

**IN THE SUPREME COURT OF OHIO**

**STATE OF OHIO**

**CASE NO. 07-1842**

Plaintiff-Appellee/  
Cross-Appellant,

**ON APPEAL FROM THE  
MONTGOMERY COUNTY COURT  
OF APPEALS, SECOND  
APPELLATE DISTRICT**

vs.

**DAVON WINN**

**COURT OF APPEALS  
CASE NO: 21710**

Defendant-Appellant/  
Cross-Appellee.

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**MEMORANDUM IN SUPPORT OF JURISDICITON AND IN RESPONSE  
OF APPELLEE/CROSS-APPELLANT STATE OF OHIO**

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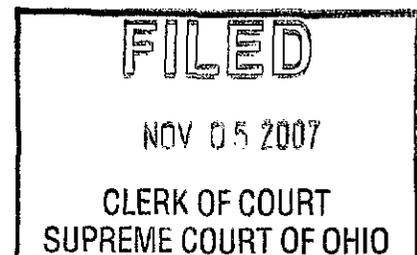
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**TABLE OF CONTENTS**

	<u>Page</u>
WHY THIS COURT SHOULD GRANT THE STATE LEAVE TO APPEAL	1-2
STATEMENT OF THE CASE AND FACTS	2-3
ARGUMENT	3-9
<b><u>FIRST PROPOSITION OF LAW:</u></b> Any inquiry into the appropriateness of cumulative punishments imposed for multiple offenses under Ohio's multiple count statute must end when the statutory elements of the offenses, compared in the abstract, do not correspond to such a degree that the commission of one offense will necessarily result in the commission of another.	3-5
<b><u>SECOND PROPOSITION OF LAW:</u></b> Ohio's multiple count statute offers no protection from cumulative punishments for aggravated robbery and kidnapping because they are not allied offenses of similar import. ( <i>State v. Logan</i> (1979), 60 Ohio St.2d 126, 129, 397 N.E.2d 1345, overruled to the extent that it found inherent in every robbery is a kidnapping.)	5-7
<b><u>THIRD PROPOSITION OF LAW:</u></b> When a sentencing court imposes cumulative punishments for multiple offenses that are allied offenses of similar import, in contravention of Ohio's multiple count statute, a reviewing court must not take notice of the error under Crim.R. 52(B) when the sentencing court imposed the punishments concurrently.	7-8
<b><u>STATE'S RESPONSE TO WINN'S SOLE PROPOSITION OF LAW:</u></b>	
A defendant is not denied his right to the effective assistance of counsel as guaranteed by the Sixth Amendment to the U.S. Constitution absent prejudicial error on the part of counsel.	8-9
CONCLUSION	10
APPENDIX A, <i>State v. Winn</i> , Opinion, August 24, 2007	11-21
APPENDIX B, <i>State v. Winn</i> , Final Entry, August 24, 2007	22-23
CERTIFICATE OF SERVICE	24

**WHY THIS COURT SHOULD GRANT THE STATE LEAVE TO APPEAL  
AND DENY APPELLANT/CROSS-APPELLEE LEAVE TO APPEAL**

There is no question that the courts of this state are confused about the application of the two-step test set forth in Ohio's multiple count statute, R.C. 2941.25, for determining when a court may impose cumulative punishments for a single act that constitutes two or more allied offenses of similar import. See e.g., *In Re Rashid*, 163 Ohio App.3d 515, 2005-Ohio-4851. No two courts seem to engage in an identical analysis in any given case. In fact, in two different cases decided in the same month, one appellate court found the same two offenses to be both similar and dissimilar offenses. *State v. Loparo*, 8th Dist. App. No. 88229, 2007-Ohio-2783, ¶ 21; *State v. White*, 8th Dist. App. No. 88491, 2007-Ohio-3080, ¶ 14. However, when the test is properly applied, as directed by this Court in *State v. Rance*, 85 Ohio St.3d 632, 1999-Ohio-291, 710 N.E.2d 99, such contrasting opinions do not result.

Accepting jurisdiction in this case presents this Court with the perfect opportunity to bring its decision in *Rance* into focus and to once and for all clarify its proper application. It also presents this Court with the opportunity to reconcile the first step of the *Rance* test with its finding in *State v. Logan* (1979), 60 Ohio St.2d 126, 397 N.E.2d 1345, that implicit in every robbery is a kidnapping. Finally, it presents this Court with the opportunity to exercise its jurisdiction in the correction of a serious misuse of the plain error analysis by a court of this state. Accordingly, the State respectfully requests this Court to grant it leave to appeal the decision of the Second District Court of Appeals in *State v. Winn*, Montgomery App. No. 21710, 2007-Ohio-4327.

