

ORIGINAL

IN THE SUPREME COURT OF OHIO

11-1705

State of Ohio	:	On Appeal from the
	:	Franklin County Court of
Plaintiff-Appellee	:	Appeals, Tenth Appellate
	:	District
vs	:	Court of Appeals
	:	Case No. 10AP-902
Vincent R. Griffin	:	
	:	
Defendant-Appellant	:	
	:	

MEMORANDUM IN SUPPORT OF JURISDICTION

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EXPLANATION WHY FURTHER REVIEW IS WARRANTED IN A CASE INVOLVING A SUBSTANTIAL CONSTITUTIONAL QUESTION, WHICH INVOLVES A FELONY, AND IN A CASE OF PUBLIC OR GREAT GENERAL INTEREST

On Thursday June 17, 2010 this court suspended attorney Gerald Noel from the practice of law for two years, with the final six months conditionally stayed. Disciplinary Counsel v. Noel, 126 Ohio St. 3d 56, 2010-Ohio-2714. That morning Mr. Noel was engaged in a jury trial in the Franklin County Court of Common Pleas, representing appellant Vincent R. Griffin, who was charged with attempted rape, kidnapping, abduction and felonious assault. Court abruptly adjourned. Mr. Noel never returned. When court resumed the following the judge sua sponte declared a mistrial as a matter of manifest necessity.

Appellant asserted that he wished to go forward without counsel, and was allowed to do so. Things did not go well - he was twice found in contempt, and upon being convicted was given maximum consecutive sentences totaling sixty-one years to life.

In the Court of Appeals appellant's first six assignments of error shared the theme that the court should have proceeded differently in the wake of Mr. Noel's suspension. The court should have held to the declaration of a mistrial. It should not have allowed appellant to represent himself without a determination that he was competent or capable of doing so, already being aware from his prior conduct that self-representation would be problematic. Despite lengthy exchanges, the court failed to secure a proper waiver of the right to counsel. The court should have been candid with the jury as to the reason for Mr. Noel's disappearance. After the defendant's efforts proved a fiasco the court should have granted his pro se motion for a new trial. The tenor of the Court of Appeals opinion was that appellant got what he asked for.

This case offers the Court an opportunity to address what trial courts should do when an attorney is suspended or otherwise becomes unable to continue mid-trial. The Court might address what it can do to facilitate orderly completion of trials that are in progress at the time of suspension or disbarment. Perhaps most significantly, this case offers the Court an opportunity to declare that attorneys who are the subject of disciplinary proceedings are under a duty to so inform trial courts

as trial approaches. In this case the matter had been submitted to the Court on February 17th, with the recommendation of a two-year suspension with eighteen months stayed. As this was an appointed case for Mr. Noel, the trial court could either have appointed new counsel or co-counsel who could have taken over. Alternately, attorneys whose cases have been submitted to the Court might be placed under a duty to notify this court when they are engaged in trial.

This case also presents a merger issue that might help clarify application of R.C. 2941.25 in the aftermath of State v. Johnson, 128 Ohio St. 3d 153, 2010-Ohio-6314.

STATEMENT OF THE CASE

Appellant Vincent R. Griffin was indicted in Franklin County for attempted rape (R.C. 2907.02 and 2923.02), felonious assault (R.C. 2903.11), kidnapping (R.C. 2905.01), and abduction (R.C. 2905.02). The victim in all counts was S.R. Count one, charging attempted rape, included a sexually violent predator specification (R.C. 2941.148) making Mr. Griffin subject to a conditional life sentence upon conviction. Counts one, two and three carried repeat violent offender specifications (R.C. 2941.149) referencing a kidnapping conviction in 1998.

The case was assigned for trial to the Honorable Kimberly Cocroft of the Franklin County Court of Common Pleas. Appellant was represented by attorney Gerald Noel, but even before Mr. Noel was suspended from practice, appellant submitted motions pro se. A hearing on both counsel's and appellant's motions was conducted on March 15, 2010. The case was set for trial on June 1, 2010, but was set over for the judge to review a pro se "Motion to Dismiss All Charges and Immediately Release Mr. Griffin."

When court resumed on June 14th appellant stated he wished to represent himself. Following inquiry from the bench, appellant elected to go forward represented by Mr. Noel. Appellant waived his right to jury trial on the sexually violent predator specification. A jury was selected and trial proceeded as far as Mr. Noel's cross-examination of the state's final witness, a DNA expert employed in the Columbus Police Department's Crime Lab. During the morning

session on Thursday June 17, 2010 Judge Cocroft interrupted cross, told the jury there would be a fifteen minute recess, directed the deputies, "if you could take Mr. Griffin, please," and summoned Mr. Noel to follow her to chambers.

That morning this court had issued its decision suspending Mr. Noel. The matter had been submitted to the Court on February 17th, but Mr. Noel failed to inform either appellant or the court that he was facing a recommended two-year suspension with eighteen months stayed.

The transcript resumes on the morning of Monday June 21, 2010. Appellant stated he had only learned of Mr. Noel's suspension that morning. The judge announced her intention to declare a mistrial. The prosecutor indicated that his witness was present and he was prepared to "proceed where we left off on Thursday." Appellant announced he wanted to represent himself, because "(a)ll the evidence really was going or went in my favor before it was presented, but now I an being prejudiced, I feel, by stopping the trial and not proceeding."

The court declared a mistrial, continued the case, but then accepted the prosecutor's offer to "look into any issues with Mr. Griffin representing himself at this point." Following inquiry from the bench he was allowed to do so. The court appointed standby counsel, who did not play an active role as trial proceeded. Appellant was never offered the option of accepting resumed representation by counsel or a mistrial.

Appellant's primary objective was introduction of some documents furnished in discovery, which the prosecutor had objected to admitting after he had rested his case. Appellant called four police officers, including the lead detective and first officer on the scene who had testified for the state. Appellant was twice found in contempt and fined. The documents were not admitted.

On June 24, 2010 the jury found appellant guilty on all counts. On June 30th the judge found appellant guilty of the repeat violent offender and sexually violent predator specifications. Numerous pro se motions, including a motion for new trial, were addressed at a hearing on August 24th. Sentencing was set for September 16, 2010. Further motions were rejected as untimely. The court proceeded to impose maximum consecutive sentences totalling sixty-one year to life.

An appeal was taken to the Tenth District Court of Appeals advancing fourteen assignments of error. These were overruled in an opinion rendered August 25, 2011. State v. Griffin, Franklin App. No. 10AP-902, 2011-Ohio-4250.

Appellant is before this court seeking further review as a matter of right in a case presenting substantial constitutional questions. In the alternative he seeks leave to appeal in a case involving a felony and in a case of public or great general interest.

STATEMENT OF THE FACTS

S.R. was living at Alvis House following her release from the Ohio Reformatory for Women, where she had served time for aggravated burglary. From Alvis House it took seven or eight minutes to walk to the school on East Main Street where she was attending classes to prepare for the GED exam.

Class began at 5:00. At 4:45-4:50, she heard a horn honk when she was about a block from the school. She kept walking. An old minivan with peeling paint pulled up. "He stopped at the stop sign, and he asked me did I want a ride. I was, like, sure." She got in, though she did not know the driver. This was because, "I was trying to go to Kroger to get me some cigarettes."

The driver, identified as appellant, offered her beer or marijuana. She declined. Instead of continuing east on Main Street towards Kroger, he turned left. She was "okay" with this because: "Everybody needs a friend, you know. I didn't, I didn't really know anybody here in Columbus, so, I, I wasn't thinking that anything was going to happen behind it." After turning north he drove past several traffic lights, then turned right into a park she did not know the name of.

There were other people and vehicles in the area. "(H)e said he was going to wait until all the people was done in the park, whatever, done doing whatever they were doing and that they were going to leave." This apparently meant getting out of the van to urinate, which he did while a couple with a dog were still in the area. At this point she still felt secure. According to S.R. they moved to the back seat of the van because. "I felt that it would be a lot easier to be able to face him

and talk to him, you know, if he was trying to get to know me, it would be a lot easier to get to know him if we are face to face."

After the shift she became somewhat apprehensive since, "He went from, you know, the laid-back demeanor until like he was edgy." Again he offered beer or marijuana. She declined since it could cause her a problem at the halfway house. Then he told her to take her pants off. She refused. He reached over the passenger seat to open the glove box, retrieved a folding knife, opened it, and again demanded she remove her pants. When she refused he punched her. There was a struggle for the knife. She bit him several times. Unbeknownst to her until later, she was cut on the thigh.

By her account, the struggle continued until a car pulled into the parking lot. She did not call out for help. The car left and the struggle resumed. Another car came and went. Then, after a white SUV pulled in, she was able to unlock the door and flee.

The police were called and a cruiser soon arrived. Beginning what was to be a key point to the defense, she described her assailant to the officer as:

He was a black male. From where I was sitting, he looked like he was about 5'9" -- 5'8", 5'9", about 200 plus pounds, salt and pepper hair, he had a burn on his right hand, he had on a hat, and like a brown outfit.

Appellant was much taller - he and a member of his basketball team said he was 6'5".

A rescue squad took Ms. Reese to OSU East. At the hospital a detective showed her two different photo arrays containing appellant's photo. No identification was made from the first set, but she chose a photo of appellant from the second.

The driver of the white SUV testified. She made no identification.

Appellant became a suspect because the van left at the scene was registered to him. When he spoke to one of the detectives involved in the investigation he maintained he had reported it stolen on the afternoon of the incident from the parking lot of a recreation center on Nelson Road where he had gone for basketball practice. His apartment was searched, and a knife and clothing seized during the search were admitted as exhibits. The victim's DNA was detected in material

taken from the van and on the knife. No sample of appellant's DNA was obtained for possible further testing.

ARGUMENT

FIRST PROPOSITION OF LAW: When disciplinary proceedings against an attorney have advanced to the stage that an actual suspension from the practice of law has been recommended, and the case has been submitted to the Supreme Court for decision, before commencing a trial which may not be concluded before the Supreme Court reaches a decision, the attorney is under a professional duty to disclose his status to his client and the court in a timely manner permitting arrangements to be made addressing the contingency that the recommended suspension may prevent the lawyer from concluding the trial. When the lawyer has failed to do so, a suspension has been imposed, and the client has been unable to undertake orderly self-representation, the client's right to effective assistance of counsel has been denied, contrary to the Sixth Amendment and Article I, Section 10 of the Ohio Constitution.

In the Court of Appeals appellant maintained trial counsel was ineffective in five respects prior to his departure from the case. These included his failure to inform the trial court and appellant of the status of disciplinary proceedings. Mindful both that this court considers proposed propositions of law rather than assignments of error, and of appellant's need for relief, counsel posits the above proposition of law, and argues prejudice under the second stage of analysis under Strickland v. Washington (1984), 466 U.S. 668.

The Sixth Amendment guarantees "(i)n all criminal proceedings, the accused shall enjoy the right...to have the Assistance of Counsel for his defence." This has been construed to mean effective assistance of counsel and not merely nominal representation. Glasser v. United States (1942), 315 U.S. 60; McMann v. Richardson (1970), 397 U.S. 759. The assistance of counsel is one of the means by which an accused is guaranteed due process in the form of a fair trial, as "(l)eft without the aid of counsel, he may be...convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible." Powell v. Alabama (1932), 287 U.S. 45, 69. The Sixth Amendment right to counsel is extended to state court proceedings through the Due Process Clause of the Fourteenth Amendment. Powell v. Alabama, supra; Gideon v. Wainwright (1963), 372 U.S. 335.

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington supra, at 686. A two part test is to be applied to claims that counsel's assistance was so defective as to require the reversal of a conviction:

...First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

(466 U.S. 668, 687.) This court enunciated a substantially similar standard in State v. Lytle (1976), 48 Ohio St. 2d 391, 396-397.

On December 16, 2009 a Common Pleas Court magistrate designated Gerald Noel to serve as appointed counsel for appellant. By that time disciplinary proceedings were well under way. Mr. Noel had been deposed in December 2008 and again in February 2009. The complaint setting forth alleged violations was served on him on August 15, 2009. Because Mr. Noel failed to respond, in November relator had moved for disposition through default. See Disciplinary Counsel v. Noel, 126 Ohio St. 3d 56, 2010-Ohio-2714, ¶1, 5. According to this court's online docket, the Board of Commissioners on Grievances and Discipline's findings of fact, conclusions of law, and recommendation was filed on December 22, 2009, shortly after Mr. Noel was appointed in this case. The case was submitted to the Court on February 17, 2010.

