ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	)	CASE NO. 2011-0619
	)	
Plaintiff-Appellant	)	
vs.	)	
	)	
JASON WILLIAMS,	)	
	)	
Defendant-Appellee	)	

MERIT BRIEF OF APPELLEE JASON WILLIAMS

JONATHAN N. GARVER
Reg. No. 0031009
The Brownhoist Building
4403 St. Clair Avenue
Cleveland, Ohio 44103
(216) 391-1112 (Telephone)
(216) 881-3928 (Facsimile)
jgarver100@aol.com (E-mail)
COUNSEL FOR APPELLEE
JASON WILLIAMS

KRISTEN L. SOBIESKI
Reg. No. 0071523
Assistant Prosecuting Attorney
The Justice Center, 8th Floor
Cleveland, Ohio 44113
(216) 443-7800 (Telephone)
E-mail: klsobieski@cuyahogacounty.us
COUNSEL FOR APPELLANT
STATE OF OHIO

Table of Contents

Table of Authorities

Statutes

Cases

Texts

Statement of the Case

On May 1, 2009, a Cuyahoga County Grand Jury returned a six-count indictment against Appellee Jason Williams ("Appellee"). The indictment charged Appellee with the following offenses:

> Count 1: forcible rape of a child under ten years of age, in violation of *R. C. §2907.02(A)(1)(b)*;
>
> Count 2: forcible rape of a child under ten years of age, in violation of *R. C. §2907.02(A)(1)(b)*;
>
> Count 3: gross sexual imposition, in violation of *R. C. §2907.05(A)(4)*;
>
> Count 4: gross sexual imposition, in violation of *R. C. §2907.05(A)(4)*;
>
> Count 5: gross sexual imposition, in violation of *R. C. §2907.05(A)(4)*;
>
> Count 6: kidnaping, in violation of *R. C. §2905.01(A)(5)*.

The rape and kidnaping charges included sexually violent predator specifications. The kidnaping charge also included a sexual motivation specification.

At trial, Appellee elected to bifurcate the sexual predator specifications and have them tried to the court. The jury convicted Appellee of all six charges. The trial court dismissed the sexual motivation specification as "legally irrelevant" and found Appellee not guilty of the sexually violent predator specifications.

Appellee's sentencing hearing was held on November 12, 2009. At the time of sentencing, the trial court addressed the question of merger under *R. C. §2941.25*. The trial court concluded that each of the rape and gross sexual imposition charges involved separate and distinct conduct/acts and, for that reason, concluded that there was no merger of those offenses. The trial court then addressed the question of whether the offense of kidnaping should be merged with the other offenses. The trial court's analysis ignored two key matters: first, the kidnaping charge,

itself, included a sexual motivation specification, thereby confirming the existence of a nexus between the kidnaping charge and the other offenses; and second, the Appellant's theory at trial was that the kidnaping committed to facilitate the commission of the other offenses and the evidence presented by the Appellant supported that theory. The trial court stated:

> But I want to talk about the kidnaping in the sense that we heard evidence about it which was that he took her arm and pulled her along and got her behind the garage. I believe under the multiple count statute, this is separate conduct because, let's face it, had he done that and got her behind the garage and then she got away, we would still have a kidnaping.
>
> And I think it's fair to say this falls into his conduct constituting two or more offenses of dissimilar import, as between the rapes and the kidnaping, and there is the fact that this conduct was committed separately. First, he escorted and kidnaped her, and secondly, he raped her.
>
> And he had a separate animus as to each kind of conduct, as between the rape and the kidnaping, there's a separate animus. So I don't think there is a merger here.

(T. 787-791)

The trial court them imposed a 25-year to life sentence as follows:

Count 1:	25 years to life, concurrent with all remaining counts;
Count 2:	25 years to life, concurrent with all remaining counts;
Count 3:	5 years, concurrent with all remaining counts;
Count 4:	5 years, concurrent with all remaining counts;
Count 5:	5 years, concurrent with all remaining counts; and
Count 6	10 years, concurrent with all remaining counts.

