[Cite as *State v. Wolfe*, 2026-Ohio-1858.]

Released 05/04/26

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
GALLIA COUNTY

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	Case Nos. 24CA3
	:	24CA8
v.	:	
	:	DECISION AND
Timothy J. Wolfe,	:	JUDGMENT ENTRY
	:	
Defendant-Appellant.	:	

APPEARANCES:

Christopher Pagan, Repper-Pagan Law, Ltd., Middletown, Ohio, for appellant.

Dave Yost, Ohio Attorney General, and Andrea K. Boyd, Special Prosecuting Attorney, Columbus, Ohio, for appellee.

Smith, P.J.

{¶1} Appellant, Timothy J. Wolfe, appeals the judgment of the Gallia County Court of Common Pleas convicting him of one count of sexual battery, a third-degree felony in violation of R.C. 2907.03(A)(2), one count of gross sexual imposition, a fourth-degree felony in violation of R.C. 2907.05(A) , and one count of abduction, a third-degree felony in violation of R.C. 2905.02(A)(2)(B).[1] He has

[1] Appeal No. 24CA3 is from underlying case number 22CR132, that originally indicted appellant for four counts of rape, one count of gross sexual imposition, and one count of kidnapping. Many of these charges were later reduced and/or dismissed as part of a plea agreement. Appeal No. 24CA8 is from underlying case number 23CR15, in which appellant pled guilty to one count of theft as part of the same plea agreement. Although appellant has filed separate appeals from both cases, which have been consolidated for purposes of appeal, he raises no challenge to his theft conviction or sentence.

set forth a single assignment of error on appeal, contending that "[t]he (A)(2) Abduction offense was allied with the sex offenses because the restraint was incidental to the sexual conduct and happened simultaneously, in the same place, and same circumstances." He raises five separate issues under his sole assignment of error.

{¶2} Because we find merit to appellant's argument that the offense of abduction should have been merged with the offense of gross sexual imposition for purposes of sentencing, we find partial merit to his sole assignment of error. However, we reject appellant's contention that the failure to merge the abduction offense with the offense of sexual battery constituted plain error. As detailed below, because we conclude appellant failed to separately argue his ineffective assistance of counsel and due process claims as required by the appellate rules, they are not properly before us and we decline to address them. Accordingly, the judgment of the trial court in Case No. 22CR132 is affirmed in part, reversed in part, and this matter is remanded to the trial court for resentencing, at which point the State can elect which allied offense it will pursue against appellant. The judgment issued in Case No. 23CR15 is also affirmed.

FACTS

{¶3} On August 11, 2022, an indictment was filed in Gallia County Common Pleas Case No. 22CR132 charging appellant with the following offenses occurring on March 13, 2022:

> Count One: Rape in violation of R.C. 2907.02(A)(2) and (B), a first-degree felony, specifying that appellant had engaged in sexual conduct (cunnilingus) with the victim, J.H., when the appellant had purposely compelled her to submit by force or threat of force;
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> Count Two: Rape in violation of R.C. 2907.02, a first-degree felony, specifying that appellant had engaged in sexual conduct (digital vaginal penetration) with the same victim when appellant purposely compelled her to submit by force or threat of force;
>
> Count Three: Rape in violation of R.C. 2907.02, a first-degree felony, specifying that appellant had engaged in sexual conduct (vaginal intercourse) with the same victim when appellant purposely compelled her to submit by force or threat of force;
>
> Count Four: Rape in violation of R.C. 2907.02, a first-degree felony, specifying that appellant had engaged in sexual conduct (fellatio) with the same victim when appellant purposely compelled her to submit by force or threat of force:
>
> Count Five: Gross Sexual Imposition in violation of R.C. 2907.05, a fourth-degree felony, specifying that appellant had unlawfully had sexual contact with the same victim, who was not his spouse, when appellant purposely compelled her to submit by force or threat of force; and
>
> Count Six: Kidnapping in violation of R.C. 2905.01, a first-degree felony, specifying that appellant unlawfully removed the same victim, by force, threat, or deception, from the place where she was found or restrained her liberty for the purpose of

> engaging in sexual activity. It was further specified in this count that the victim was under eighteen years of age.[2]

