[Cite as *State v. Fortner*, 2017-Ohio-4004.]

STATE OF OHIO, BELMONT COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	CASE NO. 16 BE 0007
	)	
PLAINTIFF-APPELLEE,	)	
	)	
VS.	)	OPINION
	)	
JOHN CHARLES FORTNER,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from the Court of Common Pleas of Belmont County, Ohio Case No. 13 CR 26
JUDGMENT:	Affirmed.
APPEARANCES:	
For Plaintiff-Appellee:	No Brief Filed.
For Defendant-Appellant:	Atty. Terrence K. Scott Asst. State Public Defender 250 East Broad Street Suite 1400 Columbus, Ohio 43215

JUDGES:

Hon. Carol Ann Robb
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: May 24, 2017

[Cite as *State v. Fortner*, 2017-Ohio-4004.]
ROBB, P.J.

{¶1} Defendant-Appellant John Charles Fortner appeals from his convictions and sentences entered in Belmont County Common Pleas Court for Importuning and Attempted Unlawful Sexual Conduct with a Minor. The issue in this case is whether the convictions should have merged. For the reasons set forth below, the offenses, as committed, are not allied offenses of similar import; merger was not warranted. The convictions and sentences are affirmed.

Statement of the Case

{¶2} In April 2012, Appellant was in Belmont County working in the oil and gas industry for a Texas company. He posted an ad on Craigslist for "Young Hot Girls." Sentencing Tr. 3. The Belmont County SPIE Task Force saw the listing and responded by e-mail with a picture of a decoy stating it was a 14 year old girl. Sentencing Tr. 3. Appellant responded and offered money for sexual conduct. Sentencing Tr. 3. A meeting was arranged at the Dollar General in Morristown, and when Appellant arrived he was arrested.

{¶3} As a result, on September 5, 2012 Appellant was indicted for Importuning, in violation of R.C. 2907.07(D)(2), a fifth-degree felony, and Attempted Unlawful Sexual Conduct with a Minor, in violation of R.C. 2923.02(A) and R.C. 2907.04(A)(B)(1), a fifth-degree felony. That indictment was later dismissed. Appellant was re-indicted on February 6, 2013 for Importuning, in violation of R.C. 2907.07(D)(2), a fifth-degree felony; Attempted Unlawful Sexual Conduct with a Minor, in violation of R.C. 2923.02(A) and R.C. 2907.04(A)(B)(1), a fifth-degree felony; and Compelling Prostitution in violation of R.C. 2907.21(A)(2)(b), a third-degree felony.

{¶4} The state and Appellant entered into a plea agreement. 2/18/16 Plea Agreement. The Compelling Prostitution charge was dismissed. 2/18/16 J.E. Appellant pled guilty to Importuning and Attempted Unlawful Sexual Conduct with a Minor. 2/18/16 J.E.

{¶5} A sentencing hearing was held on March 21, 2016. Appellant received 11 months for the Importuning conviction and 11 months for Attempted Unlawful

Sexual Conduct with a Minor. 3/23/16 J.E. The trial court ordered the sentences to run consecutive to each other. 3/23/16 J.E.

{¶6} Appellant filed a timely appeal from the convictions and sentences.

First Assignment of Error

"The trial court committed plain error in violation of Mr. Fortner's rights under the Double Jeopardy Clauses of the Fifth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution, and R.C. 2941.25, when it failed to merge for sentencing offenses that had a similar import, arose for the same conduct, and were not committed separately or with a separate animus."

{¶7} Appellant argues the trial court erred when it failed to merge the convictions for Importuning and Unlawful Sexual Conduct with a Minor because they are allied offenses of similar import. Whether offenses constitute allied offenses of similar import subject to merger under R.C. 2941.25 is a question of law that appellate courts review de novo. *State v. Williams*, 134 Ohio St.3d 482, 2012-Ohio-5699, ¶ 26-28. The burden is on the defendant to establish his entitlement to merger. *State v. Washington*, 137 Ohio St.3d 427, 2013-Ohio-4982, 999 N.E.2d 661, ¶ 18. Appellant acknowledges he did not ask the court to merge the offenses, and thus, the plain error standard of review applies.

