[Cite as *State v. Gibson*, 2009-Ohio-4984.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
**No. 92275**

## STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

## ANTHONY GIBSON

DEFENDANT-APPELLANT

**JUDGMENT:**
**AFFIRMED IN PART; REVERSED IN PART;**
**AND REMANDED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-511833

**BEFORE:** Cooney, A.J., Celebrezze, J., and Sweeney, J.

**RELEASED:** September 24, 2009

**JOURNALIZED:**

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

COLLEEN CONWAY COONEY, A.J.:

**{¶ 1}** Defendant-appellant, Anthony Gibson ("Gibson"), appeals his convictions for rape, kidnapping, and domestic violence. Finding some merit to the appeal, we affirm in part and reverse in part.

**{¶ 2}** This case arose in June 2008, when Gibson was charged with four counts of rape, gross sexual imposition, kidnapping with a sexual motivation specification, and domestic violence. The court dismissed the gross sexual imposition charge before trial and dismissed one of the rape charges during trial pursuant to Crim.R. 29. The jury found Gibson guilty of the remaining charges. The trial court sentenced Gibson to five years in prison for each of the three rape counts, five years in prison for the kidnapping count, and eighteen months in prison on the domestic violence count, all running concurrently for a total of five years in prison. The court also advised him of postrelease control. Gibson now appeals, raising five assignments of error for our review.

Manifest Weight and Sufficiency of the Evidence

**{¶ 3}** In the first assignment of error, Gibson claims that his convictions were against the manifest weight of the evidence. In the second, he argues that the evidence was insufficient to convict him of the crimes. Although the standards of review for these claims differ, we evaluate them together as they involve the same evidence.

**{¶ 4}** In *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, ¶113, the Ohio Supreme Court explained the standard for sufficiency:

**{¶ 5}** "Raising the question of whether the evidence is legally sufficient to support the jury verdict as a matter of law invokes a due process concern. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, 678 N.E.2d 541. In reviewing such a challenge, '[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.' *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560."

**{¶ 6}** In *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶25, the Ohio Supreme Court restated the criminal manifest weight standard and explained how it differs from the sufficiency standard:

**{¶ 7}** "The criminal manifest-weight-of-the-evidence standard was explained in * * * *Thompkins* * * *, [in which] the court distinguished between sufficiency of the evidence and manifest weight of the evidence, finding that these concepts differ both qualitatively and quantitatively. Id. at 386, 678 N.E.2d 541. The court held that sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, but weight of the evidence addresses the evidence's

effect of inducing belief. Id. at 386-387, 678 N.E.2d 541. In other words, a reviewing court asks whose evidence is more persuasive -- the state's or the defendant's? We went on to hold that although there may be sufficient evidence to support a judgment, it could nevertheless be against the manifest weight of the evidence. Id. at 387, 678 N.E.2d 541. 'When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony.' Id. at 387, 678 N.E.2d 541, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652."

**{¶ 8}** In the instant case, Gibson was convicted of rape under R.C. 2907.02(A)(2), which provides, "No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force." "Sexual conduct," according to R.C. 2907.01(A) includes:

> "vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse."

**{¶ 9}** Gibson was convicted of domestic violence under R.C. 2919.25(A), which states, "No person shall knowingly cause or attempt to cause physical

harm to a family or household member." A household member may include a spouse who is residing with or has resided with the offender. R.C. 2919.25(F)(1)(a)(i). Finally, Gibson was convicted of kidnapping under R.C. 2905.01(A)(4), which states:

> "No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, 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 engage in sexual activity, as defined in section 2907.01 of the Revised Code, with the victim against the victim's will."

**{¶ 10}** The jury heard the following evidence at trial. Gibson and his wife, K.W., had been married for eleven years but had been living separately from March to May 2008. During this time period, they spent several nights together. Sometime around May 2008, Gibson was evicted from his apartment, and K.W. allowed him to stay in her Cleveland Metropolitan Housing Authority ("CMHA") apartment until he could find another place to stay.