In addition, the State submits that Winn has failed to present this Court with any compelling reason to accept his single proposition of law. Each and every issue he raises in his memorandum in support of jurisdiction involve well-settled areas of law, would require this

Court to engage in an analysis of the specific facts of Winn's particular case, and would have no wide-reaching effect on the laws of this state. Accordingly, the matter does not involve a substantial constitutional question or an issue of great or general public interest. Further, in its decision, the Second District correctly resolved the issues Winn raises in his proposition of law. Therefore, the State of Ohio respectfully requests that this Court deny Winn leave to appeal.

### **STATEMENT OF THE CASE AND FACTS**

In January of 2006, Appellant/Cross-Appelle Davon Winn and two of his friends concocted and carried out a plan to break into the apartment of another friend to steal a supply of drugs and/or money that the friend had recently acquired. However, when the three men, including Winn, arrived armed to carry out their plan, their friend's grandmother, Treva Ann Hummons, was home. As they charged through the door of her apartment, Ms. Hummons encountered them in the hallway leading from her bedroom to the rest of the apartment. Two of the men ordered her, at gunpoint, to return to her bedroom, lay face down on her bed, and cover her head with a pillow. As she did, she felt one of the men pressing a gun to the back of her head.

Luckily for Ms. Hummons, her neighbor across the hall was paying attention and saw the three men trying to pry open her door when he went to investigate a commotion in the hallway. He immediately summoned police, who arrived and caught the men before any of them physically harmed Ms. Hummons or took anything from her.

At the conclusion of the three-day jury trial that resulted, a jury found Winn guilty of one count of aggravated robbery, one count of aggravated burglary, one count of kidnapping, all with firearm specifications, and three counts of tampering with evidence. The trial court sentenced Winn to an aggregate term of imprisonment of ten years; that is seven years on each count of

aggravated robbery, aggravated burglary, and kidnapping, three years on the three counts of tampering with evidence, all to be served concurrently, and one three-year sentence on the three merged firearm specifications, to run consecutively to the sentences on the other charges.

Winn appealed his conviction to the Second District Court of Appeals, arguing, among other things, that the trial court erred in not merging the kidnapping conviction with the aggravated robbery conviction. The Second District agreed with Winn, reversed the kidnapping conviction, and vacated the seven years imposed on that count. *State v. Winn*, supra. The State of Ohio now asks leave of this Court to appeal that decision.

### ARGUMENT

**FIRST PROPOSITION OF LAW: Any inquiry into the appropriateness of cumulative punishments imposed for multiple offenses under Ohio's multiple count statute must end when the statutory elements of the offenses, compared in the abstract, do not correspond to such a degree that the commission of one offense will necessarily result in the commission of the other.**

Ohio's multiple count statute, R.C. 2941.25, sets forth a two-step test for determining whether a sentencing court may impose cumulative punishments for convictions resulting from the same criminal conduct. *State v. Rance*, 85 Ohio St. 3d 632, 639, 1999-Ohio-291, 710 N.E.2d 699. Sub-section (A) of R.C. 2941.25 provides that a defendant may be convicted of only one offense if his conduct "can be construed to constitute two or more allied offenses of similar import." Determining whether two or more offenses are allied offenses of similar import requires a court to compare the offenses' statutory elements to determine whether they correspond to such a degree that the commission of one offense automatically results in the commission of another charged offense. *State v. Logan* (1979), 60 Ohio St.2d 126, 129, 397 N.E.2d 1345. This Court's 1999 decision in *State v. Rance* unequivocally directed courts of this state to conduct its comparison of the elements in the abstract, without regard to the facts of the

specific case. *Rance*, at 638. The rationale for doing so was that an abstract comparison was a more functional test that would produce “clear legal lines capable of application in particular cases.” *Rance*, at 636 (citing *Kumho Tire Co., Ltd. v. Carmichael* (1999), 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238).

