[Cite as *State v. Thomas*, 2023-Ohio-3148.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	No. 112064
v.	:	
RALPH THOMAS,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED IN PART; REVERSED IN PART; AND REMANDED
RELEASED AND JOURNALIZED: September 7, 2023

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-21-656106-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Jillian J. Piteo, Assistant Prosecuting Attorney, *for appellee*.

P. Andrew Baker, *for appellant*.

EILEEN T. GALLAGHER, P.J.:

{¶ 1} Defendant-appellant, Ralph Thomas ("Thomas"), appeals from his convictions and sentence following a bifurcated trial. He raises the following assignments of error for review:

1. Defendant-appellant must be resentenced as the trial court did not properly comply with R.C. 2929.14(C)(4).

2. Defendant-appellant's convictions must be reversed because he did not receive effective assistance of counsel.

3. The trial court erred when it did not merge allied offenses of similar import.

4. Defendant-appellant must be resentenced as he did not receive effective assistance of counsel at sentencing.

{¶ 2} After careful review of the record and relevant case law, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. Procedural and Factual History

{¶ 3} On January 20, 2021, Thomas was named in a nine-count indictment, charging him with rape in violation of R.C. 2907.02(A)(2) (Count 1); kidnapping in violation of R.C. 2905.01(A)(4) (Count 2); kidnapping in violation of R.C. 2905.01(A)(2) (Count 3); felonious assault in violation of R.C. 2903.11(A)(1) (Count 4); aggravated burglary in violation of R.C. 2911.11(A)(1) (Count 5); assault in violation of R.C. 2903.13(A) (Count 6); resisting arrest in violation of R.C. 2921.33(B) (Count 7); aggravated menacing in violation of R.C. 2903.21(A) (Count 8); and disrupting public services in violation of R.C. 2909.04(A)(3) (Count 9). Counts 1-4 of the indictment contained sexual-motivation and sexually violent predator specifications. The indictment stemmed from allegations that Thomas physically and sexually assaulted his former acquaintance, B.B., on January 16, 2021.

{¶ 4} The matter proceeded to trial on September 26, 2022, where the following relevant facts were adduced. B.B., then 59 years old, testified that when she was approximately 48 years old, she suffered a massive stroke that resulted in physical weakness, short-term memory loss, anxiety, and depression. Following years of physical therapy, B.B.'s health improved to the point that she could care for herself without assistance. Thus, in 2016, B.B. moved into an apartment complex located in Cleveland Heights, Ohio that is exclusively inhabited by physically disabled adults who are 55 years of age or older.

{¶ 5} B.B. testified that she met Thomas while living in the apartment complex. Following a period of friendship, B.B. and Thomas began a romantic relationship that led to consensual, sexual encounters. Although B.B. could not recall when her intimate relationship with Thomas began, she stated that they only engaged in consensual sex "once or twice." (Tr. 494.)

{¶ 6} At some point, B.B. determined that she no longer wished to continue a romantic relationship or friendship with Thomas. B.B. explained that she "started to have an eerie feeling about [Thomas]" after hearing "rumors" about him "around the building." (Tr. 494.) B.B. clarified that she attempted to cease all contact with Thomas and asked him to "stay away from [her]" and her apartment. B.B. testified that following a period of no contact with Thomas, she was approached by Thomas in the mailroom of the apartment complex on December 16, 2020. During this encounter, Thomas verbally threated B.B., stating:

> Next time I knock on your door, if you don't answer like the rest of the women in the building, I will break your MFing jaw. Try me if you want to.

(Tr. 499.) Thereafter, Thomas began calling and leaving threatening voice messages on B.B.'s phone. B.B. explained the situation as follows:

> He would leave threatening voice messages, and I would block them, and he would call from different phone numbers. And on the voice message, he would say, you didn't know I have so many phones. I'm going to kill you and your son, and all this stuff. Craziness.

(Tr. 495.) Thomas's collective threats caused B.B. to move in with her daughter for approximately "one week until things cooled down." (Tr. 501.)

{¶ 7} B.B. had no contact with Thomas until January 16, 2021. On this occasion, B.B. made plans to do laundry with a friend who also lived in the apartment building. When B.B. heard a knock at her door, she quickly opened the door expecting to greet her friend. Thomas, however, was on the opposite side of the door. B.B. testified that Thomas pushed the door open with his elbow and immediately punched her in the face with a closed fist. B.B. stated that Thomas struck her so hard that she flew across the room and onto the floor near a table. Thomas then stood over B.B. and told her to take her clothes off. When B.B. did not "mov[e] fast enough," Thomas continued to punch her repeatedly on the left side of her face. (Tr. 506.)

{¶ 8} Ultimately, B.B. complied with Thomas's demands and removed her clothing. B.B. explained the encounter that ensued as follows:

> That's when he kept putting his finger in my rectum and jamming up there. I don't know how many times. And I kept scooting away from him and he punched me again and said, open your mouth. And that's

> when he put the smeared poop in my mouth and face. Then he made me get up from where that cocktail table is and made me lay out on this couch * * * and he put his knee in my back and rammed his finger up my rectum again. Then he smeared the poop all on my back. So now after that happened, I told him I got to go to the bathroom. I went to the bathroom. He was about to walk out the door. He grabbed my glasses off the table and my keys off that little counter[.]