{¶8} Plain error does not exist unless, but for some "obvious" error committed by the trial court, the outcome of the trial would have been different. *State v. Johnson*, 112 Ohio St.3d 210, 2006-Ohio-6404, ¶ 31. "Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus.

{¶9} Pursuant to R.C. 2941.25, a trial court shall not impose multiple punishments for the same criminal conduct:

> (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.

R.C. 2941.25.

{¶10} "In determining whether offenses are allied offenses of similar import within the meaning of R.C. 2941.25, courts must evaluate three separate factors –the conduct, the animus, and the import." *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, paragraph one of the syllabus. If any of the following are true, a defendant's convictions do not merge and he or she may be sentenced for multiple offenses: "(1) the offenses are dissimilar in import or significance—in other words, each offense caused separate, identifiable harm, (2) the offenses were committed separately, or (3) the offenses were committed with separate animus or motivation." *Id*. at ¶ 25.

{¶11} The *Ruff* court explained:

> The defendant's conduct is but one factor to consider when determining whether multiple offenses are allied offenses of similar import pursuant to R.C. 2941.25(B). One justice in *Johnson* succinctly explained the idea of dissimilar import: "In practice, allied offenses of similar import are simply multiple offenses that arise out of the same criminal conduct and are similar but not identical in the significance of the criminal wrongs committed and the resulting harm." *Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, ¶ 64 (O'Connor, J., concurring in judgment). In other words, offenses are not allied offenses of similar import if they are not alike in their significance and their resulting harm.

Id. at ¶ 21.

{¶12} "At its heart, the allied-offense analysis is dependent upon the facts of a case because R.C. 2941.25 focuses on the defendant's conduct." *Id*. at ¶ 26. Therefore, the analysis "may result in varying results for the same set of offenses in

different cases." *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, ¶ 52, abrogated in part by *Ruff* at ¶ 30-33.

{¶13} Evidence presented at trial, during a plea hearing, or sentencing hearing will reveal whether the offenses have similar import. *Ruff* at ¶ 26. When there are multiple victims, defendant can be convicted of multiple counts. *Id*. Also, if a defendant's conduct constitutes two or more offenses against a single victim and the harm that results from each offense is separate and identifiable from the harm of the other offense, defendant can be convicted of multiple offenses. *Id*.

{¶14} Appellant was charged and convicted of Importuning in violation of R.C. 2907.07(D)(2), which is defined as:

> (D) No person shall solicit another by means of a telecommunications device, as defined in section 2913.01 of the Revised Code, to engage in sexual activity with the offender when the offender is eighteen years of age or older and either of the following applies:
>
> * * *
>
> (2) The other person is a law enforcement officer posing as a person who is thirteen years of age or older but less than sixteen years of age, the offender believes that the other person is thirteen years of age or older but less than sixteen years of age or is reckless in that regard, and the offender is four or more years older than the age the law enforcement officer assumes in posing as the person who is thirteen years of age or older but less than sixteen years of age.

R.C. 2907.07(A)(D)(2).

{¶15} Appellant was also convicted of Attempted Unlawful Sexual Conduct with a Minor in violation of R.C. 2907.04(A)(B)(1) and R.C. 2923.02(A). In order for the offense to be an attempt, the person must act with sufficient culpability for the commission of the offense and engage in conduct that if successful would constitute

or result in the offense. R.C. 2923.03(A). The Sexual Conduct with a Minor statute, in pertinent part, provides:

> (A) No person who is eighteen years of age or older shall engage in sexual conduct with another, who is not the spouse of the offender, when the offender knows the other person is thirteen years of age or older but less than sixteen years of age, or the offender is reckless in that regard.
>
> (B) Whoever violates this section is guilty of unlawful sexual conduct with a minor.
>
> (1) Except as otherwise provided in divisions (B)(2), (3), and (4) of this section, unlawful sexual conduct with a minor is a felony of the fourth degree.

