[Cite as *State v. Stadmire*, 2003-Ohio-873.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

No. 81188

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	JOURNAL ENTRY
	:	
vs.	:	and
	:	
	:	OPINION
RICHARD STADMIRE, JR.	:	
	:	
Defendant-Appellant	:	

DATE OF ANNOUNCEMENT
OF DECISION: February 27, 2003

CHARACTER OF PROCEEDING: Criminal appeal from
Court of Common Pleas
Case No. CR-410305

JUDGMENT: AFFIRMED

DATE OF JOURNALIZATION: _____

APPEARANCES:

For Plaintiff-Appellee: WILLIAM D. MASON
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COLLEEN CONWAY COONEY, J.:

{¶1} Defendant-appellant Richard Stadmire, Jr. ("Stadmire") appeals his conviction for aggravated robbery, kidnapping, misuse of credit cards, possessing a weapon under disability, and gross sexual imposition. We find no merit to the appeal and affirm.

{¶2} At trial, the victim and the codefendant Charles Boyd ("Boyd") testified that on May 17, 2001, Stadmire and Boyd approached her in the parking lot at Eastgate shopping center. As she was attempting to get into her car, Boyd grabbed her by the throat and shoved her into the car. Boyd held a gun to her throat and instructed her to drive to the Copper Tree Apartments while Stadmire followed in another car.

{¶3} At the Copper Tree Apartments, one of the men told her to get into the back seat. She testified that Stadmire got into the back seat with her, held a gun to her head, and forced her to take off her shirt while Boyd drove the car. After a short time, Boyd stopped the car, exited, and returned with duct tape. Stadmire duct-taped the victim's hands, feet, and head. Stadmire then put his hand in her pants and sexually assaulted her. When Boyd said "Come on, let's go," Stadmire pulled up her pants.

{¶4} They drove to a tire store where Stadmire purchased several tires with the victim's credit card. He loaded some of the tires in the trunk and some of the tires on top of the victim. They then drove to another location where Stadmire and Boyd unloaded the tires.

{¶5} After unloading the tires, they drove to an ATM machine to withdraw cash from the victim's accounts. When the code she gave them did not work, they drove to two

other ATM machines where they finally succeeded in withdrawing money from her bank account.

{¶6} Eventually, the two men got out of the car and left the victim duct-taped and buried under a yoga mat and blankets in the back seat. The victim gnawed through the duct tape covering her mouth and hands and peeked into the front of the car. She noticed the keys were in the ignition so she swung her legs, which were still tied together with duct tape, over the front seat. She climbed into the driver's seat and drove off. She escaped at 8:00 p.m., more than four hours after being kidnapped.

{¶7} Stadmire waived a jury trial, and after a bench trial, the trial judge found him guilty of gross sexual imposition, misuse of a credit card, kidnapping, aggravated robbery, and a firearm specification. The court sentenced him to ten years for aggravated robbery, ten years for kidnapping, one and one-half years for gross sexual imposition, one year for misuse of a credit card, and three years for the firearm specification, to be served consecutively, for a total of twenty-five and one-half years.

{¶8} Stadmire appeals, raising eleven assignments of error.

I. Speedy Trial

{¶9} In his first assignment of error, Stadmire claims he was entitled to dismissal on speedy trial grounds pursuant to the triple-count provisions of R.C. 2945.71(E) because he was in jail for over ninety days awaiting trial. The State argues the triple count provisions of R.C. 2945.71(E) are inapplicable because Stadmire was also being held pursuant to a valid parole holder.

{¶10} In *State v. Mann* (1993), 93 Ohio App.3d 301, 313, this court stated, in dealing with the identical issue:

{¶11} "The existence of a valid parole holder prevents application of the triple-count provisions of R.C. 2945.71(E)." *State v. Brown* (1992), 64 Ohio St.3d 476, 479; *State v. Cook* (1992), 65 Ohio St.3d 516, 518; see, also, *State v. Martin* (1978), 56 Ohio St.2d 207. R.C. 2945.71(E) is applicable only to those defendants held in jail in lieu of bail solely on the pending charge. *Martin*, supra, citing *State v. MacDonald* (1976), 48 Ohio St.2d 66. A parole violation is a separate offense and does not relate to the pending charge as contemplated by R.C. 2945.71(E). Id.

