

ORIGINAL

NO. 2011-0619

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 94616

STATE OF OHIO,

Plaintiff-Appellant

-vs-

JASON WILLIAMS,

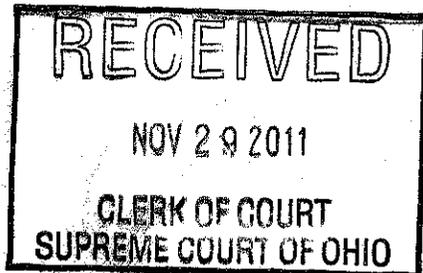
Defendant-Appellee

MERIT BRIEF OF APPELLANT, STATE OF OHIO

Counsel for Plaintiff-Appellant

WILLIAM D. MASON
CUYAHOGA COUNTY PROSECUTOR

KRISTEN SOBIESKI (0071523)
Assistant Prosecuting Attorneys
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7800



Counsel for Defendant-Appellee

JONATHAN N. GARVER
4403 ST. CLAIR AVE.
CLEVELAND, OH. 44103

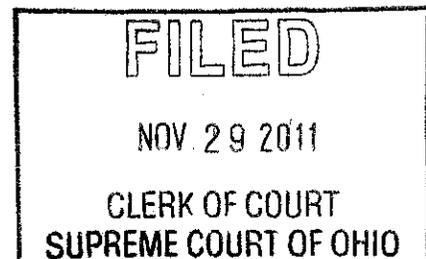


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STATEMENT OF THE CASE

On May 1, 2009, a Cuyahoga County Grand Jury issued an indictment charging Defendant-Appellee Jason Williams with the following offenses:

- Count 1: Rape in violation of R.C. 2907.02(A)(1)(b), which further alleged that the defendant compelled the victim to submit by force or threat of force and that the victim was under the age of ten at the time of the offense, also with a sexually violent predator specification;
- Count 2: Rape in violation of R.C. 2907.02(A)(1)(b), which further alleged that the defendant compelled the victim to submit by force or threat of force and that the victim was under the age of ten at the time of the offense, also with a sexually violent predator specification;
- Count 3: Gross Sexual Imposition in violation of R.C. 2907.05(A)(4);
- Count 4: Gross Sexual Imposition in violation of R.C. 2907.05(A)(4);
- Count 5: Gross Sexual Imposition in violation of R.C. 2907.05(A)(4); and,
- Count 6: Kidnapping in violation of R.C. 2905.01(A)(5), which further alleged that the victim of the offense was less than thirteen years of age and that the defendant committed the offense with a sexual motivation, also with sexual motivation and sexually violent predator specifications.

The matter proceeded with a trial by jury; however, Defendant elected to bifurcate the sexually violent predator specifications and have them tried to the bench. (10/6/2009 Journal Entry.)

The trial court dismissed the sexual motivation specification attached to the kidnapping charge as "legally irrelevant." (10/16/2009 Journal Entry.) The jury convicted Defendant of all charges and specifications (10/16/2009 Journal Entry) and the trial court found Defendant not guilty of the sexually violent predator specifications. (11/4/2009 Journal Entry.)

Prior to imposing sentence, the trial court considered whether merger of the offenses would be appropriate under Ohio's multiple count statute, R.C. § 2941.25. The trial court concluded that Counts 1 and 2 (the two counts of rape) did not merge. (Tr. 787.)¹ The court also found that Counts 3, 4, and 5 constituted separate acts of gross sexual impositions that did not merge.² With regard to the kidnapping and rape charges, the trial court considered the arguments of the parties and found,

But I want to talk about the kidnapping in the sense that we heard evidence about it which was that he took her arm and pulled her along and got her behind the garage. I believe under the multiple count statute, this is separate conduct because, let's face it, had he done that and got her behind the garage and then she got away, we would still have a kidnapping.

And I think it's fair to say this falls into his conduct constituting two or more offenses of dissimilar import, as between the rapes and the kidnapping, and there is the fact that this conduct was committed separately. First he escorted and kidnapped her, and secondly, he raped her.

And he had a separate animus as to each kind of conduct, as between the rape and the kidnapping, there's a separate animus. So I don't think there is a merger there.

(Tr. 787-791.) The trial court then sentenced Defendant to 25 years to life in prison.

The prison terms were imposed as follows:

- Count 1: 25 years to life, concurrent with all remaining counts;
- Count 2: 25 years to life, concurrent with all remaining counts;
- Count 3: 5 years, concurrent with all remaining counts;
- Count 4: 5 years, concurrent with all remaining counts;

¹ One count of rape pertained to the Defendant's penetration of the victim's vagina with his finger, while the other count of rape pertained to the separate act of cunnilingus. (Tr. 784-787.)

² One count of gross sexual imposition pertained to the Defendant's kissing/licking of the victim's neck, another count of gross sexual imposition pertained to the Defendant's rubbing of his penis against the victim, and the last count of gross sexual imposition pertained to the Defendant's placing of his hand on the victim's thigh. (Tr. 787.)

Count 5: 5 years, concurrent with all remaining counts; and,

Count 6: 10 years, concurrent with all remaining counts.

(11/16/2009 Journal Entry.)

Defendant sought review in the Eighth District Court of Appeals, which affirmed the jury's findings of guilt. However the appellate court reversed the trial court's determination that the offenses were not allied. Instead, the Eighth District held that Defendant's convictions for rape and kidnapping *were* allied offenses of similar import that should have been merged at sentencing.

After what amounted to a *de novo* review, the Eighth District found "[t]he indictment alleged that the kidnapping was sexually motivated and therefore [Defendant's] animus for the kidnapping and the rape was the same or, stated differently, the rape and the kidnapping were a single act, committed with a single state of mind." *State v. Williams*, Cuyahoga App. No. 94616, 2011-Ohio-925, ¶ 61. Therefore the case was remanded to the trial court "for further proceedings concerning the allied offenses." *Id.*

In reaching its conclusion, the appellate court failed to give deference to the trial court's factual findings with regard to the separateness of Defendant's rape and kidnapping offenses. For this reason, the State sought and was granted jurisdiction in this Supreme Court over the proposition of law, "A trial court's determination that offenses should not merge pursuant to R.C. § 2941.25 should be affirmed absent an abuse of discretion."

STATEMENT OF THE FACTS

The State's case:

The State called eight witnesses and admitted four photographs, one set of drawings, one individual drawing, two articles of clothing, a set of medical records, a rape kit, and two lab reports as exhibits.

The first witness to testify on behalf of the State was the victim, JW, who testified as follows: She lives at 3114 East 137th Street with her grandmother, siblings, great grandmother, and aunt. (Tr. 328-329.) Her date of birth is August 1, 2000 and she was in the third grade at the time of trial. (Tr. 329-330.) JW attends school and likes to play in the snow. (Tr. 330.) When JW grows up, she wants to be a designer and an art teacher. (Tr. 330.)

She testified that she has two uncles whose names are Jason and Justin. (Tr. 332.) On the date of offense, Defendant was fixing the porch light and then came to play volleyball with JW, her brother, and her two cousins. (Tr. 334.) The other children went inside while she remained outside so that she could play with her bubbles. (Tr. 335.) She did not want to talk about what happened because it is a bad memory for her, but she recognized that she had "no other choice." (Tr. 338.)

While they were outside, behind her grandmother's car in the backyard, Defendant told JW to sit down on his lap, then he pulled the front of her skirt and her "unders" and put his mouth on her "private" and said that he liked it, even though she said it was "yucky." (Tr. 339-340.) She identified her private as being on the front of her body and that it is normally used for going to the bathroom. (Tr. 340.) JW testified that Defendant putting his mouth that part of her body made her feel nervous. Id. She stated that Defendant then pulled her by her hand between the two houses. Id. She had

to go to the bathroom but Defendant was pulling her arm and she could not get out and she did not want to go between the houses with him. (Tr. 340-341.) Defendant picked her up and then put her on the ground and put his private on hers while they were both wearing clothes and that made her more nervous. (Tr. 341.) Then he “bounced” on top of her. (Tr. 342.) She finally was able to get away from Defendant after he had gotten up, and she ran to her auntie on the porch with her legs “shaking.” (Tr. 343.)

