[Cite as *State v. Ortiz*, 2011-Ohio-1238.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95026

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANTHONY J. ORTIZ

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-520686

BEFORE: Jones, J., Celebrezze, P.J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: March 17, 2011

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LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, Anthony Ortiz ("Ortiz"), appeals his convictions for rape and kidnapping. For the reasons that follow, we reverse and remand for resentencing.

Procedural History and Facts

{¶ 2} In 2009, Ortiz was charged with two counts of rape and one count each of gross sexual imposition and kidnapping. The kidnapping charge had a sexual motivation

specification, and both the rape and kidnapping charges had sexually violent predator specifications. Pursuant to a plea agreement, Ortiz pleaded guilty to one count of rape and one count of kidnapping with the sexual motivation specification. After his plea, the trial court continued the case for a sentencing hearing, even though Ortiz stated that he did not want a presentence investigation report conducted prior to sentencing.

{¶ 3} At the sentencing hearing, the trial court heard from both the state and defense counsel, the victim's mother, and Ortiz before announcing its sentence. The state's recitation of the facts, as well as facts that can be gleaned from the record, are as follows.

{¶ 4} The victim, A.B.,[1] was a 15-year-old runaway. Hungry, she went to a Giant Eagle grocery store in Middleburg Heights and shoplifted a block of cheese to eat. Ortiz, an on-duty security guard, stopped A.B. as she was leaving the store. Ortiz was dressed in a Tenable Security uniform and drove a Tenable Security-marked Jeep. Ortiz told A.B. he observed her stealing from the store and she needed to come with him to make a statement. A.B. got into Ortiz's car and he drove her to a separate building with a padlocked door. Ortiz unlocked the door and took her into the empty building, down a long hallway, and into an empty room. The room consisted of bare cement floor and walls and a single folding chair. Ortiz began to question A.B. why she was not home, what she was doing, and "eventually took it further and raped her" vaginally. Ortiz then left A.B. alone in the room.

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[1]We refer to the named victim in this case by initials in accordance with this court's policy of identifying sexual assault victims by their initials.

{¶ 5} A.B. went to her mother's house and told her what had happened. A.B.'s mother took her to the hospital for a sexual assault examination.

{¶ 6} After the incident, Ortiz told the store manager that he had seen A.B. steal cheese, but the store manager did not want to "prosecute" her because nobody from the store saw her do it. Ortiz wrote in his Tenable Security incident report that the "girl ran away and he never had contact with her." He told the police the same. But DNA recovered from A.B.'s rape kit matched Ortiz.

{¶ 7} At sentencing, the state argued that the offenses of kidnapping and rape should not merge as allied offenses of similar import because Ortiz lured A.B. into his car, drove her to another building, unlocked it, took her down a hallway, and into a room before raping her. In response, the trial court stated: "The state and I disagree about what merges and what does not. As I explained to them at sidebar, Mr. Ortiz, I take a very conservative view of merger when kidnapping is [pled] in relationship to another case. It may be that [the state] is right and I am wrong, but in my opinion for purposes of sentencing the two counts merge. Therefore you are sentenced as follows: In Count 1, felony of the first degree, to eight years in prison. Count 4, felony of the first degree, eight years in prison to be served concurrent to each other with credit for any time served."

{¶ 8} The trial court, however, failed to merge the convictions so as to indicate that Ortiz was only convicted of one crime. In the sentencing journal entry, no mention of merger

was made and the entry merely indicated that the sentences would run concurrent.

{¶ 9} Ortiz now appeals, raising the following assignment of error for our review:

> "I. The court erred when, despite finding that counts one and four are allied offenses of similar import, it failed to merge the offenses and instead sentenced Mr. Ortiz to concurrent time."

Allied Offenses

{¶ 10} Ortiz argues that the trial court erred because, even though the trial court found that the convictions should merge, it failed to merge his convictions and instead just ran his sentences concurrently. The state maintains that the convictions should not merge because they were not committed with the same animus. While Ortiz is correct that the trial court erred when it failed to actually merge his convictions upon the finding that the offenses should merge, we pause to consider whether the rape and kidnapping are indeed allied offenses of similar import in this case.

{¶ 11} We review de novo the issue of whether Ortiz's convictions for rape and kidnapping merge as allied offenses of similar import. See *State v. Young*, Montgomery App. No. 23438, 2010-Ohio-5157; *State v. Cox*, Adams App. No. 02CA751, 2003-Ohio-1935; *State v. Volgares* (May 17, 1999), Lawrence App. No. 98CA6.

{¶ 12} R.C. 2941.25 provides:

> "(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

"(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them."