(Tr. 509.) B.B. emphasized that she did not consent to a sexual encounter with Thomas and believed that he would harm her if she did not comply with his demands.

{¶ 9} B.B. testified that before Thomas left her apartment, he put his hand around her neck and threatened to kill her if she contacted the police. Nevertheless, once Thomas was out of her apartment, B.B. immediately ran downstairs to the first floor and, with the assistance of a neighbor, called 911 at approximately 12:07 p.m. An audio recording of B.B.'s 911 call was played in the presence of the jury. When the police arrived at the scene, B.B. was transported to MetroHealth Medical Center, where she underwent a sexual-assault examination and provided a statement to Detective Gregory Jakomin ("Det. Jakomin") of the Cleveland Heights Police Department.

{¶ 10} Officer Michael Laurello ("Officer Laurello") of the Cleveland Heights Police Department, testified that on January 16, 2021, he was dispatched to the apartment complex to investigate the reported sexual assault. Upon arriving at the scene, Officer Laurello and other responding officers made contact with B.B., who had visible injuries to her face and neck. Officer Erik Mild ("Officer Mild") of the Cleveland Heights Police Department, described B.B.'s initial statement as follows:

> She was alleging that she was strangled around her neck almost to the point of passing out, exhaustion of air. She was struck in the face repeatedly with a closed fist on the left side of her face, which caused – I noticed she had a swollen left cheek and bloodshot eyes.
>
> She was also assaulted sexually. She was flipped over onto her stomach, laying on her back, all of her clothes were forcefully removed off of her, and the suspect male that she identified as Mr. Thomas had inserted his fingers digitally into her anus and then proceeded to smear fecal matter of her own on her face.

(Tr. 300-301.)

{¶ 11} B.B. also provided a description of her assailant and the officers began canvassing the area to ensure Thomas was no longer on the scene. After a brief period of time, Officer Laurello began making his way back to B.B.'s apartment to secure the crime scene. At that time, Officer Laurello "observed a male matching the description of [the] suspect male who was identified as Ralph Thomas." (Tr. 329.) Officer Laurello then spoke with the male and confirmed that his name was "Thomas." Officer Laurello testified that he did not immediately attempt to detain Thomas, but rather advised Thomas that he was not the individual the police were searching for. Officer Laurello explained that he utilized a tactic of deception with Thomas because he was alone and needed more time for assisting units to respond to his location. Officer Laurello then accompanied Thomas in the elevator and rode with him to the main floor of the apartment complex.

{¶ 12} Ultimately, Officer Laurello attempted to detain Thomas before he had the opportunity to leave the apartment complex. Thomas, however, became combative and "threw a closed fist at [Officer Laurello's] face." (Tr. 334.) Thomas then pushed a woman, later identified as B.B.'s daughter, into Officer Laurello in an

effort to flee the scene. Officer Laurello testified that his physical confrontation with Thomas continued outside the apartment complex. During this altercation, Thomas lost his footing and knocked himself unconscious after striking his face on a parked vehicle. Thomas was placed under arrest at that time.

{¶ 13} Det. Jakomin confirmed that on January 16, 2021, he responded to MetroHealth and obtained a verbal statement from B.B. Det. Jakomin testified that B.B., who appeared "disheveled" and "visibly upset," reported that "she had been assaulted by Ralph Thomas." (Tr. 568-569.) B.B. further indicated that Thomas had taken certain personal items from her apartment, including her keys, a pair of eyeglasses, and her cell phone.

{¶ 14} Thereafter, Det. Jakomin performed a consensual search of B.B.'s apartment and recovered various items that corroborated her statement, including "miscellaneous clothing items that were on the floor" and "feces-stained sheets that were on the sofa." (Tr. 571.) Det. Jakomin later spoke with B.B.'s son and learned that several of the items taken from B.B.'s home were likely inside Thomas's vehicle, which was still parked at the apartment complex. Based on this information, the police executed a warrant to search Thomas's vehicle and discovered a set of keys that were consistent with the keys belonging to B.B. The investigating officers were unable to locate B.B.'s eyeglasses or cell phone.

{¶ 15} Finally, Det. Jakomin testified that he reviewed surveillance video footage that was recovered from the apartment complex. Det. Jakomin confirmed that the video footage depicted Thomas inside the apartment complex both before

and after the sexual assault was alleged to have occurred. The video footage further depicts Thomas's altercation with Officer Laurello in the lobby area of the apartment complex.

{¶ 16} At the close of its case-in-chief, the state submitted evidence of Thomas's prior convictions as necessary to establish the specifications attached to Counts 1-4. Defense counsel then moved for an acquittal pursuant to Crim.R. 29(A), which was denied. The defense rested without calling any witnesses.

{¶ 17} At the conclusion of trial, Thomas was found guilty of all counts and their accompanying specifications.