**{¶ 11}** On the evening of May 30, Gibson and K.W. planned to go out to a restaurant for dinner. They began their evening by consuming a few drinks at K.W.'s apartment. At 4:30 p.m., they proceeded to her friend's home, where they stayed for about twenty minutes. Next, they stopped at a liquor store to purchase rum, and traveled to K.W.'s aunt's home. They consumed more alcoholic beverages at the aunt's home, and by the time they left, it was

too late to go out to dinner. They purchased food at Taco Bell and returned to K.W.'s apartment at approximately 11:00 p.m.

**{¶ 12}** When they entered the apartment, K.W. said, "You didn't want to go to dinner no way." Gibson responded, "Bitch, fuck you." Instantly, K.W. felt fearful. She believed Gibson was high on crack cocaine. Gibson had been smoking crack cocaine for twenty years, and K.W. suspected that he had purchased and smoked crack cocaine that night.

**{¶ 13}** After their verbal exchange, K.W. proceeded upstairs to use the bathroom, and Gibson followed her. When she asked why he was following her, he responded, "Are you going to call the police?" K.W. described Gibson as acting strangely. She went back downstairs, and Gibson followed her into the kitchen. When she went back upstairs to the bathroom again, he followed her and waited until she finished in the bathroom, following her back downstairs. He asked if she was going to call police and said, "Fuck you. You know what, I am sick of your ass." K.W. asked Gibson why he was acting that way. He told her, "Shut the fuck up. I'm sick of you. You're a dumb bitch." K.W. began to feel fearful and wondered how she could contact police. Gibson made a fist and said, "Shut the fuck up." K.W. grabbed Gibson, embracing him in an attempt to placate him. Gibson pushed her away and told her to "get the fuck off" of him. He started making an angry

sound, and K.W. tried to embrace him again. When she asked him why he was acting that way, he replied, "You know what, just shut the fuck up."

**{¶ 14}** K.W. testified that Gibson repeatedly stated, "Bitch, I'm going to kill you. I'm going to kill your ass." He removed her dress and tore her bra, which fell to the floor. When K.W. looked at it, Gibson asked, "What, you going to use that as evidence?" Gibson then stood over K.W., grabbed her head, placed it near his penis, and made her perform oral sex on him. He kept saying, "Shut the fuck up." Then he told her to get on the bed and lay down. He performed oral sex on her. He told her to turn around and attempted to engage in anal sex with her. When she complained that he was hurting her, he turned her around and engaged in vaginal intercourse with her. When Gibson was done, he asked, "Did you like it?" K.W. replied, "Yes." Then he said, "No, the fuck, you didn't."

**{¶ 15}** Gibson eventually fell asleep on the mattress downstairs where the two usually slept when they spent the night together. K.W. lay next to him for a few hours, then rolled out of bed without waking him. She put on her robe and took her keys and cell phone and left the apartment to call police.

**{¶ 16}** Officers Manuel Leon ("Leon"), Theodore Troyer ("Troyer"), and Maurice Kennedy ("Kennedy") of the CMHA police responded to the call at K.W.'s apartment to investigate a possible rape. K.W. approached them

outside the apartment wearing a robe. She was shaking and upset and stammered that she had been raped by Gibson. She did not appear intoxicated but smelled of alcohol. She explained that Gibson was sleeping inside her apartment. The CMHA officers had EMS transport her to the hospital.

**{¶ 17}** The CMHA police entered her apartment and found Gibson asleep on a mattress on the living room floor. They woke him up and directed him to get dressed and come outside where they arrested him.

**{¶ 18}** CMHA police searched K.W.'s apartment for evidence. They found a torn bra in the living room next to the mattress. Loose change and K.W.'s bracelet and earring were observed on the kitchen floor, and a chair had been knocked over. Clothing was strewn about the floor, including Gibson's underwear and part of K.W.'s dress.