{¶12} "'Thus, the triple-count provision of R.C. 2945.71(E) is inapplicable to a defendant held in jail under a parole holder, even when there are additional criminal charges pending. ***' *State v. Dunkins* (1983), 10 Ohio App.3d 72, 74-75. See, also, *State v. Martin* (1978), 56 Ohio St.2d 207, 211. *State v. Brown*, 64 Ohio St.3d at 479, 597 N.E.2d at 99."

{¶13} Evidence of a valid parole holder can be adduced from the transcripts of the trial court hearing. See *State v. Brown*, supra, at 480-481.

{¶14} When Stadmire moved to dismiss the charges for lack of a speedy trial, the State had a witness from the parole board available to testify that Stadmire was on parole at the time the crimes were committed. Stadmire, however, stated he did not want the witness to testify. Stadmire admitted on the record at least three times that he was on parole at the time the crimes were committed. The State also produced documentation indicating there was a valid parole holder at the time of the offenses in this case. (Tr. 28-29). Therefore, the trial court properly found that a valid parole holder existed, thereby precluding application of the triple-count provisions. Accordingly, Stadmire's first assignment of error is overruled.

II. Integrity of the Court

{¶15} In his second assignment of error, Stadmire contends the trial judge was not fair and impartial because he acquired information about the case during plea negotiations between Boyd and the State and also between Stadmire and the State. During plea negotiations with Stadmire, the court stated it would not accept less than a seventeen-year sentence because it was alleged that Stadmire kidnapped a woman, forced her into her car, taped and bound her, sexually assaulted her, and later used her credit card.[1]

{¶16} In support of this argument, Stadmire relies on several cases which hold that a court's participation in plea negotiations may affect the voluntariness of a plea in certain circumstances. See e.g., *State v. Byrd* (1980), 63 Ohio St.2d 288; *State v. Filchock* (1996), 116 Ohio App.3d 572; *State v. Ball* (1990), 66 Ohio App.3d 224, 226. However, Stadmire did not accept any plea agreement. He not only proceeded with a trial, but waived a jury stating he thought it would be in his best interest to have the judge review the evidence. Now, he claims the trial judge was not impartial.

{¶17} "A trial judge is presumed not to be biased or prejudiced, and the party alleging bias or prejudice must set forth evidence to overcome the presumption of integrity." *Corradi v. Emmco Corp.* (Feb. 15, 1996), Cuyahoga App. No. 67407, citing *State v. Wagner* (1992), 80 Ohio App.3d 88, 93. What a judge learns in his judicial capacity, whether from pretrial proceedings, codefendant pleas, or evidence presented in a

[1]Stadmire also contends the trial court was biased as a result of its discussions with someone from the Adult Parole Authority. However, the record suggests the court spoke with the Parole Authority for the purpose of confirming whether Stadmire was on parole and whether there was a valid parole holder. Therefore, these discussions do not support a finding that the court was unfair or biased.

prior case, is properly considered as judicial observations and creates no personal bias requiring recusal. *In re Disqualification of Krichbaum* (1997), 81 Ohio St.3d 1205, 1206; *In re Disqualification of Corrigan* (1996), 77 Ohio St.3d 1243; *In re Daniel E.* (1997), 122 Ohio App.3d 139, citing Code of Judicial Conduct, Canon 3.

{¶18} Although Stadmire claims the trial court was biased because it obtained information about the case during plea discussions, he fails to show how the plea discussions biased the court. There is no evidence that the trial judge expressed any opinions as to the truthfulness of the claims against Stadmire, nor is there any evidence that the judge was influenced by the fact of the co-defendant's plea. To the contrary, the trial judge did not remember the codefendant or his plea. The trial judge told Stadmire that he would "have an open mind." Therefore, we find Stadmire failed to overcome the presumption of integrity. Accordingly, the second assignment of error is overruled.