{¶ 18} A sentencing hearing commenced on October 18, 2022. At the onset of the hearing, the parties agreed that Counts 1 and 2 were allied offenses of similar import, and the state elected to proceed with sentencing on Count 1. Upon hearing from the parties, the trial court sentenced Thomas to the following terms of incarceration: 10 years to life on Count 1; 10 years to life on Count 3; eight years on Count 4; 11 years on Count 5; 18 months on Count 6; 180 days on Count 7; 180 days on Count 8; and 18 months on Count 9. The prison terms imposed on Counts 1 and 3 were ordered to be served consecutively for an aggregate sentence of 20 years to life in prison. All remaining sentences were ordered to run concurrently. Finally, the trial court classified Thomas as a Tier III sex offender. (Tr. 733.)

{¶ 19} Thomas now appeals from his convictions and sentence.

II. Law and Analysis

A. Ineffective Assistance of Counsel – Trial Phase

{¶ 20} We address Thomas's assignments of error out of order for the ease of discussion. In the second assignment of error, Thomas argues defense counsel rendered ineffective assistance of counsel by failing to object to repeated references to B.B. as "the victim." Thomas suggests that because the underlying issue before the jury was whether a crime was committed at all, the references to B.B. as "the victim" lent undue credence to her testimony and undermined the proper function of the adversarial process.

{¶ 21} A criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). As a general matter, "reversal of a conviction for ineffective assistance of counsel requires that the defendant show that counsel's performance was deficient and that the deficient performance prejudiced the defendant so as to deprive him of a fair trial." *State v. Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961, 911 N.E.2d 242, ¶ 98, citing *Strickland* at 687. *Accord State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph two of the syllabus.

{¶ 22} In Ohio, a properly licensed attorney is presumed to be competent. *State v. Smith*, 17 Ohio St.3d 98, 100, 477 N.E.2d 1128 (1985). Because there are "countless ways to provide effective assistance in any given case," the court must give great deference to counsel's performance and "indulge a strong presumption" that counsel's performance "falls within the wide range of reasonable professional

assistance." *Strickland* at 689; *see also State v. Powell*, 2019-Ohio-4345, 134 N.E.3d 1270, ¶ 69 (8th Dist.) ("'A reviewing court will strongly presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'"), quoting *State v. Pawlak*, 8th Dist. Cuyahoga No. 99555, 2014-Ohio-2175, ¶ 69.

{¶ 23} Whether to object to evidence presented or to statements made in the presence of the jury is often regarded as a strategic or tactical decision. *See, e.g., State v. Frierson*, 2018-Ohio-391, 105 N.E.3d 583, ¶ 25 (8th Dist.). Strategic or tactical decisions ordinarily do not constitute ineffective assistance of counsel. *See State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, ¶ 101, 111. As such, the failure to make an objection is generally not, in and of itself, sufficient to sustain a claim of ineffective assistance of counsel. *Id.* at ¶ 103; *Frierson* at ¶ 25; *State v. C.D.S.*, 10th Dist. Franklin No. 20AP-355, 2021-Ohio-4492, ¶ 109 (observing that "[i]t is * * * conceivable that defense counsel did not want to bring further attention to the issue as part of the trial strategy by insinuating [the defendant] did not trust the jury's ability to identify the word 'victim' as a reference to a complaining witness").

{¶ 24} With respect to the issues presented in this ineffective assistance of counsel claim, it has been generally recognized that

> [t]he term "victim" means "[a] person harmed by a crime, tort, or other wrong." VICTIM, Black's Law Dictionary (11th Ed.2019). Depending on context, a party's use of the term "victim" at trial may imply that the charged offenses occurred, which reduces the state's burden of proof. Therefore, it is more appropriate for the parties to use the phrase

> "alleged victim" at trial to reflect the defendant's presumption of innocence.

State v. Aboytes, 11th Dist. Lake No. 2020-L-001, 2020-Ohio-6806, ¶ 180. Depending on context, however, "use of the term 'victim' is not necessarily 'the same as expressing an opinion that a defendant is guilty of a crime.'" *State v. Washington*, 8th Dist. Cuyahoga No. 111544, 2023-Ohio-1667, ¶ 126, quoting *State v. Palmer*, 7th Dist. Mahoning No. 19 MA 0108, 2021-Ohio-4639, ¶ 83.

{¶ 25} In this case, Thomas challenges the following uses of the phrase "the victim" by the prosecuting attorney and state witnesses during the trial:

- During the state's opening statement, the prosecutor stated, "The victim in this case, the Jane Doe I was talking about, her name is [B.B.]." (Tr. 255.)

- During the direct examination of Officer Tyler Sayer ("Officer Sayer") of the Cuyahoga County Metropolitan Housing Authority, the prosecutor asked whether Officer Sayer recalled "the victim's name in this case." (Tr. 274.) The prosecutor later asked Officer Sayer whether he took a photograph of "the victim['s]" injuries. (Tr. 277.)

- During the direct examination of Officer Mild, the prosecutor asked Officer Mild whether he spoke with "the victim" at the scene. (Tr. 298.) Officer Mild later testified during his cross-examination that "the victim" alleged that "the suspect used his fingers" to facilitate the sexual assault. (Tr. 312.) Officer Mild also confirmed that he "spoke to the victim" before interviewing any other witnesses at the scene. (Tr. 314.)

- During the direct examination of Det. Jakomin, the prosecutor asked Det. Jakomin whether he investigated "a sexual assault case with a victim named [B.B.]?" (Tr. 564.) In turn, Det. Jakomin testified that he spoke with "the victim" while she was in the hospital and also completed a formal interview of "the victim" at a later date. (Tr. 566, 567, 568, 589.) Det. Jakomin further made an isolated

reference to B.B. as "the victim" when summarizing the information gathered in the course of his investigation. (Tr. 574.)

- On direct examination, Officer Laurello referred to B.B. as "the victim" when summarizing the information he gathered from her at the scene. (Tr. 327.) Officer Laurello also referred to B.B. as "the victim" when discussing the identity of the woman, later identified as B.B.'s daughter, who was pushed by Thomas in the lobby of the apartment complex as he attempted to flee the scene. (Tr. 335.) Lastly, Officer Laurello referred to B.B. as "the victim" on redirect examination when attempting to clarify whether he had any knowledge of who owned the apartment he responded to upon arriving at the scene. (Tr. 348.)

{¶ 26} Thomas concedes that defense counsel did, in fact, raise a timely objection to a state witness's more conclusory reference to B.B. as "a rape victim." (Tr. 326.) He nevertheless argues that counsel's failure to raise continuing objections each time the phrase "the victim" was used during trial amounted to prejudice. In support of his position, Thomas relies on the Tenth District's decision in *State v. Almedom*, 10th Dist. Franklin No. 15 AP-852, 2016-Ohio-1553.

{¶ 27} In *Almedom*, the Tenth District vacated the defendant's convictions for rape and gross sexual imposition involving three girls under the age of 13. *Almedom* at ¶ 1-4, 25. The court found that the defendant was denied "the opportunity for a fair trial" in part, because his trial counsel failed to object to the trial judge's repeated references to the complaining witnesses as "victims," which the court found was "in essence, * * * telling the members of the jury that the girls were truthful when they claimed that sexual abuse occurred, as opposed to telling the jury Almedom was truthful in his denial, or refusing to comment on the

credibility of any potential witnesses." *Id.* at ¶ 2-4, 10-12. The court found that the defendant had been prejudiced by the inappropriate references because

> "[t]he trial court judge * * * is viewed as the ultimate authority figure in the courtroom" and that "the conduct of defense counsel linked with the prejudicial comments of the trial judge when added to those of the assistant prosecuting attorney during jury selection undermined the proper function of the adversarial process" was such that the court could not "be sure a just result was produced."

Id. at ¶ 10-12.

{¶ 28} The *Almedom* Court further concluded that defense counsel rendered ineffective assistance of counsel by (1) failing to object to the trial court's "consistent" references to the children as "victims," (2) failing to ask for a mistrial or a limiting instruction after one of the three girls was not called to testify and the charge involving her was dismissed on the state's motion, (3) failing to file any pretrial motions other than a motion for a bill of particulars, (4) failing to file a motion to determine the competency of the children who were expected to testify, and (5) repeatedly failing to raise timely objections during the state's presentation of evidence. *Id.* at ¶ 2-8. As a result, the court vacated the defendant's convictions and remanded the case for further proceedings. *Id.* at ¶ 10-13, 25.

{¶ 29} After careful consideration, we find the factual circumstances presented in *Almedom* are distinguishable and do not support a claim of ineffective assistance of counsel in this matter. Significantly, this is not a case in which the trial judge "singled out" "the victim's" testimony in its jury instructions or "consistently" referred to the complainant as the "victim" throughout the trial proceedings.

Rather, the statements cited by Thomas on appeal consist of general references by the prosecution and investigating officers that were merely used to refer to the identity of the complainant. Used in this context, the label "the victim" was not overly suggestive and was not used to express an opinion on the veracity of B.B.'s testimony or whether Thomas was guilty of the reported crimes.

{¶ 30} We further note that unlike trial judges, who must remain neutral and detached, "a prosecutor is not constrained by any such obligation of neutrality." *Aboytes*, 11th Dist. Lake No. 2020-L-001, 2020-Ohio-6806, at ¶ 189. "This is because the jury is aware that prosecutors are advocates and that 'prosecutors and witnesses have biases.'" *Washington,* 8th Dist. Cuyahoga No. 111544, 2023-Ohio-1667, at ¶ 137, quoting *State v. Jackson*, 8th Dist. Cuyahoga No. 111602, 2023-Ohio-455, ¶ 25-26 (observing that courts have held that "a prosecutor's or a witness's use of the term 'victim' to refer to a complaining witness does not rise to the level of plain error"), citing *State v. Butts*, 8th Dist. Cuyahoga No. 108381, 2020-Ohio-1498, ¶ 41, and *State v. Madden*, 2017-Ohio-8894, 100 N.E.3d 1203, ¶ 26-34 (10th Dist.). Similarly, "as it relates to law enforcement officers recounting their role in an investigation, 'the term "victim" * * * is a term of art synonymous with "complaining witness."'" *Washington* at ¶ 138, quoting *Madden* at ¶ 32, quoting *Jackson v. State*, 600 A.2d 21, 24-25 (Del.1991). "Thus, courts have found a lack of prejudice where a law enforcement officer uses the term 'victim' in such a manner." *Madden* at *id.* Applying these principles to this case, we find the source of the remarks, taken in context, do not support Thomas's claim.

