

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.

APPELLEE/CROSS-APPELLANT'S MERIT BRIEF

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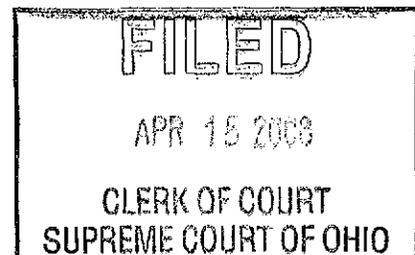


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STATEMENT OF FACTS

In January of 2006, Appellant/Cross-Appellee 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. (Transcript of Proceedings, Jury Trial, June 26-28, 2006, 137). However, when the three men, including Winn, arrived armed to carry out their plan, their friend's grandmother, Treva Ann Hummons, was home alone. (Tr. 18-19, 21-22, 37-38, 47). 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. (Tr. 37-38). One 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. (Tr. 38-42). As she did, she felt a gun pressing against the back of her head. (Tr. 45).

Luckily for Ms. Hummons, her neighbor across the hall was paying attention and went to investigate a commotion in the hallway. (Tr. 18-22). When he did, he saw the three men trying to pry open her door. *Id.* He immediately summoned police, who arrived and caught the men before any of them physically harmed Ms. Hummons or took anything from her. (Tr. 18-22, 45, 52-53, 66-75). Inside Ms. Hummons's bedroom police found two handguns, gloves, and a pry bar. (Tr. 45, 52-53, 66-75).

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. (Tr. 265-267). The trial court sentenced Winn to an aggregate term of imprisonment of ten years – seven years on each count of aggravated robbery, aggravated burglary, and kidnapping, three years each 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. (Index No. 5, Docket Entry 38).

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. (Index No. 25). The Second District agreed with Winn, reversed the kidnapping conviction, and vacated the seven years imposed on that count. *State v. Winn*, Montgomery App. No. 21710, 2007-Ohio-4327.

Both Winn and the State appealed the decision of the Second District. (Index Nos. 46, 47). This Court accepted the State's appeal regarding two propositions of law. This is the State's merit brief in support of those propositions.

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 offenses committed during a single act or course of conduct. *State v. Rance*, 85 Ohio St. 3d 632, 639, 1999-Ohio-291, 710 N.E.2d 699; *State v. Cabrales*, Slip Opinion No. 2008-Ohio-1625, ¶ 14. 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 charged offense necessarily results in the commission of another charged offense. *State v. Logan* (1979), 60 Ohio St.2d 126, 129, 397 N.E.2d 1345.

In 1999, this Court recognized a problem with the employment of this test by the courts of this state and sought to rectify it by directing the courts, in the first step of the test, to conduct its comparison of the elements of the supposed allied offenses 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). However, in its 2008 opinion in *Cabrales*, this Court again recognized that the first step of the test, as employed by the courts of the state, caused confusion and unreasonable results. *Cabrales*, ¶ 16. Thus, it clarified *Rance's*

abstract comparison test and held that when comparing the statutory elements of the two supposed allied offenses, a court need not find that the elements align exactly in order to declare the offenses allied, but that it need find that they align to the extent that the commission of one offense will necessarily result in commission of the other. *Cabrales*, at paragraph one of the syllabus. In other words, two offenses are allied offenses of similar import where “one offense is wholly subsumed within the other.” *Cabrales*, at ¶ 39 (J. Fain, concurring).

What *Cabrales* did not do, however, was modify *Rance*'s rationale that abstract comparison of the elements was a more functional test that would produce “clear legal lines capable of application in particular cases.” *Rance*, at 636. In fact, even after *Cabrales*, if properly applied, the 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 in one case a court determines that kidnapping and aggravated robbery are allied offenses, in any subsequent case involving those same offenses, it need only consider before sentencing whether the two crimes were committed by the particular defendant separately or with a separate animus. Only then could the sentencing court impose cumulative punishments for the two offenses. However, if a court finds in a particular case that kidnapping and aggravated robbery are not allied offenses of similar import; that is that they are dissimilar offenses, the court never again need evaluate, in any case, 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*, and as clarified in *Cabrales*, 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 or course of conduct.