R.C. 2907.04(A)(B)(1).

{¶16} Since *Ruff*, no court has addressed whether Importuning and Unlawful Sexual Conduct with a Minor are allied offenses of similar import. However, as *Ruff* instructs, we are to look to the facts of the case to determine if the offenses are allied offenses of similar import.

{¶17} Here, given the evidence that can be deduced from the sentencing transcript and the pre-sentence investigation, the offenses occurred within a short amount of time. On April 2, 2012 Appellant placed an ad on Craigslist for "Hot Young Girls." On April 4, 2012 an officer discovered the ad. The officer, posing as a fourteen year old girl, responded to the ad with a picture of a decoy. The next day the officer checked the e-mail and had five responses from Appellant; one of the responses included an offer of money for specific sexual acts. Appellant and the officer posing as the decoy arranged a meeting at Dollar General. Appellant drove to the appointed location and was arrested.

{¶18} Given those facts, there are two separate acts, harms, and animi. One act, harm, and animus was soliciting a child between fourteen and sixteen years old

to engage in sexual activity. The other act, harm, and animus is taking the steps to engage in unlawful sexual conduct with a minor. Appellant's animus in committing those acts and the resulting harm are distinct. The solicitation occurred on a computer through e-mails and happened over a two day period. The solicitation was complete when an offer of money for certain sexual acts was accepted. The attempt to engage in sexual conduct with a minor occurred separately when Appellant got into his vehicle and went to the rendezvous point.

{¶19} Accordingly, the offenses, as committed, are not allied offenses of similar. There was no error, plain or otherwise, committed when the trial court failed to merge the offenses. This assignment of error lacks merit.

Second Assignment of Error

"Mr. Fortner's trial counsel rendered constitutionally ineffective assistance when counsel failed to request merger of the convictions for importuning under R.C. 2907.07(D)(2) and attempted sexual conduct with a minor under R.C. 2923.02(A)/2907.04(A)(b)(1)."

{¶20} Appellant's second assignment of error is closely related to his first assignment of error. He argues trial counsel was ineffective for failing to request merger at sentencing.

{¶21} We review a claim of ineffective assistance of counsel under a two-part test, which requires the defendant to demonstrate: (1) trial counsel's performance fell below an objective standard of reasonable representation; and (2) prejudice arose from the deficient performance. *State v. Bradley*, 42 Ohio St.3d 136, 141–143, 538 N.E.2d 373 (1989), citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). In evaluating the alleged deficiency in performance, our review is highly deferential to counsel's decision as there is a strong presumption counsel's conduct falls within the wide range of reasonable professional assistance. *Bradley*, 42 Ohio St.3d at 142–143, citing *Strickland*, 466 U.S. at 689. To show prejudice, a defendant must prove his lawyer's errors were so serious that there is a reasonable probability the result of the proceedings would have been different. *State v. Carter*, 72 Ohio St.3d 545, 558, 651 N.E.2d 965 (1995). Prejudice from defective representation

justifies reversal only where the results were unreliable or the proceeding fundamentally unfair due to the performance of trial counsel. *Id*., citing *Lockhart v. Fretwell*, 506 U.S. 364, 369, 113 S.Ct. 838 (1993).

{¶22} Both deficient performance and prejudice must be established; if the performance was not deficient, then there is no need to review for prejudice and vice versa. *State v. Madrigal*, 87 Ohio St.3d 378, 389, 721 N.E.2d 52 (2000).

{¶23} As explained in the first assignment of error, the offenses, as committed, are not allied offense of similar import and merger was not required. Given that holding, Appellant cannot demonstrate he was prejudiced by counsel's alleged deficiency; merger was not warranted and therefore, the result of the proceedings would not have been different. As there is no prejudice, we do not need to decide if there was deficient performance for failing to ask for merger.

{¶24} This assignment of error is meritless.

Conclusion

{¶25} Both assignments of error are deemed meritless. The convictions and sentences are affirmed.

Donofrio, J., concurs.

Waite, J., concurs.

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