Perhaps Mr. Noel should have declined the appointment. Subsequently he failed to inform the trial judge he faced disciplinary proceedings. Appellant only learned of the suspension third hand. Whether or not the Rules of Professional Conduct imposed a specific duty to disclose disciplinary proceedings to the court or his client early on, as both the trial date and the likely disposition of disciplinary proceedings approached, candor was owed as an officer of the court. Another attorney could have been brought into the case as co-counsel. This court might have been

asked to delay release of a decision until the trial had been concluded. Perhaps the Court could have been asked to stay the effective date of the suspension until the trial wrapped up. Instead the suspension came as a surprise to all but Mr. Noel.

Appellant's second burden is to demonstrate that counsel's ineffectiveness prejudiced the defense. The test adopted by the court in Strickland was: "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, supra, at 694. In Lockhart v. Fretwell (1993), 506 U.S. 364 the court stressed that the touchstone of an ineffective assistance of counsel claim remains the fairness of adversary proceedings and the reliability of the trial process.

Left without counsel, whom appellant rightly or wrongly trusted, impatient by nature and frustrated by his inability to make bail, appellant made the unwise decision to represent himself. He was not up to that task. Counsel almost certainly would have been more effective at getting exhibits appellant wanted admitted into evidence, and in arguing to the jury. Counsel performing in an effective manner would have argued merger. Hopefully counsel could have controlled or neutralized appellant's conduct in the courtroom which led to contempt findings and the massive sentence for an attempt, despite dubious credibility, or at least extreme imprudence on the part of the prosecuting witness. The other omissions either made the prosecutor's job easier or failed to make legitimate points for the defense.

Here the "the result of the proceeding" must encompass both the verdicts and the sentence imposed by the court. Before trial began it was proffered that the plea offer was two second degree felonies. There was no mention of a jointly recommended sentence. Appellant would have faced a term of between two and eight years on each count and an aggregate sentence of as little as two years and no more than sixteen. Instead he got sixty-one years to life.

Because counsel's poor performance undermines confidence in the fairness of the trial's outcome, appellant's convictions must be reversed.

SECOND PROPOSITION OF LAW: When an attorney is unable to complete a trial because he has been disbarred or suspended from the practice of law, upon request of a party the judge shall candidly inform jurors as to the reasons for counsel's departure.

Appellant reasonably asked if he would be allowed to mention Gerald Noel's suspension during closing argument. The prosecutor suggested, "I was going to propose that the court inform the jury that Mr. Noel was no longer able to continue. I don't know if they need to know the circumstances surrounding that." Appellant made the point that his choice to represent himself was based on the circumstances. But in so stating he said "I feel like I have no other choice" which triggered the judge insisting that he did. The judge ruled, "I am not going to permit you, sir, to discuss Mr. Noel's suspension. If you make the choice to represent yourself, I will inform them that you have the right to make that choice and you are making that choice." The prosecutor again suggested the jury be informed "Mr. Noel is unable to continue." The judge said she would, but in fact she didn't. The court erred. The jury was entitled to an explanation of counsel's absence.

As the jurors were brought in one by one, except for those that had some knowledge of the suspension, they were left with the impression going forward unrepresented was purely appellant's choice. Beforehand the judge stated, "I am going to instruct them, Mr. Griffin, that you have decided to exercise your constitutional rights to represent yourself, that they are not to form any positive or negative impressions of you because you have chosen to exercise that right." This was the pattern followed. Nothing was said to explain Mr. Noel's absence. Jurors were only asked what they might have heard or read in the news, and if they would follow instructions concerning appellant's choice to exercise his constitutional right to self-representation without guessing why he made the choice. Juror Jerman had learned of the suspension. The judge did not confirm that such was the case, and, as with other jurors, inquiry had begun with the admonition not to repeat this conversation with other members of the jury. Juror Cogan said he had read of the suspension in the Dispatch, but didn't finish the article. Again there had been an admonition not to discuss inquiry with other jurors, and the accuracy of the article was not confirmed. Juror Trimble heard from

Alternate Farmer had heard that the case had been in the news. She did not know the story. The court did not fill her in, and had begun with the usual admonition. Alternate Farmer said he had heard a rumor that defense counsel was not allowed to practice. The judge did not comment and had begun inquiry with an admonition.

Before the entire panel was brought in the prosecutor again suggested the court while introducing standby counsel "reinforce that Mr. Noel's absence has nothing to do with anything that the defendant has done or, you know, I guess instruct them." The court refused to do so, and in fact did not.

When the court addressed appellant's pretrial request he be allowed to represent himself, he was asked, "Do you understand that a defendant who represents himself may impart to the jury a negative or bad feeling since an attorney is not present to handle your case" When proposing to call a mistrial as a matter of manifest necessity, the court stated:

Here is the situation Mr. Griffin. The court has decided it would be prejudicial to you, although you don't believe it, the court does believe it would be prejudicial to you to have you present the remainder of your case to the jury when this jury has seen that you have been represented by Mr. Noel. * * *

Though the court recognized the likelihood of a negative response to proceeding pro se, instead of softening the effect by candidly informing the jury of the circumstances, the problem was exacerbated by the implication going forward was entirely a matter of appellant's choice.

Jury instructions must be tailored to the facts and circumstances of each case. Avon Lake v. Anderson (1983), 10 Ohio App. 3d 297, 299. The court abused its discretion by refusing explain counsel's disappearance and appellant's decision to proceed unrepresented.

THIRD PROPOSITION OF LAW: When the conduct of the accused during proceedings strongly suggests he or she will face great difficulty if allowed to undertake self-representation mid-trial, a court may order an evaluation as to the defendant's ability to undertake self-representation, and has the further option of refusing to permit trial to proceed without the assistance of counsel. (Indiana v. Edwards (2008), 544 U.S. 164, applied.)

In Indiana v. Edwards (2008), 544 U.S. 164, 128 S.Ct. 2379, the Supreme Court addressed

the distinction between competency to stand trial and competency to undertake self-representation. The Court concluded a state court could insist that a defendant be represented by counsel at trial when he has been evaluated and determined competent to stand trial if represented, but not competent to conduct that trial himself. Appellate counsel submits appellant's responses to inquiry from the bench when he first asked to be allowed to represent himself, episodes during trial through the point at which his attorney was suspended, and subsequent inquiry addressed to waiver of the right to counsel, all demonstrated he was not competent to undertake self-representation. At a minimum, it was incumbent upon the court to order an evaluation of whether appellant was competent to undertake self-representation.

The defendant in Edwards was schizophrenic. Following a period of commitment while incompetent to stand trial his condition improved. Just before trial he asked to represent himself and requested a continuance. The continuance was denied and he proceeded to trial represented by counsel. The jury found him guilty of lesser charges, but hung on attempted murder and battery counts. Edwards again asked permission to represent himself before retrial. Based on evaluations, the court determined he was competent to stand trial, but not to represent himself. He was convicted. In the Indiana appellate courts he prevailed, claiming he had been denied his constitutional right to self-representation.

But the Supreme Court concluded nothing in the federal Constitution prevents state's from limiting the right to self-representation to those individuals who have the mental capacity to defend themselves at trial without representation.

The Court noted that the interplay between "the Constitution's 'mental competence' standard" [Dusky v. United States (1960), 362 U.S. 402; Drope v. Missouri (1975), 420 U.S. 162] and the Sixth and Fourteenth Amendment right to self-representation [Faretta v. California (1975), 422 U.S. 806] was unsettled. A single competency standard for both proceeding to trial and undertaking self-representation was inadvisable because mental illness is not a unitary concept, varying over time and affecting individuals differently. "In certain instances an individual may well

be able to satisfy Dusky's mental competence standard, for he will be able to work with counsel at trial, yet at the same time he may be unable to carry out the basic tasks needed to present his own defense without the help of counsel." Quoting from an amicus brief filed by the American Psychiatric Association, "(d)isorganized thinking, deficits in sustaining attention and concentration, impaired expressive abilities, anxiety, and other common symptoms of severe mental illness can impair the defendant's ability to play the significantly expanded role required for self-representation even if he can play the lesser role of represented defendant." Indiana v. Edwards at 128 S.Ct. 2386-2387.

Allowing self-representation respects the autonomy and dignity of the individual, but given the uncertain mental state of the defendant in Indiana v. Edwards, "the spectacle that could well result from his self-representation at trial is at least as likely to prove humiliating as ennobling." 128 S.Ct. at 2387. Both the government and the accused have an interest in assuring a trial is fair, and appear fair to all who observe them. This final point is key in the present case. As developed throughout this memorandum, appellant's trial was a spectacle encompassing counsel's humiliating departure, appellant's inability to comply with the judge's standards of decorum or relevancy, his lack of understanding of the law, and the confrontational nature of the contempt and sentencing hearings.

Nothing in Ohio law prevents a trial court finding a defendant is incompetent to proceed to or with trial without the assistance of counsel. At a minimum, before proceeding, appellant should have been evaluated to determine whether he was competent to conclude the trial representing himself.

FOURTH PROPOSITION OF LAW: When defense counsel has been suspended in the midst of trial, declaration of a mistrial is a matter of manifest necessity. In the face of such circumstances, when the defendant asserts he wishes to conclude the trial unrepresented he should not be allowed to do so when his conduct up to the point of counsel's departure suggests he will have great difficulty doing so. When the court nonetheless has allowed the defendant to represent himself, and he has proven unable to maintain courtroom decorum, the court should order a new trial.

The trial judge properly declared a mistrial following the suspension of Mr. Noel. "We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated." United States v. Perez (1824), 22 U.S. 579, 580. It is beyond dispute that the suspension from practice of defense counsel gave rise to the manifest necessity for declaration of a mistrial. It is akin to the death of counsel or the exigencies of war. Cf. Wade v. Hunter (1949), 336 U.S. 684.

There was no reasonable alternative to the declaration of a mistrial. According to Rule 5(D) of the Rules for Government of the Bar, "Unless otherwise ordered by the court, any disciplinary order or order accepting resignation shall be effective on the date that order is announced by the court." This neither authorizes nor forbids application for a stay. Only had there been co-counsel might the trial have reasonably gone forward.

The court erred by allowing itself to be talked out of the mistrial. Already the record presented ample reasons why appellant should not have been allowed to represent himself. During a suppression hearing he had to be admonished twice from the bench to control his behavior. When trial was ready to begin a deputy reported appellant, "has been moved several times due to his inability to get along with people in the jail, to avoid problems with other inmates...we request the leg irons remain on." This meant appellant remained seated at counsel table with draping arranged to conceal his shackles. Counsel was free to move around. Continuing the trial unrepresented, the jury could not help but notice that both the prosecutor and appellant were forced to remain seated. During his effort to discharge counsel before the trial, appellant was sharply admonished after he complained the judge had cut him off. His statements during the hearing on whether he would be allowed to proceed unrepresented further suggested the difficulty he would face if allowed to do so.

Among appellant's many challenging to decipher pro se post-verdict filings was a motion for a new trial. "A motion for a new trial pursuant to Crim. R. 33(B) is addressed to the sound

discretion of the trial court, and will not be disturbed on appeal absent an abuse of discretion." State v. Schiebel (1990), 55 Ohio St. 3d 71, paragraph one of the syllabus. Having determined a mistrial was a matter of necessity after Mr. Noel was suspended, the court abused its discretion in denying the post-verdict motion. Appellant struggled to meet the judge's expectations as to courtroom decorum. He was twice found in contempt and fined. He was unable to lay a foundation for the admission of exhibits. He had considerable difficulty posing unobjectionable questions and he repeatedly rambled off subject when trying to make legal arguments. Appellant may have been competent to stand trial, but the transcript as a whole painfully demonstrates he was not competent to undertake self-representation in a case involving multiple counts and technically complicated specifications. In the interest of justice, a new trial was required.

FIFTH PROPOSITION OF LAW: When rape and kidnapping are committed at the same time and with a single animus they merge pursuant to R.C. 2941.25, and conviction may be entered on one or the other, but not on both.

To complete review in this case appellant renews a merger claim rejected by the Court of Appeals. Based on a single, continuous course of events, appellant was indicted for four offenses - attempted rape, felonious assault, kidnapping and abduction. According to R.C. 2941.25(A) this was permissible. Ultimately the court imposed maximum consecutive sentences, including thirty additional years on repeat violent offender specifications. At the time of sentencing a merger argument could have been advanced under the then-applicable interpretation of the statute. Now, applying the statute, as reinterpreted by State v. Johnson, Slip Opinion No. 2010-Ohio-6314, multiple sentences are prohibited for rape, abduction and kidnapping.