Her grandmother was screaming at Defendant, who denied the accusations, which made JW angry because he wasn't telling the truth. (Tr. 344.) JW talked to Detective Berg and went to two hospitals and was examined by a woman. (Tr. 345-346.) JW explained the pictures she drew for the detective, stating that she wouldn't want to draw anything bad that has happened. (Tr. 348-351.) She identified her shirt and her skirt, stating that she likes to keep her clothes clean, but that dirt got on them because she was on the ground on her back. (Tr. 352-353.) Defendant kissed her on the front of her “private” area and she told her aunts, grandma, mother, the police, and the two doctors. (Tr. 361-362.) Defendant got her underwear down by pulling on the front of her skirt and then the front of her “unders,” he touched her body, and he used his hands to pull down the skirt to pull down her skirt and “unders.” (Tr. 380.)

Ja'Dean Williams testified: Her siblings regularly came to visit and that Defendant helped her do work around the house. (Tr. 395-396.) On the date of the crime, when JW came into the house, she had dirt in her hair, on her arm, on her back, and on her clothing and she was looking at the floor and “looking scared.” (Tr. 399-400.) A few moments later, when Ja'Dean and her mother talked to Defendant, his eyes were red and he looked spaced out and high and her opinion was that he was indeed high, most likely due to the effects of marijuana. (Tr. 404-406.) She and her mother

took JW to two different hospitals, the second having a specialist. (Tr. 408.) She identified the victim's clothing, pointing out dirt on the top of the shirt as well as some on the skirt that has fallen off since the day of the incident because of handling. (Tr. 408-410.) She explained that JW called Defendant's wife and told her what happened at the hands of Defendant. (Tr. 420-422.) She states that JW explained in more detail what had happened to her in words beyond him "putting his pee pee on her pee." (Tr. 426.)

Nadine Davis testified that she raised Defendant as her son since he was six months old. (Tr. 435-36.) On June 22, 2009, Defendant had come over to help her clean up. (Tr. 436.) Later that evening, she was about to get in the tub, when JW came upstairs and told her what happened, so she threw clothes on and came downstairs to talk to Defendant; as they stood on the porch and JW said what happened in front of Defendant, JW was shaking. (Tr. 436-438.) Nadine Davis said that JW's story did not change from upstairs to down, and that she went inside and called the police. A report was made and, at police direction, she took JW's clothing with her to the hospital. (Tr. 440-441, 451.) She testified that she was the one who turned in the clothing at the hospital; however, she did not notice if there was any dirt on the shirt, only the skirt, because the spot on the skirt was "obvious." (Tr. 443, 447, 453.)

Jonathan Shafer testified that he is a Cleveland Police officer and that he was working third shift on June 22, 2009 when he responded to a radio broadcast of a "juvenile female who had been sexually assaulted." (Tr. 457.) When he and his partner arrived, he received a general idea of what happened from Nadine Davis, and that JW "was sitting on the couch kind of nervous, didn't really want to say much." (Tr. 458-459.) He told Davis that JW should get medical treatment in the clothes that she was

wearing. He was also given the name of Defendant as the suspect, and was given an address where Defendant might be located on Kenyan. (Tr. 459-460, 464.) Officer Shafer testified that JW was very quiet at first and did not want to say much about what had happened, and although she was not very forthcoming initially, they were able to talk to her after he and his partner had talked to her grandmother and aunt to get more information. (Tr. 468-469.) Police then responded to the address that was provided where they were met by Defendant's wife, who told them that Defendant was not there. (Tr. 460.)

Diane Daiber testified that she has been a registered nurse for twenty-seven years, and has specialty training for Sexual Assault Nurse Examiners covering the entire life span. (Tr. 479-480.) Daiber treated JW on June 23, 2009. (Tr. 486-87.) She identified State's Exhibit 6 as a copy of the medical records created for JW. (Tr. 487.) On page nine of the medical records, she stated that JW name and date of birth, which she reads as 8/1/2000, appear again and that the time of the exam began at 2:30 am on 6/23/09, four and-a-half hours after the incident. (Tr. 493-494.) Daiber completed an evidence collection kit on JW and that in addition to the standard swabs, took swabs from her neck because the medical history stated that there had been kissing to the neck. (Tr. 503-505.) She collected the underwear that JW had on as well as the clothing that the family brought in, and packaged them in individual bags. (Tr. 505-506.)

Daiber noted that JW "was embarrassed at times to talk about what had happened, and she was shy when it came to the invasive physical exam, looking at the genitalia. (Tr. 507.) Daiber also noted clear injuries to the interior of JW's vagina: "Her redness was on the introitus or where the labia minora would be." (Tr. 507.) JW was

able to verbalize how the injury occurred and JW described that it occurred when a hand went inside the lips of her private parts. (Tr. 515.) JW also described someone kissing her genitalia and her neck. (Tr. 516.) All injuries noted were consistent with what JW had described, and lack of injury to the hymen was expected. (Tr. 522-523, 526.)

Lindsey Nelsen-Rausch testified that she scientifically examined the rape kit from JW. Specifically she tested skin stain swabs from the neck for amylase, a component of saliva, and they were positive. Further, she tested the underwear for amylase, and the front of them, in the crotch area, also tested positive. (Tr. 535, 542.) The largest quantity of amylase is found in saliva, and Nelson-Rausch offered her expert opinion that the material found in JW's underwear was amylase from saliva. (Tr. 545-548.)

Melissa Zielaskiewicz testified that she was asked to analyze a cutting from JW's underwear and skin stain swabs from the neck against known DNA standards from Defendant. (Tr. 558.) The skin stain swabs from the neck yielded positive amylase results, however they did not yield an amount of DNA sufficient enough to obtain a profile. (Tr. 560.) The underwear yielded a DNA profile that was a consistent with Defendant—and only one in 17 million 570 thousand people would have this profile. (Tr. 565.)

Detective Pamela Berg testified that she spoke to Nadine Davis and let her know that she was assigned to JW's case. Detective Berg interviewed Nadine Davis and JW. (Tr. 583-585.) During her interview with JW, JW disclosed a sexual assault to Detective Berg. (Tr. 584.) She testified that it was quite common for a child to be "reserved" or "not thrilled" to relive the events with her and that it is not surprising that JW may have given more information to the nurse the night that it happened, than to her when they

talked a week later. (Tr. 587, 594.) Based on what she learned, Detective Berg had no reason to conclude that JW had testified to something that did not happen. (Tr. 595.)

The Defendant's case:

Defendant exercised his right to not testify. Defendant's wife, Teleise Williams, was called as a witness. Teleise Williams did not see the incident, but she did see JW come inside when it was dark, and she came in alone (not with the other children) after Ja'Dean Williams called the kids inside. (Tr. 653-654.)

Teleise Williams talked to JW on the phone after she and the Defendant had returned to their home at the Kenyan address. Ja'Dean Davis called Teleise Williams and said that she wanted JW to tell Teleise what happened—and that JW then told Teleise that “they went to the side of the house and he pulled down her pants and her underwear and kissed her.” (Tr. 654-655.) Williams acknowledged that there was a period of time that JW and Defendant were outside of the house with no other family members there. (Tr. 658.) She stated that the police showed up at her home between eleven and midnight but Defendant was not there. She stated that she didn't know where he was because he had not told where he was going. She explained that, although Defendant had driven home with her, he had not come into the house. (Tr. 659-661.) Teleise Williams admitted that Defendant expressed to her the notion that it would help him if his mother kept JW from coming in to testify against him. (Tr. 662.)

LAW AND ARGUMENT

PROPOSITION OF LAW NO. I: A TRIAL COURT'S DETERMINATION THAT OFFENSES SHOULD NOT MERGE PURSUANT TO R.C. § 2941.25 SHOULD BE AFFIRMED ABSENT AN ABUSE OF DISCRETION.

Summary of Argument:

Where a trial court considers the evidence and finds, based on the facts presented, that two offenses are not allied, the trial court's factual determinations must be affirmed on appeal absent an abuse of discretion.

In this case, the trial court considered the evidence and arguments of the party and found that Defendant's kidnapping conviction was separately punishable from his rape convictions. Without giving any deference to the trial court's ruling on the facts, the Eighth District Court of Appeals reversed and held that Defendant's kidnapping and rape offenses should merge. However, since the trial court's findings were supported by the record and were neither unreasonable nor arbitrary, no abuse of discretion transpired and the Defendant's sentence should have been affirmed in its entirety.

In allied offense analyses, appellate courts must apply an abuse of discretion standard of review with regard to the lower courts' rulings on the facts.

Trial courts are in the best position to consider the unique facts of a given case.

