

**ORIGINAL**

**IN THE SUPREME COURT OF OHIO**

**10-2222**

**STATE OF OHIO**  
Plaintiff-Appellee

vs.

**DONALD COOPER**  
Defendant-Appellant

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On appeal from the Montgomery County  
Court of Appeals

Case No. CA 23143

Trial Court No. 08-CR-1431

**MEMORANDUM IN SUPPORT OF JURISDICTION**

Donald Cooper #589-973  
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## CLAIMED APPEAL OF RIGHT

This appeal presents several substantial constitutional questions, which are outlined below:

I. Does the Appellate Court's misrepresentation of the State's evidence stated in the final judgment suggest a possible bias, and violates Appellant's right to a fair and impartial appellate review?

A. Appellant has a due process right to have his case decided based upon the actual facts supported by the trial court record, and not by erroneous claims.

II. Is Appellate court's decision in conflict with this High Court's ruling in State v. Wilkins (1988) 65 Ohio St. 2d 382, 386... that although a defendant uses a complete defense the finder of fact should still be permitted to consider a lesser included offense if the evidence is such that the finder of fact can find against the state on at least one of the elements of the crime charged?

A. There were questions of Alleged force AND questions of consent, AND the jury who deliberated over two (2) days should have been given AN opportunity to consider A lesser included offense.

III. Was Appellant's rights to not be subjected to Double Jeopardy violated when he was convicted AND given consecutive sentences for allied offenses of similar import?

A. The Alleged victim's original statements to police AND her written statements on record were both that "her touching of Appellant's penis WAS incidental to oral sex", but she gave A different version at trial.

IV. Was Appellant's 6th Amendment rights violated when he was subjected to ineffective assistance of trial counsel?

A. Trial counsel's performance WAS deficient AND the deficiencies WAS prejudicial to the Appellant.

## STATEMENT OF THE CASE

Donald Cooper (hereinafter referred to as Appellant) was charged in Case No. 08-CR- 1431 (Indictment A containing one count of Rape and Indictment B containing one count of Rape and one count of Gross Sexual Imposition) with three felony counts. The jury was was given the option to find Appellant guilty on all three charges as Count I, Count II and Count III. Count I was a charge of Rape, a violation of R. C. 2907.02(A)(2), an allegation of forced vaginal or anal intercourse (Tr. 415, Line 19), Count II was a charge of Rape, a violation of R. C. Section 2907.02(A)(2), an allegation of forced fellatio (Tr. 514, Line 21). Count III was a charge of Gross Sexual Imposition, a violation of R.C. 2907.05(A)(1).

A jury trial began on October 27, 2008. Nine jurors were removed for cause without objection. The State used three peremptory challenges. Appellant used all four peremptory challenges. Two alternate jurors were also selected, but not used in deliberations.

Prior to opening arguments, the court addressed the issue of two indictments, one being rendered on May 22, 2008 and the other being rendered on September 25, 2008 (Tr. 127 through 130). From the transcript it is difficult to understand exactly what Appellant's counsel knew. The State indicated a prior discussion with Appellant's counsel whereby the A indictment was not to be dismissed (Tr. 126, Line 23) and, at trial, Appellant's counsel knew the indictment was not dismissed (Tr. 127, Line 9). An objection was made by Appellant's counsel indicating an initial assumption the two

charges of rape were one and the same (Tr. 127, Line 21). On the other hand, Appellant's counsel acknowledged that the discovery packet contained two alleged acts of rape, fellatio and intercourse (Tr. 128, Line 24). Further, the State indicated Appellant was offered to plead guilty to the initial charge of rape and no other charges would be filed. An offer refused by Appellant (Tr. 129, Line 9). No Bill of Particulars nor request for continuance was requested. The court indicated that the defense was on notice of additional rape charges (Tr. 129, Line 15).

Opening arguments were then held. Neither side rendered an objection to the arguments. The State presented five witnesses in its case in chief. Appellant then presented five witnesses. The State countered with three rebuttal witnesses, one of which was used in its case in chief. Closing arguments were presented with three objections, one by Appellant (Tr. 451, Line 14) and two by the State (Tr. 429, Line 3 & Tr. 434, line 17).

The trial court gave instructions to the jury, partial instructions before closing arguments (Tr. 409 through 419) and final instructions beginning on page 459 of the transcript. Appellant made no objection to the instructions nor made any specific requests for instructions. The jury asked questions of the court which were answered without objection.