III. Right to Counsel

{¶19} In his third assignment of error, Stadmire argues the trial court violated his right to counsel when the court would not permit a substitution of counsel.

{¶20} While the right to counsel is absolute, the right to choice of counsel is not. *State v. Haberek* (1988), 47 Ohio App.3d 35, 40-41; *State v. Marinchek* (1983), 9 Ohio App.3d 22, 23; *United States v. Iles* (C.A.6, 1990), 906 F.2d 1122. Nor does the right to counsel guarantee a meaningful relationship between the defendant and his counsel. *Morris v. Slappy* (1983), 461 U.S. 1; *State v. Pruitt* (1984), 18 Ohio App.3d 50, 57. To discharge a court-appointed attorney, the defendant must show a breakdown in the attorney-client relationship of such magnitude as to jeopardize the defendant's right to

effective assistance of counsel. *State v. Henness*, 79 Ohio St.3d 53, 65, quoting *State v. Coleman* (1988), 37 Ohio St.3d 286, paragraph four of the syllabus.

{¶21} An indigent defendant is entitled to appointment of substitute counsel only upon a showing of a conflict so severe that a denial of substitution of counsel would implicate a violation of the Sixth Amendment right to counsel. Id. Factors to consider in deciding whether a trial court erred in denying a defendant's motion to substitute counsel include "the timeliness of the motion; the adequacy of the court's inquiry into the defendant's complaint; and whether the conflict between the attorney and client was so great that it resulted in a total lack of communication preventing an adequate defense." *State v. Jones* (2001), 91 Ohio St.3d 335, citing *United States v. Jennings* (C.A.6, 1996), 83 F.3d 145, 148. A trial court's decision to refuse substitution of counsel will not be reversed absent an abuse of discretion. *State v. Pruitt* (1984), 18 Ohio App.3d 50, 57.

{¶22} Stadmire claims he was denied his right to counsel because there was a breakdown in communication between him and his court-appointed attorneys. The court allowed Stadmire's first attorney to withdraw. The court appointed an attorney from the public defender's office to represent him and granted a continuance to allow the newly-appointed attorney to prepare for the trial. However, when the court reconvened, Stadmire advised the court he did not wish the public defender to represent him any further because she had recommended he enter into a plea agreement and he did not wish to plea bargain.

{¶23} The Ohio Supreme Court in *State v. Cowans* (1999), 87 Ohio St.3d 68, 73, 717 N.E.2d 298, held that an attorney's encouraging a client to plead does not constitute grounds for substituting counsel. The Supreme Court held: "A lawyer has a duty to give the accused an honest appraisal of his case. * * * Counsel has a duty to be candid; he has

no duty to be optimistic when the facts do not warrant optimism." *Cowan*, citing *Brown v. United States* (1959), 105 U.S. App. D.C. 77, 264 F.2d 363, 369. See also, *McGee v. Harris* (S.D.N.Y.1980), 485 F.Supp. 866. "If the rule were otherwise, appointed counsel could be replaced for doing little more than giving their clients honest advice." *McGee* at 869.

{¶24} Stadmire also argues he was denied his right to counsel because the trial judge did not make an adequate inquiry into his complaints about his court-appointed attorneys. However, the trial judge specifically asked Stadmire about his relationship with his lawyers on several occasions throughout the trial and Stadmire spoke at length about his specific complaints. (See Tr. 6-12, 18-19, 115-120, 168). Stadmire stated that he and his lawyer disagreed about whether he should enter into a plea agreement. He also stated he thought she was not prepared to try the case and did not want to proceed with the trial. The court then questioned defense counsel, who stated she was prepared to defend the case but that Stadmire did not like her recommendation that he accept a plea bargain. Defense counsel stated that while she and Stadmire had some disagreements, she was counseling him on every step and was focused on his best interests. Therefore, we find the trial court made a sufficient inquiry into Stadmire's complaints about his attorney. Accordingly, Stadmire's third assignment of error is overruled.