This Supreme Court long ago determined that it is fundamental that "the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of facts." *State v. DeHass* (1967), 10 Ohio St.2d 230, 231, 227 N.E.2d 212. Evolving from this principle the Court has since held that a trial court is in the best position to resolve factual questions. *State v. Fanning* (1982), 1 Ohio St.3d 19, 20, 437 N.E.2d 583, citing *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212. The trial court is considered to occupy a superior advantage point in making fact-based determinations. See, *State v. Byrd*, 160 Ohio App.3d 538, 828 N.E.2d 133, 2005-Ohio-1902, ¶ 22, citing *Barbeck v. Twinsburg Twp.* (1992), 73 Ohio App.3d 587, 592, 597 N.E.2d 1204. "Consequently, an appellate court must accept the trial court's findings of fact if they are supported by

competent, credible evidence.” *State v. Roberts*, 110 Ohio St.3d 71, 850 N.E.2d 1168, 2006-Ohio-3665, ¶ 100.

Reliance must be placed in the trial court’s ability to ensure that criminal trials are fair and that no injustice is done to either party. Only when it appears that a trial court has failed in this trust should a reviewing court intervene. Thus, as a general proposition, reviewing courts should give deference to the trial judges, who see and hear the events and thus are in the best position to accurately evaluate the issue and determine the relevant facts and evidence in a given case. It is for this reason that appellate courts should only reverse trial court’s’ fact-based rulings where an abuse of discretion has occurred.³ As this Court stated in *State v. Ferranto*, 112 Ohio St. 667, 148

³ For example, “abuse of discretion” is the appropriate standard of appellate review in each of the following fact-based rulings by trial courts:

Rulings on consolidation or severance of offenses are reviewed for abuse of discretion. *State v. LaMar* (2002), 95 Ohio st.3d 181, 767 N.E.2d 166, 2002-Ohio-2128, *State v. McKnight*, 107 Ohio St.3d 101, 837 N.E.2d 315, 2005-Ohio-6046.

Rulings on motions for continuance, which call for the assessment facts, are reviewed for abuse of discretion. *State v. Blair*, 171 Ohio App.3d 702, 872 N.E.2d 986, 2007-Ohio-2417.

Rulings on the admission or exclusion of relevant evidence are reviewed for abuse of discretion. *State v. Davis*, 116 Ohio St.3d 404, 880 N.E.2d 31, 2008-Ohio-2.

Rulings on alleged juror misconduct are reviewed for abuse of discretion. *State v. Hessler*, 90 Ohio St.3d 108, 734 N.E.2d 1237, 2000-Ohio-30.

Rulings on motions for mistrial are reviewed for abuse of discretion. *State v. Trees*, 90 Ohio St.3d 460, 2001-Ohio-4, 739 N.E.2d 749.

Rulings on the appropriateness of requested jury instructions are reviewed for abuse of discretion. *State v. Lessin* (1993), 67 Ohio St.3d 487, 620 N.E.2d 72.

Rulings on motions for new trial are reviewed for abuse of discretion. Crim. R. 33; *State v. Schiebel* (1990), 55 Ohio St.3d 71, 564 N.E.2d 54, at paragraph one of the syllabus.

N.E. 362, “much latitude must be given the trial judge in the conduct of the cause before him. Unless that discretion appears to have been abused, it should not be disturbed.”
Id. at 683-684.

Allied offense analysis requires the determination of facts by a trial court.

R.C. §2941.25, Ohio’s multiple count statute, is a codification of the merger doctrine. This statute is used to enforce the constitutional protection against double jeopardy and to prevent multiple punishments for the same crime. It provides:

- (A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
- (B) Where the defendant’s conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

Recently this Court construed R.C. § 2941.25 and held, “If the offenses correspond to such a degree that the conduct of the defendant constituting commission

Rulings on motions to withdraw guilty plea are reviewed for abuse of discretion. *State v. Matthews*, 81 Ohio St.3d 375, 691 N.E.2d 1041, 1998-Ohio-433, *State v. Xie* (1992), 62 Ohio St.3d 521, 526-527, 584 N.E.2d 715.

Rulings on petitions for post conviction relief are reviewed for abuse of discretion. *State v. Gondor*, 112 Ohio St.3d 377, 860 N.E.2d 77, 2006 -Ohio- 6679, ¶ 1, *State v. Calhoun* (1999), 86 Ohio St.3d 279, 286, 714 N.E.2d 905.

Rulings on applications for DNA testing are reviewed for abuse of discretion. *State v. Buehler* (2007), 113 Ohio St.3d 114, 863 N.E.2d 124, 2007-Ohio-1246, at ¶ 37.

In each of these examples, trial courts must consider the facts presented and determine whether relief is appropriate; therefore, appellate courts only review the decisions for abuse of discretion.

of one offense constitutes commission of the other, then the offenses are of similar import.” *State v. Johnson*, 128 Ohio St.3d 153, 942 N.E.2d 1061, 2010-Ohio-6314, ¶ 48. Under *Johnson*, whether two offenses are subject to merger requires the fact-based consideration of the defendant’s conduct. Simply put, since trial courts must consider the facts of a defendant’s conduct, the trial courts’ allied offense rulings are not purely legal questions.

Prior to *Johnson*, some reviewing courts found that trial courts’ allied offense rulings were subject to a *de novo* standard of appellate review. *State v. Lee*, 190 Ohio App.3d 581, 943 N.E.2d 602, 2010-Ohio-5672; *State v. Cox*, Adams App. No. 02CA751, 2003-Ohio-1935; *State v. Volgares* (May 17, 1999), Lawrence App. No. 98CA6; *State v. Buckta* (Nov. 12, 1996), Pickaway App. No. 96 CA 3. The *de novo* standard seemed appropriate, especially in light of this Court’s holdings in *State v. Rance*, 85 Ohio St.3d 632, 710 N.E.2d 699, 1999-Ohio-291, and *State v. Cabrales*, 118 Ohio St.3d 54, 886 N.E.2d 181, 2008-Ohio-1625.

In *Rance* the Court found, “[a] problem inherent in the application of the test for similar/dissimilar import is whether the court should contrast the statutory elements in the abstract or consider the particular facts of the case. * * * [W]e believe the comparison of the statutory elements in the abstract is the more functional test, producing ‘clear legal lines capable of application in particular cases.’” *Id.* at 636. Then, in *State v. Cabrales*, 118 Ohio St.3d 54, 886 N.E.2d 181, 2008-Ohio-1625, the Court stated,

In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), courts are required to compare the elements of offenses in the abstract *without considering the evidence in the case*, but are not required to find an exact alignment of the elements. Instead, if, in comparing the elements of the offenses in the abstract, the offenses are so

similar that the commission of one offense will necessarily result in commission of the other, then the offenses are allied offenses of similar import.

Id. at paragraph one of the syllabus, (emphasis added). As the *Rance/Cabrales* approaches to allied offense analysis only involved questions of law—and did not necessitate any factual findings—*de novo* appellate review could be utilized. Indeed, “abuse of discretion” is not the appropriate standard when the matter in dispute involves purely a question of law. *State v. Futrall*, 123 Ohio St.3d 498, 918 N.E.2d 497, 2009-Ohio-5590. However, since *Johnson* specifically overruled *Rance*, and trial courts are now required to consider the conduct of the accused, *de novo* review of trial courts’ allied offense rulings is inappropriate.

The fact-based ruling as to whether a defendant’s conduct requires merger of offenses at sentencing—or whether his conduct justifies separate punishments for each crime—is a decision that must rest within the sound discretion of the trial court. In order to give full effect to *Johnson*, trial courts should have wide discretion in determining whether the facts establish separate acts, or a separate animus by the defendant, such that separately punishable crimes have been committed. As examination of the facts that demonstrate the conduct of the accused is such a crucial component of allied offense analysis under *Johnson*, a trial court’s determination of the facts should be afforded deference by a reviewing court. Accordingly, when an appellate court is asked to review a trial court’s allied findings, the appropriate standard of review must be “abuse of discretion.”

“Abuse of discretion” as a standard of review:

What constitutes an “abuse of discretion” depends on the facts in each particular case. An abuse of discretion is generally defined as more than an error of law of

judgment. *State v. Adams* (1980), 62 Ohio St. 2d 151, 157, 404 N.E.2d 144. Rather, an abuse of discretion “implies that the court’s attitude is unreasonable, arbitrary or unconscionable.” *Id.* When applying the abuse of discretion standard, an appellate court is not free to substitute its judgment for that of the trial judge. *State v. Herring*, 94 Ohio St.3d 246, 255, 762 N.E.2d 940, 2002-Ohio-796, quoting *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 169, 559 N.E.2d 1301.