**{¶ 19}** At the hospital, Judith Ann Reiner ("Reiner"), a sexual assault nurse, examined K.W. using a rape kit. K.W. told Reiner that her ex-husband had orally and vaginally penetrated her. K.W. told her that he had tried to penetrate her anally but when she complained that it hurt, he turned her around and penetrated her vaginally. Reiner observed scratches, bruises, and reddened areas on K.W.'s arms but saw no injuries to her vagina, face, mouth, or anus. Reiner testified that the lack of injury to these regions was not unusual in a rape case and that a rape exam could not distinguish

between rape and consensual "rough sex." K.W. told Reiner that she had been choked, but Reiner did not observe any evidence of choking on K.W.'s neck. Reiner also noted that K.W. appeared upset and that her account of the assault was fragmented and out of sequence.

**{¶ 20}** Detective Michael Gibbs ("Gibbs") of the Cleveland police came later to the scene to further investigate. He collected the torn bra, men's underwear, a pair of stockings, and the bedding from the living room.

**{¶ 21}** Detective Alan Strickler ("Strickler"), of the Cleveland police sex crimes and child abuse unit, obtained a DNA sample and a statement from Gibson. At trial, he read from Gibson's statement. Gibson explained to him that he and K.W. had engaged in a variety of consensual sex acts. Gibson claimed that on most nights, he and K.W. engaged in oral, anal, and vaginal sex. Gibson denied having taken drugs on the night of the incident. He told Strickler that K.W. was highly intoxicated that night but did not refuse sex. He also claimed that the bumps and bruises on K.W.'s arms resulted from her work at a nursing home, where residents often hit or kicked her. Gibson denied having told K.W. not to come to court. He told Strickler that K.W. took her own clothes off and tore her bra because she was intoxicated.

**{¶ 22}** K.W. testified that she worked in a nursing home, and some of the residents hurt her, causing her to sustain bumps and bruises. But when that happened, she would report it to her employer. She also testified that

she did not consent to any of the sexual activity but went along with it because she feared Gibson, who had threatened to kill her and was "acting crazy."

**{¶ 23}** K.W. did not wish to press charges against Gibson. After Gibson was arrested and criminally charged, she spoke to him at least eight times, recording some of the phone calls, because she wanted to know what happened. The jury heard a recording of a phone call from Gibson to K.W., in which she asked why he had threatened to hurt and kill her. He admitted, "That was fucked up." He told her not to come to court to testify against him. He said he would free her from the marriage if she did not come to court. Thereafter, K.W. tried to drop the charges.

**{¶ 24}** Based on the foregoing, the evidence was sufficient to convict Gibson of the three counts of rape, and the convictions are not against the manifest weight of the evidence. To support a conviction for rape, the evidence must show that the defendant engaged in sexual conduct with the victim by purposely causing her to submit using force or the threat of force. R.C. 2907.02(A)(2). Sexual conduct can include penetration or insertion, however slight, of any part of the defendant's body into the victim's vagina or anus, or oral sex. R.C. 2907.01(A). In the instant case, the State presented evidence that Gibson repeatedly threatened to kill K.W., and she submitted to sexual activity because she feared for her safety. She testified that Gibson

raped her anally and vaginally, forcibly performed oral sex on her, and forced her to perform oral sex on him. Gibson penetrated her anus slightly, which was sufficient for that count of rape. The CMHA officers testified that Gibson appeared shaken when they arrived on the scene, and they found objects strewn about the apartment, including a torn bra. Reiner testified that K.W. had scratches, bruises, and red areas on her arms. All of these were consistent with rape.

**{¶ 25}** Moreover, parts of Gibson's statement were implausible – for instance, that K.W. had torn off her own bra. Gibson argues that the entire encounter was consensual, pointing out, for example, that K.W. had voluntarily embraced him. But K.W. testified that she feared for her safety and embraced him in an effort to placate him. Her gesture did not make the sexual acts consensual. Based on the evidence, the jury could have reasonably concluded that the evidence was consistent with a rape rather than consensual sexual activity.