{¶ 31} Finally, Thomas suggests that he was prejudiced by defense counsel's failure to object to the trial court's line of questioning during voir dire, including the court's inquiry as to whether a juror was previously a victim of a crime "like this." (Tr. 131-134.) Thomas again suggests that the phrase "crime like this" inferred that a crime against B.B. was actually committed. Consistent with our prior discussion, we are unable to conclude that Thomas was prejudiced by counsel's failure to object to the trial court's general inquiry as to whether any potential jurors were previously victims of a crime that is similar in nature to those alleged in the indictment filed against Thomas. In our view, the trial court's remarks did not convey the impression of hostility or bias towards Thomas, nor did they amount to a comment on the strength of the state's case or the veracity of its witnesses. To the contrary, the questions posed to the jury reflect the court's broad discretion to conduct voir dire in a manner that it necessary to identify prospective jurors who hold views that would prevent or substantially impair them from performing the duties required of jurors. *See Hunt v. E. Cleveland*, 2019-Ohio-1115, 128 N.E.3d 265, ¶ 32 (8th Dist.).

{¶ 32} Based on the foregoing, we are unable to conclude that the cited references to the phrases "the victim" or "crime like this" undermined the adversarial process or produced an unjust result. Although this court continues to urge parties to use the phrase "alleged victim" at trial when suitable, Thomas has not shown that he was prejudiced by counsel's failure to raise timely objections below, i.e., that there is a reasonable probability that, but for, his trial counsel's failure to make those objections, the result of the proceeding would have been different.

Accordingly, Thomas cannot demonstrate ineffective assistance of counsel based on trial counsel's failure to object to the cited remarks.

{¶ 33} The second assignment of error is overruled.

B. Allied Offenses of Similar Import

{¶ 34} In the third assignment of error, Thomas argues the trial court erred by failing to merge allied offenses of similar import. Specifically, Thomas contends that each kidnapping offense should have merged for the purposes of sentencing because "the offenses were the same act with the same victim and therefore cannot be said to be dissimilar in import or significance." Thomas further contends that both kidnapping offenses should have merged with Count 1, rape, because the offenses were committed during one continuous course of conduct. Finally, Thomas suggests that the rape and felonious-assault offenses should have merged for the purposes of sentencing because "there was no separate harm nor separate animus."

{¶ 35} In the fourth assignment of error, Thomas alternatively argues that defense counsel rendered ineffective assistance of counsel by failing to object to the court's decision to impose separate sentences on Counts 1, 3, and 4. He contends that defense counsel's failure to raise the issue of merger at sentencing was not the product of a viable trial strategy and amounted to deficient performance that resulted in prejudice. We address these assignments of error together because they are related.

{¶ 36} Generally, we review de novo whether certain offenses should be merged as allied offenses under R.C. 2941.25. *State v. Bailey*, Slip Opinion No.

2022-Ohio-4407, ¶ 6, citing *State v. Williams*, 134 Ohio St.3d 482, 2012-Ohio-5699, 983 N.E.2d 1245, ¶ 1. However, "'the failure to raise arguments related to merger of allied offenses at the time of sentencing forfeits all but plain error.'" *Bailey* at ¶ 7, quoting *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 28. Thomas did not object to the trial court's alleged failure to merge allied offenses of similar import at the time of sentencing. He has, therefore, waived all but plain error.

> Under Crim.R. 52(B), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." 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. First, there must be an error, i.e., a deviation from a legal rule. * * * Second, the error must be plain. To be "plain" within the meaning of Crim.R. 52(B), an error must be an "obvious'" defect in the trial proceedings. * * * Third, the error must have affected "substantial rights." We have interpreted this aspect of the rule to mean that the trial court's error must have affected the outcome of the trial.

(Citations omitted.) *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002). In *Bailey*, the Ohio Supreme Court reiterated that "[t]he elements of the plain-error doctrine are conjunctive: all three must apply to justify an appellate court's intervention." *Id.* at ¶ 9, citing *Barnes* at 27. "Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus.

{¶ 37} Relevant to this appeal, *Bailey* reversed the judgment of the First District Court of Appeals, which had held that kidnapping and rape convictions were

allied offenses that should have been merged and that the trial court had committed plain error by failing to merge them. *Id.* at ¶ 4. In reversing, the court remarked that because merger involves factual analysis, it can "lead to exceedingly fine distinctions." *Id.* at ¶ 11, citing *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, ¶ 52. The court went on to state that even if it were to assume that "the trial court erred by not merging the kidnapping and rape counts, the facts of the case indicate that such an error was not obvious." *Id.* at ¶ 14. Finally, the court emphasized that

> [a]pplication of the law governing the merger of allied offenses is dependent on the specific facts of each case. Here, it is clear to us that in an area of law so driven by factual distinctions, any asserted error was not obvious.

Id. at ¶ 16.

{¶ 38} The Supreme Court of Ohio has also said that

> an accused has the burden to demonstrate a reasonable probability that the convictions are for allied offenses of similar import committed with the same conduct and without a separate animus; absent that showing, the accused cannot demonstrate that the trial court's failure to inquire whether the convictions merge for purposes of sentencing was plain error.

