[Cite as *State v. Williams*, 2011-Ohio-925.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94616

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JASON WILLIAMS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART AND
REVERSED IN PART

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-526542

BEFORE: Sweeney, J., Blackmon, P.J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: March 3, 2011

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JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellant Jason Williams appeals following his convictions for rape, gross sexual imposition, and kidnaping. For the reasons that follow, we affirm in part and reverse in part.

{¶ 2} At trial, the victim, who was at the time appellant's eight year old niece, testified at trial describing events she alleged had occurred at her residence on June 22, 2009. According to her, she was alone outside with appellant when he told her to sit down on his lap; then, he pulled up her skirt

and underwear and put his mouth on her "private."[1] They were behind her grandmother's car in the backyard. Then appellant pulled her by the arm between two houses. At that point, he picked her up and put her on the ground and put his "private" on her "private" and was bouncing on top of her. When the victim's aunt called for her, the victim went inside of the house and told her grandmother and aunt what had transpired.

{¶ 3} The victim testified that appellant did not try to kiss her or try to touch her neck. However, the medical records, that were created on the night of the incident, reflect that while appellant was being examined by the Sexual Assault Nurse Examiner (the "SANE nurse"), she told the nurse that appellant's hand went inside the lips of her vagina. The victim also reported that appellant had kissed her genitalia and neck. The SANE nurse noted redness to the labia minora that was consistent with the victim's story.

{¶ 4} The victim's underwear and skin stain swabs tested positive for amylase, a component of saliva. Appellant's DNA was consistent with the DNA profile obtained from the victim's underwear.

{¶ 5} The State also presented the testimony of the victim's grandmother and aunt, who were present in the house when the victim entered and reported the incident that had occurred with appellant. Neither

[1]The victim identified her "private" as the front of her body where she goes to the bathroom and described the appellant's "private" as the front "boy part" that is used to go to the bathroom.

the grandmother nor the aunt had witnessed the incident. Both women confronted appellant who denied it. The women described the victim as nervous, shaking, with dirt on the back of her clothing.

{¶ 6} The State also presented the testimony of a police officer who had responded to the report of a sexual assault and the detective who was assigned to the case. The state's exhibits included photographs, drawings, the victim's clothing, medical records, the rape kit, and laboratory reports.

{¶ 7} The appellant presented the testimony of his wife. Appellant's wife was inside the victim's home with her own children on the night of the incident. They had stopped by so that appellant could assist his step-mother by moving items into the basement. She did not observe appellant and the victim while they were alone outside. According to appellant's wife, the two were only alone for a few seconds after which the victim entered the house. The victim did not appear to be upset. She spoke with the victim on the phone after returning home that night who accused appellant of taking her by the side of the house, pulling down her underwear and kissing her.

{¶ 8} The jury found appellant guilty of all counts, the trial court found appellant not guilty of the sexually violent predator specifications. The trial court imposed various sentences on the multiple counts, running them all concurrently, for an aggregate sentence of twenty-five years to life in prison. Appellant assigns numerous errors for our review, which will be addressed

together where it is appropriate for discussion.

{¶ 9} "Assignment of Error No. I: The trial court denied appellant due process of law and equal protection of the law, violated the privilege against self-incrimination, and committed plain error by allowing the State to introduce evidence of appellant's custodial status and his post-arrest silence."

{¶ 10} "Plain error" exists if the trial court deviated from a legal rule, the error constituted an obvious defect in the proceedings, and the error affected a substantial right of the accused. *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68, 759 N.E.2d 1240. We recognize plain error "with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, at paragraph three of the syllabus.

{¶ 11} Appellant cites to excerpts from the victim's grandmother's testimony and the detective's testimony that indicate that appellant was in jail. However, the record reflects that the parties stipulated to appellant's custodial status. The trial court advised the jury of the following stipulation: "The defendant was being held in county jail before he was officially charged in this case." (Tr. 598.) Because the parties stipulated to this fact and there was no objection to the referenced testimony, its admission was not plain error.