Appellee filed a timely notice of appeal. On appeal, Appellee asserted sixteen assignments of error. All, but one, were rejected by the Court of Appeals, Eighth Appellate District. The Court of Appeals sustained Appellee's fourteenth assignment of error dealing with

the question of merger. The opinion issued by the Court of Appeals indicates that it followed the analysis approved by this Court in *State v. Johnson*, 128 Ohio St. 3d 153, 2010-Ohio-6314, 942 N.E. 2d 1061. The Court of Appeals held, "The indictment alleged that the kidnaping was sexually motivated and therefore [Williams's] animus for the kidnaping and the rape was the same or, stated differently, the rape and the kidnaping were a single act, committed with a single state of mind." *State v. Williams*, 8th Dist. No. 94616, 2011 Ohio 925, ¶61.

Appellant filed a timely notice of appeal to this Court. In its sole proposition of law, Appellant sought review of the decision of the Court of Appeals on the merger issue. In his cross-appeal, Appellee advanced several propositions of law.

On September 21, 2011, this Court accepted Appellant's appeals and dismissed Appellee's cross-appeal.

Statement of Facts

The alleged victim in this case is J. W., Appellee's eight-year-old niece.

On the evening of June 22, 2009, Appellee, accompanied by his wife and children, went to the home of J. D.'s grandmother, Nadine Davis, for a family gathering. The State alleged that the sexual assault occurred in the early evening, when Appellee and J. D. were outside and everyone else was inside. The State alleged that the sexual assaults occurred in Nadine's backyard.

The sexual assault alleged by the State consisted of cunnilingus and digital penetration of her vagina (Counts 1 and 2) and kissing on the neck, rubbing his penis against her private parts, and placement of hand on her thigh and genital area (Counts 3, 4, and 5). The State alleged that kidnaping (Count 6) consisted of the unlawful restraint of J. D.'s liberty to facilitate the sexual

assaults.

J. D. testified that it was getting to be dark outside and everyone else went in for dinner, but she stayed outside because she wanted to continue playing. (T. 335) J. D. testified that she had shown Appellee a bumper sticker on her grandmother's car. (T. 336)

J. D. testified that, after she showed Appellee the bumper sticker, Appellee asked her to sit on his lap and he then pulled the front part of her skirt and her "unders" and put his mouth on her "private." (T. 339) She testified that this happened behind her grandmother's car in the backyard. (Id.) J. D. testified that Appellee then took her by the hand and took her between the two houses. (340) She testified that he then picked her up, put her on the ground, and while fully clothed, "put his private part on mine" and was "bouncing" on her. (T. 341)

J. D. denied that Appellee used his mouth on any other part of her body, that he tried to kiss her, that he tried to touch her on the neck, and that he ever used his hand on her while all of this happened. (342) At some point, according to J. D., she heard her aunt calling her, and as he got up, she ran to her aunt Ja'Dean who was on the front porch. (T. 342-43) J. D. told her aunt, her mother, and her grandmother what happened. (T. 343)

When confronted that evening by family members, Appellee denied involvement in any sexual assault.

Argument

Appellant's Proposition of Law No. 1

"A trial court's determination that offenses should merge pursuant to *R.C. §2941.25* should be affirmed absent an abuse of discretion."

A. Summary Of Argument

In its sole proposition of law, Appellant contends that a trial court's determination that offenses should merge pursuant to *R.C. §2941.25* should be affirmed absent an abuse of discretion. Appellee respectfully disagrees. Appellee submits that a claim of merger under *R.C. §2941.25* presents a mixed question of fact and law, requiring *de novo* review on appeal. Appellee further submits that, even if this Court were to apply an abuse of discretion standard, the decision of the Court of Appeals should be affirmed because the trial court's ruling could not withstand review under an abuse of discretion standard.

B. *R. C. §2941.25(A)* And The Merger Doctrine

R. C. §2941.25(A) prohibits duplication of convictions where two crimes are motivated by a single purpose and where both convictions rely upon the same conduct. *R. C. §2941.25(A)* provides:

> 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.

R. C. §2941.25 essentially codifies the judicial merger doctrine. *State v. Cabrales*, 118 Ohio St. 3d 54, 2008-Ohio-1625, ¶23. Merger is "the penal philosophy that a major crime often includes as inherent therein the component elements of other crimes and that these component elements, in legal effect, are merged in the major crime." *Maumee v. Geiger*, 45 Ohio St. 2d 238, 243-244, 344 N.E. 2d 133 (1976).