Rogers, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, at ¶ 3.

{¶ 39} With these standards in mind, we consider the application of the allied offenses statute to this case. R.C. 2941.25, Ohio's allied-offenses statute, states:

> (A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

> (B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

{¶ 40} In determining whether offenses are subject to merger for sentencing under R.C. 2941.25, courts evaluate three separate factors — the import, the conduct, and the animus. *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, paragraphs one and three of the syllabus. Offenses do not merge, and a defendant may be convicted of and sentenced for multiple offenses if any one of the following is true: (1) the offenses are dissimilar in import or significance, (2) the offenses were committed separately, or (3) the offenses were committed with separate animus or motivation. *Id.* at paragraph three of the syllabus, ¶ 25, 31.

{¶ 41} Offenses are dissimilar in import or significance 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 and identifiable." *Id.* at ¶ 23. Thus, "a defendant's conduct that constitutes two or more offenses against a single victim can support multiple convictions if the harm that results from each offense is separate and identifiable from the harm of the other offense." *Id.* at ¶ 26. "The evidence at trial or during a plea or sentencing hearing will reveal whether the offenses have similar import." *Id.*

{¶ 42} Offenses are committed separately within the meaning of R.C. 2941.25(B) if "'one offense was complete before the other offense occurred, * * * notwithstanding their proximity in time and that one [offense] was committed in

order to commit the other.'" *State v. Woodard*, 2d Dist. Montgomery No. 29110, 2022-Ohio-3081, ¶ 38, quoting *State v. Turner*, 2d Dist. Montgomery No. 24421, 2011-Ohio-6714, ¶ 24. Thus, "'when one offense is completed prior to the completion of another offense during the defendant's course of conduct, those offenses are separate acts.'" *Woodard* at ¶ 38, quoting *State v. Mooty*, 2014-Ohio-733, 9 N.E.3d 443, ¶ 49 (2d Dist.).

{¶ 43} For purposes of R.C. 2941.25(B), animus has been defined as ""purpose or more properly, immediate motive."'" *State v. Priest*, 8th Dist. Cuyahoga No. 106947, 2018-Ohio-5355, ¶ 12, quoting *State v. Bailey*, 8th Dist. Cuyahoga No. 100993, 2014-Ohio-4684, ¶ 34, quoting *State v. Logan*, 60 Ohio St.2d 126, 131, 397 N.E.2d 1345 (1979). "'If the defendant acted with the same purpose, intent, or motive in both instances, the animus is identical for both offenses.'" *State v. Lane*, 12th Dist. Butler No. CA2013-05-074, 2014-Ohio-562, ¶ 12, quoting *State v. Lewis*, 12th Dist. Clinton No. CA2008-10-045, 2012-Ohio-885, ¶ 13. "Animus is often difficult to prove directly, but must be inferred from the surrounding circumstances." *Lane* at ¶ 12, citing *State v. Lung*, 12th Dist. Brown No. CA2012-03-004, 2012-Ohio-5352, ¶ 12.

{¶ 44} "At its heart, the allied-offense analysis is dependent upon the facts of a case because R.C. 2941.25 focuses on the defendant's conduct" and "an offense may be committed in a variety of ways." *Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, at ¶ 26, 30. "'[T]his analysis may be sometimes difficult to perform and may result in varying results for the same set of offenses in different cases. But

different results are permissible, given that the statute instructs courts to examine a defendant's conduct — an inherently subjective determination.'" *Ruff* at ¶ 32, quoting *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, ¶ 52 (plurality opinion per Brown, C.J.).

{¶ 45} In this case, Thomas's allied-offense arguments are limited to his convictions for rape, kidnapping, and felonious assault, as charged in Counts 1-4 of the indictment. As previously discussed, Thomas was convicted of rape in violation of R.C. 2907.02(A)(2) (Count 1). The statute prohibits a person from engaging "in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force."

{¶ 46} Thomas was also convicted of two counts of kidnapping in violation of R.C. 2905.01(A)(4) (Count 2), and 2905.01(A)(2) (Count 3), with sexual-motivation and sexually violent predator specifications. Those sections of the kidnapping statute provide, in relevant part:

> (A) No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall remove another from the place where the other person is found or restrain the liberty of the other person, for any of the following purposes:
>
> * * *
>
> (2) To facilitate the commission of any felony or flight thereafter;
>
> * * *
>
> (4) To engage in sexual activity, as defined in section 2907.01 of the Revised Code, with the victim against the victim's will[.]

{¶ 47} Finally, Thomas's felonious assault conviction (Count 4) is governed by R.C. 2903.11(A)(1). The statute provides that "[n]o person shall knowingly * * * cause serious physical harm to another or another's unborn."