This rationale still applies. In fact, if properly applied, the *Rance* test allows courts to determine a single time whether two offenses are allied offenses, and then simply apply that holding to any case before it. For example, if a court determines that kidnapping and aggravated robbery are allied offenses, in any case involving those offenses, it need only consider whether the two crimes were committed by the particular defendant separately or with a separate animus. However, if a court finds that kidnapping and aggravated robbery are not allied offenses of similar import; that is that they are dissimilar offenses, then a court never again need evaluate a defendant’s animus in committing the offenses because Ohio’s multiple count statute always allows the imposition of cumulative punishments where the offenses are dissimilar. Accordingly, the abstract comparison of statutory elements as directed in *Rance* was and is the most appropriate and easily applied test for determining whether a court may impose cumulative punishments for two offenses arising from a single act.

Most of the appellate courts of this State, however, fail to properly compare the elements of the alleged allied offenses in the abstract, as did the Second District in this case. Accordingly, this Court should grant the State leave to appeal this case so it can make clear to the courts of this state that any inquiry into the appropriateness of cumulative punishments under Ohio’s multiple count statute ends when an abstract comparison of the offenses’ statutory elements demonstrates that they are not allied offenses of similar import; that is, that the elements of the offenses do not

correspond to such a degree that the commission of one will necessarily result in the commission of the other.

**SECOND PROPOSITION OF LAW: Ohio's multiple count statute offers no protection from cumulative punishments for aggravated robbery and kidnapping because they are not allied offenses of similar import. (*State v. Logan* (1979), 60 Ohio St.2d 126, 129, 397 N.E.2d 1345, overruled to the extent that it found inherent in every robbery is a kidnapping.)**

A person may be convicted and sentenced of both aggravated robbery and kidnapping, even if committed during the same course of conduct and with a single animus, because under *Rance*, they are dissimilar offenses. In other words, aggravated robbery and kidnapping are not allied offenses of similar import. Therefore, imposing cumulative punishments for the two offenses does not violate Ohio's multiple count statute, and the Second District Court of Appeals erred when it found otherwise.

In accordance with the two-step test set forth Ohio's multiple count statute, and properly applied in *Rance*, aggravated robbery and kidnapping are not allied offenses of similar import. Abstractly speaking, aggravated robbery occurs when a person (1) attempts, commits, or flees immediately after attempting or committing, a theft offense with (2) a deadly weapon. R.C. 2911.01. Kidnapping, on the other hand, occurs when a person (1) removes another from the place where the other is found or restrains that person's liberty by (2) force, threat, or deception, (3) for the purpose of facilitating the commission of any felony or flight thereafter. R.C. 2905.01(A)(2).

As illustrated by Table 1, *infra*, one need not have, display, brandish, or use a deadly weapon in order to successfully complete a kidnapping. And one need not restrain a person's liberty or remove a person from whence he is found in order to complete an aggravated robbery. Indeed, it is quite unreasonable to say that a purse snatcher commits both an aggravated robbery

and a kidnapping when he approaches a person with a deadly weapon drawn and grabs the person's purse and runs without hindering the person's freedom of movement in any way. Likewise, it is as unreasonable to say that a kidnapper commits both a kidnapping and an aggravated robbery where he restrains a person's freedom of movement by simply blocking his path, without a deadly weapon, and steals his wallet. Accordingly, when compared in the abstract, the elements of kidnapping and aggravated robbery do not correspond to such a degree that the commission of one offense necessarily results in the commission of the other. Therefore, aggravated robbery and kidnapping are not allied offenses of similar import.

	<b>Kidnapping – 2905.01(A)(2)</b>	<b>Aggravated Robbery – 2911.01</b>
1.	Force	Attempting a theft offense
	Threat	Committing a theft offense
	Deception	Fleeing immediately after attempting or committing a theft offense
2.	Remove another from the place where the other is found	Have a deadly weapon on or about his person
	Restrain the liberty of the other	Have a deadly weapon under his control
3.	Purpose of facilitating the commission of any felony	Display the weapon.
	Purpose of facilitating flight after the commission of any felony	Brandish the weapon
		Indicate possession of the weapon
		Use the weapon

Table 1

What's more, the appellate court's reliance on *State v. Logan* for the proposition that the elements of aggravated robbery and kidnapping do correspond to such a degree that the commission of one offense will necessarily result in the commission of the other is simply misplaced. In *Logan*, this Court found that implicit within every robbery is a kidnapping. *Logan*, at 130. However, it did so long before its directive in *Rance* that requires the courts of this state to compare the statutory elements of two offenses that arise out of the same conduct *in*

*the abstract*. *Id.*; *Rance*, at 638. And there is no question that this Court did not engage in an abstract comparison of the offenses' statutory elements in *Logan*. *Logan*, at 130. As a result, the Second District's reliance on *Logan* for its finding that aggravated robbery and kidnapping are allied offenses was in error.