In *Newark v. Vazirani*, 48 Ohio St. 3d 81, 549 N.E.2d 520 (1990), this Court held that *R.C. §2941.25* required a two-step analysis. In the first step, the *elements* of the two crimes were to be compared. If the elements of the offenses corresponded to such a degree that the commission of one crime will result in the commission of the other, the crimes were allied offenses of similar import and the court must proceed to the second step. In the second step, the defendant's *conduct* was to be reviewed to determine whether the defendant can be convicted of both offenses. If the court found either that the crimes were committed separately or that there was a separate animus for each crime, the defendant could be convicted of both offenses. See also, *State v. Rance*, 85 Ohio St. 3d 632, 710 N.E. 2d 699 (1999).

In 2008, this Court explained that its holding in *Rance* had been misinterpreted, in some cases leading to absurd results, and clarified the meaning of allied offenses of similar import:

> "In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), courts are required to compare elements of offenses in the abstract without considering the evidence in the case, but are *not* required to find an exact alignment of the elements. Instead, if, in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in the commission of the other, then the offenses are allied offenses of similar important." (Emphasis Added) Id.,

State v. Cabrales, 118 Ohio St. 3d 54, 2008-Ohio-1625, 886 N.E. 2d 181, Syllabus, No. 1.

Finally, on December 29, 2010, this Court announced its decision in *State v. Johnson, supra*. In *Johnson*, this Court reconsidered its earlier decisions dealing with the determination of whether offenses qualify as allied offenses subject to merger under *R. C. §2941.25*. The Court announced that it was establishing a new standard, returning the focus to the plain language and meaning of the statute.

In *Johnson*, this Court stated,

"R.C. 2941.25 itself instructs us to look at the defendant's conduct when evaluating whether his offenses are allied. As Justice Lanzinger explained in her dissenting opinion in *Williams*: "In spite of the . . . [statutory] language emphasizing the importance of the defendant's conduct, our current cases analyzing allied offenses instruct us to jump immediately to the abstract comparison of offenses charged without first considering the defendant's actual conduct as established by the evidence." *Williams,* 124 Ohio St.3d 381, 2010 Ohio 147, 922 N.E.2d 937, at P 34 (Lanzinger, J., dissenting).

We have consistently recognized that the purpose of R.C. 2941.25 is to prevent shotgun convictions, that is, multiple findings of guilt and corresponding punishments heaped on a defendant for closely related offenses arising from the same occurrence. *Geiger,* 45 Ohio St.2d at 242, 74 O.O.2d 380, 344 N.E.2d 133. This is a broad purpose and ought not to be watered down with artificial and academic equivocation regarding the similarities of the crimes. When "in substance and effect but one offense has been committed," the defendant may be convicted of only one offense. *Botta,* 27 Ohio St.2d at 203, 56 O.O.2d 119, 271 N.E.2d 776.

. . . 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."

Johnson, ¶¶42-44.

The Court continued,

. . . 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.

[P48] 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 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.

> [P49] 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 P 50 (Lanzinger, J., dissenting).
>
> [P50] If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged.
>
> P51] 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., ¶¶47-51.

The prohibition against multiple convictions where two or more crimes are motivated by a single purpose and where both convictions rely upon identical conduct and the same evidence applies even if the sentences are made to run concurrently. *State v. Jones*, 10th Dist. No. 98 AP-129, 1998 Ohio App. LEXIS 5024.

In the present case, the Court of Appeals cited the *Johnson* decision and adopted the approach embraced by this Court in that case. See, *State v. Williams*, supra, ¶¶53-61. The Court of Appeals concluded, " . . . 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 the rape was the same or, stated differently, the rape and the kidnaping were a single act, committed with a single state of mind." Id., ¶61.

C. Since rulings under *R. C. §2941.25(A)* involve mixed questions of law and fact, they should be subject to a de novo standard of review on appeal.

In its sole proposition of law, Appellant argues that the decision of the Court of Appeals should be reversed because the scope of review in such cases should be limited to determining

whether the trial court committed an abuse of discretion.

Appellate review under an abuse of discretion standard is limited. Under an abuse of discretion standard, a lower court ruling will not be disturbed by a reviewing court unless it plainly and manifestly appears that there has been an abuse of discretion. *Roebling v. City of Cincinnati*, 102 Ohio St. 460, 132 N.E. 60 (1921); *Kronenberg v. Whale*, 21 Ohio App. 322, 155 N.E. 2d 302 (8th Dist. 1926). An abuse of discretion standard requires the appellate court to give total deference to the trial court's decision, unless the trial court is shown to have abused its discretion. *Ragone v. Sentry Ins. Co.*, 121 Ohio App. 3d 362, 700 N.E. 2d 48 (8th Dist. 1997).