IV. The Court's Interrogation of Witnesses

{¶25} In his fourth assignment of error, Stadmire argues he was denied a fair trial because the court, sitting as the trier of fact, interrogated witnesses.

{¶26} Evid.R. 614(B) provides that a trial court "may interrogate witnesses, in an impartial manner, whether called by itself or by a party." As a result, "the right to question

witnesses pursuant to Evid.R. 614(B) rests within the sound discretion of the trial court." *State v. Williams*, 11th Dist. 97-T-0148, 1998 Ohio App. LEXIS 6299. This rule exists because the trial court has an "obligation to control proceedings, to clarify ambiguities, and to take steps to insure substantial justice." *State v. Kay* (1967), 12 Ohio App.2d 49.

{¶27} In the present case, Stadmire claims he was denied a fair trial because the court interrogated witnesses. Stadmire cites a number of cases in support of this contention. See, e.g., *State ex. rel. Wise v. Chand* (1970), 21 Ohio St.2d 113; *Bates v. Bill Swad Leasing Co.* (1984), 17 Ohio App.3d 153; *State v. Sutton* (1966), 7 Ohio App.2d 178; *State v. Kay* (1967), 12 Ohio App.2d 38. However, these cases involve jury trials where the court questioned witnesses in the presence of a jury or allowed the jurors to ask prejudicial questions. In *City of Mentor v. Brancatelli*, 11th Dist. No. 97-L-011, 1997 Ohio App. LEXIS 5439, the court stated:

{¶28} "[A] trial judge is ordinarily accorded greater flexibility in questioning witnesses when the proceeding is conducted as a bench trial. *Lorenc v. Sciborowski*, 1995 Ohio App. LEXIS 951 (Mar. 16, 1995), Cuyahoga App. No. 66945, unreported, at 6, 1995 WL 116850. See, also, *State v. Armstrong*, 1993 Ohio App. LEXIS 3813 (Aug. 6, 1993), Montgomery App. No. 13498, unreported, at 5, 1995 WL 294834. Presumably, when there is no jury, there is no one to be prejudicially influenced by the judge's demeanor."

{¶29} Here, because Stadmire waived his right to a jury, any limitation in Evid. R. 614(B) concerning the judge's influence on the jury is not applicable. Moreover, the trial judge questioned the witnesses in an impartial manner and primarily for purposes of clarifying statements made during direct or cross-examination. For example, the court asked the victim: "Where was your cell phone?"; "What happened once you stopped the

first time?"; "Did you ever see a Kmart?" After reviewing the record, we find the court's questioning was neither excessive nor prejudicial. Accordingly, Stadmire's fourth assignment of error is overruled.

V. Charles Boyd's Testimony

{¶30} In his fifth assignment of error, Stadmire claims the trial court violated his right to due process when it incorrectly classified Charles Boyd, the State's witness, as a court witness pursuant to Evid.R. 614(A). Specifically, Stadmire maintains that the State was permitted to cross-examine its own witness in violation of Evid.R. 607 without a showing of surprise and affirmative prejudice.

{¶31} In *State v. Dacons* (1982), 5 Ohio App.3d 112, 114, the defendant argued the trial court committed prejudicial error when it called one of the State's witnesses as its own witness so that the State could cross-examine the witness without a showing of surprise in violation of Evid.R. 607. In affirming the conviction, the *Dacons* court explained:

{¶32} "The case of *State v. Adams* (1980), 62 Ohio St.2d 151, controls, although it was decided prior to the effective date of the Ohio Rules of Evidence. The Ohio Rules of Evidence, and in particular Evid.R. 607 and 614, codify the common-law evidentiary rules applicable in Ohio prior to the adoption of the Rules of Evidence as pertinent to this case.