In sum, when compared in the abstract, the elements of aggravated robbery and kidnapping do not correspond to such a degree that the commission of one will necessarily result in the commission of the other. Therefore, they are not allied offenses of similar import, and the Second District Court of Appeals erred when it found otherwise, reversed Winn's kidnapping conviction, and vacated the trial court's sentence imposed for that offense. This Court should accordingly grant the State leave to appeal its decision in order to thwart any further disregard for *Rance*.

**THIRD PROPOSITION OF LAW: When a sentencing court imposes cumulative punishments for multiple offenses that are allied offenses of similar import, in contravention of Ohio's multiple count statute, a reviewing court must not take notice of the error under Crim.R. 52(B) when the sentencing court imposed the punishments concurrently.**

Crim.R. 52(B) allows a court to notice plain error or defects affecting substantial rights. However, notice of plain error should be taken "with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph three of the syllabus. In the case of cumulative punishments for allied offenses of similar import, a defendant sentenced to concurrent terms of imprisonment is in no worse position after the court takes notice of an error concerning that sentence than he was before the fact. Accordingly, such circumstances are not the exceptional circumstances contemplated by Crim.R. 52(B), and it cannot be said that notice was taken with any caution, not to mention the "utmost caution."

What's more, a court's noticing an error that is by no means "plain" is in contradiction of Crim.R. 52(B). The current state of the law among the appellate districts in Ohio regarding the issue of allied offenses of similar import makes clear that any error a court may make in applying Ohio's multiple count statute to punishments for multiple offenses is far from plain. If the state's appellate courts cannot agree on the proper application of a test, it can hardly be said that a trial court's incorrect application of the test is "plain error." This case and the two cases from the Eighth Appellate District, cited supra, are prime examples of this disagreement. Therefore, because the error in imposing cumulative punishments for the offenses of aggravated robbery and kidnapping was neither plain, nor were the circumstances surrounding the error exceptional, the Second District Court of Appeals seriously misused the plain error doctrine when it noticed plain error in the trial court's imposition of concurrent sentences. In order to prevent further misuse of the doctrine by the Second District and other courts under such circumstances, this Court should accept jurisdiction of this matter.

**STATE'S RESPONSE TO WINN'S SOLE PROPOSITION OF LAW:**

**A defendant is not denied his right to the effective assistance of counsel as guaranteed by the Sixth Amendment to the U.S. Constitution absent prejudicial error on the part of counsel.**

The evidence presented by the State at trial proved beyond a reasonable doubt that Winn was, at the very least, an accomplice in these violent crimes, including tampering with evidence. Therefore, even if Winn's counsel had moved for acquittal pursuant to Crim.R. 29, requested a jury instruction regarding the defense of abandonment, and objected to any instructions that did not contain a specific instruction regarding abandonment, it would have made no difference in the outcome of the trial. Accordingly, Winn cannot establish that his trial counsel was ineffective, and this Court should therefore deny him leave to appeal.

The State's evidence established that Winn was guilty of all of the offenses, including tampering with evidence, by aiding and abetting Carlos Whiting and Tim Body because Winn acted with the same culpability as them. In essence, police caught Winn and his accomplices red-handed. They found Winn within the apartment after Whiting and Body both emerged with their hands up. Thus, Winn was at the scene of the crime. And, he assisted Whiting and Body in illegally entering Ms. Hummons's apartment by prying the door open. These facts alone established that Winn, by securing their entry into Ms. Hummons's residence, aided and abetted Whiting and Body in committing the offenses, regardless of whether he ever possessed either firearm or did anything once inside the apartment. Further, the evidence established that Winn was friends with Ms. Hummons's grandson, and concocted the robbery plan together with Whiting and Body, and would certainly, therefore, have acquiesced in his accomplices' hiding of the weapons in trying to avoid getting caught. Winn's own four different versions of the events simply support that Winn would have done anything not to have been caught, including tampering with evidence. And it was only Winn's four versions that provided the jury with any evidence whatsoever that Winn either acted under duress or abandoned his criminal purpose after the fact. But considering that the jury found his four versions as incredible<sup>1</sup> as the officers interviewing him found them, it cannot be said that any purported failures on the part of Winn's trial counsel would have made any difference in the outcome of the trial. The simple fact is that Winn was caught red-handed and gave four different accounts of how he came to be involved in the crimes, and the jury just chose not to believe any one of those accounts. Therefore, no matter what counsel did or did not do, the jury would have convicted Winn so any purported failures on