{¶ 12} Secondly, appellant believes that the detective wrongfully

commented on his post-arrest silence. Appellant's position is not supported by the testimony that consisted of the detective explaining that she did not talk to appellant because he had an attorney. This was not a comment on appellant's silence but instead explained that the detective did not even attempt to have a conversation with him.

{¶ 13} The first assignment of error is overruled.

{¶ 14} "Assignment of Error II: The trial court committed plain error by allowing the prosecution to elicit inadmissible hearsay testimony from the complainant's mother regarding nightmares the complainant was allegedly experiencing as a result of the alleged sexual assault."

{¶ 15} Appellant contends that plain error occurred when the State elicited testimony from the victim's grandmother that the victim was having nightmares. The specific testimony is:

{¶ 16} "Q: So you noticed that she has these nightmares because she is sleeping with you?

{¶ 17} "A: Yes. She talks in her sleep now, too.

{¶ 18} "Q: Does she ever talk about what happened then?

{¶ 19} "A: She be saying no. I know she says she had a dream that [appellant] was over her and that she told her brother to jump into the water. He was holding onto [appellant] by the leg so he can jump in to save him and her alone. That's the only one she really talked about."

{¶ 20} Appellant believes this testimony constitutes hearsay and was highly prejudicial because, in his opinion, it provided compelling corroboration for the victim's claim that appellant sexually assaulted her. The testimony was not offered to prove the truth of the statements. Further, the alleged nightmare had nothing to do with sexual assault and therefore did not provide any corroboration to the victim's allegations that led to the charges against appellant in this case. The defense did not object to this line of questioning and the admission of the testimony did not rise to the level of plain error.

{¶ 21} The second assignment of error is overruled.

{¶ 22} "Assignment of Error III: The trial court committed prejudicial error in admitting drawings made by the alleged victim when she was interviewed by a detective and by admitting a drawing made by the detective."

{¶ 23} Appellant contends that pictures drawn by the appellant that depicted innocuous events that took place at the victim's house on the day of the incident were irrelevant, had no evidentiary value and were admitted in violation of Evid.R. 402.

{¶ 24} All relevant evidence is admissible. Evid.R. 402. Relevant evidence is evidence " * * * having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or

less probable than it would be without the evidence." Evid.R. 401.

{¶ 25} "The trial court has broad discretion in the admission and exclusion of evidence and unless it has clearly abused its discretion and the defendant has been materially prejudiced thereby, this court should be slow to interfere." *State v. Hymore* (1967), 9 Ohio St.2d 122, 128, 224 N.E.2d 126.

{¶ 26} The credibility of the child witness was at issue in this case. No one witnessed the events that she reported had occurred between her and appellant. The victim testified concerning the events leading up to the incident with appellant, which were depicted in the drawings. Further, the admission of these drawings was not highly prejudicial to appellant as they could have equally caused a reasonable juror to question the victim's credibility based upon the fact that she did not depict anything that would corroborate her allegations of sexual assault. Therefore, the admission of these drawings was relevant to a fact in issue, namely the victim's credibility.

{¶ 27} Appellant further contests the trial court's admission of the drawings contained in State's Exhibit 14. The detective explained that she utilizes these anatomical drawings when interviewing children in order to have them identify the various body parts. The detective writes down the terminology the child uses to identify each body part. The purpose is to enable the detective to be able to refer to those body parts with the same words the child uses. Appellant did not object to this line of questioning.

However, appellant did object to the admission of State's Exhibit 14 on the basis that it was "irrelevant and redundant. [The victim] was able as well as other witnesses testifying to view exact body parts." However, in this assignment of error, appellant now asserts that the anatomical drawings constituted inadmissible hearsay.

{¶ 28} Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." In this instance, the drawings were not used or introduced to prove that appellant did anything to the victim. Instead, the drawings served only to establish the terminology the child used when referring to various body parts. Accordingly, they did not constitute hearsay. See *State v. Boston* (Nov. 22, 1995), Cuyahoga App. No. 68419 (a child's identification of "things" on two anatomically correct drawings did not demonstrate what the accused did or attempted to do, nor did it implicate the accused in any activity and therefore the drawings did not constitute hearsay).

{¶ 29} The third assignment of error is overruled.

