[Cite as *State v. Hernandez*, 2026-Ohio-4450.]

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
AUGLAIZE COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE,

v.

HECTOR GERALD HERNANDEZ,

DEFENDANT-APPELLANT.

CASE NO. 2-26-09

OPINION AND JUDGMENT ENTRY

Appeal from Auglaize County Common Pleas Court
Criminal Division
Trial Court No. 2025-CR-104

Judgment Affirmed

Date of Decision: November 9, 2026

APPEARANCES:

Nicholas A. Catania **for Appellant**

Benjamin R. Elder **for Appellee**

WALDICK, J.

{¶1} Defendant-appellant, Hector Hernandez ("Hernandez"), brings this appeal from the May 21, 2026 judgment of the Auglaize County Common Pleas Court. For the reasons that follow, we affirm.

Background

{¶2} On October 28, 2025, Hernandez was indicted for four counts of Sexual Battery in violation of R.C. 2907.03(A)(7)/(B)(1), two counts of Sexual Battery in violation of R.C. 2907.03(A)(9)/(B)(1), three counts of Unlawful Sexual Conduct with a Minor in violation of R.C. 2907.04(A)/(B)(3), and four counts of Sexual Battery in violation of R.C. 2907.03(A)(9)/(B)(2). It was alleged that over various dates in October of 2025, Hernandez, while being employed as a school bus driver, engaged in sexual acts with a 15-year old student who rode his bus.

{¶3} Pursuant to a written, negotiated plea agreement, Hernandez agreed to plead guilty to one count of Sexual Battery in violation of R.C. 2907.03(A)(7)/(B)(1), a second degree felony, and one count of Unlawful Sexual Conduct with a Minor in violation of R.C. 2907.04(A)/(B)(3), a third degree felony. The allegations Hernandez pled guilty to included Hernandez having vaginal intercourse with the 15-year old victim, and cunnilingus with the 15-year old victim, both of which occurred on October 16, 2025. In exchange for Hernandez's guilty

pleas, the State agreed to dismiss the remaining charges and recommend an aggregate 8-year prison term.

{¶4} On May 21, 2026, Hernandez was sentenced to serve a mandatory, indefinite prison term on the Sexual Battery charge of 6 years to a maximum of 9 years. He was ordered to serve a consecutive 54-month prison term on the Unlawful Sexual Conduct with a Minor charge. A judgment entry memorializing his sentence was filed that same day. It is from this judgment that Hernandez appeals, asserting the following assignment of error for our review.

Assignment of Error

> **The trial court committed prejudicial error when it failed to properly merge offenses at sentencing resulting in the defendant-appellant receiving a sentence which is contrary to law.**

{¶5} In his assignment of error, Hernandez argues that the trial court erred by not merging his convictions for Sexual Battery and Unlawful Sexual Conduct with a Minor for purposes of sentencing. Specifically, he argues that the acts of vaginal intercourse and cunnilingus occurred on the same day and were part of the same course of conduct.

Standard of Review

{¶6} Hernandez did not object to merger at the trial court level, so we review the matter for plain error. *State v. Bailey*, 2022-Ohio-4407, ¶ 7. Under the plain-error doctrine, intervention by a reviewing court is warranted only under exceptional

circumstances to prevent injustice. *Id*. To prevail under the plain-error doctrine, Hernandez must establish that "an error occurred, that the error was obvious, and that there is 'a reasonable *probability* that the error resulted in prejudice,' meaning that the error affected the outcome of the trial." (Empahsis added in *Rogers*.) *State v. McAlpin*, 2022-Ohio-1567, ¶ 66, quoting *State v. Rogers*, 2015-Ohio-2459, ¶ 22. The elements of the plain-error doctrine are conjunctive, meaning all three must apply to justify an appellate court's intervention. *Bailey* at ¶ 9.

Analysis

{¶7} The Supreme Court of Ohio has set forth the following test to determine whether allied offenses should be merged:

> As a practical matter, when determining whether offenses are allied offenses of similar import within the meaning of R.C. 2941.25, courts must ask three questions when defendant's conduct supports multiple offenses: (1) Were the offenses dissimilar in import or significance? (2) Were they committed separately? and (3) Were they committed with separate animus or motivation? An affirmative answer to *any* of the above will permit separate convictions. The conduct, the animus, and the import must all be considered.

(Emphasis added.); *State v. Ruff*, 2015-Ohio-995, ¶ 31.

{¶8} At the outset of our analysis, we first emphasize that Hernandez waived any challenge to merger at the sentencing hearing. The trial court asked if there were any merger issues, and the following dialogue occurred:

> [PROSECUTOR]: No, there are not, and it was covered at the plea.

[DEFENSE COUNSEL]: I believe that it was, Your Honor.

THE COURT: Agreed, [Defense Counsel]?

[DEFENSE COUNSEL]: Yes.

THE COURT: These do not merge?

[DEFENSE COUNSEL]: Yes.

(May 21, 2026, Tr. at 32). Based on this exchange, Hernandez expressly waived any argument in favor of allied offenses.[1]

{¶9} Furthermore, notwithstanding the clear statement at sentencing that Hernandez agreed the offenses did not merge, the record itself establishes that the offenses in this case were committed separately. It is well-settled that different forms of sexual conduct are committed separately with a separate animus. *State v. Prince*, 2021-Ohio-4475, ¶ 15 (3d Dist.). In fact, the Supreme Court of Ohio has specifically held that vaginal intercourse, cunnilingus, and digital penetration of the vaginal cavity "each constitutes a separate crime with a separate animus[.] [T]hey do not constitute allied offense of similar import." *State v. Nicholas*, 66 Ohio St.3d 431, 435 (1993). Following our prior precedent, and the precedent of the Supreme Court of Ohio, we do not find that the separate acts of vaginal intercourse and

[1] Separately, as the State argues, defense counsel's statement would appear to invoke the invited-error doctrine. "Under [the invited-error] doctrine, a party is not entitled to take advantage of an error that he himself invited or induced the court to make." *State ex rel. Kline v. Carroll*, 2002-Ohio-4849.

cunnilingus merge for purposes of sentencing. Therefore, Hernandez's assignment of error is overruled.

Conclusion

{¶10} Having found no error prejudicial to Hernandez in the particulars assigned and argued, his assignment of error is overruled and the judgment of the Auglaize County Common Pleas Court is affirmed.

Judgment Affirmed

MIILER, and WILLAMOWSKI, J. J., concur.

JUDGMENT ENTRY

For the reasons stated in the opinion of this Court, the assignment of error is overruled and it is the judgment and order of this Court that the judgment of the trial court is affirmed with costs assessed to Appellant for which judgment is hereby rendered. The cause is hereby remanded to the trial court for execution of the judgment for costs.

It is further ordered that the Clerk of this Court certify a copy of this Court's judgment entry and opinion to the trial court as the mandate prescribed by App.R. 27; and serve a copy of this Court's judgment entry and opinion on each party to the proceedings and note the date of service in the docket. See App.R. 30.

Juergen A. Waldick, Judge

Mark C. Miller, Judge

John R. Willamowski, Judge

DATED:
/jlm