Rape and kidnapping have long been recognized as allied offenses of similar import. State v. Donald (1979), 57 Ohio St. 2d 73. Given a kidnapping count alleging a purpose to engage in sexual activity, an abduction count alleging a risk of physical harm, such as rape, and the conduct from which the counts arose, under Johnson attempted rape is an allied offense of similar import to both kidnapping and abduction. In this case the victim entered the car willingly. There was no

misconduct until after the park was reached. Prior to the conduct on which charges were based, the offender exited the car to urinate and returned, and the couple moved without force or coercion to the rear seat. Thus the offenses were not committed separately. Restraint began at the same moment as the attempted rape.

In the court of appeals the prosecution conceded abduction and kidnapping merged. However, the appellate court found attempted rape and kidnapping did not merge mistakenly focusing on the total amount of time the victim spent in the van: "Although appellant told S.R. he would take her to the store for cigarettes and then drive her to school, he transported her away from the school." 2011-Ohio-4250, ¶91. Since there was no restraint until appellant allegedly tried to force sexual activity, the attempted rape and kidnapping were committed with a single animus.

CONCLUSION

For the above stated reasons, further review of this cause is warranted.

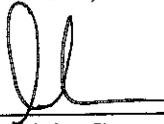
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Vincent R. Griffin

PROOF OF SERVICE

I hereby certify that a copy of this Memorandum in Support of Jurisdiction was hand delivered to the office of the Franklin County Prosecuting Attorney, Counsel for Appellee, 373 South High Street, 13th Floor, Columbus, Ohio 43215, this 7th day of October, 2011.



Allen V. Adair, Counsel of Record
Counsel for Appellant,
Vincent R. Griffin

IN THE SUPREME COURT OF OHIO

State of Ohio

Plaintiff-Appellee

vs.

Vincent R. Griffin

Defendant-Appellant

On Appeal from the
Franklin County Court of
Appeals, Tenth Appellate
District

Court of Appeals
Case No. 10AP-902

APPENDIX

Judgment Entry, Court of Appeals of Ohio, Tenth Appellate District,
10AP-902, filed August 25, 2011. A-1

Decision of the Court of Appeals of Ohio, Tenth Appellate District,
10AP-902, filed August 25, 2011. A-2

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FOR THE STATE OF OHIO

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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :

Plaintiff-Appellee, :

v. :

Vincent R. Griffin, :

Defendant-Appellant. :

No. 10AP-902
(C P C No 09CR-7439)
(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on August 25, 2011, appellant's first through thirteenth assignments of error are overruled, and his fourteenth assignment of error is sustained in part and overruled in part. It is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed in part and reversed in part, and this matter is remanded to that court for resentencing in accordance with law and consistent with said decision. Costs shall be assessed against appellee.

DORRIAN, J., BRYANT, P.J., & BROWN, J.

By Julia L. Dorrian
Judge Julia L. Dorrian

m

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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
Plaintiff-Appellee, :
v. :
Vincent R. Griffin, :
Defendant-Appellant. :

No. 10AP-902
(C P C No 09CR-7439)
(REGULAR CALENDAR)

D E C I S I O N

Rendered on August 25, 2011

Ron O'Brien, Prosecuting Attorney, and *Laura R. Swisher*, for appellee.

Yeura R. Venters, Public Defender, and *Allen V. Adair*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

DORRIAN, J.

{¶1} Defendant-appellant, Vincent R. Griffin ("appellant"), appeals from his conviction in the Franklin County Court of Common Pleas on charges of attempted rape, felonious assault, kidnapping, and abduction, and from the order imposing sentences on those convictions. For the reasons that follow, we affirm in part and reverse in part.

{¶2} On December 1, 2009, S.R. was walking from the halfway house where she resided to a nearby community center for a GED class scheduled to begin at 5:00 p.m. At approximately 4:45 or 4:50 p.m., when she was about one block from the community center, appellant drove his van near S.R. and asked if she wanted a ride. S.R. did not

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know appellant, but she accepted his offer and got into the van. S.R. told appellant that she wanted to go to a grocery store near the intersection of Main Street and Alum Creek Drive to purchase cigarettes before her class. S.R. would not have been able to make it to the store and back on foot in time for her class. Appellant agreed to take S.R. to the grocery store. After driving east toward the grocery store, appellant made a left turn away from the store and began driving north on Nelson Road. Appellant told S.R. that he wanted to go somewhere and talk for a few minutes. She agreed, but reiterated that she wanted to get cigarettes and arrive at her class on time.

{¶3} Appellant drove to Nelson Park and parked his van in a parking space near a dumpster. He told appellant that he wanted to wait until the three or four other people at the park left. While they were waiting, appellant stepped outside the van and used the bathroom. After everyone else had left the park, appellant asked S.R. to get into the backseat of the van. He got in behind her and shut the door. S.R. later testified that at this point appellant seemed "edgy"; whereas, he previously had a "laid-back demeanor." S.R. began to feel apprehensive and felt that appellant was "up to something."

{¶4} After S.R. and appellant moved to the backseat of the van, they began talking; appellant told S.R. to remove her pants. She refused. Appellant again demanded that S.R. remove her pants and began getting aggressive. S.R. told appellant "the only thing that you can basically do to me that hasn't ever been done is kill me and leave me in the park." (Tr. 293.) Appellant responded by saying "that can be arranged," and he retrieved a knife from the glove compartment of the van. (Tr. 294.) Appellant opened the knife and again ordered S.R. to remove her pants. S.R. refused, and appellant punched her in the mouth. S.R. hit and kicked appellant, causing appellant to lose control of the

knife. Both appellant and S.R. tried to grab the knife, and they struggled and wrestled for control of it. While wrestling over the knife, S.R. bit appellant on the left arm four or five times; he punched S.R. in the face at least a dozen times. Eventually, appellant regained control of the knife. He ordered S.R. to remove her clothes and began trying to rip and cut her clothes off.

{¶5} Appellant then demanded that S.R. perform oral sex on him if she would not remove her pants. Appellant attempted to force S.R.'s head toward him and continued to demand oral sex. During this time, two cars pulled into the parking lot for brief periods and then left. When a third car pulled into the parking lot and waited, appellant moved from the backseat to the driver's seat and tried to start the van. As appellant tried to start the van, S.R. moved to the passenger side of the backseat and escaped through the sliding door. S.R. ran to the nearby car, which had begun to drive away, and screamed for help. The driver of that car, Nicole Jones ("Jones"), called 911 and then let S.R. into her car. While Jones was on the phone with emergency services, appellant started the van. Jones moved her car to block the entrance to the parking lot. Appellant began to move the van and it "cut off"; Jones saw appellant twice go from the driver's seat to the sliding door on the passenger side. When emergency services arrived, appellant was no longer in the parking lot, but neither Jones nor S.R. saw him leave. Appellant was transported to the hospital, where she was treated for cuts and bruises and a puncture wound to the back of her left leg.

{¶6} Detective Ronald Haynes ("Detective Haynes") of the Columbus Division of Police identified the van as being registered to appellant. Detective Haynes identified an existing photograph lineup containing appellant's picture and took it to the hospital to

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show S.R. While Detective Haynes was at the hospital, he learned that another detective had identified a newer photo of appellant and prepared a lineup using that newer photo. Detective Haynes showed S.R. the photo lineup with the newer photo of appellant, but she was unable to identify any of the men in the lineup as being her attacker. Detective Haynes then showed S.R. the second photo lineup, containing the older photo of appellant, and she identified appellant as the man who attacked her.

{¶7} Appellant told Detective Haynes that his van had been stolen on December 1 while he was playing basketball at a recreation center at another park. Appellant told Detective Haynes he arrived to play basketball around 4:00 p.m. and learned that his van had been stolen at around 5:30 or 6:00 p.m. Detective Haynes obtained a search warrant for appellant's apartment and recovered several sets of clothing potentially matching S.R.'s description of her attacker's attire, along with a knife matching S.R.'s description of the knife used against her.

{¶8} Appellant was indicted on charges of attempted rape, felonious assault, kidnapping, and abduction. The attempted rape charge included a sexually violent predator specification and a repeat violent offender specification. The felonious assault and kidnapping charges also included repeat violent offender specifications. Appellant attested that he was indigent and unable to afford counsel, and the trial court appointed Attorney Gerald Noel ("Attorney Noel") to represent appellant.

{¶9} On June 14, 2010, before jury selection began, appellant stated that he disagreed with Attorney Noel on trial strategy. The trial court engaged in a colloquy with appellant regarding the possibility of self-representation, but ultimately appellant chose to continue being represented by Attorney Noel. On June 17, 2010, while Attorney Noel

was cross-examining the final prosecution witness, the trial court declared a recess and suspended proceedings until June 21, 2010. When the court reconvened on June 21, 2010, the trial judge stated that, on June 17, 2010, the Ohio Supreme Court suspended Attorney Noel from the practice of law. The trial judge then declared a mistrial. Appellant protested this decision and declared his intention to appeal the ruling, indicating that he wanted the trial to proceed. Later that day, after considering appellant's arguments and discussing the matter with the prosecutor, the trial judge vacated the mistrial ruling. The trial court informed appellant that he could have new counsel appointed or could represent himself. Appellant indicated that he wished to represent himself. The trial court engaged in a lengthy colloquy with appellant regarding self-representation. The trial court concluded that appellant properly waived his right to counsel, and appellant signed a written waiver of his right to counsel. The jury convicted appellant on all four counts, and the trial court found appellant guilty of the sexually violent predator specification and the repeat violent offender specifications. Based on the convictions and specifications, the trial court sentenced appellant to jail terms of 18 years to life on the attempted rape conviction, 18 years on the felonious assault conviction, 20 years on the kidnapping conviction, and five years on the abduction conviction, with the sentences to run consecutively.

{¶10} Appellant appeals his conviction and sentence, setting forth the following fourteen assignments of error for this court's review:

First Assignment of Error: Suspension of defense counsel from the practice of law before the conclusion of the trial made declaration of a mistrial a matter of "manifest necessity." The trial court properly declared a mistrial sua

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sponte, but erred by vacating that decision and allowing appellant to go forward without counsel.

Second Assignment of Error: The court erred in allowing appellant to proceed without counsel following the suspension of his attorney as the record demonstrates appellant was not competent to undertake self-representation.

Third Assignment of Error: The court erred by not having appellant evaluated to determine whether he was competent to undertake self-representation.

Fourth Assignment of Error: The trial court failed to assure that appellant's waiver of the right to counsel was truly voluntary, made with "an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other matters essential to a broad understanding of the whole matter."

Fifth Assignment of Error: The court erroneously refused to inform the jury that appellant's decision to represent himself was precipitated by counsel's suspension from the practice of law.

Sixth Assignment of Error: The court erroneously denied appellant's motion for a new trial.

Seventh Assignment of Error: Prior to his suspension from the practice of law defense counsel rendered ineffective assistance, in violation of appellant's Sixth Amendment rights and the comparable protection of Article I, Section 10 of the Ohio Constitution.

Eighth Assignment of Error: The trial court erroneously overruled [appellant's] pretrial motion to suppress identification.

~~Ninth Assignment of Error: The court erroneously overruled appellant's objection to opinion testimony offered by the lead detective.~~

Tenth Assignment of Error: The trial court erroneously excluded Defense Exhibit 5.

Eleventh Assignment of Error: The evidence was insufficient as a matter of law to establish appellant knowingly caused serious physical harm to the victim, or that he knowingly caused or attempted to cause serious harm by means of a deadly weapon.

Twelfth Assignment of Error: With respect to the felonious assault count, the trial court erroneously overruled appellant's motions for acquittal pursuant to Criminal Rule 29.

Thirteenth Assignment of Error: Appellant's convictions are against the manifest weight of the evidence.

Fourteenth Assignment of Error: The court erred by imposing multiple sentences for allied offenses of similar import committed with a single animus.

I. Mistrial

{¶11} In his first assignment of error, appellant claims that the trial court erred by vacating its initial declaration of a mistrial and by not granting a mistrial. Following the disqualification of appellant's attorney, the trial court declared a mistrial under the reasoning in *Arizona v. Washington* (1978), 434 U.S. 497, 98 S.Ct. 824. Appellant strongly objected to this decision and requested that the trial continue; he also expressed his intention to appeal the declaration of a mistrial. Later that same day, after reviewing appellant's arguments and a discussion with the prosecutor, the court vacated its declaration of a mistrial. Appellant now argues that the trial court should have kept the mistrial declaration in place and that the court erred by vacating its earlier declaration of a mistrial.