Appellant was found not guilty of Count I (rape involving intercourse). Appellant was found guilty of Counts II (rape involving fellatio) and III (gross sexual imposition). A presentence investigation was ordered. On November 13, 2008 Appellant returned to court and was sentenced to ten years for the rape conviction and eighteen months for the gross sexual imposition conviction, to be

served consecutively.

## STATEMENT OF THE FACTS

Much of this case is a test of credibility. The State presented a witness who made allegations against Appellant. Appellant denied criminal wrongdoing and countered with consent. Each side presented witnesses to corroborate their respective viewpoints.

### State's Presentation of Evidence:

The State presented the alleged victim of the rapes and gross sexual imposition, Dominique Dean. At the time of the alleged incident Ms. Dean was employed by ABX Airport in Wilmington, Ohio. She took a bus to work around 10:00 pm and returned by bus at 6:00 am. On March 29, 2008, a Saturday morning, Ms. Dean arrived back in Dayton around 6:15 am (Tr. 142, Line 21). It was still dark (Tr. 142, Line 24).

Ms. Dean called her mother, Regina Welch, by cell phone (Tr. 143, Line 6) to come pick her up (Tr. 143, Line 9). Ms. Dean was told by her mother that she could not provide transportation (Tr. 143, Line 11).

Ms. Dean decided to walk home. She walked down Main Street intending to then take Helena Street (Tr. 143, Line 21). Before reaching Helena Street, Ms. Dean heard a call to her (Tr. 144, Line 11), stopped, and looked up (Tr. 144, Line 14). Ms. Dean saw a man across the street at the bus stop (Tr. 144, Line 16) near the Family Dollar Store (Tr. 144, Line 20).

Ms. Dean continued to walk, but the man crossed the street and eventually caught up with her (Tr. 146, Line 7). This man called himself "Twin" and wanted to talk to Ms. Dean about life (Tr. 146,

Lines 13-24). Ms. Dean advised Twin that she wanted to get home, but Twin continued to talk and kissed her (Tr. 147, Lines 11-21).

Twin then grabbed her arm and forcibly took Ms. Dean to the back of an alley (Tr. 148, Line 9). First, Ms. Dean texted her mother for help (Tr. 149, Line 9). Ms. Dean was then drug down the alley, made to kneel down and Twin put his penis into Ms. Dean's mouth (Tr. 150, Line 6). Twin asked Ms. Dean to touch his erect penis with her hand and she proceeded to "jack him off" (Tr. 151, Line 16). Next, Twin turned Ms. Dean around, pulled down her pants, and attempted vaginal intercourse (Tr. 152, Line 1-14). At this point Ms. Dean attempted to call her mother (Tr. 181, Line 4).

Twin stepped back and Ms. Dean ran from the alley (Tr. 153, Line 21). Ms. Dean ran home and found her brothers and sister there (Tr. 157, Line 14). Her mother arrived home shortly thereafter. They proceed to look for Twin by car and found him near the UDF store. Police were inside the UDF and they were informed of the incident (Tr. 160, Line 2). The policed brought back a suspect and Ms. Dean identified him as the man in the alley (Tr. 12, 25). Neither the text messages nor the phone call log on either phone (Ms. Dean or Ms. Welch) were shown to the police (Tr. 195, Line 25; Tr. 233, Line 7).

In order to corroborate Ms. Dean's testimony, the State provided pictures of Ms. Dean taken by the sexual assault nurse examiner, and provided the testimony of Regina Welch, Donna Pack, Amy Rismiller, and Kimberly Tracy.

Ms. Welch verified that she received a phone call from her daughter around 6:00 am asking for

a ride (Tr. 214, Line 7). Later Ms. Welch received a second call from her daughter asking for help and the phone went dead (Tr. 215, Lines 9-23). Two text messages were then received asking for help (Tr. 216, Line 5). Possibly a second phone call was received (Tr. 224, Line 14). Ms. Welch and her husband went by car looking for Ms. Dean (Tr. 216, Line 12). After arriving back at home, Ms. Welch found her daughter there and the entire family went looking for the alleged rapist. Appellant was found near the UDF Store and the police were contacted.

The next witness, Donna Pack, was a detective for the Dayton Police Department. Detective Pack spoke with Ms. Dean and Ms. Welch on March 31, 2008 (Tr. 240, Line 4). The time of the alleged offense came into question. Detective Pack related that officers were originally dispatched at 7:21 am (Tr. 246, line 1) about ten minutes after the incident (Tr. 246, Line 4). Finally, Detective Pack testified Appellant asked "Is she saying that I raped her?" And then Appellant said "She's a crack whore, I've smoked crack with her." (Tr. 243, Line 1).