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<sup>1</sup> And, considering how often Winn's story changed and that Winn was friends with the target of the robbery/burglary, despite his assertion otherwise, it did so rightly.

counsel's part did not deprive Winn of the effective assistance of counsel. As such, the State submits that this Court should deny Winn leave to appeal.

### CONCLUSION

In *State v. Winn*, Montgomery App. No. 21710, 2007-Ohio-4327, decided by the Second District Court of Appeals on August 24, 2007, the court not only misapplied the test set forth in Ohio's multiple count statute for determining whether cumulative punishments may be imposed for same or similar crimes, it erroneously found that aggravated robbery and kidnapping are similar crimes. Moreover, it did so by relying on *State v. Logan* (1979), 60 Ohio St.2d 126, 397 N.E.2d 1345, which *State v. Rance*, 85 Ohio St.3d 632, 1999-Ohio-291, 710 N.E.2d 99, overruled, and by misusing the doctrine of plain error. Accordingly, in order to prevent any further erroneous applications of Ohio's multiple count statute and the doctrine of plain error, the State of Ohio respectfully requests that this Court grant it leave to appeal. Finally, Winn has failed to present this Court with any novel or wide-reaching issues to review. Thus, the State also respectfully requests this Court to deny Winn leave to appeal.

Respectfully submitted,

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APPENDIX A  
FILED  
COURT OF APPEALS

2007 AUG 24 AM 8:58

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MONTGOMERY CO. OHIO  
36

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellee :

C.A. CASE NO. 21710

v. :

T.C. NO. 06 CR 99

DAVON WINN :

(Criminal Appeal from  
Common Pleas Court)

Defendant-Appellant :

.....  
**OPINION**

Rendered on the 24<sup>th</sup> day of August, 2007.  
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WOLFF, P.J.

Following a three-day jury trial Davon Winn was convicted of aggravated robbery; aggravated burglary; and kidnapping, all with firearm specifications; and three counts of

tampering with evidence. The State dismissed one count of possession of criminal tools due to a faulty verdict form, and Winn was acquitted of one count of carrying a concealed weapon. The trial court sentenced him to an aggregate prison term of ten years. Winn appeals both his convictions and his sentence, presenting four assignments of error.

I

At about 9:25 on the morning of January 11, 2006, Treva Hummons was lying in bed when she heard noise at her front door. Her grandson's girlfriend, Teila Huffman, had spent the night and left earlier that morning, so Ms. Hummons thought Huffman was returning. As Ms. Hummons walked toward the living room, the door opened, and a man entered brandishing a handgun. The man pointed the gun in her face and ordered her back into the bedroom. He told her to lie on the bed and cover her face with a pillow, which she did. Ms. Hummons's could feel the gun pushed against her head through the pillow while the man kept yelling "where's the money?" Ms. Hummons said that the only money she had was a \$200 money order on her night stand.

Meanwhile, Ms. Hummons's neighbor, Charles Perkins, had heard the banging on Ms. Hummons's door. He looked through his peephole and saw a man using a pry bar to open her door while two other men stood by. Perkins immediately dialed 911.

In the midst of ransacking Ms. Hummons's home, one of the intruders looked out the window and saw that police had arrived. He warned the others. They hid a gun under Ms. Hummons's mattress along with gloves and a mask. They hid another gun in a box and the pry bar behind the dresser. Two of the men, Carlos Whiting and Timothy Body, complied with police orders to come out of the apartment, but Winn stayed in the kitchen until officers went in to get him. Perkins saw Whiting and Body leave the apartment,

followed by Winn several minutes later. Perkins believed that it was Winn, by far the shortest of the three intruders, who had used the pry bar on the door.

At trial Winn claimed that when seeking a ride home, he was forced into committing the crimes by Whiting and Body, who believed that Ms. Hummons's incarcerated grandson, Toby McLardy, had drugs and money in a safe that he kept in the apartment. Winn previously gave police three other versions of the events of January 11, 2006, each differing from his trial testimony.