{¶ 30} "Assignment of Error IV: The court committed plain error by giving jury instructions on the issue of credibility which invaded the province of the jury.

{¶ 31} "Assignment of Error V: The court committed plain error by

giving jury instructions on the offenses of rape, gross sexual imposition, and kidnapping which invaded the province of the jury and were tantamount to a directed verdict on two of the essential elements of the offense of rape, to wit: (i) the victim was under 13 years of age at the time of the offense; and (ii) the victim was under 10 at the time of the offense.

{¶ 32} "Assignment of Error VI: The trial court committed plain error by improperly shifting the burden of proof to the defendant on two of the essential elements of the offense of rape.

{¶ 33} "Assignment of Error VII: The trial court committed plain error by giving a jury instruction that improperly dilutes the statutory definition of force.

{¶ 34} "Assignment of Error VIII: The trial court committed plain error by giving a jury instruction on the offense of rape that was hopelessly confusing and incomprehensible."

{¶ 35} With respect to jury instructions, a trial court is required to provide the jury a plain, distinct, and unambiguous statement of the law applicable to the evidence presented by the parties to the trier of fact. *Marshall v. Gibson* (1985), 19 Ohio St.3d 10, 12, 482 N.E.2d 583.

{¶ 36} We note that defendant did not object to the court's jury instructions relating to this assignment of error; therefore, we review this issue for plain error. See *State v. Wamsley*, 117 Ohio St.3d 388,

2008-Ohio-1195, 884 N.E.2d 45, at ¶25. See, also, Crim.R. 30(A). An erroneous jury instruction does not amount to plain error unless, but for the error, the result of the trial clearly would have been different. *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804.

{¶ 37} Instructions to a jury "may not be judged in artificial isolation but must be viewed in the context of the overall charge." *State v. Price* (1979), 60 Ohio St.2d 136, 398 N.E.2d 772, paragraph four of the syllabus. Taken as a whole, we find that the trial court's instructions effectively advised the jury on the charged offenses.

{¶ 38} First, appellant asserts that the trial court erred by instructing the jury as follows:

{¶ 39} "Remember the testimony of one witness believed by you is sufficient to prove any fact. Discrepancies in a witness' testimony or between his or her testimony does not necessarily mean that you should disbelieve a witness, as people commonly forget facts or recollect them erroneously after the passage of time."

{¶ 40} Appellant did not object to this instruction. The trial court gave extensive instructions to the jury concerning how to assess and weigh the credibility of the witnesses and stated that the jury would decide the credibility of the witnesses. The trial court also instructed the jury that they could believe or disbelieve all or any parts of the testimony of a witness. The

Ohio Supreme Court has reviewed a challenge to a substantially similar jury instruction and determined that it did not amount to error. *State v. Cunningham*, 105 Ohio St.3d 197, 2004-Ohio-7007, 824 N.E.2d 504, ¶¶ 51-56. Appellant maintains that the following additional language was outcome determinative in the Ohio Supreme Court's decision in *Cunningham*: "* * * in considering the discrepancy in a witness [sic] testimony, you should consider whether such discrepancy concerns an important fact or a trivial fact." Id. at ¶54. However, in *Cunningham*, the Court did not focus on this language but based its determination on considering the credibility instruction as a whole. Applying that analysis here, we find no error. Viewing the credibility instruction in its entirety, the portion isolated by appellant did not invade the province of the jury to decide witness credibility, nor did it result in plain error. The fourth assignment of error is overruled.

{¶ 41} Appellant next contends that plain error occurred because he believes the trial court invaded the province of the jury by stating the alleged date of birth of the victim. Appellant argues that the trial court's jury instruction relieved the jury of its duty to determine an element of the charged offenses, that is, the victim's age. Appellant's interpretation is not supported when the jury instructions are considered as a whole. The trial court clearly instructed the jury that it had to find that the victim was under the age of thirteen years old before they could find him guilty under count

one. Likewise, the trial court instructed the jury it had to find that the victim was under the age of ten years old before they could find him guilty of other offenses. The fifth assignment of error is overruled.

