

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, : 12-0007
Plaintiff-Appellee, : On Appeal from the
v. : Montgomery County Court of
KYLE CARVER, : Appeals, Second Appellate
Defendant-Appellant. : District
Court of Appeals case
no. 24400

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT KYLE CARVER**

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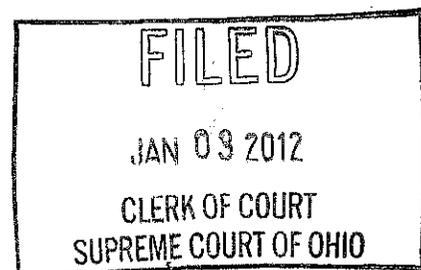


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THE JUDGMENT ENTERED BY THE COURT BELOW DEPRIVED APPELLANT OF HIS RIGHT TO TRIAL BY JURY AND DUE PROCESS OF LAW IN CONTRAVENTION OF HIS RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION. 12

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State v. Kyle Carver, 2nd District case no. 24400, 2011-Ohio-5955

WHY LEAVE SHOULD BE GRANTED

No criminal justice issue within the realm of the judiciary holds greater portent to the ongoing crisis of over-capacity of our state prison facilities and our serially under-resourced state budgets than the sole issue presented by this appeal: interpretation of the allied offense statute (R.C. 2941.25). Simply put, the greater the leeway permitted to sentencing courts for imposing consecutive prison terms upon multiple convictions, the more the judicial system contributes to this state crisis, whether the additional prison terms are justified or not.

In recognition of this crisis, Ohio legislators in September, 2011 officially re-shuffled state priorities in felony sentencing:

“The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources.”

R.C. 2929.11(A) (amendment in italics)

In step with the spirit of the newly modified priorities in felony sentencing, this Court should exercise vigilance over wayward appellate interpretations in the evolving allied offense jurisprudence, for missteps by appellate courts carry the potential for magnification many times over -case by case- in the sentencing courts within the sweep of its jurisdiction.

As such, this appeal presents an issue that should be front and center to this Court's oversight: misapplication of the “separate animus” test by which separate convictions (and consecutive prison terms imposed upon them) can be upheld, even though they otherwise would constitute allied offenses because of their overlapping application in the offense conduct. Of added importance, the separate convictions upheld in this case include Kidnapping (R.C. 2905.01), a highly technical-based offense which is far more likely than any other to be charged in connection to a

primary offense (e.g., Rape, Aggravated Robbery, etc.).

State v. Logan, 60 Ohio St.2d 126, 397 N.E.2d 1345 (1979) was an early decision interpreting the then-recently enacted allied offense statute, and through its syllabus set forth guidelines in interpreting the “separate animus” test of R.C. 2941.25(B) in relation to multiple charges of Kidnapping “with another offense of the same or similar kind.” Pertinent to this appeal, it held: “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.”

In the great majority of allied offense cases involving Kidnapping, the other offense offers the animus for the commission of the Kidnapping offense. In this case, however, both parties concede that the conduct in the commission of the Kidnapping and Felonious Assault offenses was for the purpose of committing sexual conduct, which was basis of several charges of Rape for which Appellant was not convicted at trial. This appeal, therefore, offers this Court a fresh canvass upon which to consider proper interpretation of what constitutes “separate animus” under the allied offense statute: is a different test warranted when the common purpose of two incidental offenses is committing another offense ?

The court below chopped the offense conduct that constituted Kidnapping into a single act of physical restraint which constituted choking, which also supplied the “incidental” factual basis of the Felonious Assault charge, and separate and apart from physical restraints which were exerted several times over a continuous three hour period of time to accomplish the sexual conduct with the victim. But Appellant was never charged with separate acts of Kidnapping. Nevertheless, the court below held that “those kidnapping by restraint offenses though committed for the same purpose as

the later kidnapping and felonious assault, had a significance independent of the felonious assault . . . [and] those kidnapping offenses do not merge with the later felonious assault.” *State v. Carver*, Second District case no. 24400, 2011-Ohio-5955 at ¶ 39 (emphasis added) .