{¶33} "In *State v. Adams*, upon request of the state, a witness was called as the court's witness because she had made statements in the past that were inconsistent and would be inconsistent with her expected trial testimony. The witness was called by the court who asked a short series of non-leading questions and then permitted both the prosecution and defense the opportunity to cross-examine. The Supreme Court held that, under Ohio common-law rules of evidence, the prosecution, had it called the witness,

would have been deemed to have vouched for her credibility and could not thereafter have impeached her. The court stated that the trial court had the power under common-law evidentiary rules to call witnesses in exercise of sound discretion. The court rejected the argument of the defense that it would be unfair to permit the prosecution to gain the right to impeach the witness and to be able to ask leading questions of the witness. The Supreme Court found no abuse of discretion, as there was justification in that the witness' testimony would be beneficial to the jury in performing its fact-finding responsibilities."

{¶34} In this case, the State asked the court to call Boyd as the court's witness because Boyd, a key eyewitness, made three prior inconsistent statements regarding the crime and whether Stadmire used a gun in committing the crime. Because Boyd was present and witnessed most of Stadmire's actions during the commission of the crimes, his testimony could reasonably be found to be necessary to aid the court in carrying out its fact-finding function. Therefore, we find the trial court did not abuse its discretion in calling Boyd as its own witness. Accordingly, Stadmire's fifth assignment of error is overruled.

VI. Right of Confrontation

{¶35} In his sixth assignment of error, Stadmire contends the trial court violated his right to confrontation when it admitted Boyd's prior recorded statements into evidence. In support of this argument, Stadmire cites several cases, all of which hold that a non-testifying codefendant's statement implicating the defendant violates the Confrontation Clause of the United States Constitution. See, e.g., *Douglas v. Alabama* (1965), 380 U.S. 415, 419; *Bruton v. United States* (1968), 391 U.S. 123, 126; *Lilly v. Virginia* (1999), 572 U.S. 116, 120.

{¶36} The Confrontation Clause is a constitutional safeguard that ensures a defendant will not be convicted based on the charges of unseen, unknown, and unchallengeable witnesses. *Lee v. Illinois* (1986), 476 U.S. 530, 540. The Confrontation Clause guarantees the accused the right to cross-examine witnesses who testify against him. Therefore, the admission of out-of-court statements do not violate the accused's right to confrontation if the declarant testifies as a witness and is subject to full and effective cross-examination. *California v. Green* (1970), 399 U.S. 149, 158; *State v. Keenan* (1998), 81 Ohio St.3d 133, 142.

{¶37} In the present case, Boyd testified at trial and Stadmire had the opportunity to cross-examine him. Because Stadmire was afforded the opportunity to cross-examine Boyd, we find the trial court did not violate Stadmire's constitutional right to confrontation. Accordingly, Stadmire's sixth assignment of error is overruled.

VII. Testimony Explaining Subsequent Investigative Activities

{¶38} In his seventh assignment of error, Stadmire asserts he was not given a fair trial because the trial court allowed Det. Sonnhalter, the investigating detective, to testify as to information he received from a Crime Stoppers call. Stadmire claims the detective referred to out-of-court statements which were both unnecessary and prejudicial. The State, however, contends the statements were admissible to explain how the investigation started and the subsequent steps taken in apprehending the defendants.

{¶39} In support of his argument, Stadmire relies on several federal cases involving out-of-court statements offered to explain an investigating officer's actions in conducting an investigation. See, e.g., *Garrett v. United States* (8th Cir. 1996) 78 F.3d 1296, 1302-03; *United States v. Forrester* (2nd Cir. 1995), 60 F.3d 52, 59; *United States v. Alonzo* (8th Cir.

1993), 991 F.2d 1422. Stadmire claims these cases support the position that all out-of-court statements offered to explain a criminal investigation are inadmissible as unduly prejudicial.

{¶40} However, none of these cases set forth such a strict bright line rule. For example, in *United States v. Forrester*, the court held that out-of-court statements offered to help the jury understand an investigating officer's subsequent actions is admissible as long as the jury is not "likely to consider the statement for the truth of what was stated with significant resultant prejudice." *Forrester*, supra at 59.

{¶41} Ohio courts routinely hold that testimony concerning the basis or reason for an officer's investigation or subsequent investigative activities is admissible. *State v. Thomas* (1990), 61 Ohio St.2d 223, 232; *State v. Williams* (1996), 115 Ohio App.3d 24, 44; *State v. Parson* (1990), 67 Ohio App.3d 201, 207.

