

[Cite as *State v. Adams*, 2016-Ohio-8330.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104331

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

NATHANIEL ADAMS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-15-598477-B

BEFORE: Stewart, J., McCormack, P.J., and Laster Mays, J.

RELEASED AND JOURNALIZED: December 22, 2016

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MELODY J. STEWART, J.:

{¶1} Defendant-appellant Nathaniel Adams appeals from a judgment convicting him of numerous felony charges. Adams raises one assignment of error for our review: the court erred by failing to merge many of the offenses under R.C. 2941.25, the allied offenses statute. For the reasons that follow, we overrule the assigned error and affirm the convictions.

{¶2} In August 2015, Adams and his codefendant were indicted on multiple charges related to a 2003 abduction and rape. Adams accepted a plea deal whereby he agreed to plead guilty to three counts of rape (representing three different forms of penetration), three counts of complicity to commit rape (representing three different forms of penetration from his codefendant), aggravated robbery, and kidnapping, all with one- and three-year firearm specifications, in exchange for the dismissal of the sexually violent predator specifications attached to each count, a felonious assault charge, and a kidnapping charge. The prosecutor gave a summary of the facts at sentencing where he explained how the victim was walking on Cleveland's west side when she was approached by two strangers, males, in a car. According to the prosecutor, the men asked her if she wanted to party and forced her to get into the car at gunpoint. They then proceeded to beat and rape her. The men took turns vaginally, anally, and orally raping the victim until they finally released her, naked, in a parking lot. The victim was able to

find a nearby payphone where she called for help. EMS took her to a hospital where DNA evidence was collected. Years later, a DNA hit in CODIS linked both Adams and his codefendant to the attack. The DNA of both men was present on vaginal, anal, oral, and skin swabs taken from the victim as part of the rape kit process.

{¶3} The trial court sentenced Adams to six years on the vaginal rape charge, six years on the anal rape charge, and five years on the oral rape charge, in addition to three years on merged firearm specifications. The court ran the sentences consecutively after making the necessary findings for consecutive sentences pursuant to R.C. 2929.14(C)(4), for a total 20-year prison term. The court sentenced Adams to concurrent six-year terms on each of the remaining charges and ordered the sentences to run concurrent to the base 20-year prison term.

{¶4} On appeal, Adams contends that the rape charges were allied offenses of similar import under R.C. 2941.25 because they were part of a single course of conduct. Adams further contends that the aggravated robbery, kidnapping, and complicity charges were also allied offenses. We disagree.

{¶5} The allied offenses statute, R.C. 2941.25, codifies Ohio's double jeopardy protections with regard to when multiple punishments can be imposed. *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, ¶ 12. The statute states:

(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.

{¶6} Under the statute, multiple offenses merge when they constitute the same offense. *Id.* at ¶ 24. The merger doctrine allows a defendant to be found guilty of multiple offenses that constitute the same offense, but punished — in other words, sentenced — on only one of the offenses. When considering whether offenses merge under the statute, courts must look to the conduct of the defendant, and ask “how were the offenses committed?” *Id.*

If any of the following is true, the offenses cannot merge and the defendant may be convicted and sentenced for multiple offenses: (1) the offenses are dissimilar in import or significance — in other words, each offense caused separate, identifiable harm, (2) the offenses were committed separately, and (3) the offenses were committed with separate animus or motivation.

Id.

{¶7} In this case, the prosecutor specifically stated on the record that the rape charges and complicity charges were not allied offenses of similar import because they represented different forms of penetration by two different actors. Tr. 45. Adams's defense counsel agreed with the plea as outlined by the prosecution. Tr. 46-47. This court has previously stated that a defendant waives his right to merger when the defendant

agrees that the offenses are not allied offenses under the statute. *See State v. James*, 2015-Ohio-4987, 53 N.E.3d 770, ¶ 27 (8th Dist.). Even if Adams has not waived the merger issue, the fact that each rape offense represented different forms of penetration, and each complicity offense represented different forms of penetration committed by a different actor, is independent grounds for concluding that the offenses do not merge. As explained in *Ruff*, offenses are not allied when they are dissimilar in import or significance (meaning each offense caused separate and identifiable harms), or when the offenses are committed separately. *Id.* at ¶ 25. Here, each form of penetration constituted a separate, identifiable harm to the victim. Further, each offense was committed separately, with a break in time, however slight, between each act. Accordingly, the offenses are not allied.