{¶12} The Ohio Supreme Court has declared that "[a] mistrial should not be ordered in a cause simply because some error has intervened. The error must prejudicially affect the merits of the case and the substantial rights of one or both of the

parties." *Tingue v. State* (1914), 90 Ohio St. 368, syllabus. Moreover, "[m]istrials need be declared only when the ends of justice so require and a fair trial is no longer possible." *State v. Franklin* (1991), 62 Ohio St.3d 118, 127. "A trial court may grant a mistrial sua sponte when there is manifest necessity for the mistrial or when the ends of public justice would otherwise be defeated." *State v. Johnson*, 10th Dist. No. 08AP-652, 2009-Ohio-3383, ¶30, citing *Cleveland v. Walters* (1994), 98 Ohio App.3d 165, 168.

{¶13} A trial court order granting or denying a request for a mistrial is reviewed for abuse of discretion because the trial court is best situated to determine whether a mistrial is necessary. *State v. Chambers* (July 13, 2000), 10th Dist. No. 99AP-1308. However, the failure to grant a mistrial sua sponte is reviewed under the plain-error standard. *Johnson* at ¶30, citing *State v. Jones* (1996), 115 Ohio App.3d 204, 207. Plain error exists when there is an error that is plain or obvious and affects a substantial right. *Id.* at ¶19.

{¶14} Appellant argues that the trial court abused its discretion in vacating the mistrial declaration. We note that neither the prosecutor nor appellant requested a mistrial declaration; as noted, appellant strongly objected to the possibility of a mistrial. Under these circumstances, a claim that the trial court erred by vacating a sua sponte mistrial declaration is analogous to an appeal based on a trial court's failure to grant a mistrial sua sponte. Thus, we review this matter under the plain-error standard.

{¶15} Appellant asserts that the suspension of appellant's attorney created a manifest necessity for a declaration of a mistrial. He claims that there was no reasonable alternative to a declaration of a mistrial. Yet there were at least two reasonable alternatives, each of which the trial court considered and discussed with appellant and the

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prosecutor. The first alternative was for appellant to retain or be appointed new counsel, with a possible delay in the trial to allow new counsel to prepare. Appellant expressly rejected this option, stating "I don't want no counsel." (Tr. 681.) The second alternative was for appellant to exercise his right to self-representation. The trial court noted that appellant initially waived this right and agreed to be represented by counsel. Appellant then expressed his desire to change his decision and proceed on his own behalf. Appellant noted that the majority of the trial was complete and that, prior to his attorney's suspension, the case was nearly ready to proceed to closing arguments. Appellant now argues that permitting him to proceed pro se was not a reasonable alternative, citing to certain behavior issues and conflicts with the court prior to his attorney's suspension and after appellant took over his own representation. However, as discussed herein, appellant made a knowing, voluntary, and intelligent choice to exercise his right to self-representation. He cannot now rely on his own disruptive conduct as a basis for mistrial. See *Chambers*. Thus, we find that the trial court did not err in vacating its sua sponte declaration of a mistrial.

{¶16} Moreover, by objecting to the trial court's mistrial declaration, appellant invited the error of which he now complains. Under the "invited error" doctrine, a party may not take advantage of an error which he invited or induced. *State v. Jennings*, 10th Dist. No. 09AP-70, 2009-Ohio-6840, ¶75. Accordingly, if we found that the trial court erred, it would be improper to allow appellant to benefit from an error that he urged the trial court to commit.

{¶17} Accordingly, appellant's first assignment of error is without merit and is overruled.

II. Competency to Undertake Self-representation

{¶18} Appellant's second and third assignments of error are interrelated, and we address them together beginning with the third assignment of error. In appellant's third assignment of error, he asserts that the trial court erred by not having him evaluated to determine whether he was competent to undertake self-representation. Presumably, appellant means that he should have been given a psychological evaluation prior to being permitted to engage in pro se representation because the record demonstrates that the trial court undertook two lengthy colloquies with appellant before permitting him to represent himself.

{¶19} Appellant cites to *Indiana v. Edwards* (2008), 554 U.S. 164, 128 S.Ct. 2379, in support of his claim that a psychological evaluation was required in this case. The defendant in *Edwards* suffered from schizophrenia. He was initially found not competent to stand trial; after seven months of treatment, his condition had improved to the point that he could stand trial. Another evaluation the following year found that he was not competent to stand trial. Following another eight months of treatment, he was deemed competent to stand trial. *Id.*, 554 U.S. at 167-68, 128 S.Ct. at 2382. Edwards then sought to represent himself at trial but his request was denied. At a subsequent retrial on two charges, Edwards again requested to represent himself. The trial court found that he was competent to stand trial, but not to represent himself. *Id.*, 554 U.S. at 168-69, 128 S.Ct. at 2382. The intermediate appellate court reversed this decision and ordered a new trial. The Indiana Supreme Court affirmed the appellate court's order for a new trial. *Id.*, 554 U.S. at 169, 128 S.Ct. at 2382. The case was then appealed to the United States Supreme Court, which "agreed to consider whether the Constitution required the trial

court to allow Edwards to represent himself at trial." *Id.* The Supreme Court found that its precedents addressed competency to stand trial but did not directly address the relation between mental competency and the right to self-representation. *Id.*, 554 U.S. at 170, 128 S.Ct. at 2383. Ultimately, the Supreme Court concluded that "the Constitution permits [s]tates to insist upon representation by counsel for those competent enough to stand trial * * * but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." *Id.*, 554 U.S. at 178, 128 S.Ct. at 2388.

{¶20} *Edwards* is entirely distinguishable from the present case and does not control the outcome here. The defendant in *Edwards* suffered from a serious mental illness, schizophrenia, which was so severe that he was twice found not competent to stand trial. There is no evidence that appellant suffered from any mental illness at the time of trial, nor does appellant now claim that any mental illness hindered his ability to represent himself. Although, as discussed below, appellant clashed with the trial court on several occasions while conducting his defense, this does not necessarily mean he was not competent to represent himself. Moreover, the *Edwards* case stands for the proposition that "the Constitution *permits* [s]tates to insist upon representation by counsel" for certain individuals who are not competent to represent themselves, not that it *requires* states to do so. (Emphasis added.) *Id.*

{¶21} Likewise, although appellant argues that nothing in Ohio law prevents a trial court from finding a defendant is not competent to proceed to trial without the assistance of counsel, appellant cites to no case law that would *require* a trial court to do so. Under Ohio law, a defendant is presumed competent to stand trial and bears the burden of

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overcoming that presumption to prove his incompetence. *State v. Jordan*, 101 Ohio St.3d 216, 2004-Ohio-783, ¶28. Appellant cites to *State v. Kulp* (1996), 110 Ohio App.3d 144, in arguing that trial courts have a duty to ensure a defendant is competent before permitting him to undertake self-representation. In *Kulp*, the defendant was initially represented by counsel, but a disagreement over trial strategy led him to undertake his own representation. *Id.* at 145. The trial court permitted the defendant to proceed pro se, but the appellate court reversed, finding that the trial court erred in permitting Kulp to represent himself. *Id.* at 148. However, as with *Edwards*, *Kulp* involved significant competency issues from the beginning of trial. The defendant in *Kulp* pled not guilty by reason of insanity. *Id.* at 145. Although the trial court ordered an evaluation of Kulp's sanity and competence to stand trial, there was no record of any report, nor any hearing or findings on these issues. By contrast, in this case, there was no claim that appellant suffered from mental illness or was not competent to stand trial. The decision in *Kulp* does not require that appellant be prohibited from conducting his own defense.

{¶22} In appellant's second assignment of error he claims that the trial court erred by allowing him to proceed without counsel because the record demonstrates that he was not competent to undertake self-representation. Appellant provides minimal argument and no legal citations in support of this assignment of error. Essentially, appellant argues that his "inability to comply with the judge's standards of decorum or relevancy," and the unfavorable outcome of the trial demonstrate that he should not have been allowed to proceed pro se. (Appellant's brief at 23-24.)

{¶23} Reversing the trial court based on this type of post hoc review would create an unworkable standard, potentially allowing every convicted pro se defendant to argue

that he should not have been permitted to represent himself. We note that appellant was initially represented by counsel, but at one point sought to represent himself due to a disagreement over trial strategy. Ultimately, appellant decided to proceed with counsel. Throughout this time neither appellant nor his trial counsel ever suggested that appellant was not competent to stand trial or to represent himself if he chose to do so. During the second colloquy about self-representation, appellant's standby counsel acknowledged his view that appellant was competent to conduct his own representation. Appellant advised the court that he had previously represented himself in a criminal matter. Although appellant later had difficulty in trying to introduce exhibits, during the colloquy with the court he demonstrated at least a rudimentary understanding of certain other rules of evidence—i.e., noting that, if he chose to testify on his own behalf, he would be subject to questioning by the prosecutor. We also note that appellant did have difficulty maintaining the appropriate decorum in the courtroom and clashed with the trial judge several times, but this is not a problem unique to pro se defendants. Even trained and licensed attorneys at times have problems with decorum and conflicts with the bench. See, e.g., *In re contempt of Brent L. English*, 8th Dist. No. 90417, 2008-Ohio-3671, ¶¶10-11 (upholding a contempt ruling against an attorney for repeated arguments with the trial court that "repeatedly challenged the court's authority and effectively halted the proceedings"). Thus, the failure to maintain proper decorum is insufficient to establish that appellant was not capable of exercising his right of self-representation.

{¶24} Accordingly, appellant's second and third assignments of error are without merit and are overruled.

III. Waiver of Right to Counsel

{¶25} In his fourth assignment of error, appellant claims that the trial court erred by failing to assure that his waiver of the right to counsel was truly voluntary and complied with the requirements for such a waiver.

{¶26} "A defendant may proceed without counsel if the defendant has made a knowing, voluntary, and intelligent waiver of the right to counsel." *State v. Crosky*, 10th Dist. No. 06AP-655, 2008-Ohio-145, ¶34, citing *State v. Martin*, 103 Ohio St.3d 385, 2004-Ohio-5471, ¶24. In the leading cases on the issue of waiver of the right to counsel, the Supreme Court of Ohio appears to have undertaken a de novo review without expressly reciting this standard of review. See *State v. Gibson* (1976), 45 Ohio St.2d 366, 375-78; *State v. Johnson*, 112 Ohio St.3d 210, 2006-Ohio-6404, ¶89-105; *Martin* at ¶37-45. See also *Wellston v. Horsley*, 4th Dist. No. 05CA18, 2006-Ohio-4386, ¶10 (concluding that de novo review is appropriate for issues of waiver of the right to counsel).

{¶27} As appellant acknowledges, the trial court twice engaged in lengthy colloquies with appellant about self-representation. The first colloquy occurred prior to the beginning of trial when appellant expressed a desire to represent himself due to a dispute with Attorney Noel over trial strategy. During this colloquy, the court explained appellant's constitutional right to counsel and explained that counsel would be appointed for him if he could not afford an attorney. Appellant advised the court that he had educational background in legal matters and that he had previously represented himself in a criminal matter. The court explained that, if he chose to represent himself, appellant would be held to the same standards as an attorney and would be required to comply with the rules of evidence and criminal procedure. In response to questions from the

court, appellant acknowledged that he understood the crimes charged against him and understood the potential impact of repeat violent offender and sexually violent predator specifications associated with those charges.

{¶28} With the court's permission, the prosecutor explained all of the potential penalties that could result from conviction of the four charges against appellant. The trial court reiterated in detail the maximum possible terms of incarceration, fines, and post-release control sanctions for each charge, and appellant indicated that he understood all of these penalties. The judge then explained the process of voir dire, trial, and sentencing. The judge asked appellant whether he knew what defenses might exist to the charges against him. Appellant responded with a reference to the sham legal process statute and to the defense that he did not commit the charged crimes. Appellant responded in the affirmative when asked if he understood that there might be affirmative defenses or ways of defending against the charges that he might not be aware of because he lacked legal training. The trial court explained that appellant would have the right not to testify on his own behalf but that he could choose to make a statement on his own behalf. At this point, appellant noted that, if he chose to make a statement on his own behalf "that opens the door for [the prosecutor] to ask me questions about anything, right?" (Tr. 202.) Ultimately, following this colloquy, appellant elected to have Attorney Noel serve as his counsel.

{¶29} Later, following Attorney Noel's suspension and the trial court's declaration of its intention to declare a mistrial, appellant expressed his desire to represent himself. The court temporarily appointed counsel to represent appellant, and this attorney was ultimately appointed to serve as appellant's standby counsel. After the trial court vacated

its mistrial declaration, the court held a second lengthy colloquy with appellant regarding self-representation. The judge explained that appellant had the option of representing himself or allowing new appointed counsel to represent him. The trial court explained that, if appellant elected newly appointed counsel, that new attorney would be given an opportunity to prepare before continuing with the trial. When appellant again expressed his desire to represent himself, the trial court discussed the crimes charged against appellant, and appellant stated that he understood these charges. The trial court explained the potential penalties if appellant was convicted; again, appellant indicated he understood these penalties. The court asked appellant about potential defenses to the charges against him, and appellant responded with a reference to the sham legal process statute and a claim that he did not commit the crimes. Appellant was given an opportunity to confer with standby counsel regarding potential affirmative defenses; after a recess to confer, appellant told the court he was aware of his possible affirmative defenses. Appellant again indicated that he understood he would be required to comply with the rules of evidence and criminal procedure and to maintain appropriate decorum in the courtroom. Appellant indicated that he was voluntarily and willingly invoking his right to self-representation. Appellant's standby counsel indicated that he believed appellant was competent and able to represent himself at trial. Appellant then voluntarily signed a written waiver of counsel. Following this colloquy, the trial court found that appellant knowingly, intelligently, and voluntarily waived his right to counsel.