{¶4} While this matter was pending, on July 11, 2024, appellant was indicted for one count of Grand Theft, a fourth-degree felony in violation of R.C. 2913.02, in Gallia County Common Pleas Case No. 23CR15. These two matters proceeded to a combined jury trial on March 6, 2024. However, after a jury was seated and opening arguments began, appellant entered into a plea agreement with the State whereby he agreed to plead guilty in Case No. 22CR132 to Count One, amended to third-degree Sexual Battery in violation of R.C. 2907.03(A)(2), Count Five, fourth-degree felony Gross Sexual Imposition in violation of R.C. 2907.05, and Count Six, amended to third-degree felony Abduction in violation of R.C. 2905.02(A)(2) and (B). Appellant also agreed to plead guilty in Case No. 23CR15 to first-degree misdemeanor Theft in violation of R.C. 2913.02, amended from Grand Theft. He entered these guilty pleas in exchange for the dismissal of the original and remaining charges. There was no agreement or recommendation regarding sentencing.

{¶5} During opening statements, the State informed the jury that the victim, who was a junior in high school, had gone with a friend to appellant's house. Appellant was the uncle of the victim's friend. The State alleged that appellant

[2] The State later filed a motion to amend Counts One through Four to add that the victim was not the spouse of appellant.

provided the girls with alcohol and that sometime during the night, the victim awoke to appellant "straddling her as she was laying on her side trying to take her pants off." The State further informed the jury that appellant forced the victim to engage in sexual conduct, despite the victim telling him to stop, trying to push him off of her, and kicking him in the chest. The State alleged that appellant forced himself on the victim, digitally penetrated her vagina with his fingers, had vaginal intercourse with her, and also engaged in cunnilingus and fellatio with her, "all the while touching and kissing [her] in other parts of her body," while he "restrained her and wouldn't let her leave." The defense opening statement admitted appellant and the victim were in his bedroom together and had sex but argued that the encounter did not include force or physical assault and did not constitute rape.[3]

{¶6} During the change of plea hearing, appellant admitted that regarding the sexual battery charge, he had sexual intercourse with the victim while she was drunk and that he understood her ability to appraise the nature of the situation was substantially impaired. Regarding the gross sexual imposition charge, appellant admitted that he had sexual contact with the victim in the form of touching that was separate and apart from the sexual intercourse he had with her. Regarding the

[3] Although opening statements do not constitute evidence, they do provide insight into what the State's theory of the case was and what the State alleged occurred which brought about the charges. Although a bill of particulars was provided, it provided no details regarding the conduct at issue other than what was alleged in the indictment. Furthermore, because this matter was resolved through a plea agreement, the details of the manner in which the offenses occurred is very limited.

abduction charge, he admitted that he and the victim had some drinks, he had sexual intercourse with her after he knew she was impaired and that he "had her to the point that she felt like she was in fear."

{¶7} During the sentencing hearing, appellant's counsel argued that all three counts were "one course of action" that "occurred in that narrow span of time rather than being three separate incidents." Counsel thus asked the court "to consider concurrent sentences for uh, some or all of those counts at sentencing." The trial court made no findings regarding allied offenses of similar import during the sentencing hearing and went on to impose consecutive sentences for both sex offenses as well the abduction offense. In its sentencing entry, the trial court stated as follows: "The Court finds that Defendant's conduct supports multiple offenses committed at separate times. Accordingly, the offenses were committed separately and do not constitute allied offenses of similar import."

{¶8} The trial court issued separate sentencing entries in each case and appellant has filed appeals from both entries; however, this Court has consolidated the cases on appeal. As noted above, although appellant raises no challenges to his conviction or sentence for theft, he raises a single assignment of error related to his convictions and sentences for sexual battery, gross sexual imposition, and abduction.

ASSIGNMENT OF ERROR

I. THE (A)(2) ABDUCTION OFFENSE WAS ALLIED WITH THE SEX OFFENSES BECAUSE THE RESTRAINT WAS INCIDENTAL TO THE SEXUAL CONDUCT AND HAPPENED SIMULTANEOUSLY, IN THE SAME PLACE, AND SAME CIRCUMSTANCES.

{¶9} In his sole assignment of error, appellant contends that the abduction offense should have been merged with the sex offenses (gross sexual imposition and sexual battery) for purposes of sentencing. He argues that these offenses were allied offenses of similar import in that they happened simultaneously, in the same place, and under the same circumstances. He further argues that these offenses should have merged for purposes of sentencing because the restraint element of the abduction offense was incidental to the "sexual conduct." The State contends that because appellant failed to raise the issue of merger below, he has waived all but plain error on appeal. The State alternatively argues that the trial court did not commit plain error, but rather that any error was invited by appellant.