The term "abuse of discretion" implies not merely an error in judgment, but a perversity of will, passion, or moral delinquency (*McNeil v. McNeil*, 46 Ohio Law Abs. 244, 68 N.E. 2d 338 (2d Dist.1946)) or action that is unreasonable, arbitrary, or unconscionable. *State ex rel Verhovec v. Masc*, 81 Ohio St. 3d 334, 691 N.E. 2d 2 (1988). As one court explained:

> "An abuse of discretion connotes more than an error of law or judgment. Rather, the term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an abuse in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias."

Vanest v. Pillsbury Co., 124 Ohio App. 3d 525, 706 N.E. 2d 825 (4th Dist.1997).

Typically, decisions committed to the discretion of the trial court, e.g. the admissibility of evidence, discovery matters, and the regulation of proceedings, are reviewed under an abuse of discretion standard. *State v. Sage*, 31 Ohio St. 3d 1503, 2008-Ohio-5467, 895 N.E. 2d 343 (admissibility of evidence); *State ex* rel. *Daggett v. Gessaman*, 34 Ohio St. 2d 55, 57, 295 N.E.2d 659, 661 (1973) (discovery); *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, 767 N.E.2d

166, ¶40 (scope, length, and manner of voir dire). Another example of a matter committed to the discretion of the trial court and reviewed under an abuse of discretion standard invloves sentencing in criminal cases. *State v. Mathis*, 109 Ohio St. 3d 54, 2006-Ohio-855, 846 N.E.2d 1 (2006). In these cases, the trial court is allowed discretion because it must weigh so many different considerations when making its decision. See, Davis, Standards of Review: Judicial Review of Discretionary Decisionmaking, 2 *J. App. Prac. & Process* 47 (Winter 2000)

Questions of law, on the other hand, are reviewed *de novo*. *State v. Consilio*, 114 Ohio St. 3d 295, 297, 2007-Ohio-4163, 871 N.E. 2d 1167, 1171; *MCI Telecommunications Corp. v. Pub. Util. Comm*, 38 Ohio St. 3d 266, 268, 527 N.E.2d 777, 780 (1988); *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St. 3d 559, 563, 629 N.E.2d 423, 426 (1994). *De novo* review, which equates to independent or plenary review, means that the appellate court owes no deference to the decision of the trial court. The appellate court views the case from the same position as the trial court. *De novo* review is utilized upon review of questions of law because the appellate court is as well equipped as the trial court to decide legal issues. The *de novo* standard applies to any legal decision reviewed on appeal.

Appellate review of rulings that involve mixed questions of law and fact is a little more complicated. Here, the courts are dealing with rulings which involve the application of subordinate factual findings to legal standards or rulings to resolve a dispositive issue in the case. Some of the cases reflect an attempt to determine the predominant issue and then apply the applicable standard. In others, the courts have adopted an approach that subdivides a ruling into its component parts and review each part under its applicable standard. Where the facts and the law are essentially undisputed and the dispute is whether the law has been correctly applied to the

facts, the issue is treated as a question of law subject to *de novo* review. *Coyote Valley Band of Pomo Indians v. California*, 331 F. 3rd 1094, 1107 (9th Cir. 2002)

Rulings involving mixed questions of law and fact arise in search and seizure cases and in cases where ineffective assistance of counsel is alleged. See, *State v. Burnside*, 100 Ohio St. 3d 152, ¶8, 2003-Ohio-5372, 797 N.E. 2d 71 (2003) ("Appellate review of a motion to suppress presents a mixed question of law and fact. When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses . . . Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. . .")(Citations omitted.) See also, *State v. Gondor*, 112 Ohio St. 3d 377, ¶53, 2003-Ohio-6679, 860 N.E. 2d 77 (On direct appeal, appellate courts generally review claims of ineffective assistance of counsel *de novo*.)

While the issue presented in the present case is one of first impression, this Court has rendered many decisions in cases involving allied merger issues *under R. C. §2941.25*. See, e.g. *State v. Johnson,* supra*; State v. Winn,* 121 Ohio St. 3d 413, 2009-Ohio-1059, 905 N.E. 2d 154; *State v. Harris,* 122 Ohio St. 3d 373, 2009-Ohio-3323, 911 N.E. 2d 882; *State v. Cabrales, supra*; *State v. Rance, supra*. In none of those decisions was there any indication an appellate court should defer to the decision of the trial court and that its review should be limited to determining whether the trial court committed an abuse of discretion. When this Court decided those cases, it did so without deference to the ruling of the trial court.