{¶30} Relying on *Martin*, appellant argues that the trial court failed to ensure that appellant had an "'apprehension of the nature of the charges, the statutory offenses included within them.'" *Martin* at ¶40, quoting *Gibson* at 377, quoting *Von Moltke v.*

Gillies (1948), 332 U.S. 708, 723, 68 S.Ct. 316, 323. He also argues that the trial court failed to discuss merger with appellant and that the trial court failed to ensure that appellant was aware of the possible defenses to the charges against him.

{¶31} We find that *Martin* is distinguishable from the present case and does not require reversal here. In *Martin*, the defendant wanted to act as co-counsel in his case and "never did he unequivocally state that he wished to waive his right to counsel." *Id.* at ¶42. Moreover, *Martin* never signed a written waiver of the right to counsel. *Id.* at ¶18. The present case is more analogous to the situation this court faced in *Crosky*, where the defendant's attorney was disqualified due to a potential conflict of interest created by the fact that he had previously represented a co-defendant in the same matter. *Id.* at ¶32. After disqualifying the attorney, the court engaged in a colloquy with the defendant. The defendant indicated that he was "fully aware" of the charges against him and, when asked about potential defenses, stated that he "had plenty of answers to their charges." *Id.* at ¶37. On appeal, the defendant claimed that the trial court failed to explain his possible defenses. We held that "a trial court is not required to advise a defendant of all available defenses or mitigating circumstances. A broader discussion of defenses and mitigating circumstances as applicable to the present charges is sufficient." *Id.* at ¶39. Further, the defendant in *Crosky* "clearly and adamantly expressed his desire to represent himself at trial." *Id.* at ¶41. It was sufficient that the "trial court assured itself that appellant knew of the dangers and disadvantages of self-representation, and that he was aware of the charges against him, the possible penalties, and available defenses." *Id.*

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{¶32} As detailed above, the trial court engaged in two lengthy colloquies with appellant about the issue of self-representation. On both occasions, the trial court detailed the charges against appellant and the additional specifications included with those charges. Like the defendant in *Crosky*, appellant indicated that he understood the charges against him. Also like the defendant in *Crosky*, appellant indicated that he was aware of certain defenses to the charges against him. Appellant now focuses on his references to the sham legal process statute and asserts that the trial court should have advised him that this was an invalid defense. However, during both colloquies, appellant clearly expressed his intention to defend himself by asserting that he did not commit the charged crimes and that he was misidentified as the perpetrator. Moreover, during the second colloquy, appellant was given an opportunity to confer with standby counsel about possible affirmative defenses. In this case, we find that the trial court's inquiries were sufficient to determine that appellant's decision to represent himself was a voluntary, knowing, and intelligent choice. Accordingly, appellant's fourth assignment of error is without merit and is overruled.

IV. Jury Instructions

{¶33} In his fifth assignment of error, appellant claims that the trial court erred by refusing to inform the jury that appellant's decision to represent himself was a result of his trial counsel's suspension from the practice of law. Appellant argues that the trial court recognized that the jury might be left with a negative impression from the fact that he was represented by counsel for most of the trial and then suddenly was representing himself and, therefore, the trial court abused its discretion by not instructing the jury as to the reason for appellant's decision to proceed without an attorney. Under Crim.R. 30(B),

"during the course of the trial, the court may give the jury cautionary and other instructions of law relating to trial procedure, credibility and weight of the evidence, and the duty and function of the jury and may acquaint the jury generally with the nature of the case." A trial court has broad discretion in giving cautionary instructions under Crim.R. 30(B) and we review a trial court's instructions, or refusal to give requested instructions, for abuse of discretion. *Columbus v. Andrews* (Feb. 27, 1992), 10th Dist. No. 91AP-590. An abuse of discretion occurs where the trial court's attitude is " 'unreasonable, arbitrary or unconscionable.' " *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶34} Following Attorney Noel's suspension and appellant's decision to represent himself for the remainder of the trial, the trial court conducted voir dire of the jurors to determine whether they had seen or read any media stories about Attorney Noel's suspension. As part of this voir dire, the trial court instructed each juror individually that appellant had a constitutional right to represent himself and that they were not to speculate as to why appellant had chosen to exercise that right or to formulate any positive or negative impressions of appellant because he was representing himself. The trial court further instructed each juror that appellant was to be given the same respect and attention as an attorney. The trial court asked each juror individually whether they would be able to comply with those instructions, and each juror responded in the affirmative. Two of the jurors and one alternate juror were aware that Attorney Noel had been suspended from the practice of law. One other juror had heard a rumor that there was some issue with the case but was not aware of any specifics. Each of these jurors was specifically asked whether they could continue to be fair and impartial toward

appellant, and each one responded in the affirmative. At the end of this voir dire, appellant stated that he was satisfied with retaining the existing jury panel for the remainder of the trial. Before the trial resumed, the prosecutor suggested that the trial judge instruct the jury that Attorney Noel's absence was not related to anything the appellant had done. The trial judge stated that she did not want to continue to draw attention to Attorney Noel's absence.

{¶35} The trial court took steps to ensure that the jury maintained its ability to be fair and impartial toward appellant. Each juror was individually informed of appellant's constitutional right to represent himself and instructed not to draw any positive or negative impressions from appellant's self-representation. Appellant consented to proceeding with trial before the existing jury. In light of these facts, the trial court did not act in a manner that was unreasonable, arbitrary, or unconscionable in refusing to give additional instructions explaining why Attorney Noel was not continuing to represent appellant. Accordingly, appellant's fifth assignment of error is without merit and is overruled.

V. Motion for New Trial

{¶36} In his sixth assignment of error, appellant claims that the trial court erred in denying his motion for a new trial under Crim.R. 33(B). Appellant asserts that he was entitled to a new trial under Crim.R. 33(A)(1), which provides for a new trial based on "[i]rregularity in the proceedings, or in any order or ruling of the court, or abuse of discretion by the court, because of which the defendant was prevented from having a fair trial," or Crim.R. 33(A)(3), which provides for a new trial based on "[a]ccident or surprise which ordinary prudence could not have guarded against."

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{¶37} A reviewing court will not reverse a trial court's decision granting or denying a motion for new trial under Crim.R. 33(B) absent an abuse of discretion. *State v. Sanders*, 188 Ohio App.3d 452, 2010-Ohio-3433, ¶18, citing *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, ¶82. "A new trial should not be granted unless it affirmatively appears from the record that a defendant was prejudiced by one of the grounds stated in the rule or was thereby prevented from having a fair trial." *Id.*, citing *State v. Samatar*, 152 Ohio App.3d 311, 2003-Ohio-1639, ¶35. Appellant argues that Attorney Noel's suspension from the practice of law constituted an irregularity in the proceedings or an accident or surprise sufficient to entitle appellant to a new trial. Although the suspension of appellant's attorney from the practice of law was irregular or a surprise in the context of being an event that does not regularly or commonly occur, we do not believe that it constituted an "irregularity in the proceedings" or an "accident or surprise" within the context of Crim.R. 33.

{¶38} However, even assuming that appellant is correct about the disqualification constituting an irregularity or surprise within the scope of the rule, he fails to demonstrate that he suffered prejudice as a result. After Attorney Noel was disqualified, appellant was offered the opportunity to obtain new counsel and was informed that his new counsel would be given an opportunity to become familiar with the case before the trial proceeded. Appellant repeatedly and adamantly rejected this option. As discussed above, the trial court questioned appellant at length and established that his waiver of the right to counsel and decision to represent himself was a voluntary, knowing, and intelligent choice. The fact that appellant ultimately had difficulties maintaining proper decorum, introducing exhibits, and making arguments while exercising his right to self-

representation may show that he chose poorly in deciding to exercise that right but does not rise to the level of prejudice requiring a new trial. Accordingly, appellant's sixth assignment of error is without merit and is overruled.

VI. Effective Assistance of Counsel

{¶39} In his seventh assignment of error, appellant argues that his convictions should be reversed because of ineffective assistance of counsel. The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to the effective assistance of counsel. *State v. Banks*, 10th Dist. No. 10AP-1065, 2011-Ohio-2749, ¶12, citing *McMann v. Richardson* (1970), 397 U.S. 759, 771, 90 S.Ct. 1441, 1449. Courts use a two-part test to evaluate claims of ineffective assistance of counsel. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 2064; *State v. Bradley* (1989), 42 Ohio St.3d 136, 141-42. "First, the defendant must show that counsel's performance was deficient." *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.*, 466 U.S. at 686, 104 S.Ct. at 2064.

{¶40} Appellant first asserts that Attorney Noel provided ineffective assistance by failing to inform appellant and the trial court that he was subject to pending disciplinary proceedings and potential sanctions from the Supreme Court of Ohio. Appellant argues that, had the trial court been advised of the pending disciplinary proceedings, it could have appointed another attorney to serve as co-counsel. Alternatively, appellant suggests that the Supreme Court could have been asked to delay any decision against

Attorney Noel or to stay the effective date of his suspension until after appellant's trial was completed. (Appellant's brief at 34.) Appellant argues that Attorney Noel was aware of the pending disciplinary proceeding well before taking appellant's case.

{¶41} Although we are troubled by the suggestion that Attorney Noel may have been aware of potential sanctions and did not take appropriate steps to ensure that appellant would receive proper legal counsel, the details of the disciplinary case against Attorney Noel are not part of the record on appeal. The record before this court only indicates that Attorney Noel was suspended from the practice of law on June 17, 2010. Thus, this is not an appropriate claim for direct appeal because it relies on facts outside the record of the court below. *State v. Hamilton*, 10th Dist. No. 10AP-543, 2011-Ohio-3305, ¶29. See also *State v. Douthat*, 10th Dist. No. 09AP-870, 2010-Ohio-2225, ¶19 ("Where a claim of ineffective assistance of counsel is dependent upon facts outside the record, the appropriate remedy is for the defendant to file a petition for post-conviction relief.").

{¶42} Notwithstanding appellant's reliance on facts outside the trial record, it is unlikely that appellant would be able to establish that Attorney Noel provided ineffective assistance by failing to inform the trial court and appellant that he was subject to pending disciplinary proceedings. "To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." *Bradley*, at paragraph three of syllabus. At the time that the trial court learned of Attorney Noel's suspension, the state had presented its final witness, a forensic biologist with the Columbus police crime lab. Attorney Noel was in the process of cross-examining this

witness when the trial court stopped the proceedings. When the proceedings resumed following Attorney Noel's suspension, appellant stated that the defense planned to proceed to closing arguments after completing cross-examination of the final state witness. As discussed herein, appellant chose to represent himself for the remainder of the trial. The trial court appointed standby counsel to assist appellant with any questions during the proceedings. The trial court took steps to ensure that the jury would remain fair and impartial and would not form any negative impression of appellant based on the fact that he was no longer represented by an attorney. Therefore, appellant fails to establish that he suffered prejudice due to his attorney's suspension.