Threshold Matters

{¶10} Appellant sets forth five issues presented for review, as follows:

1. The undisputed facts require this court to merge the (A)(2) Abduction with Sexual Battery and GSI and remand to the trial court for the State to elect what offenses to pursue for sentencing.

2. The undisputed facts show that the trial court committed plain error by failing to merge the (A)(2) Abduction with Sexual Battery and GSI.

3. The undisputed facts show that trial counsel was ineffective for failing to argue merger of the (A)(2) Abduction and Sexual Battery and GSI.

4. The trial court violated Due Process and Rule 43(A)(1) when its merger analysis and findings were made outside the sentencing hearing and outside Wolfe's presence in open court.

5. The record fails to support the trial court's finding that the conduct around the (A)(2) Abduction and the sex offenses involved separate acts and times.

{¶11} Issues 1, 2, and 5 all relate to appellant's assigned error, which challenges the trial court's failure to merge his offenses for sentencing and thus, they will be addressed together. However, issues 3 and 4 are based upon alleged errors that do not fall under the assignment of error as presented. App.R. 12(A)(2) and 16(A)(7) both require appellants to separately argue each assignment of error. Here, because appellant did not assign error based upon ineffective assistance of counsel, nor did he assign error based upon the denial of due process stemming from a violation of Crim.R. 43(A)(1), we decline to address these arguments. *See State v. Armstrong*, 2026-Ohio-245, ¶ 23 (4th Dist.). *See also State v. Barnes*, 2025-Ohio-1967, ¶ 50 (12th Dist.).

Merger Arguments

{¶12} Appellant's first, second, and fifth issues framed under his sole assignment of error taken together challenge the trial court's determination that the offenses of sexual battery, gross sexual imposition, and abduction did not merge in this case. Although appellant urges this Court to find that the issue was preserved for review, he alternatively argues that the trial court committed plain error. It is the State's position that this issue was not preserved for appellate review.

{¶13} A review of the record reveals that although trial counsel argued for the imposition of concurrent sentences below, he made no argument to the court regarding the merger of allied offenses of similar import. We find that a request for concurrent sentences does not constitute either a request for merger or an objection to the trial court's failure to merge the offenses for purposes of sentencing. As such, appellant has waived the issue except for plain error. *See State v. Bailey*, 2022-Ohio-4407, ¶ 7, citing *State v. Rogers*, 2015-Ohio-2459, ¶ 28 ("the failure to raise the allied offense issue at the time of sentencing forfeits all but plain error"). *See also State v. Hughes*, 2025-Ohio-894, ¶ 21 (4th Dist.).

Standard of Review

{¶14} The Supreme Court of Ohio recently had reason to elucidate upon the proper application of the plain error doctrine to merger arguments in *State v. Bailey*, *supra*. The Court stated as follows:

> Under the plain-error doctrine, intervention by a reviewing court is warranted only under exceptional circumstances to prevent injustice. *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus ("Notice of plain error * * * is to be taken with the utmost caution, under exceptional circumstances and only to prevent a miscarriage of justice"). To prevail under the plain-error doctrine, [an appellant] 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." (Emphasis added in *Rogers*.) *State v. McAlpin*, 169 Ohio St.3d 279, 2022-Ohio-1567, 204 N.E.3d 459, ¶ 66, quoting *Rogers* at ¶ 22; *see also State v. Wilks*, 154 Ohio St.3d 359, 2018-Ohio-1562, 114 N.E.3d 1092, ¶ 52.
>
> The elements of the plain-error doctrine are conjunctive: all three must apply to justify an appellate court's intervention. *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002) ("By its very terms, the rule places three limitations on a reviewing court's decision to correct an error despite the absence of a timely objection at trial").
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> * * *
>
> The second element of the plain-error test requires the error to be obvious.
>
> * * *
>
> The second element of the three-part test gives teeth to our belief that the plain-error doctrine is warranted only under exceptional circumstances to prevent injustice. *See Long*, 53 Ohio St.2d 91, 372 N.E.2d 804, at paragraph three of the syllabus; *see also United States v. Atkinson*, 297 U.S. 157, 160, 56 S.Ct. 391, 80 L.Ed. 555 (1936) ("In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings").