**{¶ 26}** The evidence was also sufficient to convict Gibson of domestic violence, and that conviction was not against the manifest weight of the evidence. The crime of domestic violence requires that the defendant knowingly harmed or attempted to harm a household member, including a spouse or former spouse who currently resides with the defendant or who has previously resided with the defendant. K.W. was Gibson's spouse and

resided with him on and off during the period when the incident took place. The jury heard evidence that Gibson harmed K.W. by causing her to sustain bruises to her arms. Gibson also followed K.W. up and down the stairs while threatening to hurt or kill her. Accordingly, the jury did not lose its way in convicting Gibson of domestic violence.

**{¶ 27}** Finally, the evidence was sufficient and the jury did not lose its way in convicting Gibson of kidnapping. Kidnapping requires either that the defendant restrain the liberty of the victim or transport the victim away from the place where he or she is found. *State v. Logan* (1979), 60 Ohio St.2d 126, 130, 397 N.E.2d 1345; *State v. Marine*, 141 Ohio App.3d 127, 2001-Ohio-2147, 750 N.E.2d 194. Gibson argues that he did not restrain K.W.'s liberty, nor did he remove her from the location where she was found. But the evidence shows that Gibson threatened to harm and kill K.W., causing her to remain in her apartment and submit to sexual activity against her will. She testified that she crept out of the apartment when she knew he had fallen asleep, because she could not leave while he was awake.

**{¶ 28}** Based on the foregoing, Gibson's first and second assignments of error are overruled because the evidence was sufficient to support each conviction and the convictions are not against the manifest weight of the evidence.

Merger of Allied Offenses of Similar Import

**{¶ 29}** In the fourth assignment of error, Gibson claims that the trial court erred in upholding his convictions because rape and kidnapping and rape and domestic violence are allied offenses of similar import. The trial court sentenced Gibson to five years in prison for each rape count, five years in prison for the kidnapping count, and eighteen months in prison on the domestic violence count, all running concurrently for a total of five years in prison. Imposition of multiple sentences, even concurrent ones, for allied offenses of similar import is plain error.[1] *State v. Yarbrough*, 104 Ohio St.3d 1, 2004-Ohio-6087, 817 N.E.2d 845, ¶96-102; *State v. Whitfield*, Cuyahoga App. No. 90244, 2008-Ohio-3150, ¶37, citing *State v. Sullivan*, Cuyahoga App. No. 82816, 2003-Ohio-5930.

**{¶ 30}** Ohio's allied offense statute, R.C. 2941.25, prohibits multiple convictions and states 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."

[1]Gibson did not raise the error below, so we review for plain error.

**{¶ 31}** In *State v. Harris*, 122 Ohio St.3d 373, 2009-Ohio-3323, ¶10-13, the Ohio Supreme Court explained the two-step process to determine whether two offenses are allied offenses of similar import:

> "This court has interpreted R.C. 2941.25 to involve a two-step analysis. 'In the first step, the elements of the two crimes are compared. If the elements of the offenses correspond to such a degree that the commission of one crime will result in the commission of the other, the crimes are allied offenses of similar import and the court must then proceed to the second step. In the second step, the defendant's *conduct* is reviewed to determine whether the defendant can be convicted of both offenses. If the court finds either that the crimes were committed separately or that there was a separate animus for each crime, the defendant may be convicted of both offenses." (Emphasis sic.) *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117, 526 N.E.2d 816.
>
> "In *State v. Rance* (1999), 85 Ohio St.3d 632, 710 N.E.2d 699, paragraph one of the syllabus, we held that '[u]nder an R.C. 2941.25(A) analysis, the statutorily defined elements of offenses that are claimed to be of similar import are compared in the abstract.' (Emphasis sic.) We determined that, as opposed to considering elements within the context of the facts of each case, comparing the elements in the abstract 'is the more functional test, producing 'clear legal lines capable of application in particular cases.' ' Id. at 636, 710 N.E.2d 699, quoting *Kumho Tire Co., Ltd. v. Carmichael* (1999), 526 U.S. 137, 148, 119 S.Ct. 1167, 143 L.Ed.2d 238.
>
> "However, some courts interpreted *Rance* to require a strict textual comparison of the elements of the compared offenses under R.C. 2941.25(A). *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, ¶21. We concluded that that interpretation 'conflicts with legislative intent and causes inconsistent and absurd results.' Id. at ¶27. Thus, in *Cabrales* we clarified *Rance* and held that 'in determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), *Rance* requires courts to compare the elements of offenses in the abstract, i.e., without considering the evidence in the case, but does not require an exact alignment of elements.' Id."