{¶43} Appellant also argues that Attorney Noel provided ineffective assistance at a hearing on motions to suppress evidence, identification, and statements. The crux of this claim is that appellant's attorney should not have called him to testify at the suppression hearing because "there was nothing to be gained by testifying" and because, on cross-examination, the state was able to have appellant authenticate judgment entries from prior convictions. (Appellant's brief at 35.) These prior convictions formed the basis for appellant's conviction as a repeat violent offender and a sexually violent predator. Appellant also notes that counsel failed to object to these questions at the suppression hearing. In performing the first part of the ineffective-assistance-of-counsel analysis, "[t]he defendant has the burden of proof and must overcome the strong presumption that counsel's performance was adequate or that counsel's action might be sound trial strategy." *Banks* at ¶13, citing *State v. Smith* (1985), 17 Ohio St.3d 98, 100. "Debatable trial tactics and strategies do not constitute a denial of effective assistance of counsel. Furthermore, an attorney's selection of witnesses to call at trial falls within the purview of

trial tactics and generally will not constitute ineffective assistance of counsel." *State v. Hester*, 10th Dist. No. 02AP-401, 2002-Ohio-6966, ¶10 (internal citations omitted). However, "evidence of other crimes which come before the jury due to defense counsel's neglect, ignorance or disregard of defendant's rights, and which bears no reasonable relationship to a legitimate trial strategy, will be sufficient to render the assistance of counsel ineffective." *Id.*

{¶44} As explained above, establishing ineffective assistance of counsel requires appellant to prove that his attorney's performance was deficient and that he suffered prejudice due to that deficient performance. Even if we assume that Attorney Noel performed deficiently by calling appellant to testify at the suppression hearing, appellant cannot establish that he was prejudiced. Appellant does not argue that the evidence of prior convictions would not have been admitted without his testimony, only that "[t]he state was spared the burden of identifying appellant as the subject of those [prior] proceedings." (Appellant's brief at 35.) Generally, "[a] certified copy of the judgment entry of the prior conviction together with evidence identifying the defendant named in the entry as the offender in the case at bar is sufficient to prove that prior conviction." *State v. Taniguchi* (1994), 96 Ohio App.3d 592, 594. The state presented certified copies of the judgment entries for the prior convictions. These judgment entries were only presented to the trial judge for consideration with regard to the violent offender and sexually violent predator specifications, not to the jury for consideration on the underlying substantive charges against appellant. Appellant has not established that this evidence would not have been admitted absent appellant's cross-examination testimony; in fact, appellant only argues that the state would have been required to identify appellant as the subject of

the convictions through other means. Thus, appellant has failed to show that he suffered prejudice due to counsel's performance at the suppression hearing.

{¶45} Appellant also argues that Attorney Noel provided ineffective assistance by failing to impeach S.R.'s credibility through evidence of a prior conviction and failing to impeach S.R.'s testimony by suggesting that she was involved in criminal activity when the incident occurred. Specifically, appellant claims that Attorney Noel failed to establish that S.R. had been previously convicted of burglary and failed to question S.R. as to whether she was engaged in prostitution at the time of the incident. "[D]ecisions regarding cross-examination are within trial counsel's discretion and generally do not form the basis for a claim of ineffective assistance of counsel." *State v. Harris*, 10th Dist. No. 09AP-578, 2010-Ohio-1688, ¶28. Further, appellant has failed to demonstrate a reasonable probability that the result of the trial would have been different absent these alleged deficiencies. While impeaching S.R. in the manner suggested might have caused the jury to doubt her credibility, there was testimony from another witness corroborating parts of S.R.'s story. There was also independent evidence tending to establish appellant's guilt, including the recovery of a knife in appellant's apartment that was found to have S.R.'s blood on it. In light of this additional evidence, appellant has failed to establish a reasonable probability that the outcome of the trial would have been different if Attorney Noel had impeached S.R.'s testimony with evidence of a prior conviction or the suggestion that she was engaged in criminal activity.

{¶46} Finally, appellant argues that Attorney Noel rendered ineffective assistance by failing to object when the state called witnesses to rebut the alibi appellant offered to police detectives. Two members of appellant's recreational basketball team and the

attendant of the practice facility were called to testify that appellant was not at a basketball practice on December 1, 2009. "The failure to make objections does not constitute ineffective assistance of counsel per se, as that failure may be justified as a tactical decision." *State v. Loughman*, 10th Dist. No. 10AP-636, 2011-Ohio-1893, ¶63 (quoting *State v. Gumm*, 73 Ohio St.3d 413, 428, 1995-Ohio-24). Moreover, appellant essentially complains that this testimony was received out of order, not that it would have ultimately been inadmissible. Assuming that an objection from appellant's counsel would have been granted, the state simply would have had to call the detective to testify before putting on the other witnesses. Thus, appellant cannot establish that he suffered prejudice from this alleged deficiency by his trial counsel.

{¶47} Accordingly, for all the reasons stated above, appellant's seventh assignment of error lacks merit and is overruled.

VII. Evidence

{¶48} In his eighth assignment of error, appellant argues that the trial court erred in overruling his pretrial motion to suppress S.R.'s identification testimony. Detective Haynes showed S.R. two photo arrays or lineups, with each one containing a photograph of appellant. S.R. was first shown a photo array containing a photo of appellant taken in 2007 and did not identify any of the men in that lineup as her attacker. The second photo array was a pre-existing photo lineup from the police database containing an older photograph of appellant. S.R. identified appellant in this second lineup as her attacker. Appellant asserts that the use of two photo lineups containing his photograph was impermissibly suggestive and that the identification should have been suppressed on this basis.

{¶49} Appellate review of a motion to suppress involves mixed questions of law and fact and, therefore, is subject to a twofold standard of review. *State v. Humberto*, 10th Dist. No. 10AP-527, 2011-Ohio-3080, ¶46. "Because the trial court is in the best position to weigh the credibility of the witnesses, we must uphold the trial court's findings of fact if competent, credible evidence supports them. We nonetheless must independently determine, as a matter of law, whether the facts meet the applicable legal standard." *Id.*, citing *State v. Reedy*, 10th Dist. No. 05AP-501, 2006-Ohio-1212, ¶5 (internal citations omitted).

{¶50} The right to due process prohibits the use of identification procedures that are "so impermissibly suggestive as to give rise to a substantial likelihood of misidentification." *Humberto* at ¶47, citing *Neil v. Biggers* (1972), 409 U.S. 188, 198, 93 S.Ct. 375, 382. "A trial court considering whether to admit identification evidence must utilize a two-step analysis. Initially, the court must consider whether the procedure was impermissibly suggestive. Secondly, the court must consider whether, despite the procedure's suggestiveness, the identification was reliable." *Humberto*, citing *State v. Sharp*, 10th Dist. No. 09AP-408, 2009-Ohio-6847, ¶14.

{¶51} Detective Haynes testified that it was not the normal procedure to show a victim two photo lineups that both contained photographs of a suspect. However, he used these two lineups because the photographs involved looked so different. Under similar circumstances, we have previously found that the use of different photographs of a suspect in multiple photo lineups may not be impermissibly suggestive. In *State v. Myers*, 153 Ohio App.3d 547, 2003-Ohio-4135, the police showed the victim a photo array containing a photograph of the defendant obtained from his employer. *Id.* at ¶10. The

victim was unable to identify any of the individuals in that array as her attacker. Six days later, after obtaining a more recent photograph of the defendant, the victim was shown another photo array containing his photograph. *Id.* at ¶17. After reviewing this second photo lineup, the victim identified the photograph of the defendant. *Id.* On appeal, this court affirmed the trial court's denial of the motion to suppress the identification. We found that there was little resemblance between the two photos, particularly given that in one photo the defendant had hair and a clean shaven face, while in the other photo the defendant had a shaved head and a moustache. *Id.* at ¶39.

{¶52} Similarly, in *State v. Sealy*, 10th Dist. No. 09AP-1128, 2010-Ohio-6294, a crime victim was initially shown a photo array containing a photograph of the defendant from 2007 but was unable to make an identification. *Id.* at ¶28. The next day, the victim was shown another array containing a photograph of the victim taken in 2009. He selected the defendant's photo from this second array. *Id.* Once again, this court affirmed the trial court's denial of the motion to suppress the identification. *Id.* at ¶30. We noted that, in the older photo, the defendant had short hair, and the other photos in the lineup showed men with similar hairstyles, skin tone, age, and weight. *Id.* at ¶29. The newer photo showed the defendant with braided hair, and the other photos in that lineup showed men with similar characteristics. *Id.* We found that there was nothing impermissibly suggestive about the use of two photo lineups containing different photos of the suspect with a very different appearance in each photo.

{¶53} The identification procedure in this case is similar to the process used in *Myers and Sealy*. In the first photo lineup, using the more recent photograph, appellant is in the second position. His hair is difficult to see, but appears to be flecked with gray. In

this photograph, appellant has a moustache but appears to be otherwise clean shaven. In the second photo lineup, containing the older photograph, appellant is in the third position. Appellant's hair is mostly dark in this photograph, with only a small amount of gray near the temples. His hairline appears to be noticeably different from the newer photo. Appellant has a moustache and appears to have a scruffy partial beard in this photograph. There is very little similarity between the two photographs, and appellant's appearance is noticeably different in each of them. Although we note the risks of using multiple photo lineups containing different photographs of the same subject, we find that, in this case, the identification procedure was not impermissibly suggestive, and the trial court did not err in overruling the motion to suppress.

{¶54} Further, "even if [an] identification procedure was suggestive, the subsequent identification is still admissible as long as it is reliable." *Sealy* at ¶26. In determining whether an identification is reliable, a court must consider factors including "(1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the criminal, (4) the level of certainty demonstrated at the confrontation, and (5) the time between the crime and the confrontation." *Myers* at ¶30, citing *Biggers*, 409 U.S. at 199-200, 93 S.Ct. at 382. In *Myers*, we held that, even if the identification had been impermissibly suggestive, the rape victim's identification in that case was sufficiently reliable. In that case, the victim was able to view her attacker despite not having her glasses on because he was an arm's length away, and the room was well lit. *Id.* at ¶40. The victim also had a high degree of attention, facing her attacker "directly and intimately" as a victim of "one of the most personally humiliating of all crimes." *Id.* at 41, quoting

Biggers, 409 U.S. at 200, 93 S.Ct. at 375. Additionally, the victim accurately described her attacker to police, and she demonstrated a high degree of certainty in identifying her attacker in the photo array. *Id.* at ¶¶42-43. Based on all these factors, we concluded that there was no substantial likelihood of irreparable misidentification. *Id.* at ¶¶49.

{¶55} Likewise, in this case we find that even if the identification procedure had been impermissibly suggestive, the identification was sufficiently reliable. Whereas the attack in the *Myers* case lasted two to three minutes, in the present case, S.R. had extensive opportunity to view appellant as he spoke to her from the van, as she sat beside him while he drove to the park, and as they sat together talking before the attack began. In both cases, the victims had a high degree of attention and faced their attackers directly. Also, in both cases, the victims' post-attack descriptions were highly accurate. S.R. described her attacker as being a black male approximately five foot eight to five foot nine inches, approximately 230 to 250 pounds, with salt and pepper hair on his face. She also testified that he had a burn scar on his right hand. Appellant argues that this description does not match his height, but both S.R. and appellant were seated or struggling in the van throughout most of the encounter. Appellant does not contest the other details of S.R.'s description.

{¶56} In *Myers*, the victim was 70 percent certain that the individual she selected from the photo array was her attacker but could not be more certain because her attacker wore a hat, and the men in the photo lineup did not wear hats. *Id.* at ¶43. In this case, S.R. was 80 percent certain that the man she selected in the photo array was her attacker, but she could not be more certain because her attacker wore a hat, and the man in the photo did not have a hat on. The identification also occurred within hours after the

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attack, so the image of her attacker was fresh in S.R.'s mind. Thus, applying the reliability factors, we cannot find that there was a substantial likelihood of irreparable misidentification. See *Myers* at ¶49. Accordingly, appellant's eighth assignment of error is without merit and is overruled.

{¶57} In his ninth assignment of error, appellant argues that the trial court erred by overruling appellant's objection and permitting the lead detective to offer opinion testimony. Appellant recalled Detective Haynes as a witness. On direct examination, appellant asked Detective Haynes a series of questions about the investigation and the evidence collected in the investigation. Appellant sought to elicit testimony from Detective Haynes regarding why no DNA sample had been taken from appellant and why no testing was performed to determine whether appellant was a match for the unidentified male DNA on the knife. Appellant's examination of Detective Haynes included the following exchanges:

Q: Okay. I guess my question is, would it have been easier after the arrest to have a suspect, defendant, swabbed for DNA?

A: Not necessarily, no.

Q: Okay. But since there were [sic] blood in the vehicle and on the knife, that is why I asked you, okay. At what time do you take it upon yourself, as the lead detective, to obtain swabs for DNA, to compare with other DNA that you got?

A: Sir, if she had told me that you had actually been able to penetrate her, then I would have taken your DNA as well and ~~matched it with anything that the hospital was able to locate.~~

Q: I was referring to the blood that was found, that was a test tube that said it was an unknown donor, a male donor. At what point would you swab a suspect that you have incarcerated for a time or whatever that amount, whatever,

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etcetera, at what time would you order for them to have a swab?

A: There is no specific time. It is up to the lead detective as to whether or not the suspect is swabbed. There is no set time, no policy, no procedure.

Q: Okay. So wouldn't that make it more easier to prove that that was the suspect or not, upon results compared to the unknown donor that they came up with, the male donor?

A: Sir, I don't feel that that would have been the case in this case.

Q: Why not?

A: Because the overwhelming evidence, I did not feel that I needed to get a swab from you.