{¶42} In the present case, Det. Sonnhalter testified that Crime Stoppers was used to obtain information from the public regarding the man portrayed in ATM surveillance films. The detective also testified that a person called Crime Stoppers and identified the man in the video as Charles Boyd. The detective explained how Crime Stoppers worked so that the court could understand why it was used in this investigation. Moreover, because this case was tried to a judge rather than a jury, the danger of unfair prejudice, if any, was less of an issue than it was in *Forrester*. Therefore, the detective's testimony was admissible because it explained an officer's conduct while investigating a crime. Accordingly, the seventh assignment of error is overruled.

VIII. The Firearm Specification

{¶43} In his eighth assignment of error, Stadmire argues the enhanced sentence he received for the firearm specification was not appropriate because the State did not satisfy its burden regarding proof of a firearm and its operability. Stadmire argues that no firearm was recovered and he refers to Boyd's testimony that he had a BB gun. Stadmire claims that because a BB gun does not fall within the statutory definition of a firearm, the State failed to prove the use of a firearm beyond a reasonable doubt.

{¶44} The firearm specification statute imposes an additional three years of actual incarceration if a felony is committed while the offender is in possession and control of a firearm. See R.C. 2929.71. R.C. 2923.11(B) defines "firearm" as "any deadly weapon capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant."

{¶45} In cases in which the alleged firearm is never recovered, the State is not precluded from proving beyond a reasonable doubt that a firearm was used in the commission of a felony. The Ohio Supreme Court has held that proof of the existence of a firearm may be based on lay testimony, and is not dependent on an empirical analysis of the gun. *State v. Murphy* (1990), 49 Ohio St.3d 206, 208. R.C. 2923.11(B)(2) provides that in determining operability the trier of fact may rely on circumstantial evidence, including, but not limited to, the representations and actions of the individual exercising control over the firearm.

{¶46} In *Murphy*, supra, the evidence going to operability was as follows: testimony the gun was wrapped in a shirt, a description of the instrument from eyewitnesses, and the statement by the defendant that he would kill the clerk if he did not give him the money. The court held that from the totality of the circumstances the evidence was sufficient to

establish proof beyond a reasonable doubt that the appellant possessed a "firearm" as defined in R.C. 2923.11(B).

{¶47} In the present case, the victim testified that she knew the difference between a BB gun and a revolver. She stated, "I've shot target practice before myself with a BB gun and I know they have a very small hole. We own a gun ourselves. It has a large hole. I know the difference. I've been taught the difference." She gave a detailed description of the gun: "It was an automatic type. Not a revolver." She also testified as to the continuous deadly threats Stadmire made towards her: "He said, 'Get in or I will have to kill you.'"; "He still has the gun on me. He seems really nervous. He says, 'Just do what I say or we will have to hurt you.'"

{¶48} Although Boyd testified that they had a BB gun as opposed to a firearm, the trial judge found the victim's testimony more credible. Based on the victim's testimony, the court could conclude beyond a reasonable doubt that Stadmire used a firearm during the commission of these crimes. Therefore, the eighth assignment of error is overruled.

IX. Kidnapping

{¶49} In his ninth assignment of error, Stadmire argues he was entitled to have the kidnapping charge reduced to a second degree felony because the victim was released in a safe place unharmed. Under R.C. 2905.01(C), the offense of kidnapping is generally a first degree felony, but may be reduced to a second degree felony if "the offender releases the victim in a safe place unharmed." However, this provision is not an element of the crime, but rather a mitigating circumstance. *State v. Sanders* (2001), 92 Ohio St.3d 245, 265. Therefore, the burden is upon the defendant, who must plead and prove, in the fashion of an affirmative defense, release of the victim in a safe place unharmed. Id. See

also, (1998), *State v. Avery* 126 Ohio App.3d 36, 44; *State v. Leslie* (1998), 14 Ohio App.3d 343; *State v. Cornute* (1979), 64 Ohio App.2d 199, 201.