{¶ 48} After careful consideration, we cannot say the trial court committed plain error by separately imposing sentences on Counts 1, 3, and 4 of the indictment. Viewing the record in its entirety, we are unable to conclude that the trial court's failure to merge the kidnapping offenses alleged in Counts 2 and 3 of the indictment amounted to an obvious error. In this case, the state produced substantial evidence that in addition to the circumstances supporting the kidnapping conviction that related to the commission of the sexual assault (Count 2), Thomas did separately restrain B.B.'s liberty, by force or threat of force, to facilitate the commission of other felony offenses, namely felonious assault and/or aggravated robbery. It is reasonable, therefore, that the kidnapping offense charged in Count 3 resulted in a separate, identifiable harm to B.B., and was committed with a separate purpose than the kidnapping offense charged in Count 2.

{¶ 49} For these same reasons, our review of the record reveals that the kidnapping offense charged in Count 3 of the indictment could have been committed separately from the rape offense charged in Count 1 of the indictment. At trial, the state set forth ample evidence demonstrating that B.B.'s liberty was forcefully restrained at various times during the incident, including physical altercations that corresponded to the commission of other felonious acts and occurred both before and after the rape offense was completed. As in *Bailey*, "[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 an error was not obvious." *Id.*, Slip Opinion No. 2022-Ohio-4407, at ¶ 14. Thus, we cannot conclude that it was plain error for the court to separately impose sentences on the rape and the kidnapping offenses alleged in Counts 1 and 3 of the indictment.

{¶ 50} Finally, with respect to Thomas's felonious-assault conviction, the record reflects that B.B. suffered severe injuries that were not limited to the restraint of her liberty or the sexual assault. The evidence adduced at trial established that B.B. was repeatedly struck in the face with a closed fist and was strangled "almost to the point of passing out, exhaustion of air." (Tr. 300.) Her documented injuries were significant and she required medical treatment at MetroHealth Medical Center. Under these circumstances, a reasonable person could find the kidnapping, rape, and felonious assault offenses varied in import or significance within the meaning of R.C. 2941.25(B).

{¶ 51} Based on the foregoing, we cannot say the trial court committed plain error by limiting its merger to Counts 1 and 2 and imposing sentences on each of the remaining counts for which Thomas was found guilty. Because Thomas has failed to demonstrate plain error, we further conclude that Thomas has not shown that he was prejudiced by counsel's failure to raise timely objection at the time of sentencing. Accordingly, we find no merit to Thomas's ineffective assistance of counsel claim. *State v. Smith*, 8th Dist. Cuyahoga No. 111870, 2023-Ohio-1670, ¶ 35, citing *State v. Davis*, 159 Ohio St.3d 31, 2020-Ohio-309, 146 N.E.3d 560, ¶ 10.

{¶ 52} The third and fourth assignments of error are overruled.

C. Consecutive Sentences

{¶ 53} In the first assignment of error, Thomas argues the trial court failed to make the necessary findings to impose consecutive sentences pursuant to R.C. 2929.14(C)(4).

{¶ 54} "In Ohio, sentences are presumed to run concurrent to one another unless the trial court makes the required findings under R.C. 2929.14(C)(4)." *State v. Gohagan*, 8th Dist. Cuyahoga No. 107948, 2019-Ohio-4070, ¶ 28. Trial courts must therefore engage in the three-tier analysis of R.C. 2929.14(C)(4) before imposing consecutive sentences. *Id.* First, the trial court must find that "consecutive service is necessary to protect the public from future crime or to punish the offender." Second, the trial court must find that "consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public." *Id.* Third, the trial court must find that at least one of the following applies::

> (a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.
>
> (b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.

> (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶ 55} Our review of consecutive sentences is authorized by R.C. 2953.08(G)(2). The statute provides that when reviewing felony sentences, a reviewing court may overturn the imposition of consecutive sentences where the court "clearly and convincingly" finds that (1) "the record does not support the sentencing court's findings under R.C. 2929.14(C)(4)," or (2) "the sentence is otherwise contrary to law."

> "Clear and convincing evidence is that measure or degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established."

State v. Marcum, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 22, quoting *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus.

{¶ 56} Relevant to this appeal, the imposition of consecutive sentences is contrary to law if a trial court fails to make the findings mandated by R.C. 2929.14(C)(4). *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 37. Compliance with R.C. 2929.14(C)(4) requires the trial court to make the statutory findings at the sentencing hearing, which means that "'the [trial] court must note that it engaged in the analysis' and that it 'has considered the statutory criteria and specifie[d] which of the given bases warrants its decision.'" *Bonnell* at ¶ 26, quoting *State v. Edmonson*, 86 Ohio St.3d 324, 326, 715 N.E.2d 131 (1999).

The reviewing court must be able to discern that the record contains evidence to support the findings. *State v. Davis*, 8th Dist. Cuyahoga No. 102639, 2015-Ohio-4501, ¶ 21, citing *Bonnell* at ¶ 29. A trial court is not, however, required to state its reasons to support its findings, nor is it required to precisely recite the statutory language, "provided that the necessary findings can be found in the record and are incorporated in the sentencing entry." *Bonnell* at ¶ 37.

{¶ 57} In this case, the trial court made the following relevant statements on the record at the time of sentencing:

> The court has considered the sentencing factors in R.C. 2929.12 and the court notes and finds that there were severe physical and mental injury done to the [victim]. She suffers from serious, ongoing issues from the assault. Your familiarity with her did facilitate the crime now.
>
> With regard to your record, the court does note that you had issues going back to 1985. You had multiple sex crimes in the past, and the court makes findings and observes all this and basically comes to the conclusion that the only way I can properly protect the public from any future harm is to sentence you severely.
>
> * * *
>
> Counts 3 and Count 1, because of the nature of the offense and the necessitation to protect the public from future criminal activity, the court is going to impose sentences on 3 and 1 consecutive to each other.