{¶ 42} In the sixth assignment of error, appellant contends that the trial court improperly shifted the burden of proof on certain elements of rape. At one point, the trial court did erroneously instruct the jury that the "defendant" had to prove that he purposely compelled the victim to submit by force or threat of force. Neither party objected or otherwise noted on the record the obvious misstatement. Nonetheless, shortly after, the trial court began explaining the verdict forms and correctly instructed the jurors, "if you are not convinced, the State didn't prove it, and you will put did not." Further, appellant ignores the balance of the jury instructions where the trial court clearly advised the jury that the State bore the burden of proof, that the appellant did not have to prove anything, and that appellant did not have the burden of proof. When the jury instructions are viewed in the entirety, the isolated misstatement by the trial court did not constitute plain error. The sixth assignment of error is overruled.

{¶ 43} Appellant's seventh assignment of error contends the trial court's instruction on the force element of rape was "diluted" and constituted plain error. Although appellant acknowledges that the alleged victim was his minor niece, he asserts that the psychological force instruction was not

warranted absent special circumstances. The instruction provided by the trial court was proper in this case. *State v. Eskridge* (1988), 38 Ohio St.3d 56, 526 N.E.2d 304; see also, *State v. Welch*, Cuyahoga App. No. 93035, 2010-Ohio-1206, ¶16, ("where there was not a parent-child relationship, but instead an uncle-niece relationship, this court held that psychological force could be inferred from the inherent authority the adult male held over the child."), citing, *State v. Byrd*, Cuyahoga App. No. 79661, 2002-Ohio-661. The seventh assignment of error is overruled.

{¶ 44} In his final challenge to the jury instructions, appellant asserts that the trial court's instruction on rape was incomprehensible and confusing. Appellant raised no objection to it in the trial court. In particular, appellant contends that the trial court injected the concept of "duress" into the charge. However, the trial court's use of the term duress was in the context of the element of force and describing the type of evidence that could be considered in determining whether it was established in this type of case that involved a minor child who was related to the accused. The trial court's instructions were proper. See, *Eskridge*, 38 Ohio St.3d at 59 ("[w]e also recognize the coercion inherent in parental authority when a father sexually abuses his child. "* * * Force need not be overt and physically brutal, but can be subtle and psychological. As long as it can be shown that the rape victim's will was overcome by fear or duress, the forcible element of rape can be established.")

The trial court's use of the term "duress" was in reference to the jury's duty to determine whether the State had proved the element of force beyond a reasonable doubt. The eighth assignment of error is overruled.

{¶ 45} "Assignment of Error IX: The evidence was insufficient to support the charge of gross sexual imposition under Count III (alleged kissing on the neck)."

{¶ 46} "Assignment of Error X: The evidence was insufficient to support the charge of rape under Count I (digital penetration of victim's vagina)."

{¶ 47} "Assignment of Error XI: The evidence was insufficient to support the charge of rape under Count II (placement of mouth on victim's vagina.)"

{¶ 48} An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The 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. Thompkins* (1997), 78 Ohio St.3d 380, 386, 678 N.E.2d 541.

{¶ 49} The victim testified that appellant pulled down her underwear and put his mouth on her private. While the victim initially indicated that appellant did not use his hand on her or touch her private with his hands, she

stated in other testimony that he did. The SANE nurse testified that the victim reported that appellant had kissed her on the neck and had put his hand inside the lips of her vagina. The medical records corroborate this fact. The SANE nurse further observed redness to the labia minora that would be consistent with the victim's report. Laboratory reports and testimony indicate that a component of saliva was detected on the swabs taken from the victim's neck. There was sufficient evidence, that if believed, would support each of the challenged convictions. Assignments of error nine, ten and eleven are overruled.

{¶ 50} "Assignment of Error XII: Appellant's convictions are against the manifest weight of the evidence."

{¶ 51} To warrant reversal of a verdict under a manifest weight of the evidence claim, this Court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether, in resolving conflicts in evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.

{¶ 52} Appellant contends his convictions were against the weight of the evidence because he asserts the child victim's trial testimony should "trump" any prior inconsistent statements she made out of court. While there are

inconsistencies between the eight year old victim's statements on the night of the incident compared with her trial testimony at age nine years old, the inconsistencies do not establish that the jury clearly lost its way in resolving the conflicts or that it erred by finding appellant guilty of the various offenses. Beyond the child's testimony, the record contains testimony from an attending nurse, as well as medical records, lab reports, and testimony of other witnesses who confirmed that appellant's DNA was found on the victim's underwear. The twelfth assignment of error is overruled.