Q: That is how you feel?

A: You just asked me, sir.

Q: That is how you feel?

A: As the lead detective, that is how I felt.

Q: So this is what you want us to believe or want me to believe, or whoever in here, you know, that it would not have been easier to swab the suspect that is here today, that could have shown hard evidence, DNA, if in fact he was the assailant, the suspect?

A: Sir, I still stand by my decision. I don't feel that that was necessary.

(Tr. 895-96.)

Q: Okay. So once you knew that it was an unknown male trait that was found on the knife and in the van, why wouldn't you — I know I asked you this earlier. Now, since we know the time, why wouldn't you have Mr. Griffin swabbed[?] That would have been a wrap?

A: The same reason, no matter what the time would be, sir, it was the same reason.

Q: Did that make any sense to you?

A: Yes, sir. As I stated before, the evidence was overwhelming. I did not take your DNA. Between the knife with her DNA found in your nightstand, the clothing matched the description that your fiancée identified as yours, the vehicle —

Q: I object.

THE COURT: That is overruled. You may continue.

THE WITNESS: The vehicle registered in name to your address where the search warrant was served, to the scar on your hand, the whole physical description except for your 5' 9" all matching, all the DNA located in your van that belonged to [S.R.], that is the overwhelming evidence, which is why I did not then go to get your DNA from you.

BY [APPELLANT]:

Q: Okay. That is your opinion that — that was just your opinion, right? Upon your opinion, you made the decision not to do that, right, about it being overwhelming, that is your opinion?

A: As the lead detective, that was my opinion.

Q: But isn't law also based on hard facts?

[PROSECUTOR]: Objection, your Honor.

THE COURT: Sustained. Move on, Mr. Griffin.

BY [APPELLANT]:

~~Q: So you tested for [S.R.]. You had an opportunity to test for mine, and you are saying, in your opinion, that this was overwhelming, that is why you didn't do it, right?~~

A: That was my statement, yes, sir.

(Tr. 944-45.)

{¶58} Under Evid.R. 701, a witness who has not been qualified as an expert may only testify as to opinions that are "(1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." A trial court's decision whether to admit lay opinion evidence under Evid.R. 701 is reviewed under the abuse-of-discretion standard. *City of Urbana ex rel. Newlin v. Downing* (1989), 43 Ohio St.3d 109, 113.

{¶59} Detective Haynes was not formally qualified as an expert witness under the rules of evidence; therefore, his opinion testimony may only be admitted if it qualifies under Evid.R. 701. In reviewing the testimony, it is clear that Detective Haynes was seeking to explain an aspect of his investigation, specifically why he had not taken a DNA sample from appellant. Thus, it meets the requirements of Evid.R. 701 because it is based on his perception and helpful to understanding his testimony as to why a DNA sample was not taken.

{¶60} We found similar testimony admissible in *State v. Coney* (Feb. 16, 1995), 10th Dist. No. 94APA05-670. In that case, the defendant was accused of chasing her co-workers around an office while swinging a pair of scissors and the blade from a paper cutter at them. At trial, a police detective explained that he assisted the victims in filing charges against the defendant and that the victims were permitted to file felony charges because he considered the scissors to be a possible deadly weapon. The defendant argued that this was impermissible opinion testimony from the police detective. We rejected this argument, finding that the officer was explaining the assistance he provided to the victims and was not rendering an opinion that the scissors were a deadly weapon,

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merely that it was possible that they may be shown to be a deadly weapon. Similarly, in this case, Detective Haynes's testimony was offered to explain the steps taken in the investigation, not to establish that the evidence against appellant actually was overwhelming.

{¶61} Moreover, the primary case appellant cites is distinguishable. In *State v. Hawn* (2000), 138 Ohio App.3d 449, a police officer testified to her opinion that a suspect's crying was feigned. *Id.* at 464-65. The appellate court held that the trial court abused its discretion by permitting this testimony because the police officer's prior testimony did not rationally support her speculative opinion and because the opinion testimony did nothing to help the jury understand the officer's other testimony. *Id.* at 466. By contrast, in this case, Detective Haynes's testimony did help the jury understand why there was no DNA sample taken from appellant and why there was no attempt to match appellant to the unidentified male DNA found on the knife.

{¶62} Finally, we note that appellant elicited this testimony from Detective Haynes through repeated questioning. Appellant concedes that he "blundered into this exchange," but argues that the trial court should have protected him from his own error by sustaining his objection. (Appellant's brief at 41.) As the excerpts above demonstrate, appellant repeatedly questioned Detective Haynes about this issue. Because appellant's questioning led to Detective Haynes's testimony, even if the trial court erred by admitting the testimony, the error would fall under the "invited error" doctrine, and appellant would not be able to take advantage of an error he created. *Jennings* at ¶75. Appellate courts have generally found that a party's appeal based on the admission of allegedly improper testimony will fail when the objectionable testimony was elicited through that party's own

questioning. See, e.g., *State v. Johnson*, 1st Dist. No. C-090413, 2010-Ohio-3861, ¶19; *Miller v. Defiance Regional Med. Ctr.*, 6th Dist. No. L-06-1111, 2007-Ohio-7101, ¶37. Accordingly, appellant's ninth assignment of error is without merit and is overruled.

{¶63} In his tenth assignment of error, appellant asserts that the trial court erred in excluding an exhibit he proffered. The proposed exhibit appears to be a wanted-person record from the Columbus Division of Police, a copy of one of the photo arrays, and a record showing some of the charges against appellant. The wanted-person record describes appellant's physical characteristics. It appears that appellant sought to introduce this document to establish that the police had access to records showing that he had a scar on his hand. The trial court excluded the exhibit because the photo was cumulative of the photo array, which had already been admitted, and because the exhibit had not been authenticated.

{¶64} "A trial court has broad discretion concerning the admission of evidence; in the absence of an abuse of discretion that materially prejudices a defendant, a reviewing court generally will not reverse an evidentiary ruling." *Humberto* at ¶25, citing *State v. Issa*, 93 Ohio St.3d 49, 64, 2001-Ohio-1290. "[D]ocuments must be authenticated or identified as a condition precedent to their admissibility." *Thompson v. Hayes*, 10th Dist. No. 05AP-476, 2006-Ohio-6000, ¶104, quoting *St. Paul Fire & Marine Ins. Co. v. Ohio Fast Freight, Inc.* (1982), 8 Ohio App.3d 155, 157. Appellant showed the proposed exhibit to Detective Jason Sprague and asked whether he was familiar with "those type of documents." (Tr. 845.) However, appellant never asked Detective Sprague to identify the document itself, and Detective Sprague offered no testimony identifying the specific record at issue. Appellant also questioned Detective Haynes about the proposed exhibit.

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Detective Haynes's responses to those questions appear to indicate that he had access to the document and the information contained within it prior to arresting appellant. However, this testimony does not clearly identify the document or explain its origins. Because the testimony at issue is so unclear, we cannot conclude that the trial court acted in a manner that was unreasonable, arbitrary, or unconscionable in ruling that the document was not properly authenticated. Accordingly, appellant's tenth assignment of error is without merit and is overruled.

VIII. Sufficiency of Evidence/Motion for Acquittal

{¶65} Appellant's eleventh and twelfth assignments of error are interrelated, and we will address them together. In his eleventh assignment of error, appellant argues that the evidence was insufficient as a matter of law to sustain his conviction for felonious assault. He asserts that the state failed to prove that he knowingly caused the wound to S.R.'s leg. In his twelfth assignment of error, appellant asserts that, because the evidence was insufficient to sustain a conviction on the felonious assault charge, the trial court erred in denying his motion for acquittal under Crim.R. 29(A).

{¶66} In reviewing a challenge to the sufficiency of the evidence, an appellate court must determine "whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus, superseded by constitutional amendment on other grounds as recognized in *State v. Smith*, 80 Ohio St.3d 89, 102, 1997-Ohio-355. The felonious assault statute prohibits an individual from knowingly causing serious physical harm to another or causing or attempting to cause physical harm to another by means of a deadly

weapon or dangerous ordnance. R.C. 2903.11(A). "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist." R.C. 2901.22(B).

{¶67} Appellant relies on S.R.'s testimony that she did not know she had been stabbed in the leg until she had been transported to the hospital and that she was not aware of the knife being pressed against that part of her body during the attack. Based on this testimony, appellant argues that the injury to S.R.'s thigh must have occurred during the struggle over the knife and that, therefore, he did not knowingly inflict this wound.

{¶68} In *State v. McClelland*, 10th Dist. No. 08AP-205, 2008-Ohio-6305, we considered a similar argument that a defendant lacked the requisite mental state to be convicted of felonious assault. In that case, the defendant, McClelland, threatened a bus driver and a police officer who came to the aid of the bus driver. *Id.* at ¶¶7-9. McClelland was sitting on an elevated platform near the rear of the bus, and the police officer positioned himself on the steps leading to that platform. After McClelland stood up and turned toward the officer in a fighting stance, the officer used a taser in an attempt to subdue McClelland. *Id.* at ¶10. McClelland removed the taser barbs and charged the police officer, causing him to fall backward off the steps; as they continued to struggle, both McClelland and the officer fell out of the bus. *Id.* at ¶11. The police officer suffered a dislocated patella as a result of the struggle. *Id.* at ¶12. On appeal, McClelland asserted that the evidence was insufficient to support his conviction for felonious assault and that his conviction was against the manifest weight of the evidence. *Id.* at ¶13. McClelland

claimed that the injury to the police officer's knee was accidental and that, because the knee injury was only a possible but not probable result of his actions, he acted recklessly rather than knowingly. *Id.* at ¶16. After reviewing the evidence, we found that McClelland's threats against the police officer provided circumstantial evidence of acting knowingly, "with awareness that the officer would probably suffer serious physical harm." *Id.* at ¶19. Further, we concluded that, although McClelland may not have foreseen the precise injury that the police officer suffered, "because such an injury was within the scope of the risk created by a physical attack occurring at the top of steps next to the back door of a bus, [McClelland] is presumed to have intended the injury." *Id.* at ¶20. Therefore, the evidence was sufficient to prove that McClelland acted knowingly. *Id.*

{¶69} In this case, the evidence presented at trial establishes that appellant obtained a knife from the glove compartment of the van, opened the knife, and threatened S.R. with it. Immediately prior to obtaining the knife, appellant insinuated that he could kill her if she did not comply with his sexual demands. Appellant attempted to cut off S.R.'s clothing and poked at her with the knife, albeit not hard enough to break her skin. Appellant also wrestled and struggled with S.R. in an attempt to regain control of the knife after he briefly lost control of it. As in *McClelland*, the evidence demonstrates that appellant created a risk of physical harm by threatening S.R. with a knife and wrestling with her for control of the knife. " [I]t is not necessary that the accused be in a position to foresee the precise consequence of his conduct; only that the consequence be foreseeable in the sense that what actually transpired was natural and logical in that it was within the scope of the risk created by his conduct.' " *Id.* at ¶20, quoting *State v. Losey* (1985), 23 Ohio App.3d 93, 96. Based on the evidence presented at trial, a

rational finder of fact could find that the state proved beyond a reasonable doubt that appellant acted knowingly.

{¶70} Crim.R. 29(A) provides that a trial court shall order the entry of a judgment of acquittal if the evidence is insufficient to sustain a conviction on a charged offense. Based on our finding that the evidence was sufficient to sustain appellant's conviction for felonious assault, we conclude that the trial court did not err in denying appellant's motions for acquittal pursuant to Crim.R. 29(A).

{¶71} Accordingly, appellant's eleventh and twelfth assignments of error are without merit and are overruled.

IX. Manifest Weight

{¶72} In his thirteenth assignment of error, appellant argues that his convictions are against the manifest weight of the evidence.

{¶73} "When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 2220. "The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Thompkins*, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. This discretionary authority "should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Thompkins*.

{¶74} Appellant's manifest-weight argument focuses solely on the issue of identity, with appellant arguing that his convictions are the product of misidentification. He points to the fact that S.R. identified her attacker as being five foot eight to five foot nine inches and that Nicole Jones also estimated the attacker as being five foot nine to five foot ten inches tall. Appellant asserts that he is significantly taller. Appellant also notes that Jones did not recognize him in the courtroom. Further, appellant argues that, although S.R. claimed that she bit her attacker on the left arm, Detective Haynes did not observe bite marks on appellant's arm. Appellant complains that, although S.R. claimed her attacker had a "burn" on his hand, she was never asked if this mark matched the scar on appellant's hand. Appellant also suggests that other people had access to his van and apartment and could have been the sources of the incriminating evidence found in those locations. (Appellant's brief at 45-46.)