{¶50} Stadmire never raised this defense at trial and thus failed to establish that the victim was released in a safe place unharmed. Moreover, the record is replete with evidence that she was not released, but rather escaped while she was still bound by duct tape. There was also evidence that she sustained physical and psychological injuries as a result of the kidnapping. Therefore, Stadmire's ninth assignment of error is overruled.

X. Allied Offenses

{¶51} In his tenth assignment of error, Stadmire argues the trial court subjected him to unconstitutional multiple punishments because it failed to merge the offense of aggravated robbery and kidnapping. If the indictment contains two or more allied offenses of similar import, a defendant may only be convicted of one. R.C. 2941.25(A). However, if the defendant's conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, a defendant may be convicted of all of them. R.C. 2941.25(B).

{¶52} Stadmire claims that pursuant to R.C. 2941.25, aggravated robbery and kidnapping are "allied offenses of similar import" and, therefore, the trial court should not have convicted and sentenced him for both offenses. However, Stadmire never objected to the convictions or sentences imposed. Therefore, his claim that the sentences are allied offenses of similar import is subject only to a plain error analysis. Crim.R. 52; *State v. Fields* (1994), 97 Ohio App.3d 337, 343-344.

{¶53} In *State v. Logan* (1979), 60 Ohio St.2d 126, the Ohio Supreme Court established the following guidelines to be used in determining whether kidnapping and another offense are of the same or similar kind or committed with a separate animus:

{¶54} "(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;

{¶55} "(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."

{¶56} Here, Stadmire and Boyd forcibly restrained the victim in her car for over four hours. They drove to several locations while she was duct-taped, bound, and buried under blankets in the back seat. This extended detention satisfies the requirements of prolonged restraint and substantial movement. The confinement was secretive because she was buried under a yoga mat and blankets in the back seat. Stadmire also sexually assaulted the victim after her movement was restrained. Under these circumstances, we conclude that the restraint and movement of the victim in this case was not merely incidental to the robbery but had a significance independent of the robbery. Accordingly, we find the court did not err in sentencing defendant for both offenses, and overrule this assignment of error.

XI. Maximum and Consecutive Sentences

{¶57} In his eleventh assignment of error, Stadmire argues he was subjected to cruel and unusual punishment when the trial court sentenced him to maximum consecutive sentences. Although Stadmire concedes the court stated its findings on the record, he claims the sentences are excessive.

{¶58} In *State v. Edmonson* (1999), 86 Ohio St.3d 324, 329, the Ohio Supreme Court held that in order to lawfully impose a maximum prison sentence, the record must reflect that the trial court found the defendant satisfied at least one of the criteria set forth in R.C. 2929.14(C). As pertinent to this appeal, R.C. 2929.14(C) provides that a trial court may impose a maximum sentence only if it finds the offender committed the worst form of the offense or that the offender poses the greatest likelihood of committing future crimes.

{¶59} In addition, R.C. 2929.19(B) requires the trial court "make a finding that gives its reasons for selecting the sentence imposed" and if that sentence is the maximum term allowed for that offense, the judge must set forth "reasons for imposing the maximum prison term." *Edmonson*, supra at 328. A judge commits reversible error if he fails to enumerate the findings behind the sentence. Id. at 329.

{¶60} In the instant case, the trial judge found that Stadmire demonstrated the greatest likelihood that he would commit future crimes. In making this finding, the trial judge mentioned that Stadmire, who was then only thirty years old, had already served eleven years in prison. He committed these offenses while he was on parole and approximately eight months after being released from prison. The trial judge also found that the Stadmire's actions showed "no consideration for other people." In light of Stadmire's criminal history and inability to be rehabilitated, the trial court properly found

that he was a likely recidivist. Such a finding justifies the imposition of maximum sentences.