Appellate courts’ use of “abuse of discretion” in allied offense review:

Several Ohio appellate district courts have used the “abuse of discretion” standard of review in allied offense analysis.

For example the Fourth District Court of Appeals has found abuse of discretion to be the appropriate standard. “The determination of whether two or more offenses constitute allied offenses of similar import is within the sound discretion of the trial court; the lower court should not be reversed absent a clear demonstration of an abuse of discretion that materially prejudiced appellant.” *State v. Cain*, Hocking App. No. 99CA025, 2001-Ohio-2447, *2. In *Cain*, the appellate court reviewed a trial court’s determination that a defendant’s rape and kidnapping convictions were separately punishable offenses. In *Cain*, the Fourth District Court of Appeals applied an abuse of discretion standard of review and affirmed the trial court’s ruling.

In applying the abuse of discretion standard of review the *Cain* court noted, An abuse of discretion is more than an error of judgment, but rather a demonstrated “perversity of will, passion, prejudice, partiality, or moral delinquency.” *Id.* citing, *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621, 614 N.E.2d 748, 1993-Ohio-122. The *Cain* court found that, while the elements of the rape and kidnapping offenses do align,

the trial court did not err in finding them to be separately punishable based on the facts.

The appellate court regarded the trial court's findings and held,

Therefore, we find that the trial court was incorrect in determining that kidnapping was not an allied offense of similar import to rape. However, we find that the lower court did not abuse its discretion in convicting appellant of both offenses because each offense was committed with a separate animus, thereby rendering them separate crimes and not allied offenses of similar import.

Accordingly, appellant's conviction for kidnapping is upheld.

Id. at *6.

Deference to a trial court's ruling was similarly provided in *State v. Townsend*, Licking App. No. 3375, 1988 WL 142277 in which the Fifth District Court of Appeals reviewed a trial court's determination that gross sexual imposition and kidnapping were allied offenses of similar import. The *Townsend* court held, "Establishing which animus is present for sentencing is deferred to the discretion of the trial court. * * * Upon review of the record, we find no abuse of discretion in the trial court's sentencing of defendant." Id. at *2. Similarly, in *State v. Silva*, Stark App. No. 2002CA00351, 2003-Ohio-4275, the Fifth District Court of Appeals examined forgery and theft and held "The trial court, therefore, did not abuse its discretion in failing to merge the crimes of theft and forgery and appellant's trial counsel was not ineffective in failing to request that such crimes be merged." Id. at ¶ 38.

Further, in *State v. Johnson*, Cuyahoga App. No. 91900, 2009-Ohio-4367 the Eighth District reviewed a trial court's rulings on the facts and gave deference to the lower court's decision. Id. at ¶ 62-68. In *Johnson*, separate sentences for rape and kidnapping were affirmed.

In *State v. Dean*, Portage App. No. 2010-P-0003, 2010-Ohio-5185, the Eleventh District Court of Appeals considered the trial court's separate sentences for the

defendant's kidnapping and aggravated robbery convictions under an abuse of discretion standard of review. That court held, "the trial court did not abuse its discretion in failing to merge them for sentencing." *Id.* at ¶ 40.

In *State v. Russell* (April 10, 1991), Summit App. No. 14714, 1991 WL 57331, the Ninth District Court of Appeals reasoned:

Russell contends that the trial court abused its discretion by sentencing him to allied offenses of similar import. Russell points to various counts in making this contention, but fails to undertake an analysis to demonstrate that the offenses in question are allied offenses of similar import. The question of whether verdicts should merge is an issue of fact to be determined by the trial court. *State v. Jennings* (July 12, 1989), Summit App. No. 13912, unreported; *State v. Rumschlag* (March 12, 1986), Summit App. No. 12270 and 12281, unreported. If the record contains sufficient evidence to support the court's findings, we will not substitute our judgment for the trial court's. *Id.*

We have reviewed the record and the testimony as to the various counts upon which Russell was convicted, and find that there was sufficient evidence upon which the trial court could properly refuse Russell's motion to merge the alleged allied offenses as the State adequately demonstrated that the numerous offenses occurred separately or with separate animi.

Id. at *7. Earlier, in *State v. Jennings* (July 12, 1989), Summit App. No. 13912, 1989 WL 77230, the Ninth District stated,

Whether the verdicts should merge is an issue of fact to be determined by the trial court. Although one incident looms as the direct cause of death and serves as the underlying felony to the involuntary manslaughter charge, the record contains sufficient evidence for the trial court to find, under these facts, that child endangering and involuntary manslaughter are not allied offenses of similar import under R.C. § 2941.25. We will not substitute our judgment for that of the trial court.

Id. at *7, citing *State v. Rumschlag* (March 12, 1986), Summit App. No. 12270 and 12281, unreported.

As illustrated by these cases, appellate courts have applied an abuse of discretion standard of review to instances where allied offense arguments were first fully litigated and facts were decided in the trial courts. An abuse of discretion standard is equitable,

practical, and a sound use of judicial resources. The standard is a fair one, and it should be required in all cases where the trial court has already heard the evidence and arguments and made a ruling about merger. When trial courts preside over the evidence and determine that two offenses do not merge under R.C. § 2941.25, then that decision should stand unless it is unreasonable, arbitrary, or unconscionable.

In this case, the appellate court failed to allow deference to the trial court's findings.

With regard to merger, the trial court considered the facts and evidence of Defendant's conduct as proven during his trial. The court found,

But I want to talk about the kidnapping in the sense that we heard evidence about it which was that he took her arm and pulled her along and got her behind the garage. I believe under the multiple count statute, this is separate conduct because, let's face it, had he done that and got her behind the garage and then she got away, we would still have a kidnapping.

And I think it's fair to say this falls into his conduct constituting two or more offenses of dissimilar import, as between the rapes and the kidnapping, and there is the fact that this conduct was committed separately. First he escorted and kidnapped her, and secondly, he raped her.

And he had a separate animus as to each kind of conduct, as between the rape and the kidnapping, there's a separate animus. So I don't think there is a merger there.

(Tr. 787-788.) Upon appeal, deference should have been afforded to these findings.

In fact, Defendant's kidnapping of this victim was of a sufficiently separate character to warrant its own sentence. Defendant raped his eight year old niece behind her grandmother's car. He then pulled her by the arm between two houses where he picked her up, put her on the ground, and raped her again. In reality there were three times and manners in which Defendant unlawfully restrained the victim. First, when he raped her behind the vehicle. Next, when he forcibly dragged her by the arm to the

location between two houses. Last, when he raped the victim between the houses. Such substantial and prolonged movement justifies a kidnapping conviction that is legally separate and apart from the convictions for the acts of rape. See, *State v. Moore* (1983), 13 Ohio App.3d 226, 228, 468 N.E.2d 920, *State v. Johnson*, Cuyahoga App. No. 91900, 2009-Ohio-4367, ¶ 62-68; *State v. Evans*, Cuyahoga App. No. 85396, 2005-Ohio-3847, ¶ 23, *State v. Logan* (1979), 60 Ohio St.2d 126, 135, 397 N.E.2d 1345.

Yet, upon review, the Eighth District reversed the trial court's decision. The Eighth District reasoned "[t]he indictment alleged that the kidnapping was sexually motivated and therefore [Defendant's] animus for the kidnapping and the rape was the same or, stated differently, the rape and the kidnapping were a single act, committed with a single state of mind." *State v. Williams*, Cuyahoga App. No.94616, 2011-Ohio-925, ¶ 61. While the kidnapping count may have had a sexual motivation, the kidnapping itself was not merely incidental to the rape. Further, the Eighth District's dependence on the language of the indictment in merging Defendant's rape and kidnapping offenses is inconsistent with this Court's holding in *State v. Johnson*, 128 Ohio St.3d 153, 942 N.E.2d 1061, 2010-Ohio-6314. Moreover, the appellate court's analysis failed to consider the guidelines established in *State v. Logan* (1979), 60 Ohio St.2d 126, 131, 397 N.E.2d 1345. While the elements of each offense are unquestionably important guideposts for a merger analysis, this Court has made it clear that allied offense review must go beyond the elements.