{¶ 53} "Assignment of Error XIII: Appellant's conviction for rape (Count I) and Gross Sexual Imposition (Count V) are improper under the Ohio Rev. Code §2941.25 and constitute plain error."

{¶ 54} "Assignment of Error XIV: Appellant's convictions for rape (Counts I and II) and kidnaping (Count VI) are improper under Ohio Rev. Code §2941.25."

{¶ 55} The Ohio Supreme Court recently established the proper analysis for determining whether offenses qualify as allied offenses subject to merger pursuant to R.C. 2941.25. *State v. Johnson*, _____Ohio St.3d _____, 2010-Ohio-6314, _____ N.E.2d _____.

{¶ 56} "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.

{¶ 57} "'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." *Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, at ¶ 50 (Lanzinger, J., dissenting).

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

{¶ 59} "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." Id. at ¶¶ 48-51.

{¶ 60} First appellant maintains that his conviction for rape under Count I and gross sexual imposition under Count V were allied offenses that the trial court should have merged. The State counters that these acts were distinct and were committed with a separate animus, i.e., Count I involved the placement of appellant's fingers into the victim's vagina and Count V

involved appellant touching victim's thigh. These counts, therefore, were not allied offenses of similar import.

{¶ 61} Appellant next asserts that his rape convictions under Counts I and II were allied. The State counters that these also were distinct acts committed with a separate animus, i.e., Count II involved appellant putting his mouth on the victim's vagina. Because Counts I and II involved different acts with a separate animus, they are not allied offenses. Finally, appellant maintains that the kidnaping conviction should have been merged as an allied offense. The State maintains that this also constituted a separate act with a distinct animus. However, we find the same conduct supports appellant's rape and kidnaping conviction. The indictment alleged that the kidnaping was sexually motivated and therefore appellant's animus for the kidnaping and rape was the same or, stated differently, the rape and kidnaping were a single act, committed with a single state of mind. Accordingly, the fourteenth assignment of error is sustained in part and this matter must be remanded to the trial court for further proceedings concerning the allied offenses.[2]

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[2]"If the reviewing court concludes that two offenses are allied offenses of similar import under R.C. 2941.25, the State may elect which of the offenses to pursue on resentencing. *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, ¶ 24. The trial court is bound to accept the State's choice and must merge the offenses into a single conviction for purposes of resentencing. Id." *State v. Sanchez*, Cuyahoga App. Nos. 93569 and 93570, 2010-Ohio-6153
¶51.

{¶ 62} "Assignment of Error XV: Appellant was deprived of his right to effective assistance of counsel."

{¶ 63} To establish his claim of ineffective assistance of counsel, defendant must show that (1) the performance of defense counsel was seriously flawed and deficient; and (2) the result of appellant's trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Brooks* (1986), 25 Ohio St.3d 144, 495 N.E.2d 407.

{¶ 64} Appellant essentially premises his ineffective assistance of counsel claim upon trial counsel's failure to assert objections to errors he has identified in this appeal, specifically assignments of error 1-8 and 13-14. Applying the above standard of review to the record, we find that appellant has failed to establish a deficiency in his counsel's performance or that the result of the trial would have been different had counsel raised the subject objections. To the extent we have sustained appellant's assignment of error concerning the allied offenses of kidnaping and rape, we note that the analysis we employed to do so was the result of a recent change in the

applicable law. *Johnson*, supra. The fifteenth assignment of error is overruled.

{¶ 65} "Assignment of Error XVI: Appellant's convictions should be reversed because the cumulative effect of the errors committed by the trial court violated Appellant's right to a fair trial."