Amy Rismiller, a serology and DNA expert from the Miami Valley Regional Crime Laboratory, was the third witness. Ms. Rismiller tested the rape kit generated in this investigation. Ms. Rismiller examined vaginal, rectal and oral swabs taken from Ms. Dean. All swabs were negative for the presence of semen (Tr. 251, Line 17).

A nurse from Miami Valley Hospital, Kimberly Tracy, was the next witness testifying as a sexual assault nurse examiner (Tr. 255, Line 19). Ms. Tracy noticed certain injuries on Ms. Dean and documented those injuries in writing and by photographs.

Appellant's Presentation of Evidence:

Ronald Cooper, twin brother of Appellant, was the defense's first witness. On March 29, 2008 both Ronald Cooper and Appellant went to Main Street. Appellant was trying to "get with a girl" and Ronald Cooper was going to a friend's house to collect money (Tr. 289, Line 20). The time was around 5:30 to 6:30 am (Tr. 291, Line 10). Mr. Cooper mentioned speaking with Daphne Tillman. Finally, Mr. Cooper related that this particular area of Main Street involved prostitution (Tr. 300, Line 1).

The next witness was Daphne Tillman. Ms. Tillman stated that she was at the Main Street location around 6:00 to 7:30 am (Tr. 305, Line 2) in March (Tr. 304, Line 16), later identified as March 29 (Tr. 310, Line 20). Ms. Tillman identified Ms. Dean from a photograph indicating that she was at that location and her name was Dominique (Tr. 307, Lines 15-25). Dominique was a hooker (Tr. 308, Line 4). Appellant and Dominique were sitting at the bus stop talking (Tr. 319, Line 12). Both appeared to be under the influence of drugs (Tr. 319, Line 23) and sharing crack (Tr. 320, Lines 11-18). Ms. Tillman indicated both Appellant and Ms. Dean walked down an alley toward a house used for prostitution (Tr. 310, Line 18). There were no signs of force used by Appellant (Tr. 311, Line 25); however, Ms. Dean and Appellant were seen running out of the alley ten or fifteen minutes later (Tr. 314, Line 19). Appellant was calling Ms. Dean a "bitch" and telling her to stop (Tr. 315, Line 16).

Jerald Foltz, an employee of Cincinnati Bell Telephone Company, was Appellant's third witness. Mr. Foltz described phone usage for Ms. Dean's phone. On March 29 phone activity took

place at 6:39, 6:41, 6:43 and 6:46 in the morning.

The Fourth witness Appellant called was Sgt. West of the Dayton Police Department. Sgt. West was at the UDF on March 29, 2008 and saw the apprehension of Appellant. Appellant did not run from the police (Tr. 348, Line 17).

Lastly, Appellant testified. Appellant admitted to being on Main Street on March 29 to "buy me a girl" (Tr. 356, Line 11). Dominique came to the bus stop. Appellant first met her in a crack house in February (Tr. 356, Line 23). They smoked crack together at the bus stop (Tr. 360, Line 15). Appellant also saw Daphne Tillman at the bus stop (Tr. 360, Line 19).

Appellant hired Ms. Dean to perform oral sex for \$20.00 (Tr. 362, Line 10). They walked down an alley and the act begun. Ms. Dean stopped the act so that a more secluded area could be found and began a phone call (Tr. 375, Line 18). Appellant noticed that money was missing from his pocket. Ms. Dean began to run and Appellant chased her (Tr. 365, Line 1).

Appellant caught Ms. Dean, grabbed her by the arms, and demanded his money back (Tr. 365, Line 17). Ms. Dean then assaulted Appellant and Appellant hit Ms. Dean in the mouth (Tr. 365, Lines 17-22). At this point Ms. Dean is on the phone yelling for help (Tr. 368, Lines 17-23).

Appellant then describes why it is impossible for him to drag another into an alley (Tr. 369-370).

Appellant avers that any sexual act was consensual.

Rebuttal:

Officer Berger of the Dayton Police Department stated that Ms. Dean did not appear to be under

the influence of drugs or alcohol (Tr. 391, Line 1). Detective Coverman of the Dayton Police Department, Vice Unit, indicated this area of Main Street is an area of prostitution, but had no familiarity with Dominique Dean. Finally, Ms. Pack was recalled as a witness and stated no police records existed indicating Ms. Dean was a prostitute.

PROPOSITION OF LAW #1  
~~FIRST ASSIGNMENT OF ERROR~~

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT FAILED TO INSTRUCT ON THE LESSER INCLUDED OFFENSE OF SEXUAL BATTERY, A VIOLATION OF R.C. SECTION 2907.03 AND SUCH FAILURE AMOUNTED TO PLAIN ERROR, AND A DUE PROCESS VIOLATION.