This Court should accept review in this case and clarify the holding of *State v. Logan* that when Kidnapping and Felonious Assault (or another offense) are incidental offenses committed within a course of conduct in which the on-going purpose is committing another offense, the restraint incidental to the conduct resulting in the Felonious Assault is the only restraint to be considered in applying the test for separate animus of Kidnapping under R.C. 2941.25(B).

Applying such clarification to this case would result in one conviction for either Kidnapping or Felonious Assault. Had appellant been convicted of offenses relating to the sexual conduct, the sentencing court would then decide if those offenses were committed with a separate animus from Kidnapping associated with the restraints utilized to commit those offenses. In a different case where the restraint conduct and Felonious Assault were not “incidental” to each other, the defendant could be convicted of offenses relating to the sexual conduct, Kidnapping and Felonious Assault. Otherwise, the potential convictions would be limited of the offenses related to the sexual conduct, and the State’s election between Kidnapping and Felonious Assault. The fact that the defendant was not convicted of any offense relating to sexual conduct is analytically insignificant.

STATEMENT OF CASE AND FACTS

I. Proceedings below:

Appellant was charged by indictment in Montgomery County Common Pleas Court case no. 03-CR-3323, filed March 10, 2005, with the following offenses:

- (1) Unauthorized Use of Vehicle R.C. 2913.03(B)

- | | |
|-----------------------------|--------------------|
| (2) Rape | R.C. 2907.02(A)(2) |
| (3) Rape | R.C. 2907.02(A)(2) |
| (4) Rape | R.C. 2907.02(A)(2) |
| (5) Rape | R.C. 2907.02(A)(2) |
| (6) Rape | R.C. 2907.02(A)(2) |
| (7) Gross Sexual Imposition | R.C. 2907.05(A)(1) |
| (8) Kidnapping | R.C. 2905.01(A)(4) |
| (9) Felonious Assault | R.C. 2903.11(A)(1) |

Following a jury trial, the jury returned guilty verdicts as to Counts 1, 8 & 9; not guilty verdicts were returned in Counts 2,3, 5 & 6. The jury was unable to reach a verdict on Counts 4 & 7, and a mistrial (without prejudice) was ordered by the court below. At the sentencing hearing, the court below entered three maximum consecutive prison terms of twelve months, ten years, and eight years, for a total of nineteen years.

The judgment of conviction and sentence was affirmed on appeal. *State v. Carver*, 2nd District no. 21328, 2006-Ohio-5798. This Court declined further review. 113 Ohio St. 3d 1441, 2007-Ohio-1266, 863 N.E.2d 658. An application to re-open his appeal was granted, upon which the judgment of conviction and sentence were again affirmed in all respects. *State v. Carver*, 2nd District case no. 2138, 2008-Ohio-4631. This Court again denied further review. 113 Ohio St. 3d 1516, 2007-Ohio-2208, 866 N.E.2d 513.

On May 14, 2010, Appellant filed a motion for re-sentencing pursuant to *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958. After the motion was granted, Appellant filed a motion requesting the trial court to find that the offenses of conviction were allied offenses

under R.C 2941.25. A de novo re-sentencing hearing was held on December 3, 2010, which resulted in the trial court imposing the identical sentence to that originally imposed. This led to the instant appeal, wherein the court below affirmed the trial court's judgment in all respects. *State v. Carver*, 2nd District no. 24400, 2011-Ohio-5955.

II. *Statement of facts:*

[The following is a verbatim recitation of the evidence admitted at trial, as set forth in the lower court's opinion in *State v. Carver*, 2nd District case no. case 21328, 2008-Ohio-1431, and adopted in the decision by the court below.]

“{¶ 13} In late August, 2003, Carver and “M” were living together in M's apartment in Dayton. They met in March or April of 2003, when both were working for a telecommunications company, and they began dating in early August. Carver was approximately forty years old, approximately fourteen years older than M.

“{¶ 14} On August 28, 2003, Carver picked up M from work, and they returned to the apartment. There M discovered that her television was missing. Carver told her that he had pawned the television to get money. According to M, they argued and she later found a pawn ticket from Don's Pawn Shop in the car. At some point, Carver pulled out a crack pipe, lit it up, and had M watch him smoke it. Around 9:00 p.m., Carver left, saying that he was going to try to make some money to get her television back. Carver later returned with a cousin, J.R., and Carver and M “had a few more words.” Carver grabbed M's car keys, which were for a Chevrolet Cavalier owned by M's mother, and he left. M stated she thought he had left at approximately 3:00 a.m.