Bailey at ¶ 8-10, 14-15.

The *Bailey* Court did not elaborate upon the third element of the test, which requires a showing that there is "a reasonable probability that the error resulted in prejudice," because it ended its analysis once it determined that the error at issue was not obvious.

Allied Offenses of Similar Import

{¶15} In making the first determination under a plain error analysis, the *Bailey* Court immediately considered the definition of allied offenses of similar import to determine whether an error existed. The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." This protection applies to Ohio citizens through the Fourteenth Amendment and is additionally guaranteed by Article I, Section 10 of the Ohio Constitution. This constitutional protection prohibits multiple punishments in a single trial for the same conduct in the absence of a clear indication of contrary legislative intent. *Missouri v. Hunter*, 459 U.S. 359 , 366 (1983); *State v. Fannon*, 2018-Ohio-5242, ¶ 129 (4th Dist.).

{¶16} The General Assembly enacted R.C. 2941.25 to identify when a court may impose multiple punishments:

> (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.

Although the trial court's duty to merge allied counts at sentencing is mandatory, a defendant bears the burden to establish that he is entitled to the R.C. 2941.25 protection. *See State v. Underwood*, 2010-Ohio-1, ¶ 26; *State v. Washington*, 2013-Ohio-4982, ¶ 18.

{¶17} In *State v. Ruff,* 2015-Ohio-995, the Supreme Court of Ohio discussed the proper analysis to determine whether two offenses merge under R.C. 2941.25. According to *Ruff*, "[i]n determining whether offenses are allied offenses of similar import within the meaning of R.C. 2941.25, courts must evaluate three separate factors - the conduct, the animus, and the import." *Id.* at paragraph one of the syllabus.

> Under R.C. 2941.25(B), a defendant whose conduct supports multiple offenses may be convicted of all the offenses if any one of the following is true: (1) the conduct constitutes offenses of dissimilar import, (2) the conduct shows that the offenses were committed separately, or (3) the conduct shows that the offenses were committed with separate animus.

Id. at paragraph three of the syllabus.

"Two or more offenses of dissimilar import exist within the meaning of R.C. 2941.25(B) when the defendant's conduct constitutes offenses involving separate victims or if the harm that results from each offense is separate or identifiable." *Id.* at paragraph two of the syllabus.

{¶18} In *State v. Hughes* this Court explained that in applying the test to determine whether allied offenses should be merged, the following questions should be asked:

> "(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."

State v. Hughes, supra, at ¶ 24, quoting *State v. Earley*, 2015-Ohio-4615, ¶ 12, in turn citing *Ruff, supra*, at ¶ 31.

Legal Analysis

{¶19} As set forth above, appellant was indicted on four counts of rape, one count of gross sexual imposition, and one count of kidnapping. After going through voir dire, seating a jury, and conducting opening statements, appellant entered into a plea agreement with the State whereby he agreed to enter guilty pleas to a single, amended count of sexual battery (in place of rape), one count of gross sexual imposition, and one amended count of abduction (in place of

kidnapping). More specifically, appellant pled guilty to Sexual Battery in violation R.C. 2907.03(A)(2), which provides as follows:

> (A) No person shall engage in sexual activity with another; cause another to engage in sexual activity with the offender; or cause two or more other persons to engage in sexual activity when any of the following apply:
>
> * * *
>
> (2) The offender knows that the other person's, or one of the other persons', ability to appraise the nature of or control the other person's own conduct is substantially impaired.

{¶20} Appellant also pled guilty to Gross Sexual Imposition in violation of R.C. 2907.05(A)(1), which provides as follows:

> (A) No person shall have sexual contact with another; cause another to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies:
>
> (1) The offender purposely compels the other person, or one of the other persons, to submit *by force or threat of force*.

(Emphasis added).

{¶21} Finally, appellant pled guilty to Abduction in violation of R.C. 2905.02(A)(2) and (B), which provides as follows:

> (A) No person, without privilege to do so, shall knowingly do any of the following:
>
> * * *

> (2) *By force or threat*, restrain the liberty of another person under circumstances that create a risk of physical harm to the victim or place the other person in fear;
>
> * * *
>
> (B) No person, with a sexual motivation, shall violate division (A) of this section.

(Emphasis added).