The determination of whether offenses should merge under *R. C. §2941.25* presents a mixed question of law and fact, requiring *de novo* review on appeal. In this case, as in most

cases, the disputed factual issues at trial were decided by the jury, not the trial court. The trial court was essentially applying the law to the facts as determined by the jury. The trial court did not base its ruling upon its own observation of the demeanor of the witnesses and a determination of their credibility. The ruling made by the trial court did not require a weighing of many considerations or factors with respect to which the trial court was in a better position to assess than a reviewing court. The trial court merely applied the law to the facts as determined by the jury. There is no reason for the appellate court to show deference to the trial court's determination. The appellate court was as well equipped as the trial court to decide whether *R. C. 2945.21* required a merger. Accordingly, there is no justification for the use of an abuse of discretion standard.

More importantly, *de novo* review of rulings under *R. C. §2941.25.* will promote uniformity and consistency in the law. It will provide greater assurance that the purpose of the statute (the avoidance of multiple punishment) will be given effect. It will provide the lower courts with meaningful guidance for future decisions. Mistakes and bad calls will be corrected, not condoned. Chief Justice Renquist's argument in favor of *de novo* review in Fourth Amendment cases is equally applicable in this context:

> Independent review is, therefore, necessary if appellate courts are to maintain control of, and to clarify the legal principles . . .
>
> . . . *de novo* review tends to unify precedent and will come closer to providing law enforcement officers with a defined "set of rules which, in most instances, make it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement."

Ornelas v. United States, 517 U.S. 690 (1996).

Several Ohio appellate courts have addressed the issue presented by this appeal and have

applied a *de novo* standard of review. See, *State v. Lee*, 3rd Dist., 190 Ohio App. 3d 581, 2010-Ohio-5672, 943 N.E. 2d 602, ¶17 (characterizing the presented under *R. C. 2945.21* as a "question of law" requiring a *de novo* standard of review); *State v. Loomis*, 11th Dist., 190 Ohio App. 3d 581, 2010-Ohio-5672, 943 N.E. 2d 602, ¶8 ("This assignment of error presents a question of law ; thus our standard of review is *de novo.*"); *State v. Cox*, 4th Dist. No. 02CA751, 2003-Ohio-1935, ¶5 ("An appellate court conducts a *de novo* review over whether the trial court erred in holding that two offenses were not allied offenses of similar important . . ."); *State v. Vogares*, 4th Dist. No. 98CA6, at p. 40, 1999 Ohio App. LEXIS 2356 ("We conduct a *de novo* review of such issues."); *State v. Buckta*, 4th Dist. No. 96 CA 3, 1996 Ohio App. LEXIS 5180 ("Our standard of review is de novo.")

Appellant attempted to distinguish these cases by pointing out that they were decided before this Court's decision in *Johnson, supra*. Merit Brief of Appellant, at 12-14. However, all of these cases were decided after the two-step test was adopted by this Court in *Newark v. Vazirani, supra*, and *State v. Rance, supra*. Although this Court's recent decision in *Johnson* abandoned the rigid analysis required under the first step of that test, it retained the analysis of the defendant's conduct required under the second step. Hence, appellate court decisions adopting a *de novo* standard of review retain their validity despite the change brought by the *Johnson* decision.

Appellant incorrectly characterizes the issue presented under *R. C. 2945.21* as a question of fact. ("Where a trial court considers the evidence and finds, based on the facts presented, that two offenses are not allied, the trial court's factual determinations must be affirmed on appeal absent an abuse of discretion." (Merit Brief of Appellant, at 10) However, in a jury trial, the jury

is the trier of the facts, not the trial court. The jury determines the credibility of the witnesses and weighs the evidence, not the trial court. When issuing a ruling under *R.C. 2945.21*, the trial court is simply applying the law to the facts as determined by the jury. The issue resolved by the trial court is essentially a question of law.

Characterizing the decision required under *Johnson* as a "fact-based ruling" is somewhat misleading in this context. (Merit Brief of Appellant, at 14) A ruling under *R. C. 2945.21* requires an application of the law to the facts as determined by a jury. It does not require the trial court to determine the credibility of the witnesses and weigh the evidence.

