person who has the authority to revoke the privilege of initial entry.'"). Notably, the jury instructions and verdict forms do not indicate on which theory the jury based its finding of guilt, potentially raising the problem identified by Swiergosz in his sixth assignment of error. However, we need not address this problem because under either theory the offenses would not merge.

{¶ 19} Under the former theory, the burglary was complete as soon as Swiergosz entered the facility with his gun and with the purpose to commit a criminal offense. Thus, the burglary would constitute a separate act from the offenses he committed once inside the facility. *State v. Elmore*, 111 Ohio St.3d 515, 2006-Ohio-6207, 857 N.E.2d 547, ¶ 128 (aggravated burglary and aggravated robbery were not subject to merger because the burglary was complete as soon as the defendant entered the home). Further, under the latter theory, the offenses would not merge because the criminal offense Swiergosz entered the facility with the purpose to commit, which related to Barb, was different than the criminal offense which would have revoked his permission, i.e., kidnapping Sharkey. *Compare State v. Ruby*, 6th Dist. Sandusky No. S-10-028, 2011-Ohio-4864, ¶ 59 (aggravated burglary and grand theft merge because the theft was "the

purpose and grand incidence of the burglary"). Therefore, the offenses were committed by separate acts, and do not merge. Accordingly, Swiergosz's third assignment of error is not well-taken.

{¶ 20} For his fourth assignment of error, Swiergosz argues that the felonious assault count should have merged with the counts of rape. Swiergosz's argument is based on his assumption that the felonious assault count stems from the rape of Barb. However, as discussed above, the felonious assault count is based on his conduct of striking Barb in the head with the tire iron, which is clearly a separate act. Therefore, the offenses do not merge. Accordingly, Swiergosz's fourth assignment of error is not well-taken.

{¶ 21} Finally, as his fifth assignment of error, Swiergosz argues that the three kidnapping counts should merge. We first note that the trial court has already merged the two counts pertaining to Barb (Counts IV and V). Thus, the remaining issue is whether the count of kidnapping pertaining to Sharkey (Count II) should merge with the count of kidnapping pertaining to Barb (Count IV). We hold that they should not. Swiergosz kidnapped Sharkey when he held her at gunpoint in her office. He later kidnapped Barb when he pulled her into a closet, had her remove her clothes, and then forced her to move down the hall to the empty apartment. Thus, the offenses were committed by two separate acts, and do not merge. Moreover, even if the same conduct had constituted kidnapping both of them, the offenses still would not merge because "separate convictions and sentences are permitted when a defendant's conduct results in multiple

victims." *State v. Young*, 2d Dist. Montgomery No. 23642, 2011-Ohio-747, ¶ 39. Therefore, Swiergosz's fifth assignment of error is not well-taken.

III. Conclusion

{¶ 22} For the foregoing reasons, the judgment of the Lucas County Court of Common Pleas is affirmed. Swiergosz is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE