

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 11AP-755
 : (C.P.C. No. 10CR-6207)
 Ervin C. Vance, : (REGULAR CALENDAR)
 :
 Defendant-Appellant. :

D E C I S I O N

Rendered on June 12, 2012

Ron O'Brien, Prosecuting Attorney, and *Susan M. Suriano*,
for appellee.

Robert D. Essex, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶ 1} Defendant-appellant, Ervin C. Vance, appeals from a judgment of the Franklin County Court of Common Pleas finding him guilty, pursuant to guilty plea, of one count each of kidnapping, aggravated robbery, and having a weapon under disability, and imposing a term of incarceration totaling 22 years. Defendant assigns a single error:

The trial court erred in entering multiple convictions and sentences for offenses that were allied offenses of similar import committed with a single animus.

Because the trial court properly concluded defendant's convictions for kidnapping and aggravated robbery do not merge under R.C. 2941.25, we affirm.

I. Facts and Procedural History

{¶ 2} By indictment filed October 21, 2010, defendant was charged with seven counts: one count each of kidnapping in violation of R.C. 2905.01, aggravated robbery in violation of R.C. 2911.01, and robbery in violation of R.C. 2911.02, all with both firearm and repeat violent offender specifications. In addition, defendant was charged with a second robbery count under R.C. 2911.02 with a firearm specification, and one count each of identity fraud in violation of R.C. 2913.49, receiving stolen property in violation of R.C. 2913.51, and having a weapon under disability in violation of R.C. 2923.13. The matter ultimately was scheduled for trial on July 5, 2011.

{¶ 3} Instead of pursuing a trial, defendant entered a guilty plea to kidnapping, aggravated robbery, and having a weapon while under disability, all without specifications; as part of the agreement, plaintiff-appellee, the state of Ohio, requested a nolle prosequi be entered on the remaining counts of the indictment. The trial court scheduled sentencing for August 4, 2011.

{¶ 4} At sentencing, the court allowed the parties to discuss extensively whether R.C. 2941.25, Ohio's allied offenses statute, applied and required the court to merge the kidnapping and aggravated robbery counts for purposes of sentencing. Following the discussion and the trial court's independent research of the issue, the court concluded defendant committed the two offenses with a separate animus, so they did not merge for purposes of sentencing. With that predicate, the trial court sentenced defendant to five years for the kidnapping charge, nine years for the aggravated robbery charge, and two years for the weapons under disability charge, all to be served consecutively to each other and to the six years the court imposed in a separate case, for a total of 22 years.

II. Assignment of Error—Allied Offenses

{¶ 5} Defendant's single assignment of error asserts the trial court misapplied the Supreme Court of Ohio's recent decision in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, and wrongly failed to merge his kidnapping and aggravated robbery counts for purposes of sentencing under R.C. 2941.25.

{¶ 6} "The federal and state constitutions' double jeopardy protection guards citizens against cumulative punishments for the 'same offense.' " *State v. Hall*, 10th Dist. No. 05AP-957, 2006-Ohio-2742, ¶ 16, citing *State v. Moss*, 69 Ohio St.2d 515, 518 (1982).

"Despite such constitutional protection, a state legislature may impose cumulative punishments for crimes that constitute the 'same offense' without violating double jeopardy protections." *Id.* "Under the 'cumulative punishment' prong, double jeopardy protections do 'no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.'" *Id.*, quoting *Missouri v. Hunter*, 459 U.S. 359, 366 (1983). When determining "the constitutionality of imposing multiple punishments against a criminal defendant in one criminal proceeding for criminal activity emanating from one transaction, appellate courts are limited to assuring that the trial court did not exceed the sentencing authority the legislature granted to the judiciary." *Id.*, citing *Moss* at 518, citing *Brown v. Ohio*, 432 U.S. 161 (1977).

{¶ 7} R.C. 2941.25 provides that where a defendant's same conduct "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(A). Where, however, "the defendant's conduct constitutes two or more offenses of dissimilar import" or "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." R.C. 2941.25(B). R.C. 2941.25 is a legislative attempt "to codify the judicial doctrine of merger, i.e., the principle 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.'" *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, ¶ 42, quoting *State v. Botta*, 27 Ohio St.2d 196, 201 (1971).

{¶ 8} The Supreme Court of Ohio recently reviewed and revised its analysis under R.C. 2941.25. *Johnson* at ¶ 40 (summarizing the allied offenses jurisprudence prior to *Johnson*). The court held that, when a court determines 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." *Id.* at syllabus. *Johnson* thus overruled *State v. Rance*, 85 Ohio St.3d 632 (1999), to the extent *Rance* instructed courts to compare the statutory elements of the two offenses in the abstract. *Johnson* at ¶ 44. Under *Johnson*, "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." *Id.* at ¶ 47. Rather, the court simply must ask whether the defendant committed the offenses by the same conduct. *Id.*

{¶ 9} Accordingly, in analyzing defendant's conduct, we ask "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." (Emphasis sic.) *Id.* at ¶ 48, citing *State v. Blankenship*, 38 Ohio St.3d 116, 119 (1988) (Whiteside, J., concurring). If the offenses are of similar import because the defendant committed them through the same conduct, the court then must ask whether the offenses were committed separately or with a separate animus. *Johnson* at ¶ 49-51.