ARGUMENT

The Supreme Court of Ohio has held that sexual battery under R.C. 2907.03(A)(1) is a lesser included offense of rape under R.C. 2907.02(A)(2). *State v. Johnson* (2006), 112 Ohio St.3d 210, citing *State v. Wilkins* (1980), 65 Ohio St.2d 382, 386. An instruction regarding a lesser included offense must be given "only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense." *State v. Thomas* (1988), 40 Ohio St.3d 213, 216.

A lesser included instruction depends on the particular facts of the case.

"If the evidence adduced on behalf of the defense is such that if accepted by the trier of fact it would constitute a complete defense to all substantive elements of the crime charged, the trier of fact will not be permitted to consider a lesser included offense, unless [it] could reasonably find against the state and for the accused upon one or more of the elements of the crime charged, and for the state and against the accused on the remaining elements, which, by themselves, would sustain a conviction upon a lesser included offense." *Wilkins* at 388.

Therefore, this court must look at the relevant facts of the testimony.

Appellant provided one witness, plus his own testimony, which indicated the alleged victim, Dominique Dean, was under the influence of crack. Appellant stated so in his testimony (Tr. 360, Line

15). They were smoking crack together. Daphne Tillman also stated that Ms. Dean was sharing crack (Tr. 320, Lines 11-18). Further, Ms. Tillman alleged that Ms. Dean was under the influence of crack (Tr. 319, Line 23).

It is true that Appellant has stated that any sexual conduct was consensual. Obviously, the trier of fact rejected such argument. However, the trier of fact should have been given the opportunity to consider the lesser offense of sexual battery under R.C. Section 2907.03(A)(1): "No person shall engage in sexual conduct with another, not the spouse of the offender, when an of the following apply: (1) The offender knowingly coerces the other person to submit by any means that would prevent resistance by a person of ordinary resolution." As such, there are two differences between the crimes.

Rape requires purpose whereas sexual battery requires an act to be done knowingly. Appellant alleged that Ms. Dean was under the influence of crack. A person can subjectively believe that there is consent when there is none. If that were true, Appellant could not have intended to commit rape. However, Appellant would have acted knowingly. Appellant offered crack to Ms. Dean and she became under its influence, as did Appellant. This is best explained by *State v. Wilkins*, at 387:

"[i]t is possible for a person to compel another to engage in sexual conduct by force or threat of force knowingly but not purposely. A person could subjectively believe that there is consent where there is none, and in using his strength could coerce another to submit by force. In such case he would not intend to do the prohibited act. However, if he is aware of the circumstances that probably exist and that under such circumstances there probably is not consent, he would have knowingly coerced another to engage in sexual conduct by force."

The trier of fact did not have the opportunity to compare the two crimes. The jury could only conclude the guilt on the charge of rape. The choice was either to find Appellant not guilty and grant his freedom or find him guilty of rape. The jury might have found that the "force" to constitute rape was plying the victim with crack.

Therefore, Appellant requests that this Court reverse the conviction of rape and remand to the trial court for a new trial.

PROPOSITION OF LAW #2  
~~SECOND ASSIGNMENT OF ERROR~~

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT FAILED TO MERGE THE SENTENCES IMPOSED ON THE TWO REMAINING COUNTS PURSUANT TO R.C. 2941.25 AND SUCH FAILURE AMOUNTED TO PLAIN ERROR, AND A DOUBLE JEOPARDY VIOLATION.

ARGUMENT

Appellant was sentenced to consecutive terms for rape and gross sexual imposition. Appellant submits that these convictions and sentences should have merged resulting in one sentence as elected by the State. Even though Appellant's counsel failed to request this merger, Appellant submits that the duty still rests with the trial court to make this determination. Such failure to merge the counts constitutes plain error. *State v. Sullivan*, 2003 Ohio App. LEXIS 5278 (2003).

R.C. 2941.25 provides:

“(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.”

“A two-step analysis is required to determine whether two crimes are allied offenses of similar import.”

*State v. Blankenship* (1988), 38 Ohio St.3d 116, 117; *State v. Williams* (2010), 124 Ohio St. 3d 381.