**{¶ 32}** Therefore, our first step is to compare the elements of rape and kidnapping to determine whether the commission of one crime will result in the commission of another. An offender commits rape when he or she "engage[s] in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force." Kidnapping requires an offender to remove the victim from the place where he or she is found or to restrain the victim's liberty by deception, force, or threat of force. During a rape, the offender necessarily restrains a victim's liberty, such that every rape is also kidnapping. *State v. Winn*, 121 Ohio St.3d 413, 2009-Ohio-1059, 905 N.E.2d 154, ¶36, citing *State v. Donald* (1979), 57 Ohio St.2d 73, 74-75, 11 O.O.3d 242, 386 N.E.2d 1341.

**{¶ 33}** Moving to the second prong of the test, we must determine whether Gibson committed the crimes separately or had separate animus for each. We conclude that he did not. "Animus" is the defendant's "purpose or, more properly, immediate motive." *State v. Wilson*, Cuyahoga App. No. 91091, 2009-Ohio-1681, fn. 1, quoting *Logan* at 131. In *State v. Craig*, 110 Ohio St.3d 306, 2006-Ohio-4571, 853 N.E.2d 621, ¶117, the Ohio Supreme Court explained:

> "The test for determining whether kidnapping and rape were committed with a separate animus as to each is 'whether the restraint or movement of the victim is merely incidental to a separate underlying crime or, instead, whether it has a significance independent of the other offense.' Id. at 135, 14 O.O.3d 373, 397 N.E.2d 1345. '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.' Id. at subparagraph (b) of the syllabus. In *Logan* and in subsequent cases, we have said that prolonged restraint, secretive confinement, or substantial movement of the victim apart from that involved in the other crime were factors establishing a separate animus for kidnapping. Id. at subparagraph (a) of the syllabus; *State v. Foust*, 105 Ohio St.3d 137, 2004-Ohio-7006, 823 N.E.2d 836, ¶141; [*State v.*] *Lynch*, 98 Ohio St.3d 514, 2003-Ohio-2284, 787 N.E.2d 1185, ¶134."

**{¶ 34}** In the instant case, the State has not shown that Gibson had a separate purpose to kidnap K.W. The State argues that because the jury convicted Gibson of kidnapping without the sexual motivation specification, it found that Gibson committed the kidnapping with a separate animus. However, the State has not shown that Gibson moved K.W. beyond the site of the rape, confined her secretively or for a prolonged period, or subjected her to a higher risk of harm. Gibson confined K.W. within her apartment and raped her in the same place – on a mattress in the living room. On these facts, we hold that the one of the rape convictions and the kidnapping conviction should merge.

**{¶ 35}** Gibson also claims that the domestic violence conviction should merge with the rape convictions. We disagree. The elements of the crimes do not correspond to the extent that the commission of one crime results in the commission of the other. Domestic violence requires knowingly causing or attempting to cause physical harm to a family or household member but

does not require a sexual act. Rape requires the defendant to threaten or force the victim, who need not be a family or household member, into sexual contact. Accordingly, the offenses are not allied offenses of similar import and separate convictions for domestic violence and rape may stand. The fourth assignment of error is sustained in part.