(Tr. 730-732.)

{¶ 58} On appeal, Thomas acknowledges that the trial court made some of the findings required for the imposition of consecutive sentences, including the need to protect the public from future crime and the seriousness of the harm caused to the victim of his offenses. Thomas contends, however, that the trial court failed to

make the proportionality finding required under R.C. 2929.14(C)(4), stating "the word 'disproportionate' does not even appear in the transcript of sentencing."

{¶ 59} In contrast, the state submits that viewing the record as a whole, "this court is capable of determining that the trial court engaged in the proper analysis to impose a consecutive sentence." While the state does not dispute that the trial court did not expressly recite the proportionality language contained in R.C. 2929.14(C)(4), it suggests that the court's discussion of the severe physical and mental injuries sustained by B.B. "demonstrates that the court did consider disproportionality."

{¶ 60} This court has previously recognized that when making the proportionality finding contemplated under R.C. 2929.14(C)(4) "the court must find both that the consecutive sentence is not disproportionate to (1) the seriousness of the offender's conduct, and (2) the danger the offender poses to the public." *State v. Tobert*, 8th Dist. Cuyahoga No. 107055, 2022-Ohio-197, ¶-41. We have explained that

> [t]he essential question is whether the record of the sentencing hearing makes it clear that the court considered 1) the seriousness of the offender's conduct and 2) the danger the offender poses to the public *and compared those factors to the sentence imposed on the defendant and determined that comparison supported the imposition of the consecutive sentence.*

(Emphasis added.) *Id.* at ¶ 48.

{¶ 61} In this case, the trial court undoubtedly considered the heinous nature of Thomas's conduct, the severity of the injuries sustained to the victim, the need to

punish Thomas, and the need to protect the public based upon the nature of Thomas's offenses and his criminal history. These findings were sufficient to satisfy the first and third findings required under R.C. 2929.14(C)(4). Nevertheless, having carefully reviewed the sentencing transcript in its entirety, we are unable to discern from the record that the trial court, either expressly or by analogous language, considered the principle of whether the imposition of consecutive sentences is not disproportionate to the seriousness of Thomas's conduct and the danger he poses to the public.

{¶ 62} Consistent with previous observations made by this court, we recognize that decisions addressing the proportionality findings implemented under R.C. 2929.14(C)(4) are not entirely uniform. *See Tobert* at ¶ 46-47 (citations omitted). In our view, however, the proportionality prong of the consecutive sentence statute requires, at the very least, a statement that reflects the trial court's contemplation of the specific sentence resulting from the use of consecutive sentences, here 20 years to life, and the court's determination that the resulting sentence is not inconsistent or otherwise disproportionate with the offender's conduct and the danger the offender poses to the public. *See State v. Gwynne*, Slip Opinion No. 2022-Ohio-4607, ¶ 2, 14 (stating that the consecutive sentence findings must be made in consideration of the aggregate term to be imposed).[1] While the proportionality findings contemplated under R.C. 2929.14(C)(4) can be satisfied

[1] We note that a motion for reconsideration was filed in *Gwynne* on January 3, 2023, and that motion is still pending as of the release date of our opinion in this case.

without employing the phrase "not disproportionate," we are unable to conclude that such considerations occurred in this case. *See Tolbert* at ¶ 49-50 (trial court did not make proportionality finding under R.C. 2929.14(C)(4) where trial court did not expressly state at the sentencing hearing that consecutive sentences were "'not disproportionate' to either the offense of the [a]ppellant or to the likelihood of the [a]ppellant of reoffending" and none of the trial court's other statements could "be taken as any sort of comparison between the consecutive sentence and the offense or the likelihood that [a]ppellant would reoffend"); *State v. Clay*, 8th Dist. Cuyahoga No. 111492, 2023-Ohio-525, ¶ 18 ("It is not clear from the transcript of the sentencing hearing that the trial court considered the danger appellant posed to the public, compared that factor to the sentence imposed on appellant and determined that that comparison supported the imposition of consecutive sentences.").

{¶ 63} Based on the foregoing, we find the trial court failed to make all of the requisite findings for the imposition of consecutive sentences. Thus, while our judgment shall not be interpreted as a stance on the aggregate sentence imposed, we find Thomas's consecutive sentence is contrary to law. The appropriate remedy is to vacate Thomas's consecutive sentences and remand for the trial court to again consider whether the sentences on Counts 1 and 3 should be served consecutively and, if so, to make all of the required findings on the record and to incorporate those findings into its sentencing journal entry.

{¶ 64} Judgment affirmed in part, reversed in part, and remanded to conform to the mandates of R.C. 2929.14(C)(4).

It is ordered that appellant and appellee share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

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

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EILEEN T. GALLAGHER, PRESIDING JUDGE

MARY J. BOYLE, J., and
SEAN C. GALLAGHER, J., CONCUR