First, the trial court must compare the elements of the two offenses in the abstract and must look at the statutory elements of the involved crimes without considering the particular facts of the case. The two offenses are allied if the elements of the crimes correspond to such a degree that the commission of one crime will result in the commission of the other. No exact alignment of the elements is necessary,

However, if the offenses are so similar that the commission of one offense will necessarily result in the commission of the other, then the offenses are allied offenses of similar import. *State v. Cabrales* (2008), 118 Ohio St.3d 54; *State v. Rance* (1999), 85 Ohio St. 3d 632. If the offenses are allied, then the second step is to determine whether the offenses were committed separately or with a separate animus.

Appellant submits that when one commits the offense of rape, one necessarily commits the act of gross sexual imposition. Therefore, these two offenses are allied offenses of similar import. The first step has been answered.

The question properly placed before this Court is whether these offenses were committed separately or with a separate animus, an answer necessary for the second step of the analysis.

Appellant first submits that the alleged actions were an uninterrupted episode. The act of fellatio began immediately continuing to an act of "jacking off." There was no separate animus; the goal was to ejaculate. Such uninterrupted act can only constitute one conviction. *State v. Nichols*, 1994 Ohio App. LEXIS 1123 (12<sup>th</sup> Dist. 1994). Secondly, Appellant submits that the "jacking off" was incidental to the rape and, as such, constitutes allied offenses of similar import. *State v. Dehler*, 1994 Ohio App. LEXIS 2269 (8<sup>th</sup> Dist. 1994).

Therefore, Appellant requests that this Court merge the convictions for sentencing and remand to the trial court for disposition.

# Proposition of Law #3

## ~~THIRD ASSIGNMENT OF ERROR~~

**APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL,  
A VIOLATION OF THE 6th AMENDMENT.**

### ARGUMENT

The United States Supreme Court has long held that "the right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970). In the case of *Strickland v. Washington*, 466 U.S. 668 (1984) the Supreme Court held that, to successfully claim ineffectiveness, a defendant must establish that the facts of the case satisfy a two-pronged test. First, counsel's performance must have been deficient, meaning that "counsel's representation fell below an objective standard of reasonableness." *Id.* At 668. The second prong is that any deficiencies must be prejudicial to the defendant. Prejudice exists where there is a reasonable probability that the trial result would have been different but for the alleged deficiencies of counsel. *State v. Bradley* (1989), 42 Ohio St.3d 136 (paragraph three of the syllabus).

This argument relates to the first and second assigned errors. Trial counsel failed to request a lesser included instruction of sexual battery. Obviously, Appellant's counsel should have done so. There were questions of force and consent. There was evidence of crack usage. Appellant was prejudiced because, if convicted of sexual batter, his sentence would have been less. The jury was only given the choice of all or nothing. In other words, convict Appellant of rape or release him. Appellant also submits that his counsel was deficient when a merger was not requested. Again, Appellant was prejudiced because consecutive sentences would have been prohibited. Appellant would have been

sentenced on only one charge.

Therefore, Appellant submits that he is entitled to a new trial, or in the alternative, a merger of the offenses.

**CERTIFICATE OF SERVICE**

I hereby certify that a hand-written copy of the foregoing Memorandum In Support of Jurisdiction was sent by regular U.S. Mail, postage pre-paid, to Carley Ingram, Assistant Prosecutor, Montgomery County Prosecutor's Office, 301 West Third Street, Fifth Floor, Dayton, Ohio 45422, on this 20<sup>th</sup> day of December 2010.

Respectfully submitted,

  
Donald Cooper #589-973

Appellant in Pro Se

# ATTACHMENTS

- ① A date-stamped copy of the court of appeals opinion being appealed.
- ② A date-stamped copy of the court of appeals judgment entry being appealed.

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO :  
Plaintiff-Appellee : C.A. CASE NO. 23143  
v. : T.C. NO. 08CR1431  
DONALD COOPER : (Criminal appeal from  
Defendant-Appellant : Common Pleas Court)

.....  
**OPINION**

Rendered on the 12<sup>th</sup> day of November, 2010.  
.....

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Attorney for Plaintiff-Appellee

WILLIAM N. MERRELL, Atty. Reg. No. 0015957, P. O. Box 2901, Springfield, Ohio 45501  
Attorney for Defendant-Appellant

.....  
FROELICH, J.

Defendant-appellant Donald Cooper appeals his conviction and sentence for rape and gross sexual imposition. For the following reasons, the judgment of the trial court will be Affirmed.

Shortly after 6:00 a.m. on March 29, 2008, twenty-year-old D.D. was on her way home from work. When she got off of the bus in downtown Dayton, she called her mother to pick her up, who told her daughter that she (the mother) did not have enough gas. Not wanting to wait for another bus, D.D. decided to walk to the Five Oaks neighborhood in which she lived.