{¶ 13} In *State v. Johnson*, Slip Opinion No. 2010-Ohio-6314, the Ohio Supreme Court determined:

"Under R.C. 2941.25, the court must determine prior to sentencing whether the offenses were committed by the same conduct. Thus, the court need not perform any hypothetical or abstract comparison of the offenses at issue in order to conclude that the offenses are subject to merger.

"In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), the question is whether it is possible to commit one offense and commit the other with the same conduct, not whether it is possible to commit one without committing the other. * * * If the offenses correspond to such a degree that the conduct of the defendant constituting commission of one offense constitutes commission of the other, then the offenses are of similar import.

"If the multiple offenses can be committed by the same conduct, then the court must determine whether the offenses were committed by the same conduct, i.e., 'a single act, committed with a single state of mind.' * * *

"If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged.

"Conversely, if the court determines that the commission of one offense will never result in the commission of the other, or if the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge." (Internal citations omitted.) Id. at ¶46-51.

{¶ 14} Ortiz was convicted of rape in violation of R.C. 2907.02(A)(2), which provides that "[n]o person shall engage in sexual conduct with another when the offender purposely

compels the other person to submit by force or threat of force." Ortiz also pleaded guilty to kidnapping in violation of R.C. 2905.01(A)(4), which provides that "[n]o person, by force, threat, or deception, * * * 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."

{¶ 15} The Ohio Supreme Court has held that kidnapping, in violation of R.C. 2905.01(A)(4), and rape, in violation of R.C. 2907.02(A)(2), can constitute allied offenses of similar import. *State v. Mitchell* (1983), 6 Ohio St.3d 416, 418, 453 N.E.2d 593. In analyzing the two crimes post-*Johnson*, we come to the same conclusion because the crimes of kidnapping and rape as charged in this case may be committed with the same conduct.

{¶ 16} But our next step is to establish whether the two crimes in this case were committed with the same animus. And in doing so, we turn to the Ohio Supreme Court's holding in *State v. Logan* (1979), 60 Ohio St.2d 126, 397 N.E.2d 1345. In *Logan*, the court set forth the following guidelines to establish whether kidnapping and an offense of the same or similar import are committed with separate animus:

> "(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." Id. at syllabus.

{¶ 17} This court has repeatedly found that movement from one location to another, even at times in the same house or apartment, may demonstrate that the kidnapping was committed with a separate animus from the rape. See *State v. Walton*, Cuyahoga App. No. 93659, 2010-Ohio-3875 (finding separate animus when the victim followed defendant to his hotel room under false pretenses, the defendant became angry when the victim refused his hug and slammed the victim against the wall, forced her into the bathroom and then back onto the bed and raped her); *State v. Knight*, Cuyahoga App. No. 89534, 2008-Ohio-579 (finding separate animus when the victim testified that after the rape was over, the defendant grabbed her by the hair, forced her to go downstairs, and forced her to walk outside of the house with him and down the street to the corner); *State v. Lawson*, Cuyahoga App. No. 90589, 2008-Ohio-5590 (finding separate animus when defendant lured victim outside a rapid station, forcefully walked her through a parking lot, across a street, and behind a store where he raped her); *State v. Rodrigues*, Cuyahoga App. No. 80610, 2003-Ohio-1334 (finding separate animus when defendant carried victim from her apartment to his in the same complex and raped her).

{¶ 18} We find the factors the Ohio Supreme Court set forth in *Logan* exist in this case: Ortiz essentially restrained A.B. for a prolonged period of time from the time he lured her into

his car under the pretense that he needed her to fill out a report until he finished raping her; Ortiz confined A.B. in an empty building away from the supermarket; and the movement of A.B. from the Giant Eagle to a separate building in the area was sufficiently substantial as to demonstrate a significance independent of the rape. The record shows that Ortiz, while in uniform, told A.B. to get into his car, took her to another building that was padlocked, walked her down a long hall into an empty room, raped her, and then left her in the room by herself. It may also be argued that the second prong of *Logan* was also met as leaving 15-year-old A.B. in an empty building by herself may have subjected her to a substantial increase in risk of harm separate and apart from that involved in the rape.

{¶ 19} Thus, we find that under the circumstances of this case, there was substantial evidence that Ortiz committed the offenses of rape and kidnapping with separate animus. Therefore, the crimes are not allied offenses and the trial court erred in so finding.

{¶ 20} Although the trial court here did not actually merge the convictions, we remand the case for resentencing. The trial court, of course, is free to again run the sentences for kidnapping and rape concurrently. But the convictions do not merge.

{¶ 21} Accordingly, case is remanded for proceedings consistent with this opinion.

It is ordered that appellant recover of appellee 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.

LARRY A. JONES, JUDGE

FRANK D. CELEBREZZE, JR., P.J., and
SEAN C. GALLAGHER, J., CONCUR