{¶ 10} According to the plea proceedings in the trial court, the victim pulled her minivan into a Walgreens at 3583 E. Broad Street on October 2, 2010 at about noon; she entered the store to purchase cold medication, along with some other items. Because her child was ill and she was in a hurry to return home, the victim overlooked locking her car doors. Unknown to her, defendant entered her minivan while she was inside the store, and he concealed himself from view, waiting for her to return.

{¶ 11} On returning to the vehicle, the victim prepared to leave when defendant suddenly revealed himself, produced a handgun, and ordered the victim into the passenger seat while he took control of her vehicle. Defendant drove out of the parking lot and stopped a short time later in an alley one street south of the Walgreens store. He demanded the victim give him her purse and, when she explained she had no purse, demanded whatever she had of value. He ultimately took from her a cell phone, Ohio identification card, a bank card, two rings, and cigarettes. Although she pleaded for him to release her, he refused.

{¶ 12} Defendant drove the victim to a Chase bank down the street at 3200 E. Broad Street. He pulled up to the ATM at approximately 12:25 p.m. and demanded the victim provide a pin number. Defendant attempted to withdraw \$100 from her account using her bank card, but the transaction was not successful. On his second attempt, he was able to remove \$20 from her account. A photograph taken during the transaction depicts a face that the prosecution stated "looks an awful like" defendant. (Tr. 31.) The victim "would verify that that's her in the passenger seat of the car." (Tr. 31.)

{¶ 13} At that point, defendant told the victim "they were taking a road trip." (Tr. 31.) He drove her to the area of Parsons and Reeb Avenues to a suspected drug house where he exited the minivan, took the keys, and threatened to "hunt * * * down" the victim and her family if she attempted to flee. (Tr. 31.) The victim remained in the vehicle while defendant went inside; he returned a short time later and again drove away with her. Defendant then returned to the same area near the Walgreens where he originally entered the victim's vehicle, exited the vehicle for the last time, and ordered the victim to drive away and not look back.

{¶ 14} When we apply the *Johnson* analysis to the facts present here, we note " '[i]t is clear * * * that no movement is required to constitute the offense of kidnapping; restraint of the victim by force, threat, or deception is sufficient.' " *State v. Winn*, 121 Ohio St.3d 413, 2009-Ohio-1059, ¶ 23, quoting *State v. Logan*, 60 Ohio St.2d 126, 130 (1979) "Thus, implicit within every forcible rape (R.C. 2907.02(A)(1)[D]) is a kidnapping. The same may be said of robbery (R.C. 2911.02), and, under certain circumstances, of felonious assault (R.C. 2903.11)." *Logan* at 130; see *State v. Cooper*, 1st Dist. No. C-110027, 2012-Ohio-555, ¶ 21-24 (concluding aggravated robbery and kidnapping were allied offenses of similar import where the state relied on the same conduct to prove both offenses); *State v. Sidibeh*, 192 Ohio App.3d 256, 2011-Ohio-712, ¶ 60-61 (10th Dist.) (concluding kidnapping and aggravated robbery merge under R.C. 2941.25). The issue, then, is whether the offenses here were committed with a separate animus. *Id.* (Applying *Logan* to determine whether the evidence demonstrated a separate animus.)

{¶ 15} Under *Logan*, courts examine whether "the restraint is prolonged, the confinement is secretive, or the movement is substantial so as to demonstrate a significance independent of the other offense." *Logan* at syllabus (a). If so, "there exists a separate animus as to each offense." *Id.* Moreover, "[w]here 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." *Id.* at syllabus (b).

{¶ 16} The restraint here was prolonged and involved a substantial asportation. Unlike the facts in this court's decision in *Sidibeh*, where moving the victim from the bathroom to a common area in the house was deemed incidental to the aggravated

robbery, here, defendant transported the victim from the Walgreens, where he took the victim's belongings, to an ATM, where he withdrew money from her account. He then drove the victim to a drug house, threatening her should she leave. The entire episode consumed approximately one hour and 15 minutes and involved transporting the victim a considerable distance over a section of the city. Finally, defendant's kidnapping subjected the victim to an increased risk of substantial harm if for no other reason than he left her in a vehicle in the neighborhood of a drug house he visited, and he refused with accompanying threats to permit her to leave.

{¶ 17} Defendant responds by suggesting he, in effect, was sentenced for an unindicted count of kidnapping. As defendant explains the argument, the indictment charged him with kidnapping in furtherance of the robbery, but, he asserts, the trial court sentenced him for kidnapping by force or threat of force. Defendant's argument is not persuasive. Defendant kidnapped the victim in order to rob her. Accordingly, the kidnapping was appropriately charged as facilitating a robbery. The analysis under R.C. 2941.25 is directed only to determining whether the two charges should merge for purposes of sentencing. Applying the Supreme Court's analysis under *Johnson* and *Logan*, the kidnapping, although part of the aggravated robbery, involved substantial asportation and prolonged restraint, both of which support the trial court's determination that defendant had a separate animus for the kidnapping. Accordingly, defendant's single assignment of error is overruled.

III. Disposition

{¶ 18} Having overruled defendant's single assignment of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN, P.J., and KLATT, J., concur.