{¶22} On appeal, appellant contends that the restraint which formed the basis of the abduction offense was merely incidental to the commission of these sex offenses and thus, it should have been merged for purposes of sentencing. This principle appears to stem from an Ohio Supreme Court case predating *Ruff* which specifically addressed the question of the merger of the offenses of rape and kidnapping, offenses of which appellant was initially indicted. *See State v. Logan*, 60 Ohio St.2d 126 (1979). In *Logan*, the Court held as follows:

> In establishing whether kidnapping and another offense of the same or similar kind are committed with a separate animus as to each pursuant to R.C. 2941.25(B), this court adopts the following guidelines:
>
> (a) Where the restraint or movement of the victim is merely incidental to a separate underlying crime, there exists no separate animus sufficient to sustain separate convictions; however, where the restraint is prolonged, the confinement is secretive, or the movement is substantial so as to demonstrate a significance independent of the other offense, there exists a separate animus as to each offense sufficient to support separate convictions;
>
> (b) 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.

Logan at syllabus.

The *Logan* Court, in analyzing the kidnapping statute, found that "[i]t is clear from the plain language of the statute that no movement is required to constitute the offense of kidnapping; restraint of the victim by force, threat, or deception is sufficient." *Logan* at 1349. The Court further stated that "[t]he same may be said of robbery * * * and, under certain circumstances, of felonious assault * * *." *Id.*

{¶23} Despite the fact that we look to the test set forth in *Ruff* when reviewing arguments regarding the merger of allied offenses of similar import, recent cases, including a case from this district, have applied the principles set forth in *Logan* when specifically reviewing whether kidnapping and another offense should merge. *See State v. Chapman*, 2022-Ohio-2853, ¶ 58 (4th Dist.) (in a case involving kidnapping and attempted murder, we acknowledged *Logan* but observed the *Logan* Court held that "where murder is the underlying crime, a kidnapping in facilitation thereof would generally constitute a separately cognizable offense") and *State v. Turner,* 2024-Ohio-684, ¶ 63 (2d Dist.) (" 'Although *Logan* predates *Ruff*, the *Logan* guidelines are still relevant to determining whether rape and kidnapping convictions merge.' "), citing *State v. Grate*, 2020-Ohio-5584, ¶ 108.

{¶24} In *Chapman*, we ultimately determined that the offenses of kidnapping and attempted murder did not merge where the evidence adduced at trial showed there was substantial movement, prolonged restraint, and secretive confinement of the victim when she was dragged into a field and left, which we held presented a substantial increase in the risk of harm separate from the harm involved in the attempted murder, unlike in *Logan, supra*, where the victim was forced into an alley, around a corner, and down a flight of stairs at gunpoint. *Chapman* at ¶ 65, citing *Logan* at 1345. However, we did consider the principles set forth in *Logan* in deciding whether the restraint at issue was incidental to the underlying crime.

{¶25} In *Turner*, the court reasoned as follows:

> It is well established that "[a]ll rapes inherently involve a restraint on the liberty of another, and where the act of rape is the sole unlawful exercise of restraint on the physical liberty of another person, the law is clear that any accompanying kidnapping charge should merge with the rape charge." *State v. Portman*, 2d Dist. Clark No. 2013-CA-68, 2014-Ohio-4343, 2014 WL 4823868, ¶ 32, citing *Logan*, 60 Ohio St.2d 126, 397 N.E.2d 1345. Therefore, "[w]here the restraint or movement of the victim is merely incidental to a separate underlying crime [such as rape], there exists no separate animus sufficient to sustain separate convictions[.]" *Logan* at paragraph (a) of the syllabus.
>
> As an exception to this rule, the Supreme Court in *Logan* explained that a separate animus does exist and offenses do not merge if (1): "the restraint is prolonged, the confinement is secretive, or the movement is substantial so as to demonstrate a significance independent of the other offense," or (2) "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[.]" *Id.* at paragraphs (a) and (b) of the syllabus.
>
> "Although *Logan* predates *Ruff*, the *Logan* guidelines are still relevant to determining whether rape and kidnapping convictions merge." (Citations omitted.) *State v. Grate*, 164 Ohio St.3d 9, 2020-Ohio-5584, 172 N.E.3d 8, ¶ 108. "The guidelines in *Logan* are also reasonable considerations for determining whether the defendant committed kidnapping as separate conduct from other offenses." *State v. Cargle*, 2d Dist. Montgomery No. 28044, 2019-Ohio-1544, 2019 WL 1870910, ¶ 46, citing *State v. Lovato*, 2d Dist. Montgomery No. 25683, 2014-Ohio-2311, 2014 WL 2475593, ¶ 13, citing *State v. Ware*, 63 Ohio St.2d 84, 406 N.E.2d 1112 (1980).