## II

Winn's second assignment of error:

"TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO MAKE OR RENEW A RULE 29 MOTION BECAUSE INSUFFICIENT EVIDENCE WAS PRESENTED TO PROVE DEFENDANT-APPELLANT'S GUILT OF KIDNAPPING, AGGRAVATED ROBBERY, AGGRAVATED BURGLARY, AND THREE COUNTS OF TAMPERING WITH EVIDENCE AND THE ACCOMPANYING FIREARM SPECIFICATIONS IN VIOLATION OF THE DUE PROCESS CLAUSE, AND/OR THE DEFENDANT-APPELLANT WAS ENTITLED TO BE ACQUITTED BECAUSE HE PROVED HIS AFFIRMATIVE DEFENSE OF DURESS BY [A] PREPONDERANCE OF THE EVIDENCE."

Winn's fourth assignment of error:

"TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO REQUEST A JURY INSTRUCTION ON THE AFFIRMATIVE DEFENSE OF ABANDONMENT AND/OR FAILING [TO] OBJECT TO THE COURT'S JURY INSTRUCTIONS WHICH DID NOT INCLUDE SUCH AN INSTRUCTION."

In his second and fourth assignments of error, Winn contends that his trial counsel

was ineffective. First, he insists that counsel should have made and renewed a Crim.R. 29 motion for acquittal both because there was insufficient evidence of his guilt and because he had proven his affirmative defense of duress. Winn also argues that counsel should have ensured that a instruction on the affirmative defense of abandonment was given. We disagree in both regards.

In order to prevail on a claim of ineffective assistance of counsel, the defendant must demonstrate both deficient performance and resulting prejudice. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. To show deficiency, the defendant must show that counsel's representation fell below an objective standard of reasonableness. *Id.* Trial counsel is entitled to a strong presumption that his conduct falls within the wide range of effective assistance. *Id.* Moreover, the adequacy of counsel's performance must be viewed in light of all of the circumstances surrounding the trial court proceedings. *Id.* Hindsight may not be allowed to distort the assessment of what was reasonable in light of counsel's perspective at the time. *State v. Cook* (1992), 65 Ohio St.3d 516, 524, 605 N.E.2d 70.

Even assuming that counsel's performance was ineffective, the defendant must still show that the error had an effect on the judgment. *State v. Bradley* (1989), 42 Ohio St.3d 136, 142, 538 N.E.2d 373. Reversal is warranted only where the defendant demonstrates that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id.* In this case Winn fails to meet either prong.

Because, when faced with a Crim.R. 29 motion for acquittal, a trial court must view the evidence in a light most favorable to the State, "[f]ailure to move for an acquittal under Crim.R. 29 is not ineffective assistance of counsel where the evidence in the State's case

demonstrates that reasonable minds can reach different conclusions as to whether the elements of the charged offense[s] have been proved beyond a reasonable doubt, and that such a motion would have been fruitless." *State v. Poindexter*, Montgomery App. No. 21036, 2007-Ohio-3461, ¶29, citations omitted. Here the State offered sufficient evidence to prove all elements of all offenses with which Winn was charged to warrant submitting the case to the jury.

In regards to counsel's decision to not seek an instruction on abandonment, we first note that it cannot be said that the jury would have believed Winn's claim of abandonment had the instruction been given, particularly since the abandonment theory directly conflicts with Winn's claim of duress. Therefore, it is likely that counsel made that strategic choice to pursue the duress defense rather than the abandonment theory. Trial strategy decisions such as this will not be the basis of a finding of ineffective assistance of counsel. *State v. Dixon*, 101 Ohio St.3d 328, 2004-Ohio-1585, ¶52, citation omitted.

Finding no lack in Winn's legal representation and discerning no prejudice to his defense, we overrule Winn's second and fourth assignments of error.

### III

Winn's first assignment of error:

"THE ADMISSION OF A PHOTOGRAPH OF A PHOTOGRAPH OF A PERSON WHO WAS PURPORTED TO BE THE DEFENDANT VIOLATED THE BEST EVIDENCE RULE, EVID.R. 1002, AND DEFENDANT'S RIGHT TO DUE PROCESS AS GUARANTEED BY ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION AND THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION."