Without question, the trial court was in the best position to hear and consider the evidence of Defendant's conduct. Based on the evidence submitted the trial court properly determined that Defendant's act of kidnapping was distinct, substantial, and separately punishable. Upon review, the appellate court gave no deference to the trial

court's ruling. Despite the fact that the trial court's decision cannot be said to demonstrate an unreasonable, arbitrary or unconscionable attitude, the appellate court reversed. This result demonstrates the need for a rule of law from this Supreme Court delineating the appropriate standard of review in allied offense cases—that of “abuse of discretion.”

CONCLUSION

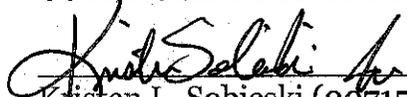
It is within the trial court's discretion to determine, based on the evidence, whether two similar offenses were committed by separate acts or with a separate animus. Therefore, a trial court's ruling must be affirmed on appeal unless an abuse of discretion is established. Deference to trial courts' factual findings should be afforded by appellate courts in all allied offense analyses.

The State of Ohio respectfully requests this Honorable Court adopt its proposition of law: A trial court's determination that offenses should not merge pursuant to R.C. § 2941.25 should be affirmed absent an abuse of discretion.

Respectfully submitted,

WILLIAM D. MASON
CUYAHOGA COUNTY PROSECUTOR

BY:



Kristen L. Sobieski (0071523)
Assistant Prosecuting Attorney
1200 Ontario Street, 8th Floor
Cleveland, Ohio 44113
216.443.7800
ksobieski@cuyahogacounty.us

CERTIFICATE OF SERVICE

A true and accurate copy of the foregoing Merit Brief of Plaintiff-Appellant the State of Ohio was sent by regular United States Mail on this 28th day of November 2011 to the following:

JONATHAN N. GARVER, ESQ.
4403 St. Clair Avenue
The Brownhoist Building
Cleveland, OH 44103



Kristen L. Sobieski (007623)
Assistant Prosecuting Attorney

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94616

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JASON WILLIAMS

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED IN PART AND
REVERSED IN PART**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-526542

BEFORE: Sweeney, J., Blackmon, P.J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: March 3, 2011

ATTORNEY FOR APPELLANT

Jonathan N. Garver, Esq.
4403 St. Clair Avenue
The Brownhoist Building
Cleveland, Ohio 44103-1125

ATTORNEYS FOR APPELLEE

William D. Mason, Esq.
Cuyahoga County Prosecutor
By: Katherine Mullin, Esq.
Assistant County Prosecutor
1200 Ontario Street
Cleveland, Ohio 44114

JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellant Jason Williams appeals following his convictions for rape, gross sexual imposition, and kidnaping. For the reasons that follow, we affirm in part and reverse in part.

{¶ 2} At trial, the victim, who was at the time appellant's eight year old niece, testified at trial describing events she alleged had occurred at her residence on June 22, 2009. According to her, she was alone outside with appellant when he told her to sit down on his lap; then, he pulled up her skirt

and underwear and put his mouth on her “private.”¹ They were behind her grandmother’s car in the backyard. Then appellant pulled her by the arm between two houses. At that point, he picked her up and put her on the ground and put his “private” on her “private” and was bouncing on top of her.

When the victim’s aunt called for her, the victim went inside of the house and told her grandmother and aunt what had transpired.

{¶ 3} The victim testified that appellant did not try to kiss her or try to touch her neck. However, the medical records, that were created on the night of the incident, reflect that while appellant was being examined by the Sexual Assault Nurse Examiner (the “SANE nurse”), she told the nurse that appellant’s hand went inside the lips of her vagina. The victim also reported that appellant had kissed her genitalia and neck. The SANE nurse noted redness to the labia minora that was consistent with the victim’s story.

{¶ 4} The victim’s underwear and skin stain swabs tested positive for amylase, a component of saliva. Appellant’s DNA was consistent with the DNA profile obtained from the victim’s underwear.

{¶ 5} The State also presented the testimony of the victim’s grandmother and aunt, who were present in the house when the victim entered and reported the incident that had occurred with appellant. Neither

¹The victim identified her “private” as the front of her body where she goes to the bathroom and described the appellant’s “private” as the front “boy part” that is used to go to the bathroom.

the grandmother nor the aunt had witnessed the incident. Both women confronted appellant who denied it. The women described the victim as nervous, shaking, with dirt on the back of her clothing.

{¶ 6} The State also presented the testimony of a police officer who had responded to the report of a sexual assault and the detective who was assigned to the case. The state's exhibits included photographs, drawings, the victim's clothing, medical records, the rape kit, and laboratory reports.

{¶ 7} The appellant presented the testimony of his wife. Appellant's wife was inside the victim's home with her own children on the night of the incident. They had stopped by so that appellant could assist his step-mother by moving items into the basement. She did not observe appellant and the victim while they were alone outside. According to appellant's wife, the two were only alone for a few seconds after which the victim entered the house. The victim did not appear to be upset. She spoke with the victim on the phone after returning home that night who accused appellant of taking her by the side of the house, pulling down her underwear and kissing her.

{¶ 8} The jury found appellant guilty of all counts, the trial court found appellant not guilty of the sexually violent predator specifications. The trial court imposed various sentences on the multiple counts, running them all concurrently, for an aggregate sentence of twenty-five years to life in prison. Appellant assigns numerous errors for our review, which will be addressed

together where it is appropriate for discussion.

{¶ 9} “Assignment of Error No. I: The trial court denied appellant due process of law and equal protection of the law, violated the privilege against self-incrimination, and committed plain error by allowing the State to introduce evidence of appellant’s custodial status and his post-arrest silence.”

{¶ 10} “Plain error” exists if the trial court deviated from a legal rule, the error constituted an obvious defect in the proceedings, and the error affected a substantial right of the accused. *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68, 759 N.E.2d 1240. We recognize plain error “with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.” *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, at paragraph three of the syllabus.

{¶ 11} Appellant cites to excerpts from the victim’s grandmother’s testimony and the detective’s testimony that indicate that appellant was in jail. However, the record reflects that the parties stipulated to appellant’s custodial status. The trial court advised the jury of the following stipulation: “The defendant was being held in county jail before he was officially charged in this case.” (Tr. 598.) Because the parties stipulated to this fact and there was no objection to the referenced testimony, its admission was not plain error.

{¶ 12} Secondly, appellant believes that the detective wrongfully

commented on his post-arrest silence. Appellant's position is not supported by the testimony that consisted of the detective explaining that she did not talk to appellant because he had an attorney. This was not a comment on appellant's silence but instead explained that the detective did not even attempt to have a conversation with him.

{¶ 13} The first assignment of error is overruled.

{¶ 14} "Assignment of Error II: The trial court committed plain error by allowing the prosecution to elicit inadmissible hearsay testimony from the complainant's mother regarding nightmares the complainant was allegedly experiencing as a result of the alleged sexual assault."

{¶ 15} Appellant contends that plain error occurred when the State elicited testimony from the victim's grandmother that the victim was having nightmares. The specific testimony is:

{¶ 16} "Q: So you noticed that she has these nightmares because she is sleeping with you?

{¶ 17} "A: Yes. She talks in her sleep now, too.

{¶ 18} "Q: Does she ever talk about what happened then?

{¶ 19} "A: She be saying no. I know she says she had a dream that [appellant] was over her and that she told her brother to jump into the water. He was holding onto [appellant] by the leg so he can jump in to save him and her alone. That's the only one she really talked about."

{¶ 20} Appellant believes this testimony constitutes hearsay and was highly prejudicial because, in his opinion, it provided compelling corroboration for the victim's claim that appellant sexually assaulted her. The testimony was not offered to prove the truth of the statements. Further, the alleged nightmare had nothing to do with sexual assault and therefore did not provide any corroboration to the victim's allegations that led to the charges against appellant in this case. The defense did not object to this line of questioning and the admission of the testimony did not rise to the level of plain error.

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

{¶ 22} "Assignment of Error III: The trial court committed prejudicial error in admitting drawings made by the alleged victim when she was interviewed by a detective and by admitting a drawing made by the detective."

{¶ 23} Appellant contends that pictures drawn by the appellant that depicted innocuous events that took place at the victim's house on the day of the incident were irrelevant, had no evidentiary value and were admitted in violation of Evid.R. 402.

{¶ 24} All relevant evidence is admissible. Evid.R. 402. Relevant evidence is evidence " * * * having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or

less probable than it would be without the evidence.” Evid.R. 401.

{¶ 25} “The trial court has broad discretion in the admission and exclusion of evidence and unless it has clearly abused its discretion and the defendant has been materially prejudiced thereby, this court should be slow to interfere.” *State v. Hymore* (1967), 9 Ohio St.2d 122, 128, 224 N.E.2d 126.