While some Ohio appellate courts have limited their review, using an abuse of discretion standard, those cases contain virtually no analysis related to a determination of the appropriate standard of review and are, therefore, of little or no precedential value. See, e.g. *State v. Cain*, 4th Dist., 2001-Ohio-2447; *State v. Townsend*, 5th Dist. No. 3375, 1988 WL 142277; *State v. Silva*, 5th Dist., 3003-Ohio-4275; *State v. Johnson*, 8th Dist. 2009-Ohio-4367; *State v. Russell*, 9th Dist. 14714, 1991 WL 57331; *State v. Jennings*, 9th Dist. No. 13912, 1989 WL 77230.

Appellant argues, "An abuse of discretion standard is equitable, practical, and a sound use of judicial resources." (Appellant's Merit Brief, pp. 17-18) On the contrary, the use of an abuse of discretion standard would be inequitable, impractical, and an unsound use of judicial resources. It would be inequitable because it would lead to inconsistent results, with some offenders serving vastly longer sentences than others under the same or similar circumstances. It is impractical and an unsound use of judicial resources because it would provide little or no guidance to the lower courts, therefore resulting in *more* appeals. Efficiency and judicial economy are best served by promoting consistency and uniformity in the law; helping the lower courts get it right the first

time, rather than creating a hodgepodge of decisions that provide no guidance for the lower courts.

D. Even if this Court were to adopt an abuse of discretion standard for the review of determinations under *R. C. §2941.25*, the decision of the Court of Appeals should be affirmed because the decision of the trial court in this case constitutes an abuse of discretion.

Even if this Court were to adopt an abuse of discretion standard for the review of determinations under *R. C. §2941.25*, the decision of the Court of Appeals should be affirmed because the decision of the trial court in this case constitutes an abuse of discretion.

First, it is an abuse of discretion to apply the wrong legal standard. *Corley v. Rosewood Care Center, Inc. of Florida*, 142 F. 3d 1041, 1052 ("district court necessarily abuses its discretion if it bases its decision on erroneous conclusions of law"); *Koon v. United States*, 518 U.S. 81, 100 (1996) ("district court by definition abuses its discretion when it makes an error of law"). In the present case, the trial court applied the *Rance* test which this Court abandoned in *Johnson*, supra..

Second, a trial court abuses its discretion when it fails or refuses to properly apply the law to conceded or undisputed facts. *Clemons v. Board of Education* (CA6 Ohio), 228 F 2d 853, cert. den 350 U.S. 1006. In the present case, for purposes of merger, the facts were undisputed. How can Appellant possibly suggest that the offense of kidnaping was committed separately, with a separate *animus*, when the indictment contains a sexual motivation specification -- a formal declaration of the nexus between the kidnaping and the sex offenses?

In *State v. Gibson*, 8th Dist. No. 92275, 2009- Ohio-4984, the Eighth District Court of Appeals examined a similar case and concluded that the kidnaping and rape charges merge under

R. C. §2941.25. In *Gibson*, the defendant was convicted of three counts of rape and kidnaping. In *Gibson*, the victim was the defendant's estranged wife. The sexual assault took place in her apartment. After telling his estranged wife that he was going to kill her, the defendant removed her dress and tore off her bra. At that point, her stood over her, grabbed her head, placed it near his penis, and made her perform oral sex on him. He then instructed her to get on the bed and lay down. He performed oral sex on her. The defendant told her to turn around and he attempted to engage in anal sex with her. When she complained that it was hurting her, the defendant turned her around and engaged in vaginal sex with her.

In its discussion of the second step of the *Rance* test -- the one that is consistent with the analysis approved by this Court in *Johnson, supra* -- the Court of Appeals quoted the following language from this Court's decision in *State v. Craig*, 110 Ohio St.3d 306, 2006 Ohio 4571, 853 N.E.2d 621, ¶117:

> "The test for determining whether kidnaping 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 kidnaping. Id. at subparagraph (a) of the syllabus; *State v. Foust*, 105 Ohio St.3d 137, 2004 Ohio 7006, 823 N.E.2d 836, P141; [*State v.*] *Lynch*, 98 Ohio St.3d 514, 2003 Ohio 2284, 787 N.E.2d 1185, P134."