However, in this case, as discussed in the State's second proposition of law, the Second District Court of Appeals failed to properly compare the elements of kidnapping and aggravated robbery in the abstract. Accordingly, the State respectfully requests this Court to reverse the decision of the Second District, reinstate Winn's conviction for kidnapping, and find 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 another.

SECOND PROPOSITION OF LAW: Neither Ohio's multiple count statute nor the Double Jeopardy Clause of the United States Constitution offer 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* and *Cabrales*, 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 in Ohio's multiple count statute, and properly applied in *Rance* and *Cabrales*, 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 and (3) displays, uses, brandishes, or indicates possession of the 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).

Elementary comparisons of these offenses, as well as common sense, conclusively establish that a person can commit a kidnapping without also committing an aggravated robbery. However, the true issue in this case, whether a person can commit an aggravated robbery without also committing a kidnapping, is more complex, especially in light of this Court's decision in *State v. Logan*, supra. In *Logan*, this Court found that implicit within every robbery is a kidnapping. *Logan*, at 130. Many appellate courts in this state have relied on that finding, as did the Second District in this case, in order to conclude that aggravated robbery and kidnapping are allied offenses of similar import. The State contends however that since this Court decided *Rance* in 1999 that reliance has been misplaced. And this Court's decision in *Cabrales* does not change the analysis. When compared in the abstract, as directed in *Rance* and *Cabrales*, the elements of aggravated robbery and kidnapping do not align to the extent that an aggravated robbery necessarily results in a kidnapping. 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 fleeing shoplifter who uses force to escape has committed both a kidnapping and a robbery, where the shoplifter simply punches another in his attempt to escape, but never removes the other from the place where he was found or restrains the liberty of the other. Accordingly, when compared in the abstract, in accordance with both *Rance* and

Cabrales, 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.

Further, the Double Jeopardy Clause of the United States Constitution provides no protection from cumulative punishments for two offenses arising out of the same act or course of conduct where the General Assembly expresses its intent to permit cumulative punishments for the offenses. *Rance*, supra, at 634-635. No where is the intent of the General Assembly clearer than in the plain language of the statutes themselves. *State v. Lowe*, 112 Ohio St.3d 507, 2007-Ohio-606, 861 N.E.2d 512, ¶ 9 (citing *State ex rel. Burrows v. Indus. Comm.* (1997), 78 Ohio St.3d 78, 81, 1997-Ohio-310, 676 N.E.2d 519). As set forth in Table 1, infra, the plain language of the statutes at issue in this case demonstrates that the General Assembly intended for courts of this state to always impose cumulative punishments for the offenses of aggravated robbery and kidnapping, regardless of animus, in accordance with R.C. 2941.25. Specifically, the mens rea element of kidnapping requires proof that the offender's purpose was to facilitate the commission of any felony or flight thereafter. Standing alone, this element evidences the legislature's intent to increase the range of punishments available to a court where an offender is found guilty of both a kidnapping that facilitates the commission of any felony offense and the offense itself.

Despite this evidence of the legislature's intent, however, the law as it currently exists under *Logan* rewards a person for choosing to commit an aggravated robbery and kidnapping rather than choosing to commit some other felony offense and a kidnapping. For example, a person who chooses to rob someone on the street with a deadly weapon and restrain that person's liberty in the process is not subject to cumulative punishments for the two offenses under *Logan*; but a person who chooses to burglarize a person's home with a deadly weapon and restrain that

person's liberty in the process is. See *State v. Monroe*, 105 Ohio St.3d 384, 2005-Ohio-2282, 827 N.E.2d 285, ¶ 69 (citing *State v. Waddy* (1992), 63 Ohio St.3d 424, 448, 588 N.E.2d 819 and *State v. Fears*, 86 Ohio St.3d 329, 344, 1999-Ohio-111, 715 N.E.2d 136). Such a result simply frustrates the intent of the legislature in enacting the kidnapping statute in the first place, which was to increase the range of punishments available to a court in sentencing where an offender facilitates the commission of a felony by kidnapping another. The remedy, however, simply lies in the proper application of *Rance* and *Cabrales*. When the test is properly applied, as discussed supra, this Court should find that aggravated robbery and kidnapping are not allied offenses of similar import because the elements of the two offenses do not align to the extent that aggravated robbery, in the words of Judge Fain in *Cabrales*, "wholly subsumes" the offense of kidnapping. Accordingly, the Second District Court of Appeals erred in merging Winn's conviction for kidnapping into his conviction for aggravated robbery and vacating the seven-year sentence for kidnapping.