Ineffective Assistance of Counsel

**{¶ 36}** In the third assignment of error, Gibson argues that he received ineffective assistance of counsel because his counsel (1) failed to advise him that he should not make incriminating statements against himself, (2) failed to vigorously explore the issue of consent, (3) failed to use Crim.R. 16(B)(1)(g) to examine the prior statements of witnesses, and (4) failed to request a limiting jury instruction on the use of a prior domestic violence conviction.

**{¶ 37}** In a claim of ineffective assistance of counsel, the burden is on the defendant to establish that counsel's performance fell below an objective standard of reasonable representation and prejudiced the defense. *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph two of the syllabus; *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. To show that his counsel was ineffective, Gibson must show that: (1) counsel's performance was deficient, in that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment, and (2) counsel's deficient performance

prejudiced the defense in that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different. *Bradley* at paragraph three of the syllabus; *Strickland*. If the defendant fails to establish either prong, then the court should overrule the ineffective assistance of counsel claim. Id. at 697.

**{¶ 38}** We must presume that a licensed attorney is competent and that the challenged action is the product of sound trial strategy and falls within the wide range of professional assistance. *Strickland* at 689. Courts must generally refrain from second-guessing trial counsel's strategy, even where that strategy is questionable, and appellate counsel claims that a different strategy would have been more effective. *State v. Jalowiec*, 91 Ohio St.3d 220, 237, 2001-Ohio-26, 744 N.E.2d 163.

**{¶ 39}** In the instant case, Gibson claims that his counsel erred in failing to advise him against making self-incriminating statements. He also complains that his counsel did not meet with him until two months after his arrest. But shortly after Gibson was arrested, he signed a *Miranda* waiver, which advised him that he was giving up his right to remain silent and that any of his statements could be used against him. Nevertheless, he made threatening phone calls to K.W. that were recorded and introduced at trial. Gibson has not shown that if his counsel had met with him sooner, he would

not have made these threatening calls. Thus, he has not shown counsel's failure to meet with him prejudiced him.

**{¶ 40}** We next turn to his claim that his counsel did not explore the issue of consent. As Gibson did not testify at trial, K.W. was the only witness who could testify to consent, and she repeatedly denied consenting to the acts. On appeal, Gibson proposes several lines of questioning that trial counsel should have pursued; however, trial counsel's choice of alternate lines of questioning does not amount to ineffective assistance of counsel. Trial counsel cross-examined the witnesses to establish that K.W. had consumed alcohol on the night in question, that K.W. worked in a job that caused her to sustain bumps and bruises, that K.W. did not want Gibson to be prosecuted, that K.W. had planned to move into Gibson's new apartment when he obtained one, that K.W. wanted to "make the marriage work," that Gibson purchased a purse for K.W. on the evening in question, and that K.W. and Gibson generally slept on the air mattress where she was raped. On these facts, we must conclude that the deficiency that Gibson alleges is a matter of trial strategy.

**{¶ 41}** Next, we evaluate Gibson's claim that trial counsel failed to use Crim.R. 16(B)(1)(g) to examine the prior statements of witnesses. The trial transcript shows that trial counsel identified some inconsistencies in the testimony. For example, he elicited K.W.'s admission that she had told

Reiner on the night of the rape that Gibson had choked her, yet during trial she did not recall having been choked. Gibson has not shown how the result of the trial would have been any different if trial counsel had utilized Crim.R. 16(B)(1)(g), so he cannot prevail on this claim.