As D.D. walked north on Main Street, approaching Helena Street, she heard a man at the bus stop across the street call out, "Hey girl. Come here." D.D. looked up and saw the man (later identified as Cooper) walking toward her. D.D. kept walking, but Cooper started walking faster, catching up to her. Cooper grabbed D.D.'s arm and asked her where she was going, insisting that he wanted to talk to her. The two talked for a couple of minutes, then D.D. told Cooper that she had to get home to her daughter.

Being only two blocks away from her home, D.D. tried to walk away, but Cooper followed her, continuing to talk. Becoming more concerned, D.D. sent a text message to her mother, asking for help. Cooper suddenly kissed D.D., who pushed him away, and repeated that she needed to get home to her child. Cooper grabbed her arm and told her, "You're not going anywhere." As Cooper dragged D.D. into an alley, she hit the send button on her phone to text her mother again.

In the alley, Cooper pushed D.D. onto her knees and shoved his penis into her mouth. Cooper then withdrew his penis and forced D.D. to masturbate him. D.D. managed to call her mother, who could hear her begging someone to leave her alone. The call was disconnected, and D.D.'s mother left the house to look for her daughter. D.D. claimed that Cooper then turned her around and pulled down her pants. D.D. testified on

direct examination that Cooper vaginally raped her from behind, but on re-direct examination, she testified that Cooper anally raped her. When Cooper withdrew, D.D. ran down the alley to her home, where she told her siblings what had happened. D.D.'s mother arrived home a couple of minutes later, and the family went looking for Cooper, finding him back at the bus stop where D.D.'s ordeal began. They saw a police officer at a nearby store and reported the attack.

The officer arrested Cooper, and D.D. was taken to the hospital. She suffered from cut, swollen, and bruised lips, bruising to both arms, and an abrasion to her cervix. Cooper was indicted on two counts of rape and one count of gross sexual imposition.

Cooper testified that he had sex with D.D., but he insisted that it was consensual. He said D.D. was a prostitute and that he paid her \$20 and shared some crack cocaine with her in exchange for oral sex that morning. Cooper also offered the testimony of Daphne Tillman, a drug addict and prostitute with an extensive criminal history. Tillman claimed that she knew D.D. to be a prostitute. She testified that she saw D.D. and Cooper smoking crack cocaine at the bus stop before walking together down the alley.

On rebuttal, the State offered the testimony of several police officers who stated that D.D. did not appear to be under the influence of either drugs or alcohol when they spoke to her. A detective in the vice squad was not familiar with either D.D.'s name or her face, and at the time of this offense there were no police records for D.D. for any crime, including prostitution.

A jury found Cooper guilty of gross sexual imposition and one count of rape for the act of fellatio, but not guilty of the other count of rape. The trial court ordered Cooper to serve consecutive sentences of ten years for rape and eighteen months for gross sexual

imposition. Cooper appeals.

## II

### Cooper's First Assignment of Error:

"THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT FAILED TO INSTRUCT ON THE LESSER INCLUDED OFFENSE OF SEXUAL BATTERY, A VIOLATION OF R.C. SECTION 2907.03 AND SUCH FAILURE AMOUNTED TO PLAIN ERROR."

In his first assignment of error, Cooper maintains that the trial court erred in failing to instruct on sexual battery, a lesser included offense of rape. As Cooper acknowledges, he has waived all but plain error by not objecting or requesting a different instruction in the trial court. See, e.g., *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶74. "Plain error exists only where it is clear that the verdict would have been otherwise but for the error." *Id.*, quoting *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, ¶52. We find no plain error in the trial court's failure to instruct on sexual battery in this case.

A trial court's determination of whether to instruct a jury on a lesser included offense is a two-step process. *State v. Gregory* (Aug. 19, 1994), Montgomery App. No. 14187. "The court must first determine whether the offense may be a lesser included offense." *Id.* If so, "the court must then determine whether the evidence warrants the giving of the lesser included instruction." *Id.*

"An offense may be a lesser included offense of another only if: (1) the offense is a crime of lesser degree than the other; (2) the offense of greater degree cannot, as statutorily defined, ever be committed without the offense of the lesser degree, as statutorily defined, also being committed, and (3) some element of the greater offense is

not required to prove the commission of the lesser offense.” *Id.*, quoting *State v. Kidder* (1987), 32 Ohio St.3d 279.