	Kidnapping – 2905.01(A)(2)	Aggravated Robbery – 2911.01
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

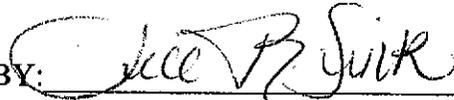
Table 1

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 (re-affirmed in *State v. Cabrales*, Slip Opinion No. 2008-Ohio-1625), implicitly overruled. In order to prevent any further erroneous applications of Ohio's multiple count statute, specifically to the crimes of kidnapping and aggravated robbery, the State of Ohio respectfully requests that this Court reverse the decision of the Second District and reinstate Winn's conviction for kidnapping.

Respectfully submitted,

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IN THE SUPREME COURT OF OHIO

07 - 1842

STATE OF OHIO

CASE NO. 07-

Plaintiff-Appellant,

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

VS.

DAVON WINN

COURT OF APPEALS
CASE NO: 21710

Defendant-Appellee.

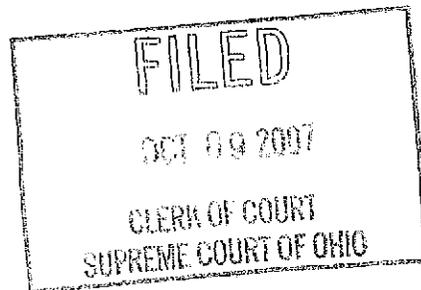
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NOTICE OF APPEAL OF APPELLANT, STATE OF OHIO

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NOTICE OF APPEAL OF APPELLANT, STATE OF OHIO

Appellant, State of Ohio, through the Office of the Prosecuting Attorney for Montgomery County, hereby gives notice of appeal to the Supreme Court of Ohio, from the judgment of the Montgomery County Court of Appeals, Second Appellate District, entered in *State of Ohio v. Davon Winn.*, Case No. 21710 on August 24, 2007.

This case presents a question of public or great general interest.

Respectfully submitted,

MATHIAS H. HECK, JR.
PROSECUTING ATTORNEY

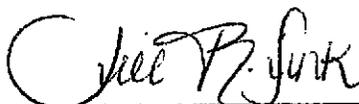
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CERTIFICATE OF SERVICE

I hereby certify that a copy of this notice of appeal was sent by first class mail on this 5th day of October, 2007, to the following: Sandra J. Finucane, 630 Morrison Road, Suite 160, Gahanna, OH 43230 and David H. Bodiker, Ohio Public Defender Commission, 8 East Long Street – 11th Floor, Columbus, OH 43266-0587.



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COURT OF APPEALS

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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	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	:	

OPINION

Rendered on the 24th 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.

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Hon. Michael T. Hall

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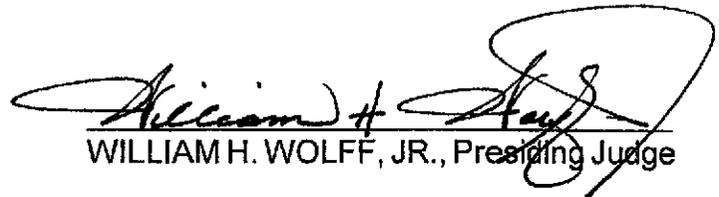
IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

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

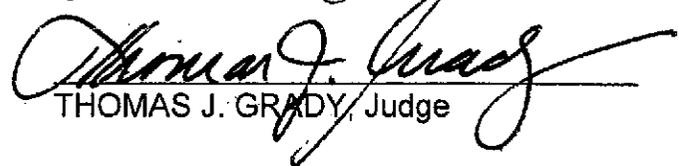
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Pursuant to the opinion of this court rendered on the 24th day of August, 2007, Winn's conviction for kidnapping is merged into the conviction for aggravated robbery and the separate sentence on the kidnapping charge is vacated. As modified, the judgment 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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2941.25 Allied offenses of similar import - multiple counts.

(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.