{¶ 66} The Ohio Supreme Court defined the cumulative-error doctrine in *State v. Garner* (1995), 74 Ohio St.3d 49, 64, 656 N.E.2d 623. "Pursuant to this doctrine, a conviction will be reversed where the cumulative effect of errors in a trial deprives a defendant of the constitutional right to a fair trial even though each of numerous instances of trial court error does not individually constitute cause for reversal." See, also, *State v. DeMarco* (1987), 31 Ohio St.3d 191, 509 N.E.2d 1256. Because the only error that we have sustained in this case will be addressed on remand, the cumulative-error doctrine does not apply and assignment of error sixteen is overruled.

{¶ 67} Judgment affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion.

It is ordered that appellee and appellant split 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. 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.

JAMES J. SWEENEY, JUDGE

PATRICIA ANN BLACKMON, P.J., CONCURS;

SEAN C. GALLAGHER, J., CONCURS. (SEE ATTACHED CONCURRING OPINION)

SEAN C. GALLAGHER, J., CONCURRING:

{¶ 68} I concur fully with the judgment and analysis of the majority. I write separately to address issues relating to appellant's fourteenth assigned error relating to allied offenses of similar import and merger of offenses under R.C. 2941.25.

{¶ 69} The majority opinion references the new analysis for merger of offenses under R.C. 2941.25 that was recently set forth in *State v. Johnson,* ___ Ohio St.3d ___, 2010-Ohio-6314, ___ N.E. 2d ___. *Johnson* overruled *State v. Rance* (1999), 85 Ohio St.3d 632, 710 N.E.2d 699, and established that the conduct of the accused must be considered when determining if offenses are allied offenses of similar import subject to merger under R.C. 2941.25.

{¶ 70} A careful reading of *Johnson* reflects that it does not expressly state that consideration of the legal elements of the offenses in question is eliminated, rather the case

holds that the conduct of the offender must be considered. "Given the purpose and language of R.C. 2941.25, and based on the ongoing problems created by *Rance*, we hereby overrule *Rance to the extent* that it calls for a comparison of statutory elements *solely* in the abstract under R.C. 2941.25. When determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25, *the conduct of the accused must be considered.*" (Emphasis added.) *Johnson*, at _ 44.

{¶ 71} Thus, *Johnson* does not replace the analysis of legal elements, it supplements it. Clearly, an offender's conduct cannot be considered in a vacuum. It must have some context. The legal elements of the crimes at issue provide that context, or backdrop, under which the offender's conduct can be evaluated to determine if it warrants merger or a separate punishment. To this end, in overruling *Rance*, *Johnson* relied in part on a prior concurring opinion from Judge Whiteside in *State v. Blankenship* (1988), 38 Ohio St.3d 116, 526 N.E.2d 816. "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. *Blankenship,* 38 Ohio St.3d at 119, 526 N.E.2d 816 (Whiteside, J., concurring) ('It is not necessary that both crimes are always committed by the same conduct but, rather, it is sufficient if both offenses *can be* committed by the same conduct. It is a matter of possibility, rather than certainty, that the same conduct will constitute commission of both

offenses.' [Emphasis sic]). 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." *Johnson*, at _ 48.

{¶ 72} Thus, in looking at multiple offenses, the legal elements of those offenses give us the needed guideposts for examining the defendant's conduct to determine if multiple offenses could have been committed by the same conduct. While examining the conduct of the offender in relation to the offenses committed provides better clarity on the question of whether two offenses are allied offenses of similar import, the bigger challenge relates to how courts determine when an offender acts with a separate animus.

{¶ 73} Part of the analysis in *Johnson* relating to animus relied on an earlier concurring Ohio Supreme Court opinion authored by Justice Lanzinger. In Lanzinger's concurring opinion in *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, two forms of felonious assault were at play: first, the causing of serious physical harm, and second, the causing of serious physical harm by means of a deadly weapon (essentially, two forms of the same offense with differing elements). Lanzinger found that when a singular act of stabbing with one purpose in mind implicates two versions of the felonious assault statute, no allied offense analysis was necessary because the offender could only be convicted of one crime. Lanzinger agreed with the view that the allied offense analysis "is implicated only in a situation where the conduct by a defendant could be construed to constitute two or more

offenses." Id. at ¶ 49. Thus, examining the offender's conduct within the context of the legal elements provides a means to understand when an offender acts with a separate or similar animus.