{¶ 26} The credibility of the child witness was at issue in this case. No one witnessed the events that she reported had occurred between her and appellant. The victim testified concerning the events leading up to the incident with appellant, which were depicted in the drawings. Further, the admission of these drawings was not highly prejudicial to appellant as they could have equally caused a reasonable juror to question the victim’s credibility based upon the fact that she did not depict anything that would corroborate her allegations of sexual assault. Therefore, the admission of these drawings was relevant to a fact in issue, namely the victim’s credibility.

{¶ 27} Appellant further contests the trial court’s admission of the drawings contained in State’s Exhibit 14. The detective explained that she utilizes these anatomical drawings when interviewing children in order to have them identify the various body parts. The detective writes down the terminology the child uses to identify each body part. The purpose is to enable the detective to be able to refer to those body parts with the same words the child uses. Appellant did not object to this line of questioning.

However, appellant did object to the admission of State's Exhibit 14 on the basis that it was "irrelevant and redundant. [The victim] was able as well as other witnesses testifying to view exact body parts." However, in this assignment of error, appellant now asserts that the anatomical drawings constituted inadmissible hearsay.

{¶ 28} Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." In this instance, the drawings were not used or introduced to prove that appellant did anything to the victim. Instead, the drawings served only to establish the terminology the child used when referring to various body parts. Accordingly, they did not constitute hearsay.

See *State v. Boston* (Nov. 22, 1995), Cuyahoga App. No. 68419 (a child's identification of "things" on two anatomically correct drawings did not demonstrate what the accused did or attempted to do, nor did it implicate the accused in any activity and therefore the drawings did not constitute hearsay).

{¶ 29} The third assignment of error is overruled.

{¶ 30} "Assignment of Error IV: The court committed plain error by giving jury instructions on the issue of credibility which invaded the province of the jury.

{¶ 31} "Assignment of Error V: The court committed plain error by

giving jury instructions on the offenses of rape, gross sexual imposition, and kidnapping which invaded the province of the jury and were tantamount to a directed verdict on two of the essential elements of the offense of rape, to wit: (i) the victim was under 13 years of age at the time of the offense; and (ii) the victim was under 10 at the time of the offense.

{¶ 32} “Assignment of Error VI: The trial court committed plain error by improperly shifting the burden of proof to the defendant on two of the essential elements of the offense of rape.

{¶ 33} “Assignment of Error VII: The trial court committed plain error by giving a jury instruction that improperly dilutes the statutory definition of force.

{¶ 34} “Assignment of Error VIII: The trial court committed plain error by giving a jury instruction on the offense of rape that was hopelessly confusing and incomprehensible.”

{¶ 35} With respect to jury instructions, a trial court is required to provide the jury a plain, distinct, and unambiguous statement of the law applicable to the evidence presented by the parties to the trier of fact. *Marshall v. Gibson* (1985), 19 Ohio St.3d 10, 12, 482 N.E.2d 583.

{¶ 36} We note that defendant did not object to the court’s jury instructions relating to this assignment of error; therefore, we review this issue for plain error. See *State v. Wamsley*, 117 Ohio St.3d 388,

2008-Ohio-1195, 884 N.E.2d 45, at ¶25. See, also, Crim.R. 30(A). An erroneous jury instruction does not amount to plain error unless, but for the error, the result of the trial clearly would have been different. *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804.

¶37 Instructions to a jury “may not be judged in artificial isolation but must be viewed in the context of the overall charge.” *State v. Price* (1979), 60 Ohio St.2d 136, 398 N.E.2d 772, paragraph four of the syllabus. Taken as a whole, we find that the trial court’s instructions effectively advised the jury on the charged offenses.

¶38 First, appellant asserts that the trial court erred by instructing the jury as follows:

¶39 “Remember the testimony of one witness believed by you is sufficient to prove any fact. Discrepancies in a witness’ testimony or between his or her testimony does not necessarily mean that you should disbelieve a witness, as people commonly forget facts or recollect them erroneously after the passage of time.”

¶40 Appellant did not object to this instruction. The trial court gave extensive instructions to the jury concerning how to assess and weigh the credibility of the witnesses and stated that the jury would decide the credibility of the witnesses. The trial court also instructed the jury that they could believe or disbelieve all or any parts of the testimony of a witness. The

Ohio Supreme Court has reviewed a challenge to a substantially similar jury instruction and determined that it did not amount to error. *State v. Cunningham*, 105 Ohio St.3d 197, 2004-Ohio-7007, 824 N.E.2d 504, ¶¶ 51-56. Appellant maintains that the following additional language was outcome determinative in the Ohio Supreme Court's decision in *Cunningham*:
“* * * in considering the discrepancy in a witness [sic] testimony, you should consider whether such discrepancy concerns an important fact or a trivial fact.” Id. at ¶54. However, in *Cunningham*, the Court did not focus on this language but based its determination on considering the credibility instruction as a whole. Applying that analysis here, we find no error. Viewing the credibility instruction in its entirety, the portion isolated by appellant did not invade the province of the jury to decide witness credibility, nor did it result in plain error. The fourth assignment of error is overruled.

{¶ 41} Appellant next contends that plain error occurred because he believes the trial court invaded the province of the jury by stating the alleged date of birth of the victim. Appellant argues that the trial court's jury instruction relieved the jury of its duty to determine an element of the charged offenses, that is, the victim's age. Appellant's interpretation is not supported when the jury instructions are considered as a whole. The trial court clearly instructed the jury that it had to find that the victim was under the age of thirteen years old before they could find him guilty under count

one. Likewise, the trial court instructed the jury it had to find that the victim was under the age of ten years old before they could find him guilty of other offenses. The fifth assignment of error is overruled.

{¶ 42} In the sixth assignment of error, appellant contends that the trial court improperly shifted the burden of proof on certain elements of rape. At one point, the trial court did erroneously instruct the jury that the “defendant” had to prove that he purposely compelled the victim to submit by force or threat of force. Neither party objected or otherwise noted on the record the obvious misstatement. Nonetheless, shortly after, the trial court began explaining the verdict forms and correctly instructed the jurors, “if you are not convinced, the State didn’t prove it, and you will put did not.” Further, appellant ignores the balance of the jury instructions where the trial court clearly advised the jury that the State bore the burden of proof, that the appellant did not have to prove anything, and that appellant did not have the burden of proof. When the jury instructions are viewed in the entirety, the isolated misstatement by the trial court did not constitute plain error. The sixth assignment of error is overruled.

{¶ 43} Appellant’s seventh assignment of error contends the trial court’s instruction on the force element of rape was “diluted” and constituted plain error. Although appellant acknowledges that the alleged victim was his minor niece, he asserts that the psychological force instruction was not

warranted absent special circumstances. The instruction provided by the trial court was proper in this case. *State v. Eskridge* (1988), 38 Ohio St.3d 56, 526 N.E.2d 304; see also, *State v. Welch*, Cuyahoga App. No. 93035, 2010-Ohio-1206, ¶16, (“where there was not a parent-child relationship, but instead an uncle-niece relationship, this court held that psychological force could be inferred from the inherent authority the adult male held over the child.”), citing, *State v. Byrd*, Cuyahoga App. No. 79661, 2002-Ohio-661. The seventh assignment of error is overruled.

{¶ 44} In his final challenge to the jury instructions, appellant asserts that the trial court’s instruction on rape was incomprehensible and confusing. Appellant raised no objection to it in the trial court. In particular, appellant contends that the trial court injected the concept of “duress” into the charge. However, the trial court’s use of the term duress was in the context of the element of force and describing the type of evidence that could be considered in determining whether it was established in this type of case that involved a minor child who was related to the accused. The trial court’s instructions were proper. See, *Eskridge*, 38 Ohio St.3d at 59 (“[w]e also recognize the coercion inherent in parental authority when a father sexually abuses his child. “* * * Force need not be overt and physically brutal, but can be subtle and psychological. As long as it can be shown that the rape victim’s will was overcome by fear or duress, the forcible element of rape can be established.”)

The trial court's use of the term "duress" was in reference to the jury's duty to determine whether the State had proved the element of force beyond a reasonable doubt. The eighth assignment of error is overruled.

{¶ 45} "Assignment of Error IX: The evidence was insufficient to support the charge of gross sexual imposition under Count III (alleged kissing on the neck)."