In his first assignment of error, Winn argues that the introduction and admission of

a photograph of Ms. Hummons's living room, which was marked as State's Ex. 15, violated the best evidence rule and that his trial counsel was ineffective for failing to object to the use of the photo. Because testimony regarding the contents of a photograph depicted within State's Ex. 15 was not closely related to a controlling issue, the original of the depicted photograph was not necessary under Ev.R. 1004(4), and counsel was not ineffective for electing not to object to the use of State's Ex. 15. Accordingly, Winn's first assignment of error fails.

Evidence Rule 1002 states: "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio." However, there are exceptions to that rule. Relevant to this case is Evid.R. 1004(4), which states: "The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if: (4) The writing, recording, or photograph is not closely related to a controlling issue."

During the State's case in chief, State's Ex. 15 was offered to depict the scene of the crime, and the trial court admitted it as such with no objection from Winn. When Winn took the stand, he denied knowing the victim's grandson, Toby McLardy. Although Winn later conceded that he knew McLardy from the neighborhood, he insisted that the two were not friends. The State called McLardy's girlfriend, Teila Huffman, as a rebuttal witness. Huffman explained that not only were Winn and McLardy friends, but she had seen a framed photograph of the two men together on top of the television in Ms. Hummons's living room. At that point the State again used State's Ex. 15 in which could be seen a framed photograph on top of the television. Although the contents of the framed

photograph were unidentifiable in the exhibit photograph, Huffman identified the framed photograph as the one of Winn and McLardy about which she had testified.

When Huffman testified that the photo was one of Winn and McLardy, she implicitly testified that, in fact, Winn and McLardy were portrayed in the photo, thus implicating Ev.R. 1002. However, the friendship of Winn and McLardy is not closely related to a controlling issue in this case. There is no question that Winn was involved in the crimes against Ms. Hummons. He admitted to being present at the scene, claiming duress as his defense. The question of whether Hummons had a photo of Winn and McLardy on her television set is, at best, an issue collateral to Winn's guilt or innocence of the crimes alleged. Accordingly, the original photograph of Winn and McLardy was not required. Ev.R. 1004(4).

Winn also presents a cursory statement that trial counsel was ineffective for failing to object to the admission of State's Ex. 15. As already stated, the exhibit was admitted during the State's case in chief to depict the scene of the crime. There was no basis for objection at that point. Even if counsel had objected to use of the photo during Huffman's rebuttal testimony, such use was permissible pursuant to Evid.R. 1004(4). We cannot say that but for Huffman's testimony regarding the photograph, the outcome of the trial would have been different. Therefore, Winn cannot demonstrate the prejudice prong of *Strickland and Brady*, supra.

For these reasons, Winn's first assignment of error is without merit and is overruled.

#### IV

Winn's third assignment of error:

"THE DEFENDANT-APPELLANT'S KIDNAPPING CONVICTION VIOLATES THE

DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND SECTION 10, ARTICLE I, OF THE OHIO CONSTITUTION.”

Here Winn maintains that his kidnapping and aggravated robbery convictions were required to be merged because the charges are allied offenses of similar import that were committed with the same animus. Because this issue was not raised in the trial court, Winn has waived all but plain error. *State v. Long* (1978), 53 Ohio St.2d 91, 95-96, 372 N.E.2d 804; Crim.R. 52(B). We have previously applied a plain error analysis in cases concerning alleged allied offenses of similar import and found that a defendant's substantial rights are violated by conviction for two felonies rather than one where the offenses are allied offenses of similar import and committed with a single animus. *State v. Coffey*, Miami App. No. 2006 CA 6, 2007-Ohio-21, ¶14. See, also, *State v. Puckett* (March 27, 1998), Greene App. No. 97 CA 43.

In applying R.C. §2941.25 the Ohio Supreme Court established a two-part test for determining whether multiple offenses are allied offenses of similar import. First, the court must compare the elements of the offenses in the abstract to determine whether the elements correspond to such a degree that the commission of one crime will necessarily result in the commission of the other. *State v. Rance*, 85 Ohio St.3d 632, 636, 1999-Ohio-291, citation omitted. If the elements do so correspond, the offenses are allied offenses of similar import, and the defendant may only be convicted of and sentenced for both offenses if he committed the crimes separately or with a separate animus. *Id.* at 638-39, citations omitted.

The State encourages us to reconsider our recent decision in *Coffee*, wherein we held that kidnapping and aggravated robbery are allied offenses of similar import, requiring

consideration of the second step of the analysis set forth in *Rance*. We decline to do so. While we are aware of differing opinions in other appellate courts, we believe that our decision in *Coffee* was the right one.