{¶ 74} *Johnson* does not give us a specific test to determine animus. We obviously cannot open the offender's brain and examine intent. We have to look at the offender's conduct in relation to the elements of the offenses and determine whether the offender is acting with a separate animus. This is the real challenge moving forward.

{¶ 75} Virtually all crimes start with an offender having "one purpose," but this does not automatically mean that all the offenses the offender may commit during a course of conduct are slavishly tied to that initial criminal goal. The arsonist who breaks into a building with a purpose to set a fire that results in the deaths of the residents may arguably be punished separately for burglary, and even manslaughter or murder, in addition to the arson, if the analysis supports such a finding.

{¶ 76} In the instant case, the majority finds that rape and gross sexual imposition are distinct and committed with a separate animus. Thus, they were subject to separate convictions and punishments. The majority distinguished the rape from the gross sexual imposition, by the act of penetration. But how are we to determine if the sexual contact associated with gross sexual imposition is actually different from the intent to rape? It is arguable that both involve the "general" goal of some type of sexual gratification. There

must be some basis for finding the distinction.

{¶ 77} It may well be that the different conduct of penetration inherent in rape versus sexual contact with an erogenous zone under R.C. 2907.01(B) in a gross sexual imposition is enough to warrant separate convictions and punishments. The physical conduct involved in each offense is different enough to suggest a separate or distinct purpose or intent on its face. Touching the victim's thigh was not done to gain access to complete penetration. It was done for a separate purpose. Nevertheless, there may be times where a set of facts blurs or blends the offenses into one. One example may be penetration coupled with simultaneous sexual conduct.

{¶ 78} The majority also finds that the two counts of rape are separate offenses. This finding is based on the conduct of penetration by two separate means at two separate times. These two acts, while involving the same charged offense and arguably part of the offender's overall goal, are distinct by the offender's specific acts of penetration by differing means and at separate times. Arguably, either method or the separation of time, even if slight, could form the basis for finding distinctive conduct subject to separate convictions.

{¶ 79} Last, the majority finds that the kidnaping conviction is an allied offense of similar import that merges with the rape convictions. While I take some issue with the majority's reference to the sexual motivation specification as a partial basis for finding these are allied offenses of similar import, I nevertheless agree because the movement of the victim

is incidental to the underlying crime as interpreted by prior Supreme Court case law. The Ohio Supreme Court addressed a similar fact pattern in 1979 and found the offenses of kidnaping and rape were allied offenses of similar import. The court noted:

> "Secret confinement, such as in an abandoned building or nontrafficked area, without the showing of any substantial asportation, may, in a given instance, also signify a separate animus and support a conviction for kidnapping apart from the commission of an underlying offense.
>
> "The primary issue, however, 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. In the instant case, the restraint and movement of the victim had no significance apart from facilitating the rape. The detention was brief, the movement was slight, and the victim was released immediately following the commission of the rape. In such circumstances, we cannot say that appellant had a separate animus to commit kidnapping.
>
> "We adopt the standard which would require an answer to the further question of whether the victim, by such limited asportation or restraint, was subjected to a substantial increase in the risk of harm separate from that involved in the underlying crime. If such increased risk of harm is found, then the separate offense of kidnaping could well be found. For example, prolonged restraint in a bank vault to facilitate commission of a robbery could constitute kidnaping. In that case, the victim would be placed in substantial danger.
>
> "Looking at the facts in this case, we cannot find that the asportation of the victim down the alley to the place of rape presented a substantial increase in the risk of harm separate from that involved in the rape."

State v. Logan (1979), 60 Ohio St.2d 126, 397 N.E.2d 1345.

{¶ 80} As the Supreme Court noted in *Johnson*, inconsistent results may occur for the same set of offenses in different cases because the analysis may vary because of the facts of

particular cases. As the law moves forward, both prosecutors and defense counsel alike will have to develop the record in each case to aid the trial judge and reviewing courts in assessing how to evaluate an offender's conduct. More careful and pointed questions regarding the alleged offender's conduct may well have to be asked at trial to support or refute a particular finding.

{¶ 81} In any event, I concur with the judgment and analysis of the majority.