Cooper was convicted of rape in violation of R.C. 2907.02(A)(2), in that he engaged in sexual conduct with another, purposely compelling the other person to submit by force or threat of force. He argues that the trial court should have instructed on the lesser included offense of sexual battery in violation of R.C. 2907.03(A)(1), which provides that “No person shall engage in sexual conduct with another, not the spouse of the offender, when \* \* \* [t]he offender knowingly coerces the other person to submit by any means that would prevent resistance by a person of ordinary resolution.” The offenses sexual battery and rape “differ in mens rea, knowingly for sexual battery versus purposefully for rape, and degree of compulsion applied to the victim, coercion for sexual battery and force or threat of force for rape.” *State v. Cain*, Franklin App. No. 06AP-1252, 2007-Ohio-6181, ¶5.

“The Supreme Court of Ohio has held that sexual battery committed by use of coercion as defined in R.C. 2907.03(A)(1) is a lesser-included offense of forcible rape.” *Id.*, ¶8, citing *State v. Wilkins* (1980), 64 Ohio St.2d 282; *State v. Stricker*, Franklin App. No. 03AP-746, 2004-Ohio-3557. However, “[t]he mere fact that an offense can be a lesser included offense of another offense does not mean that a court must instruct on both offenses where the greater offense is charged.” *Wilkins*, supra, at 387. Instead, an instruction on a lesser included offense must be given “only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense.” *State v. Thomas* (1988), 40 Ohio St.3d 213, 216. Moreover, “[i]f the evidence adduced on behalf of the defense is such that if accepted by the trier of fact it would constitute a complete defense to all substantive elements of the

crime charged, the trier of fact will not be permitted to consider a lesser included offense unless the trier of fact could reasonably find against the state and for the accused upon one or more of the elements of the crime charged, and for the state and against the accused on the remaining elements, which, by themselves, would sustain a conviction upon a lesser included offense." *Wilkins*, supra, at 388.

Cooper's defense was that D.D. consented to perform oral sex. Had the jury believed this testimony, his defense to the charge of rape was complete. Contrary to Cooper's assertion, "[t]he jury could not have found that defendant acted knowingly but not purposely; it had to choose between a complete defense, and therefore acquittal, or the commission of the crime of rape." *Id.*, at 389. "[W]here a defendant presents a complete defense to the substantive elements of the crime, \* \* \* an instruction on a lesser included offense is improper." *State v. Keenan* (1998), 81 Ohio St.3d 133, 139. See, also, *State v. Taylor*, Montgomery App. No. 21122, 2006-Ohio-2655, ¶35 ("[A] trier of fact will not be allowed to consider a lesser-included offense when the evidence adduced on behalf of the defense is such that, if accepted by the trier of fact, the evidence would constitute a complete defense to all substantive elements of the crime charged.")

Because Cooper claimed that D.D. consented to the sexual conduct, no instruction on the lesser included offense of sexual battery was warranted. Cooper's first assignment of error is overruled.

### III

Cooper's Second Assignment of Error:

"THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT FAILED TO MERGE

THE SENTENCES IMPOSED ON THE TWO REMAINING COUNTS PURSUANT TO R.C. 2941.25 AND SUCH FAILURE AMOUNTED TO PLAIN ERROR.”

In his second assignment of error, Cooper contends that his gross sexual imposition and rape charges were allied offenses of similar import, which were required to be merged for sentencing pursuant to R.C. 2941.25(A). Cooper acknowledges that this issue was not raised below, and he has therefore waived all but plain error. See, e.g., *State v. Hay*, Union App. No. 14-2000-24, 2000-Ohio-1938, citing *State v. Comen* (1990), 50 Ohio St.3d 206, 211.

The Ohio Supreme Court has established a two-part test for determining whether multiple offenses are allied offenses of similar import pursuant to R.C. §2941.25. 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.

Cooper was convicted of rape in violation of R.C. 2907.02(A)(2), which states: “No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force.” He was also convicted of gross sexual imposition in violation of R.C. 2907.05(A)(1), which provides: “No person shall have sexual contact with another \* \* \* when \* \* \* [t]he offender purposely compels the other

person \* \* \* to submit by force or threat of force.”

The Ohio Supreme Court has compared the elements of these two offenses in the abstract and concluded that rape and gross sexual imposition are allied offenses of similar import. *State v. Evans*, 122 Ohio St.3d 381, 2009-Ohio-2974, ¶30, citations omitted. However, the analysis does not end here. While a defendant may not be convicted of rape and gross sexual imposition arising out of the same conduct, there are circumstances under which he may be convicted of both. *State v. Hawks*, Cuyahoga App. No. 93582, 2010-Ohio-4345, ¶21, citing *State v. Foust*, 105 Ohio St.3d 137, 2004-Ohio-7006; additional citations omitted. *State v. Hay*, Union App. No. 14-2000-24, 2000-Ohio-1938, citing *State v. Johnson* (1988), 36 Ohio St.3d 224, 226; *State v. Jones* (1996), 114 Ohio App.3d 306, 325. We must next consider whether the crimes were committed with a separate animus.