{¶ 46} "Assignment of Error X: The evidence was insufficient to support the charge of rape under Count I (digital penetration of victim's vagina)."

{¶ 47} "Assignment of Error XI: The evidence was insufficient to support the charge of rape under Count II (placement of mouth on victim's vagina.)"

{¶ 48} An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is 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. Thompkins* (1997), 78 Ohio St.3d 380, 386, 678 N.E.2d 541.

{¶ 49} The victim testified that appellant pulled down her underwear and put his mouth on her private. While the victim initially indicated that appellant did not use his hand on her or touch her private with his hands, she

stated in other testimony that he did. The SANE nurse testified that the victim reported that appellant had kissed her on the neck and had put his hand inside the lips of her vagina. The medical records corroborate this fact.

The SANE nurse further observed redness to the labia minora that would be consistent with the victim's report. Laboratory reports and testimony indicate that a component of saliva was detected on the swabs taken from the victim's neck. There was sufficient evidence, that if believed, would support each of the challenged convictions. Assignments of error nine, ten and eleven are overruled.

{¶ 50} "Assignment of Error XII: Appellant's convictions are against the manifest weight of the evidence."

{¶ 51} To warrant reversal of a verdict under a manifest weight of the evidence claim, this Court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether, in resolving conflicts in evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.

{¶ 52} Appellant contends his convictions were against the weight of the evidence because he asserts the child victim's trial testimony should "trump" any prior inconsistent statements she made out of court. While there are

inconsistencies between the eight year old victim's statements on the night of the incident compared with her trial testimony at age nine years old, the inconsistencies do not establish that the jury clearly lost its way in resolving the conflicts or that it erred by finding appellant guilty of the various offenses. Beyond the child's testimony, the record contains testimony from an attending nurse, as well as medical records, lab reports, and testimony of other witnesses who confirmed that appellant's DNA was found on the victim's underwear. The twelfth assignment of error is overruled.

{¶ 53} "Assignment of Error XIII: Appellant's conviction for rape (Count I) and Gross Sexual Imposition (Count V) are improper under the Ohio Rev. Code §2941.25 and constitute plain error."

{¶ 54} "Assignment of Error XIV: Appellant's convictions for rape (Counts I and II) and kidnaping (Count VI) are improper under Ohio Rev. Code §2941.25."

{¶ 55} The Ohio Supreme Court recently established the proper analysis for determining whether offenses qualify as allied offenses subject to merger pursuant to R.C. 2941.25. *State v. Johnson*, _____ Ohio St.3d _____, 2010-Ohio-6314, _____ N.E.2d _____.

{¶ 56} "In 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.

{¶ 57} “If the multiple offenses can be committed by the same conduct, then the court must determine whether the offenses were committed by the same conduct, i.e., “a single act, committed with a single state of mind.” *Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, at ¶ 50 (Lanzinger, J., dissenting).

{¶ 58} “If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged.

{¶ 59} “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.” *Id.* at ¶¶ 48-51.

{¶ 60} First appellant maintains that his conviction for rape under Count I and gross sexual imposition under Count V were allied offenses that the trial court should have merged. The State counters that these acts were distinct and were committed with a separate animus, i.e., Count I involved the placement of appellant’s fingers into the victim’s vagina and Count V

involved appellant touching victim's thigh. These counts, therefore, were not allied offenses of similar import.

{¶ 61} Appellant next asserts that his rape convictions under Counts I and II were allied. The State counters that these also were distinct acts committed with a separate animus, i.e., Count II involved appellant putting his mouth on the victim's vagina. Because Counts I and II involved different acts with a separate animus, they are not allied offenses. Finally, appellant maintains that the kidnaping conviction should have been merged as an allied offense. The State maintains that this also constituted a separate act with a distinct animus. However, we find the same conduct supports appellant's rape and kidnaping conviction. The indictment alleged that the kidnaping was sexually motivated and therefore appellant's animus for the kidnaping and rape was the same or, stated differently, the rape and kidnaping were a single act, committed with a single state of mind. Accordingly, the fourteenth assignment of error is sustained in part and this matter must be remanded to the trial court for further proceedings concerning the allied offenses.²

²"If the reviewing court concludes that two offenses are allied offenses of similar import under R.C. 2941.25, the State may elect which of the offenses to pursue on resentencing. *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, ¶ 24. The trial court is bound to accept the State's choice and must merge the offenses into a single conviction for purposes of resentencing. *Id.*" *State v. Sanchez*, Cuyahoga App. Nos. 93569 and 93570, 2010-Ohio-6153 ¶51.

{¶ 62} “Assignment of Error XV: Appellant was deprived of his right to effective assistance of counsel.”

{¶ 63} To establish his claim of ineffective assistance of counsel, defendant must show that (1) the performance of defense counsel was seriously flawed and deficient; and (2) the result of appellant’s trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Brooks* (1986), 25 Ohio St.3d 144, 495 N.E.2d 407.

{¶ 64} Appellant essentially premises his ineffective assistance of counsel claim upon trial counsel’s failure to assert objections to errors he has identified in this appeal, specifically assignments of error 1-8 and 13-14. Applying the above standard of review to the record, we find that appellant has failed to establish a deficiency in his counsel’s performance or that the result of the trial would have been different had counsel raised the subject objections. To the extent we have sustained appellant’s assignment of error concerning the allied offenses of kidnaping and rape, we note that the analysis we employed to do so was the result of a recent change in the

applicable law. *Johnson*, supra. The fifteenth assignment of error is overruled.

{¶ 65} “Assignment of Error XVI: Appellant’s convictions should be reversed because the cumulative effect of the errors committed by the trial court violated Appellant’s right to a fair trial.”

{¶ 66} The Ohio Supreme Court defined the cumulative-error doctrine in *State v. Garner* (1995), 74 Ohio St.3d 49, 64, 656 N.E.2d 623. “Pursuant to this doctrine, a conviction will be reversed where the cumulative effect of errors in a trial deprives a defendant of the constitutional right to a fair trial even though each of numerous instances of trial court error does not individually constitute cause for reversal.” See, also, *State v. DeMarco* (1987), 31 Ohio St.3d 191, 509 N.E.2d 1256. Because the only error that we have sustained in this case will be addressed on remand, the cumulative-error doctrine does not apply and assignment of error sixteen is overruled.

{¶ 67} Judgment affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant’s conviction having been affirmed, any bail pending appeal is terminated.

Case remanded to the trial court for execution of sentence.

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

JAMES J. SWEENEY, JUDGE

PATRICIA ANN BLACKMON, P.J., CONCURS;

SEAN C. GALLAGHER, J., CONCURS. (SEE ATTACHED CONCURRING OPINION)

SEAN C. GALLAGHER, J., CONCURRING:

{¶ 68} I concur fully with the judgment and analysis of the majority. I write separately to address issues relating to appellant's fourteenth assigned error relating to allied offenses of similar import and merger of offenses under R.C. 2941.25.

{¶ 69} The majority opinion references the new analysis for merger of offenses under R.C. 2941.25 that was recently set forth in *State v. Johnson*, ___ Ohio St.3d ___, 2010-Ohio-6314, ___ N.E. 2d ___. *Johnson* overruled *State v. Rance* (1999), 85 Ohio St.3d 632, 710 N.E.2d 699, and established that the conduct of the accused must be considered when determining if offenses are allied offenses of similar import subject to merger under R.C. 2941.25.

{¶ 70} A careful reading of *Johnson* reflects that it does not expressly state that consideration of the legal elements of the offenses in question is eliminated, rather the case

holds that the conduct of the offender must be considered. “Given the purpose and language of R.C. 2941.25, and based on the ongoing problems created by *Rance*, we hereby overrule *Rance to the extent* that it calls for a comparison of statutory elements *solely* in the abstract under R.C. 2941.25. When determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25, *the conduct of the accused must be considered.*”

(Emphasis added.) *Johnson*, at __ 44.

{¶ 71} Thus, *Johnson* does not replace the analysis of legal elements, it supplements it. Clearly, an offender’s conduct cannot be considered in a vacuum. It must have some context. The legal elements of the crimes at issue provide that context, or backdrop, under which the offender’s conduct can be evaluated to determine if it warrants merger or a separate punishment. To this end, in overruling *Rance*, *Johnson* relied in part on a prior concurring opinion from Judge Whiteside in *State v. Blankenship* (1988), 38 Ohio St.3d 116, 526 N.E.2d 816. “In 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.