The Ohio Supreme Court has previously compared the elements of kidnapping and robbery and found that kidnapping is implicit within every robbery. *State v. Logan* (1978), 60 Ohio St.2d 126, 130, 397 N.E.2d 1345. "[W]hen a person commits the crime of robbery, he must, by the very nature of the crime, restrain the victim for a sufficient amount of time to complete the robbery." *Id.* at 131. Thus, kidnapping and aggravated robbery are allied offenses of similar import, and Winn may only be convicted of both crimes if he committed each with a separate animus.

The second "separate animus" step of the *Rance* analysis was first embodied in the syllabus of *Logan*, *supra*, wherein the Court held: "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."

In this case, Winn's movement of Ms. Hummons the few steps from her hallway into her bedroom as well as his restraint of her therein was merely incidental to the aggravated robbery. Moreover, the restraint was relatively brief. It was not secretive, nor did it involve a substantial movement or increase in risk to Ms. Hummons. Certainly, Winn used far less restraint in moving his victim in this case than was seen in *Logan*, supra, wherein the Court found the same animus for kidnapping and rape when the defendant forced his victim into an alley, around a corner, and down a flight of stairs. Because Winn's victim, Ms. Hummons, was held in her bedroom in furtherance of the aggravated robbery, we cannot conclude that there was a separate animus for the kidnapping and aggravated robbery in this case.

Because kidnapping and aggravated robbery are allied offenses of similar import, and because Winn did not commit the two crimes with a separate animus, he could only be convicted of and sentenced for one of those crimes. Winn's third assignment of error is sustained.

V

Having overruled three of Winn's assignments of error and sustained the other, the judgment of the trial court will be AFFIRMED in part and REVERSED in part. We will merge Winn's kidnapping conviction into his aggravated robbery conviction and vacate the separate sentence imposed on the kidnapping charge. As modified, the judgment of conviction and sentence will be affirmed.

.....

BROGAN, J. and GRADY, J., concur.

Copies mailed to:

Jill R. Sink  
Sandra J. Finucane  
Hon. Michael T. Hall

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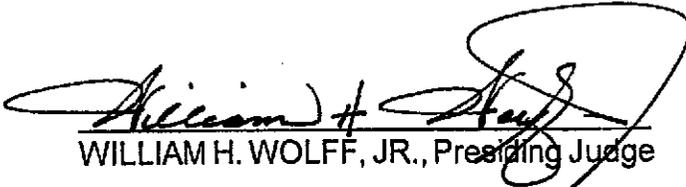
IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO :  
Plaintiff-Appellee : C.A. CASE NO. 21710  
v. : T.C. NO. 06 CR 99  
DAVON WINN : FINAL ENTRY  
Defendant-Appellant :

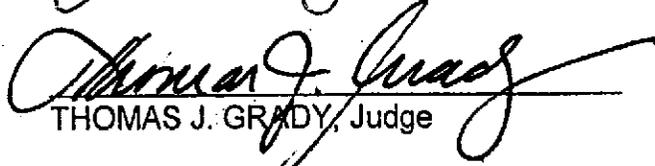
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Pursuant to the opinion of this court rendered on the 24th day of August, 2007, Winn's conviction for kidnapping is merged into the conviction for aggravated robbery and the separate sentence on the kidnapping charge is vacated. As modified, the judgment of conviction and sentence is affirmed.

Costs to be paid as follows: 25% by plaintiff-appellee; 75% by defendant-appellant.

  
WILLIAM H. WOLFF, JR., Presiding Judge

  
JAMES A. BROGAN, Judge

  
THOMAS J. GRADY, Judge

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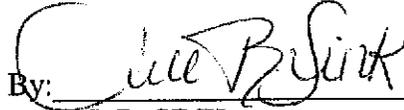
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Hon. Michael T. Hall  
Common Pleas Court  
41 N. Perry Street  
Dayton, Ohio 45422

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Memorandum in Support and Response was sent by first class mail on this 30 day of November, 2007, to the following: Sandra Finucane, 711 Waybaugh Drive, Gahanna, Ohio 43230 and David Bodiker, Ohio Public Defender Commission, 8 East Long Street – 11<sup>th</sup> Floor, Columbus, Ohio 43215-2998.

**MATHIAS H. HECK, JR.**  
PROSECUTING ATTORNEY

By:  \_\_\_\_\_

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