{¶8} We also find that the aggravated robbery charge is not allied with any other offense. Although it is unclear from the record what specific actions constitute the aggravated robbery charge, there is some indication from the prosecution's recitation of the facts that the charge might be related to the fact that Adams and his codefendant kept some of the victim's personal items (clothing) before releasing her in the parking lot. In his brief, Adams accepts this as the reason for the aggravated robbery charge and raises no other claims of error related to the charge. Accordingly, we will also accept that the aggravated robbery charge reflects the act of stealing certain items of clothing from the victim.

{¶9} Adams pleaded guilty to the offense of aggravated robbery and did not object on the basis of allied offenses. Where a defendant fails to raise the issue of allied offenses in the trial court, he forfeits all but plain error review on appeal. *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 3. Under the plain error standard, an error is not reversible unless it affected the outcome of the proceeding and reversal is necessary to correct a manifest miscarriage of justice. *Id.*; *see also* Crim.R. 52. Pursuant to this standard, the “accused has the burden to demonstrate a reasonable probability that the convictions are allied offenses of similar import committed with the same conduct and without a separate animus.” *Id.* The defendant must meet this burden before a reviewing court may reverse for plain error. *See id.*

{¶10} Adams argues in his brief on appeal that the charge of aggravated robbery should merge with the rape charges, because “[i]n order to rape, clothes must be removed.” We are not persuaded by his argument. Even accepting that the aggravated robbery charge stemmed from the removal of the victim’s clothes and nothing else, the record indicates that the conduct resulting in the aggravated robbery exceeded the conduct necessary to commit the rape because Adams and his codefendant did not return the victim’s clothing upon her release. In fact, the victim was left in a parking lot, naked, except for a couple pieces of clothing that the defendants threw at her. Accordingly, the offenses of rape and aggravated robbery, resulted in separate and identifiable harms and are therefore not subject to merger.

{¶11} Lastly, Adams pled guilty to the kidnapping charge contained in Count 17 of the indictment. The bill of particulars on Count 17 states that “Adams, did, by threat, force, or deception, purposely remove [the victim] from the place where she was found or restrain the liberty of her for the purpose of engaging in sexual activity.” Again, Adams did not object at sentencing to the court’s failure to conduct an allied offenses analysis on the issue of whether the kidnapping under Count 17 merged with any other offense. Thus, we review for plain error. *See Rogers* at ¶ 3.

{¶12} On appeal, Adams contends that the kidnapping should merge with the rape offenses because Adams and his codefendant kidnapped the victim for the purpose of committing the rapes. Adams argues that the kidnapping “flowed from one act, upon one victim, with one animus.” In support of his argument, Adams cites to *State v. Curtis*, 1st Dist. Hamilton No. C-150174, 2016-Ohio-1318, where the court concluded that the crimes of aggravated robbery and murder were allied offenses of similar import. In *Curtis*, the defendant was charged with murder and aggravated robbery under R.C. 2911.01(A)(3), which requires proof of the additional aggravating element of inflicting or attempting to inflict serious physical harm. *Id.* According to the facts, Curtis approached his victim with a gun, and demanded money. *Id.* at ¶ 28. When the victim refused, Curtis shot the victim in the chest and proceeded to take money off of the victim who had fallen to the ground. *Id.* The victim eventually died from his injuries. *Id.* The first district concluded that because the gunshot was a single act committed with a single animus (to effectuate the robbery) and represented the only infliction of serious

bodily harm to the victim that also resulted in the victim's death, the aggravated robbery should merge with the offense of murder. *Id.*

{¶13} This case is distinguishable from *Curtis* because Count 17 contained a theory of kidnapping related to the initial abduction that was separate and apart from a kidnapping offense that might be associated with the rapes. As this court has previously stated:

Ohio courts have long held that where captivity is prolonged, or the movement of the victim is so substantial that it becomes significantly independent of any other criminal act, there exists a separate animus to support the kidnapping conviction. *See State v. Houston*, 1st Dist. Hamilton No. C-130429, 2014-Ohio-3111, ¶ 22. In such cases, the kidnapping offense ceases to be incidental to the underlying felony from which it might have originated. *See id.* at ¶ 23.

State v. Cotton, 2015-Ohio-5419, 55 N.E.3d 573, ¶ 29 (8th Dist.).

{¶14} Here, the victim was forced into Adams's car, held at gunpoint, and beaten. Thereafter, Adams and his codefendant took turns raping the victim while driving around the city. Adams cannot show that there is a reasonable probability that the kidnapping offense would have merged with the rape offenses. *Accord id.* at ¶ 30.

{¶15} Judgment affirmed.

It is ordered that appellee recover of appellant 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.

MELODY J. STEWART, JUDGE

TIM McCORMACK, P.J., and
ANITA LASTER MAYS, J., CONCUR