Blankenship, 38 Ohio St.3d at 119, 526 N.E.2d 816 (Whiteside, J., concurring) (“It is not necessary that both crimes are always committed by the same conduct but, rather, it is sufficient if both offenses *can be* committed by the same conduct. It is a matter of possibility, rather than certainty, that the same conduct will constitute commission of both

offenses.’ [Emphasis sic]). 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.” *Johnson*, at _ 48.

{¶ 72} Thus, in looking at multiple offenses, the legal elements of those offenses give us the needed guideposts for examining the defendant’s conduct to determine if multiple offenses could have been committed by the same conduct. While examining the conduct of the offender in relation to the offenses committed provides better clarity on the question of whether two offenses are allied offenses of similar import, the bigger challenge relates to how courts determine when an offender acts with a separate animus.

{¶ 73} Part of the analysis in *Johnson* relating to animus relied on an earlier concurring Ohio Supreme Court opinion authored by Justice Lanzinger. In Lanzinger’s concurring opinion in *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, two forms of felonious assault were at play: first, the causing of serious physical harm, and second, the causing of serious physical harm by means of a deadly weapon (essentially, two forms of the same offense with differing elements). Lanzinger found that when a singular act of stabbing with one purpose in mind implicates two versions of the felonious assault statute, no allied offense analysis was necessary because the offender could only be convicted of one crime. Lanzinger agreed with the view that the allied offense analysis “is implicated only in a situation where the conduct by a defendant could be construed to constitute two or more

offenses.” Id. at ¶ 49. Thus, examining the offender’s conduct within the context of the legal elements provides a means to understand when an offender acts with a separate or similar animus.

{¶ 74} *Johnson* does not give us a specific test to determine animus. We obviously cannot open the offender’s brain and examine intent. We have to look at the offender’s conduct in relation to the elements of the offenses and determine whether the offender is acting with a separate animus. This is the real challenge moving forward.

{¶ 75} Virtually all crimes start with an offender having “one purpose,” but this does not automatically mean that all the offenses the offender may commit during a course of conduct are slavishly tied to that initial criminal goal. The arsonist who breaks into a building with a purpose to set a fire that results in the deaths of the residents may arguably be punished separately for burglary, and even manslaughter or murder, in addition to the arson, if the analysis supports such a finding.

{¶ 76} In the instant case, the majority finds that rape and gross sexual imposition are distinct and committed with a separate animus. Thus, they were subject to separate convictions and punishments. The majority distinguished the rape from the gross sexual imposition, by the act of penetration. But how are we to determine if the sexual contact associated with gross sexual imposition is actually different from the intent to rape? It is arguable that both involve the “general” goal of some type of sexual gratification. There

must be some basis for finding the distinction.

{¶ 77} It may well be that the different conduct of penetration inherent in rape versus sexual contact with an erogenous zone under R.C. 2907.01(B) in a gross sexual imposition is enough to warrant separate convictions and punishments. The physical conduct involved in each offense is different enough to suggest a separate or distinct purpose or intent on its face. Touching the victim's thigh was not done to gain access to complete penetration. It was done for a separate purpose. Nevertheless, there may be times where a set of facts blurs or blends the offenses into one. One example may be penetration coupled with simultaneous sexual conduct.

{¶ 78} The majority also finds that the two counts of rape are separate offenses. This finding is based on the conduct of penetration by two separate means at two separate times. These two acts, while involving the same charged offense and arguably part of the offender's overall goal, are distinct by the offender's specific acts of penetration by differing means and at separate times. Arguably, either method or the separation of time, even if slight, could form the basis for finding distinctive conduct subject to separate convictions.

{¶ 79} Last, the majority finds that the kidnaping conviction is an allied offense of similar import that merges with the rape convictions. While I take some issue with the majority's reference to the sexual motivation specification as a partial basis for finding these are allied offenses of similar import, I nevertheless agree because the movement of the victim

is incidental to the underlying crime as interpreted by prior Supreme Court case law. The Ohio Supreme Court addressed a similar fact pattern in 1979 and found the offenses of kidnaping and rape were allied offenses of similar import. The court noted:

“Secret confinement, such as in an abandoned building or nontrafficked area, without the showing of any substantial asportation, may, in a given instance, also signify a separate animus and support a conviction for kidnaping apart from the commission of an underlying offense.

“The primary issue, however, is whether the restraint or movement of the victim is merely incidental to a separate underlying crime or, instead, whether it has a significance independent of the other offense. In the instant case, the restraint and movement of the victim had no significance apart from facilitating the rape. The detention was brief, the movement was slight, and the victim was released immediately following the commission of the rape. In such circumstances, we cannot say that appellant had a separate animus to commit kidnaping.

“We adopt the standard which would require an answer to the further question of whether the victim, by such limited asportation or restraint, was subjected to a substantial increase in the risk of harm separate from that involved in the underlying crime. If such increased risk of harm is found, then the separate offense of kidnaping could well be found. For example, prolonged restraint in a bank vault to facilitate commission of a robbery could constitute kidnaping. In that case, the victim would be placed in substantial danger.

“Looking at the facts in this case, we cannot find that the asportation of the victim down the alley to the place of rape presented a substantial increase in the risk of harm separate from that involved in the rape.”

State v. Logan (1979), 60 Ohio St.2d 126, 397 N.E.2d 1345.

{¶ 80} As the Supreme Court noted in *Johnson*, inconsistent results may occur for the same set of offenses in different cases because the analysis may vary because of the facts of

particular cases. As the law moves forward, both prosecutors and defense counsel alike will have to develop the record in each case to aid the trial judge and reviewing courts in assessing how to evaluate an offender's conduct. More careful and pointed questions regarding the alleged offender's conduct may well have to be asked at trial to support or refute a particular finding.

{¶ 81} In any event, I concur with the judgment and analysis of the majority.

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO)
)
 Plaintiff-Appellant)
)
 v.)
)
 JASON WILLIAMS)
)
 Defendant-Appellee)

CASE NO: 11-0619

On Appeal from the Cuyahoga
County Court of Appeals
Eighth Appellate District

Court of Appeals
Case No. CA-94616

NOTICE OF APPEAL OF APPELLANT STATE OF OHIO

WILLIAM D. MASON (0037540)

Katherine Mullin

By: KATHERINE MULLIN (0084122)
Counsel of Record
Cuyahoga County Prosecutor
Assistant Prosecuting Attorney
1200 Ontario Street
Cleveland OH 44113
Tel. (216)-443-7800
Fax (216)-443-7602

COUNSEL FOR APPELLANT, STATE OF OHIO

JONATHAN N. GARVER, ESQ.
4403 St. Clair Avenue
The Brownhoist Building
Cleveland, Ohio 44103

OFFICE OF THE OHIO PUBLIC DEFENDER
250 East Broad Street, Suite 1400
Columbus, OH 43215

COUNSEL FOR APELLEE, Jason Williams

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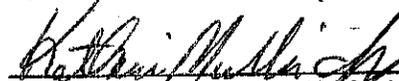
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APR 18 2011
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SUPREME COURT OF OHIO

NOTICE OF APPEAL OF APPELLANT STATE OF OHIO

Appellant, State of Ohio, hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District, entered in *State v. Williams*, Appeals Case No. 94616, Cuyahoga Common Pleas Case number CR-526542, on March 3, 2011.

This appeal raises a substantial constitutional question, involves a felony, or a question of public or great general interest and invokes this Court's discretionary authority pursuant to Art. IV, § 2(B)(2)(e) and S.Ct. R. II Section 1 (A)(2) and (3).

Respectfully submitted,
WILLIAM D. MASON (0037540)

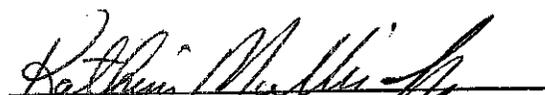

By: Katherine Mullin (0084122)
Counsel of Record
Cuyahoga County Prosecutor
Assistant Prosecuting Attorney
1200 Ontario Street
Cleveland OH 44113
Tel. (216)-443-7800
Fax (216)-443-7602

CERTIFICATE OF SERVICE

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail, postage prepaid, on this 15th day of April, 2011 to counsel for Appellee:

JONATHAN N. GARVER, ESQ.
4403 St. Clair Avenue
The Brownhoist Building
Cleveland, Ohio 44103

OFFICE OF THE OHIO PUBLIC DEFENDER
250 East Broad Street, Suite 1400
Columbus, OH 43215


Katherine Mullin (0084122)
Assistant Prosecuting Attorney