In *State v. Dudley*, Montgomery App. No. 22931, 2010-Ohio-3240, we held that the offenses of rape and gross sexual imposition had to be merged. This holding does not overrule the second step of an allied offenses analysis under *Rance*, which focuses upon the factual basis for the charges and the animus behind those acts. We held under the particular facts of *Dudley* that the offenses were allied offenses of similar import and had to be merged both because the commission of one crime necessarily resulted in the commission of the other and because the acts were committed with the same animus.

When a defendant gropes his victim’s breast and buttocks, as well as rapes her, we have held that the acts of groping are not merely incidental to the rape, and a trial court does not err in separately sentencing the defendant for each of the counts of gross sexual

imposition based upon those actions, as well as for the rape. *State v. Young*, Montgomery App. No. 23438, 2010-Ohio-5157, ¶¶109-10, citing *State v. Knight*, Cuyahoga App. No. 89534, 2008-Ohio-579. See, also, *Foust*, supra, at ¶45 (gross sexual imposition charges as a result of the defendant's touching his victim's breasts and vagina were distinct and separate from the act of rape).

In *Hay*, supra, a case more factually similar to this case, the Third District Court of Appeals considered whether masturbation was separate and distinct from rape. The Court explained that "[t]he charge of gross sexual imposition was premised upon the alleged masturbation of [the victim's] penis. This is separate and distinct from the action, specifically the act of fellatio, which constituted the sexual conduct which lead to the appellant's criminal charge for rape. Therefore, the appellant committed two separate offenses, and he may be convicted of both." *Hay*, supra, citing R.C. 2941.25(B).

We conclude that Cooper's act of forcing D.D. to masturbate him was not merely incidental to the act of rape, but was instead a separate and distinct act, committed with a separate animus. Therefore, the trial court did not err in sentencing D.D. separately for the two offenses.

Cooper's second assignment of error is overruled.

#### IV

Cooper's Third Assignment of Error:

**"APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL."**

In his third assignment of error, Cooper maintains that he was denied the effective assistance of trial counsel because counsel failed to ask for an instruction on sexual

battery, as a lesser included offense of rape, and in failing to request that his sentences be merged as allied offenses of similar import. We disagree.

In order to prevail on a claim of ineffective assistance of counsel, the defendant must show both deficient performance and resulting prejudice. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. See, also, *State v. Bradley* (1989), 42 Ohio St.3d 136. Trial counsel is entitled to a strong presumption that his conduct falls within the wide range of effective assistance, and to show deficiency the defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness. *Id.*

As discussed in response to Cooper's first assignment of error, no instruction on the lesser included offense of sexual battery was warranted in this case because Cooper offered the complete defense of consent. Furthermore, as explained in response to his second assignment of error, the acts constituting gross sexual imposition and rape were committed with a separate animus, and therefore were not required to be merged for sentencing. Accordingly, counsel did not act deficiently either in not requesting a sexual battery instruction or in failing to object to the imposition of consecutive sentences.

Cooper's third assignment of error is overruled.

V

All three of Cooper's assignments of errors having been overruled, the judgment of the trial court is Affirmed.

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FAIN, J. and GRADY, J., concur.

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Hon. Dennis J. Langer

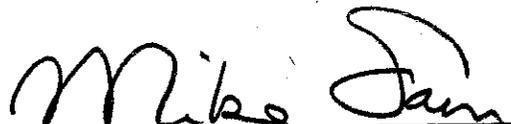
IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

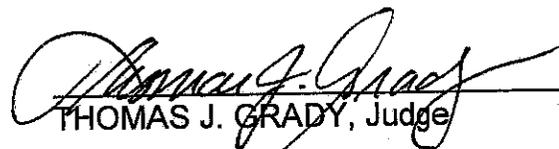
STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23143
v.	:	T.C. NO. 08CR1431
DONALD COOPER	:	<b><u>FINAL ENTRY</u></b>
Defendant-Appellant	:	

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Pursuant to the opinion of this court rendered on the 12th day of November, 2010, the judgment of the trial court is affirmed.

Costs to be paid as stated in App.R. 24.

  
MIKE FAIN, Judge

  
THOMAS J. GRADY, Judge

  
JEFFREY E. FROELICH, Judge

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