{¶61} Although not required to do so, the trial judge also found that Stadmire committed the worst form of the offense. Statutory law does not, nor can it, define the "worst form of the offense." To determine whether an offender committed the worst form of an offense, the trial court should consider the totality of the circumstances. *State v. Garrard* (1997), 124 Ohio App.3d 718. In finding that Stadmire committed the worst form of the offense, the court explained:

{¶62} "The aggravated robbery, the terror that was inflicted on this lady over a four-hour period, sexual assault on her, the only thing that could have made this worse would have been a more severe sexual assault or serious physical injury or death. But, those would have carried additional penalties. So, just in the context of an aggravated robbery or kidnapping, itself, this is at the level of the worst form of the offense.

{¶63} "And, the sexual assault on this lady, although not intrusive in the way that a rape would be intrusive, nonetheless, was committed in the context of absolute terror, when she did not know what was to come next. Typical sexual assaults that we see involve some semblance of romance. This was pure animal activity that was carried on under circumstances where someone didn't know what was coming next and could only fear the worst.

{¶64} "Theft is, frankly, almost minor here, but, you know, there was a lot of money involved – credit card – well planned and after the fact, but ultimately had you thought about this over a period of hours, there was a plan how to make use of this. So, I think all of these fall into the category of the worst form of the offense."

{¶65} After considering the totality of the circumstances, which includes Stadmire's premeditation to commit a robbery, the prolonged detention exceeding four hours, the terror Stadmire instilled in his victim, and the psychological and physical pain suffered by the victim, this court cannot say the trial court erred in concluding that this was the worst form of the offense.

{¶66} Stadmire also claims the trial court improperly imposed consecutive sentences. R.C. 2929.14(E)(4), which governs the imposition of consecutive sentences, provides that a court may impose consecutive sentences only when it concludes that the sentence is (1) necessary to protect the public from future crime or to punish the offender; (2) not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public; and (3) the court finds one of the following: (a) the crimes were committed while awaiting trial or sentencing, under sanction, or under post-release control; (b) the harm caused by multiple offenses was so great or unusual that a single prison term would not adequately reflect the seriousness of his offense; or (c) the offender's criminal history demonstrates that consecutive sentences are necessary to protect the public from future crime. R.C. 2929.14(E)(4).

{¶67} Further, R.C. 2929.19(B)(2) provides that:

{¶68} "The court shall impose a sentence and shall make a finding that gives its reasons for selecting the sentence imposed in any of the following circumstances:

{¶69} "* * *

{¶70} "(C) If it imposes consecutive sentences under section 2929.12 of the Revised Code, its reasons for imposing the consecutive sentences."

{¶71} Thus, R.C. 2929.14(E)(4) requires the trial court to make at least three findings prior to sentencing an offender to consecutive sentences and, pursuant to R.C. 2929.19(B)(2)(c), the trial court must give the reasons for its findings. Failure to sufficiently state these reasons on the record constitutes reversible error. *State v. Gary* (2001), 141 Ohio App.3d 194, 196-198; *State v. Beck*, Cuyahoga App. No. 75193, 2000-Ohio-1349.

{¶72} Here, the trial judge stated that public protection outweighed every other consideration. The judge emphasized the fact that Stadmire had an extensive criminal history, showed no remorse, and still failed to take any responsibility for his crimes. The court stated:

{¶73} "Okay, the fact that you have learned nothing from eleven years in the penitentiary, only to come out and commit such an aggressive crime again, I think speaks loudly to the inability of any prison system to reform you and to the continuing danger that you pose to people.

{¶74} "And this isn't the first time, apparently, that you didn't learn your lesson from prison, because as the prosecutor pointed out, after you served a year in prison, you got out and shortly thereafter, committed five separate offenses that got you the six to ten."

{¶75} The court's statements regarding Stadmire's extensive criminal history, lack of remorse, inability to be rehabilitated, and failure to take responsibility for his actions adequately support the imposition of consecutive sentences. Accordingly, Stadmire's eleventh assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

PATRICIA ANN BLACKMON, P.J. and

JOSEPH J. NAHRA, J.* CONCUR

JUDGE

COLLEEN CONWAY COONEY

*Sitting by assignment, Judge Joseph J. Nahra, Retired, of the Eighth District Court of Appeals.