Turner at ¶ 61-63.

{¶26} We note that the offenses at issue in *Logan*, *Chapman*, and *Turner* all included elements of force (kidnapping, rape, attempted murder). Here, appellant pled guilty to abduction and gross sexual imposition, both of which contain an element of force, as well as sexual battery under R.C. 2907.03(A)(2), which does not include the element of force contained in the (A)(1) subsection, but instead requires that the offender knows that the other person's ability to appraise the nature of or control the other person's own conduct is substantially impaired. As noted above, appellant provided the victim herein with alcohol and she was very intoxicated at the time the offenses took place.

{¶27} Appellant contends that the trial court committed plain error in failing to merge the offense of abduction with the offenses of sexual battery and gross

sexual imposition and he cites several cases from other districts in support of his argument. *See State v. Dennison*, 2020-Ohio-2699, ¶ 34 (9th Dist.) (finding the offenses of abduction and rape should have been merged for sentencing where the court found that the defendant's restraint of the victim was incidental to the commission of the rape, noting that case law "supports the conclusion that, when the abduction of the victim is incidental to the underlying sexual crime, and is undifferentiated by time, place or circumstance, those offenses merge"); *State v. Powih*, 2017-Ohio-7208, ¶ 40-42 (12th Dist.) (finding the trial court committed plain error in failing to merge abduction and rape where the offenses occurred as part of a single course of conduct as "[t]he restraint and sexual acts were undifferentiated by time, place or circumstances"); *State v. Patel*, 2011-Ohio-6329, ¶ 88 (2d Dist.) (finding the offenses of abduction, rape, and gross sexual imposition were allied offenses of similar import where the defendant entered a bathroom, locked the door, and proceeded to place a hand down the victim's pants and a finger inside the victim's vagina); *State v. Hernandez*, 2011-Ohio-3765, ¶ 53 (12th Dist.) (finding abduction and rape were allied offenses of similar import where the defendant's restraint of the victim was "incidental to the underlying sexual crimes, and had no significance independent of those sexual crimes"); *State v. Merz*, 2021-Ohio-2093 (1st Dist.) (applying the *Logan* reasoning regarding kidnapping and rape by analogy to find that abduction and gross sexual imposition

should merge where the restraint was incidental to the sex offenses and where there was no separate animus, the offenses were not dissimilar in import, and were not committed separately). Appellant points out that in *Merz*, as in the present case, the defendant was found guilty of abduction in violation of R.C. 2905.02(B) which states that the abduction was sexually motivated, arguing therefore that there was a single animus in committing abduction, gross sexual imposition, and sexual battery.

{¶28} After careful consideration of the case law cited by appellant and after conducting our own research, we agree with appellant's argument that the trial court committed plain error in failing to merge the offense of abduction with the offense of gross sexual imposition. We conclude that the offenses of abduction and gross sexual imposition were accomplished with the same conduct and we believe the record indicates that appellant's actions in restraining the victim were incidental to the commission of the gross sexual imposition offense, consistent with the reasoning in *Logan*, *supra*. Further, applying the test set forth in *Ruff, supra*, it appears that these two offenses were not of dissimilar import or significance, were not committed separately, but instead were committed with a single animus and motivation.

{¶29} Both offenses involved an element of force and/or threat of force and the force exhibited in the restraint of the victim appears to have had similar import

to the force with which appellant committed the offense of gross sexual imposition. We find that applying the foregoing reasoning set forth in *Logan, Dennison, Powih, Patel, Hernandez*, and *Merz* leads to the conclusion that the trial court committed plain error in failing to merge these offenses for purposes of sentencing. Thus, we find that the failure to merge the offenses of abduction and gross sexual imposition constituted error, that such error was obvious, and that appellant was prejudiced by virtue of the fact that he would have received a lesser sentence absent this error.