Effective Date: 01-01-1974

2905.01 Kidnapping.

(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:

- (1) To hold for ransom, or as a shield or hostage;
- (2) To facilitate the commission of any felony or flight thereafter;
- (3) To terrorize, or to inflict serious physical harm on the victim or another;
- (4) To engage in sexual activity, as defined in section 2907.01 of the Revised Code, with the victim against the victim's will;
- (5) To hinder, impede, or obstruct a function of government, or to force any action or concession on the part of governmental authority.

(B) 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 knowingly do any of the following, under circumstances that create a substantial risk of serious physical harm to the victim or, in the case of a minor victim, under circumstances that either create a substantial risk of serious physical harm to the victim or cause physical harm to the victim:

- (1) Remove another from the place where the other person is found;
- (2) Restrain another of the other person's liberty;
- (3) Hold another in a condition of involuntary servitude.

(C) Whoever violates this section is guilty of kidnapping. Except as otherwise provided in this division, kidnapping is a felony of the first degree. Except as otherwise provided in this division, if the offender releases the victim in a safe place unharmed, kidnapping is a felony of the second degree. If the victim of the offense is less than thirteen years of age and if the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, kidnapping is a felony of the first degree, and, notwithstanding the definite sentence provided for a felony of the first degree in section 2929.14 of the Revised Code, the offender shall be sentenced pursuant to section 2971.03 of the Revised Code as follows:

- (1) Except as otherwise provided in division (C)(2) of this section, the offender shall be sentenced pursuant to that section to an indefinite prison term consisting of a minimum term of fifteen years and a maximum term of life imprisonment.
- (2) If the offender releases the victim in a safe place unharmed, the offender shall be sentenced pursuant to that section to an indefinite term consisting of a minimum term of ten years and a maximum term of life imprisonment.

(D) As used in this section, "sexual motivation specification" has the same meaning as in section 2971.01 of the Revised Code.

Effective Date: 07-01-1996; 2007 SB10 01-01-2008

2911.01 Aggravated robbery.

(A) No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following:

- (1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it;
- (2) Have a dangerous ordnance on or about the offender's person or under the offender's control;
- (3) Inflict, or attempt to inflict, serious physical harm on another.

(B) No person, without privilege to do so, shall knowingly remove or attempt to remove a deadly weapon from the person of a law enforcement officer, or shall knowingly deprive or attempt to deprive a law enforcement officer of a deadly weapon, when both of the following apply:

- (1) The law enforcement officer, at the time of the removal, attempted removal, deprivation, or attempted deprivation, is acting within the course and scope of the officer's duties;
- (2) The offender knows or has reasonable cause to know that the law enforcement officer is a law enforcement officer.

(C) Whoever violates this section is guilty of aggravated robbery, a felony of the first degree.

(D) As used in this section:

- (1) "Deadly weapon" and "dangerous ordnance" have the same meanings as in section 2923.11 of the Revised Code.
- (2) "Law enforcement officer" has the same meaning as in section 2901.01 of the Revised Code and also includes employees of the department of rehabilitation and correction who are authorized to carry weapons within the course and scope of their duties.

Effective Date: 09-16-1997

2911.11 Aggravated burglary.

(A) No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if any of the following apply:

(1) The offender inflicts, or attempts or threatens to inflict physical harm on another;

(2) The offender has a deadly weapon or dangerous ordnance on or about the offender's person or under the offender's control.

(B) Whoever violates this section is guilty of aggravated burglary, a felony of the first degree.

(C) As used in this section:

(1) "Occupied structure" has the same meaning as in section 2909.01 of the Revised Code.

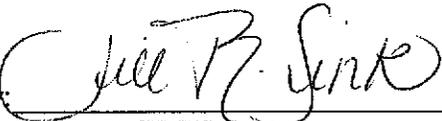
(2) "Deadly weapon" and "dangerous ordnance" have the same meanings as in section 2923.11 of the Revised Code.

Effective Date: 07-01-1996

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellee/Cross-Appellant's Merit Brief was sent by first class on this 15TH day of April, 2008, to Opposing Counsel: Timothy Young, Ohio Public Defender's Office, 8 East Long Street – 11th Floor, Columbus, Ohio 43215-2998.

MATHIAS H. HECK, JR.
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By:  _____

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