{¶75} We have already concluded that S.R.'s pretrial identification was reliable. Although her description does not match appellant's height, it is accurate in other respects. Most of her encounter with appellant happened while they were seated in the van, so an inaccurate description of appellant's height does not necessarily discredit her identification. Jones testified that she did not get a very good look at the attacker because her car was parked "quite a distance away." (Tr. 492.) To the extent that S.R.'s and Jones's identifications were inconsistent with appellant's appearance, this does not render appellant's conviction against the manifest weight of the evidence. *Sharp* at ¶22. "The jury was aware of the arguably inconsistent descriptions and could take those inconsistencies into account when determining witness credibility." *Id.* "Juries are not so susceptible that they cannot measure intelligently the weight of identification

testimony that has some questionable feature.' " *State v. Coleman* (Nov. 21, 2000), 10th Dist. No. 99AP-1387, quoting *Manson v. Brathwaite* (1977), 432 U.S. 98, 116, 97 S.Ct. 2243, 2254.

{¶76} The jury was also aware of the other issues appellant mentions, including the fact that Detective Haynes did not observe any bite marks on appellant's arm and that S.R. was never asked if the scar on appellant's hand matched the burn she observed on her attacker's hand. The jury heard testimony suggesting that appellant's van could be operated without a key. There was also testimony that appellant shared an apartment with his fiancée and that other men, including appellant's nephew, lived in the same apartment building.

{¶77} However, there was further evidence establishing that appellant was the attacker. S.R. identified appellant as her attacker in both a photo lineup and in the courtroom. S.R.'s blood was found on the seat covers in appellant's van, on swabs taken from other areas inside the van, and on the knife retrieved from a bedside nightstand in appellant's apartment. Further, S.R. identified the boots that were taken from appellant as matching the boots her attacker wore and the knife found in his apartment as matching the knife her attacker used. S.R. also identified photos of appellant's van as the vehicle driven by the man who attacked her.

{¶78} Appellant told Detective Haynes that he was playing basketball at a recreational center between 4:00 p.m. and 5:30 or 6:00 p.m. on December 1, 2009, and that his van was stolen during this time. However, two teammates on appellant's recreational basketball team testified that the team practiced on Tuesdays and Thursdays from 6:00 p.m. to 8:00 p.m. One of these teammates, who described

appellant as a "longtime friend of 35 years," expressly testified appellant did not play basketball with him on December 1. (Tr. 453, 458.) Additionally, the attendant responsible for the recreational center testified that he opened it up at 5:30 p.m. for league games at 6:00 p.m. and that no one was in the facility when he arrived. Thus, there was evidence before the jury tending to discredit appellant's alibi. Based on our review of the evidence, we cannot conclude that the jury clearly lost its way and created a manifest miscarriage of justice warranting reversal. Accordingly, appellant's thirteenth assignment of error is without merit and is overruled.

X. Allied Offenses of Similar Import

{¶79} In his fourteenth assignment of error, appellant argues that the trial court erred by imposing multiple sentences for the offenses of which he was convicted. Appellant argues that each of these four crimes were allied offenses of similar import and should merge for the purposes of sentencing.

{¶80} Appellant claims that he mentioned merger at the sentencing hearing and that this is sufficient to preserve this error for review. However, at sentencing, appellant argued that some of his convictions in a prior case should have merged but that he failed to clearly argue for merger in the present case. Therefore, the plain-error standard applies. *State v. Taylor*, 10th Dist. No. 10AP-939, 2011-Ohio-3162, ¶34. "Plain error exists when a trial court was required to, but did not, merge a defendant's offenses because the defendant suffers prejudice by having more convictions than authorized by law." *Id.*

{¶81} Ohio law provides that "[w]here 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." R.C. 2941.25(A). By contrast, "[w]here 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." R.C. 2941.25(B). The Supreme Court of Ohio recently ruled on the test for determining whether two crimes are allied offenses of similar import in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314. There was no majority opinion in *Johnson*, but the plurality opinion and concurring justices emphasized the importance of considering the defendant's conduct. *State v. Hopkins*, 10th Dist. No. 10AP-11, 2011-Ohio-1591, ¶5. "Under the holding [of the plurality opinion] in *Johnson*, '[i]n determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), the question is whether it is possible to commit one offense and commit the other with the same conduct, not whether it is possible to commit one without committing the other. * * * If the offenses correspond to such a degree that the conduct of the defendant constituting commission of one offense constitutes commission of the other, then the offenses are of similar import.'" *State v. White*, 10th Dist. No. 10AP-34, 2011-Ohio-2364, ¶62, quoting *Johnson* at ¶48.

{¶82} If the offenses can be committed by the same conduct, then we must "determine whether the offenses were committed by the same conduct, i.e., "a single act, committed with a single state of mind." * * * If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged.'" (Emphasis sic.) *Id.* at ¶63, quoting *Johnson* at ¶49-50. "Conversely, if the court determines that the

commission of one offense will *never* result in the commission of the other, or if the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge." (Emphasis sic.) *Johnson* at ¶51.

{¶83} The state concedes that appellant's abduction conviction should have merged with the kidnapping conviction. (Appellee's brief at 31.) Therefore, we must consider whether the attempted rape conviction should have merged with the felonious assault conviction, and whether the felonious assault or attempted rape convictions should have merged with the kidnapping conviction.

{¶84} We begin by considering whether appellant's convictions for attempted rape and felonious assault should have merged. The attempt statute provides that "[n]o person, purposely or knowingly * * * shall engage in conduct that, if successful, would constitute or result in the offense." R.C. 2923.02(A). In relevant part, the law defines rape as "engag[ing] in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force." R.C. 2907.02(A)(2). Combining these two provisions, attempted rape is engaging in conduct that, if successful, would result in sexual conduct in which the other person is compelled to submit by force or threat of force. Felonious assault occurs when an offender knowingly causes serious physical harm to another or to another's unborn, or causes or attempts to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance. R.C. 2903.11(A). Even if we determined that the use of force in committing an attempted rape could result in serious physical harm to the victim, and thus that the same conduct could constitute both attempted rape and felonious assault, under *Johnson*, we

would still need to consider whether the offenses of felonious assault and attempted rape were committed by the same conduct.

{¶85} In this case, appellant's conduct exhibits distinct and separate crimes of felonious assault and attempted rape. After appellant and S.R. moved to the backseat of the van, appellant ordered S.R. to remove her pants. Appellant then obtained the knife from the glove compartment and again ordered S.R. to remove her pants. When she refused, appellant punched her. S.R. kicked appellant, causing him to briefly lose control of the knife. They then struggled and wrestled for control of the knife. Throughout this struggle, appellant continued to punch S.R., striking her multiple times. At some point during this struggle, S.R. was stabbed in the back of the leg, although she did not learn of the wound until after she was transported to the hospital. This evidence supports a felonious assault conviction. After regaining control of the knife, appellant tried to force S.R. to perform oral sex through threats and by physically forcing her head. This constituted separate and distinct conduct from the felonious assault that immediately preceded it, not a single act committed with a single state of mind. Accordingly, felonious assault and attempted rape are not allied offenses of similar import here because appellant's conduct exhibits separate and distinct crimes. *State v. Marrero*, 10th Dist. No. 10AP-344, 2011-Ohio-1390, ¶87.

{¶86} Next, we consider whether the conviction for felonious assault should have merged with the kidnapping conviction. In relevant part, the kidnapping statute provides:

No person, by force, threat, or deception * * * 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:

(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[.]

R.C. 2905.01(A). Again, even if we determined the use of force in removing a person from where she is found or restraining her could result in serious physical harm to the victim, and thus that the same conduct could constitute both kidnapping and felonious assault, under *Johnson*, we would still need to consider whether the offenses of felonious assault and kidnapping were committed by the same conduct.

{¶187} Once again, appellant's conduct constituted distinct and separate crimes, not a single act committed with a single state of mind. When appellant and S.R. moved to the backseat of the van, appellant positioned himself between S.R. and the door, thereby preventing her from freely exiting the van. S.R.'s liberty was restrained because she was unable to leave the van. When appellant demanded that S.R. remove her pants, he manifested his intention to engage in sexual activity against her will. This conduct was sufficient to sustain a kidnapping conviction. As explained above, appellant committed felonious assault by punching S.R. and stabbing her while struggling for the knife. This was separate and distinct conduct from the initial restraint of S.R. inside the van, not a single act committed with a single state of mind. Accordingly, in this case, felonious assault and kidnapping are not allied offenses of similar import.

{¶188} Finally, we consider whether appellant's convictions of kidnapping and attempted rape should have merged. More than three decades ago, the Supreme Court of Ohio ruled that rape and kidnapping are allied offenses of similar import. *State v.*

Henderson, 10th Dist. No. 06AP-645, 2007-Ohio-382, ¶13, citing *State v. Donald* (1979), 57 Ohio St.2d 73, syllabus. Similarly, courts have held that attempted rape and kidnapping are also allied offenses of similar import. *State v. Saleh*, 10th Dist. No. 07AP-431, 2009-Ohio-1542, ¶125, citing *State v. Fletcher* (Nov. 25, 1987), 8th Dist. No. 52906. These rulings were based on the conclusion that "[n]ecessarily, in the crime of rape, the victim must be restrained of her liberty, which can constitute an element of kidnapping." *Donald* at 75. Accordingly, courts would then proceed to determine whether the kidnapping and rape or attempted rape were committed with separate animus. *Saleh* at ¶126.

{¶89} It is unclear how the plurality opinion in *Johnson*, which held that courts need not perform an abstract comparison of the offenses at issue and that the conduct of the defendant must be considered in determining whether the offenses merge, affects the *Donald* line of cases, which is based on the Supreme Court's conclusion that kidnapping and rape "by their very nature, are committed for the same purpose." *Donald* at 75. Several courts that have considered this question in the post-*Johnson* era have continued to rely on *Donald* and its progeny and proceeded to analyze whether the crimes were committed with a separate animus. See *State v. Ortiz*, 8th Dist. No. 95026, 2011-Ohio-1238, ¶15-19; *State v. Gardner*, 7th Dist. No. 10 MA 52, 2011-Ohio-2644, ¶30-35; *State v. Moore*, 8th Dist. No. 96122, 2011-Ohio-2934, ¶25-35.

{¶90} Assuming for the purposes of analysis that kidnapping and attempted rape remain offenses of similar import under the *Donald* line of cases, we must analyze whether the offenses were committed by the same act with a single state of mind. In *State v. Logan* (1979), 60 Ohio St.2d 126, the Supreme Court of Ohio adopted the

following guidelines for determining whether kidnapping and another offense of similar import are committed with a separate state of mind, or "animus":

(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.

Id. at syllabus.

{¶91} Applying the standards from *Logan*, the restraint of S.R. was not incidental to the attempted rape. Although appellant told S.R. he would take her to the store for cigarettes and drive her to school, he transported her away from the school. There is no bright line rule for how far a kidnapped victim must be transported to constitute "substantial" movement demonstrating a separate state of mind from a subsequent rape or attempted rape. In *State v. Staten* (Feb. 4, 1999), 10th Dist. No. 98AP-263, this court held that asportation of only two blocks was not sufficient to demonstrate a significant independence of the rape. By contrast, in *Saleh*, we held that transporting a victim 28 miles prior to a rape would constitute substantial movement to demonstrate a separate animus for a kidnapping. Id. at ¶128. Here, appellant transported S.R. away from her intended destination, approximately two to three miles away. This is more significant than the two blocks in the *Staten* case and under the circumstances constitutes substantial



movement demonstrating a separate independence. Moreover, although appellant took S.R. to a public park, he clearly intended a secretive confinement of S.R. because he parked near a dumpster and expressed his intention to wait until all the people in the park left before moving to the backseat of the van. See *State v. Smith* (Apr. 6, 1995), 10th Dist. No. 94AP-1300 (victim was confined in secret as evidenced by the fact that attacker drove her to a dark alley or street to rape her). Thus, the evidence demonstrates that appellant had a separate state of mind as to each offense sufficient to support separate convictions for kidnapping and attempted rape.

{¶92} Accordingly, appellant's fourteenth assignment of error is sustained in part, to the extent that his convictions for kidnapping and abduction should have merged for sentencing and overruled in part as to the asserted merger of all other convictions.

{¶93} For the foregoing reasons, appellant's first through thirteenth assignments of error are overruled, and his fourteenth assignment of error is sustained in part and overruled in part. The judgment of the Franklin County Court of Common Pleas is affirmed in part and reversed in part, and this matter is remanded to that court for resentencing consistent with this decision.

*Judgment affirmed in part and reversed in part;
case remanded for resentencing.*

BRYANT, P.J., and BROWN, J., concur.