{¶30} However, we are constrained to hold that the trial court's failure to merge the offenses of abduction and sexual battery did not constitute plain error in light of the recent reasoning of the Supreme Court of Ohio in *State v. Bailey, supra*. As set forth above, the *Bailey* Court refused to find plain error occurred in failing to merge counts of kidnapping and rape based on its finding that the error was not obvious. *Bailey* at ¶ 14. In reaching its decision, the Court seems to have found fault with the appellate court's reliance on *State v. Logan* to find that kidnapping and rape should have merged based upon the distance Bailey forced the victim to walk before raping her. *Id.* at ¶ 13.

{¶31} More specifically, the *Bailey* Court found that "the three-part test [for plain error] is not a factual test centered on distance or any other fact. Nor should it be." *Id.* The Court noted that while the trial court found Bailey's motivation for

making his victim walk to a parking garage was not incidental to the rape, the appellate court found that it was. *Id.* After pointing out the differing conclusions reached by each court, the Court stated that "[e]ven if we were to assume that the trial court erred by not merging the kidnapping and rape counts, the facts of the case indicate that such error was not obvious." *Id.* The Court went on to reason that it is the obviousness element of the plain error test that "gives teeth" to the "belief that the plain error doctrine is warranted only in exceptional circumstances to prevent injustice." *Id.* at ¶ 15.

{¶32} Ultimately, the Court appears to have reached its conclusion that there was no plain error in failing to merge the offenses of kidnapping and rape based upon the fact that "[a]pplication of the law governing the merger of allied offenses is dependent on the specific facts of each case." *Id.* at ¶ 16. The Court reasoned that "it is clear to us that in an area of the law so driven by factual distinctions, an asserted error was not obvious." *Id.*

{¶33} We believe that the reasoning set forth in *Bailey* constrains us to find that appellant has failed to demonstrate plain error with respect to the trial court's failure to merge the offenses of abduction and sexual battery for sentencing. The form of sexual battery appellant pled guilty to is different from other offenses such as rape and gross sexual imposition in that it did not include an element of force. Appellant pled guilty to sexual battery under R.C. 2907.03(A)(2), which provided

that in engaging in sexual activity with the victim, appellant knew that the victim's ability to appraise the nature of or control her own conduct was substantially impaired. It differs from all the other offenses in the cases cited by appellant in that it does not include an element of force but instead contemplates that the victim was overcome not by force, but by impairment.

{¶34} Although we note the difference in the elements of these offenses, we also acknowledge that an analysis and comparison of the elements of offenses has been discarded in favor of an analysis of an offender's conduct, animus, and import of the offenses. Instead, we simply note this difference in elements as part of the question of whether the harm suffered by a victim from a sexual assault might, in some cases, differ depending on whether it occurred by force, or whether it occurred as a result of impairment. In this respect, we find some merit to the State's argument that

> a victim who engages in vaginal intercourse when she is too inebriated to consent suffers a harm. But a victim who is held down when she is kicking and screaming and placed in fear suffers additional harm, which constitutes a different offense.

Importantly, no case cited by appellant or discovered in our research stands for the proposition that the offenses of abduction and sexual battery constitute allied offenses of similar import that must be merged. Thus, much like the case in *Bailey*, *supra*, we find that even if we were to conclude that the trial court erred in

failing to merge these two offenses, we cannot conclude that the error was obvious, thereby constituting plain error.

{¶35} In light of the foregoing, although we find no plain error occurred with respect to the trial court's failure to merge the offenses of Abduction and Sexual Battery, we conclude the trial court committed plain error in failing to merge Abduction and Gross Sexual Imposition for purposes of sentencing. Accordingly, the judgment of the trial court issued in underlying Case No. 23CR132 is affirmed in part, reversed in part, and this matter is remanded to the trial court for resentencing, at which point the State can elect which allied offense it will pursue against appellant. Furthermore, the judgment of the trial court issued in underlying Case No. 23CR15 is affirmed.

JUDGMENTS AFFIRMED IN PART, REVERSED IN PART, AND CAUSE REMANDED.

JUDGMENT ENTRY

It is ordered that the JUDGMENTS BE AFFIRMED IN PART, REVERSED IN PART, AND CAUSE REMANDED. Costs are to be assessed to appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Gallia County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed 60 days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the 60-day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the 45-day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of 60 days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Abele, J. and Wilkin, J. concur in Judgment and Opinion.

For the Court,

_____

Jason P. Smith
Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 22, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.