In *Gibson*, the Court of Appeals concluded that the State had " . . . 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 . . . rape convictions and the kidnaping convictions should merge." *Gibson*, supra, at ¶34. In the present case, the sexual assault took place at two locations in the backyard, within relatively close proximity. This is not a case where the defendant threw the victim in a car, drove her a great distance to a remote location, and then raped her. This is not a case the defendant confined his victim in the basement of his home for a week for purposes of sexually assaulting her. Nor can it be said that the victim in this case was exposed to a higher risk of harm when she was moved from one location in the back yard to another location in the backyard. In the present case, the movement of the victim was merely incidental to the commission of the underlying sexual assault. The limited movement of the victim from one location in the backyard to another cannot justify multiple convictions and/or the imposition of multiple punishments.

Third, the analysis employed by the trial court is otherwise unpersuasive. The trial court observed, "I believe under the multiple count statute, this is separate conduct because, let's face it, had he done that and got her behind the garage and then she got away, we would still have a kidnaping." The reasoning of the trial court is not consistent with this Court's holding in *Johnson*. The question is "not whether it is possible to commit one *without* committing the other." *Johnson*, *supra*, ¶48. The question is not whether the defendant would have been guilty of kidnaping if J. W. had escaped after he escorted her to the area behind the garage, but before he committed the rape. The question is whether the offenses correspond to such a degree that the conduct of the defendant constituting commission of one offense constitutes commission of the other and whether they were committed with the same animus. Finally, the trial court's

conclusion that Appellee "had a separate animus as to each kind of conduct" is without any support in the record. If Appellee's purpose or motive for the kidnaping was something other than the commission of a sexual assault, why was there a sexual motivation specification in the indictment? If the defendant's purpose or motive for the kidnaping was something other than the commission of a sexual assault what was it?

The analysis set forth in the Merit Brief of Appellant is also unpersuasive. Appellant argues, "Defendant raped his eight year old niece behind her grandmother's car. He then pulled her by the arm between two houses where he picked up, put her on the ground, and raped her again." (Merit Brief of Appellant, p. 18) Appellant continues, "In reality, there were three times and manners in which Defendant unlawfully restrained the victim. First, when he raped her behind the vehicle. Next, when he forcibly dragged her by the arm to the location between the houses.[1] Last, when he raped the victim between two houses." (Id. at 18-19) Of course, there was *only one* kidnaping charge in the present case and there was *only one* kidnaping. The kidnaping began with the first rape and did not end until after the second rape was committed. At no time was there any interruption in the control exerted over the victim. No matter how you dissect it, the sole purpose of the kidnaping was to facilitate the sexual assaults. Appellant argues that "the substantial and prolonged movement" of the victim justifies a separate punishment for the kidnaping. But the record does not reveal any "substantial and prolonged movement" of the victim. All of the events occurred in the backyard of the residence. The victim was moved a very short distance before the second rape. And it was undisputed that all of this took place over just a

---

[1] J. D. testified that "he pulled me -- he took me by the hand and he took me between the two houses." (T. 340) There was no evidence adduced at trial that Appellee "dragged" J.D.

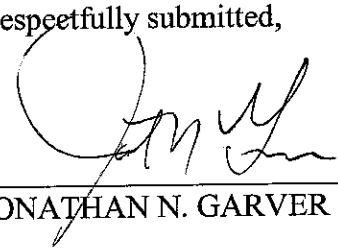
few minutes.

Without question, the Court of Appeals came to the correct decision and correctly applied the law in this case. Appellee was convicted of several serious offenses and the punishment imposed (25 years to life) was commensurate with the crimes he was found to have committed. The purpose of the merger doctrine and *R. C. 2945.21* is "to prevent shotgun convictions" -- to prevent "multiple findings of guilt and corresponding punishments heaped on a defendant for closely related offenses arising from the same occurrence." *Johnson, supra*, ¶43, citing *State v. Geiger, supra*. The decision of the Court of Appeals in this case is in complete accord with the purpose of the merger doctrine and *R. C. 2945.21.*

Conclusion

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

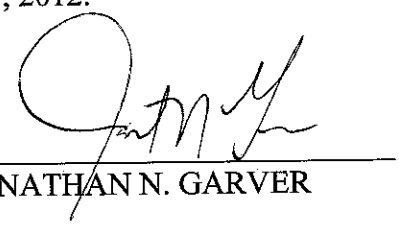
Respectfully submitted,



JONATHAN N. GARVER

Certificate of Service

A true copy of the foregoing Appellee's Merit Brief was sent by regular mail to Kristin Sobieski, Assistant Prosecuting Attorney, The Justice Center, 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113, this 16th day of January, 2012.



JONATHAN N. GARVER