Limiting Instruction Regarding Prior Conviction

**{¶ 42}** Finally, we evaluate Gibson's claim his counsel was deficient in failing to request a limiting jury instruction regarding his previous domestic violence conviction. Domestic violence is a fourth degree felony if the defendant has a prior conviction for domestic violence. R.C. 2919.25(D)(3). The prior conviction is an essential element of the offense if it enhances the penalty, and the jury must determine the existence of a prior conviction as a factual matter before the trial court can impose a greater punishment. *State v. Arnold* (Jan. 24, 2002), Cuyahoga App. No. 79280, citing *State v. Allen* (1987), 29 Ohio St.3d 53, 54, 506 N.E.2d 199. Accordingly, the jury considered evidence of Gibson's prior domestic violence conviction. The court instructed the jury, in part, as follows:

> "If you find that the State proved beyond a reasonable doubt all the essential elements of the offense of domestic violence, your verdict must be guilty.
> "If you find that the State failed to prove beyond a reasonable doubt any one of the essential elements of the offense of domestic violence as charged in count seven, your verdict must be not guilty.
>
> "*If your verdict is guilty of domestic violence, you will separately determine* whether the State proved beyond a reasonable doubt that the

> defendant was previously convicted of domestic violence, to wit: That the defendant, with counsel, on or about August 25, 2004, in the Court of Common Pleas, Cuyahoga County, Ohio, case number CR-04-452940, was convicted of the crime of domestic violence in violation of Revised Code 2919.25.
>
> "Now, in this case the parties have stipulated or agreed that defendant was previously convicted of domestic violence as charged." (Emphasis added.)

**{¶ 43}** In these instructions, the court specified that the jury was to consider the prior conviction only if it found Gibson guilty of domestic violence. This implies that the jury was not to consider the prior conviction as evidence that Gibson had committed domestic violence in the case before it. Although a limiting instruction is clearly preferable, Gibson has not shown that the result of the trial would have been different if his trial counsel had requested one.

**{¶ 44}** Based on the foregoing, Gibson has not borne his burden to prove that he received ineffective assistance of counsel. We overrule the third assignment of error.

Jury Instruction

**{¶ 45}** In the fifth and final assignment of error, Gibson claims that the trial court committed plain error in failing to issue a limiting instruction regarding Gibson's prior conviction for domestic violence. "Plain error does not exist unless, but for the error, the outcome at trial would have been different." *State v. Joseph* (1995), 73 Ohio St.3d 450, 653 N.E.2d 285, citing

*State v. Moreland* (1990), 50 Ohio St.3d 58, 62, 552 N.E.2d 894, 899. As we have already concluded, Gibson has not shown that the result of the trial would have been different had the court issued a limiting instruction.

**{¶ 46}** Gibson relies on *State v. Ganelli*, Cuyahoga App. Nos. 84694 and 84695, 2005-Ohio-770, to support his argument. However, the trial court in *Ganelli* committed multiple errors that affected the outcome of the case. First, it had erroneously bifurcated the trial on the issue of the prior conviction. Second, the State introduced testimony about Ganelli's prior convictions to explain his arrest for the offense for which he was being tried. Moreover, no evidence other than the victim's testimony connected Ganelli with the crime. And the prosecutor referred to the prior convictions during closing argument. Finally, the trial court issued no instruction at all related to the prior conviction.

**{¶ 47}** In the instant case, the trial court correctly refused to bifurcate the trial. The prosecutor did not question the witnesses about the prior conviction and did not raise the issue during closing argument. There existed independent evidence connecting Gibson with the crime, including photos and testimony about K.W.'s injuries, recordings of Gibson's threatening phone calls to K.W. before trial, and photos of K.W.'s disheveled apartment on the morning after the incident. On these facts, the trial court's

failure to issue a limiting instruction did not rise to the level of plain error. Therefore, we overrule the fifth assignment of error.

**{¶ 48}** Judgment is affirmed in part and reversed in part.

**{¶ 49}** We remand to the trial court to vacate the finding of guilt and sentence for either kidnapping or one of the rape convictions. The State must determine which of Gibson's charges should merge into the other for the purpose of his conviction and sentence. See *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, ¶43.

It is ordered that appellant and appellee share the 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 common pleas court to carry this judgment into execution.

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

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COLLEEN CONWAY COONEY, ADMINISTRATIVE JUDGE

FRANK D. CELEBREZZE, JR., J., and
JAMES J. SWEENEY, J., CONCUR