“{¶ 15} At approximately 3:00 a.m. on August 29, 2003, “B,” M's mother, was awakened by someone banging on the door to her apartment. B testified that she initially did not know who was at the door and she threatened to call the police if the person did not leave. However, she then

heard the mail slot open and Carver's voice say, "Mom, it's Kyle, I need to talk to you about [M]."

B let Carter into her apartment

"{¶ 16} After entering, Carver got a glass of water and sat on the couch in the living room. Carver told B that "this isn't really about [M]" and he started to unbutton his shirt. B tried to stand and move away, but Carver grabbed her and pulled her back down to the couch. B testified that Carver put his hand on her throat and threatened to strangle her if she screamed or made noise. Carver continued to undress and told her that "he was going to give [her] what [she] wanted." Carver then led B to her bedroom, where he performed oral sex on her and had vaginal intercourse. Afterwards, Carver and B returned to the living room so Carver could smoke a cigarette; B also smoked a cigarette.

"{¶ 17} B testified that she thought Carver would leave at that point. Instead, after approximately twenty minutes, Carver took B back to her bedroom, where they had vaginal intercourse again. B stated that she tried to prevent Carver from turning her over for anal intercourse by putting her legs around him. Carver then put his fingers in her rectum. Carver and B returned to the living room for more cigarettes, and Carver began to pull his pants up. However, he apparently changed his mind and choked B until she was almost rendered unconscious. Afterward, Carver dragged B back to the bedroom and had vaginal intercourse for a third time.

"{¶ 18} Carver again went back to the living room. There, Carver pulled out a crack pipe, lit it, and smoked it. Carver told B: "This is the reason I do stuff like this. I have a habit. This makes me ***do the bad things." Carver then stated that he had to go home and tell M. Carver took B's cell phone and her keys to the Cavalier. Carver started to hand B her cell phone, but then stated, "I'll leave it out there on the dumpster and that'll give me some time." B testified that Carver left

at approximately 6:00 a.m. B and M both testified that Carver did not have permission to use the vehicle.

“{¶ 19} After Carver left her apartment, B crawled to a neighbor’s apartment, and the police were called. B was transported to Good Samaritan Hospital, where she gave a statement to a sheriff’s deputy and a rape kit was completed, primarily by Julia Rismiller, a registered nurse. Photographs were taken of B’s neck, which was red. Several witnesses testified that B’s voice sounded raspy and hoarse in the hospital.

“{¶ 20} According to Mark Squibb, of the Miami Valley Regional Crime Laboratory, spermatozoa and semen were found on the vaginal and anal swabs. After Carver provide and DNA sample in February, 2005, Squibb identified Carver as the source of the semen on the vaginal swab. No DNA analysis was performed on the anal swab.

“{¶ 21} B’s car was recovered in September 2003 in Greensboro, North Carolina, after it was involved in an accident. M testified that Carver had a son who lived in Greensboro. In 2005, Carver was ultimately arrested in Pennsylvania and returned to Ohio.

“{¶ 22} Carver did not present any evidence at trial. However, his counsel asserted during opening statements that Carver and B had engaged in consensual intercourse. Defense counsel’s cross-examination also emphasized that B was taking several psychotropic medications at the time of the alleged sexual assault.”

PROPOSITION OF LAW I

KIDNAPPING AND FELONIOUS ASSAULT CAN BE ALLIED OFFENSES AND SUBJECT TO MERGER WHERE THE USE OF FORCE NECESSARY TO COMMIT THE FELONIOUS ASSAULT IS INCIDENTAL TO RESTRAINT UTILIZED IN COMMITTING THE KIDNAPPING, AND EACH OFFENSE SHARES THE SAME ANIMUS. *State v. Logan*, 60 Ohio St.2d 126, 397 N.E.2d 1345 (1979) construed.

Appellant was charged and convicted of one count of Kidnapping and one count of Felonious Assault on the basis of evidence adduced by the State of a three hour ordeal where, after obtaining entry into the victim's residence by deception, Appellant physically forced the victim from her living room to her bedroom on three separate occasions over a continuous three hour period of time. The force exercised in committing these offenses consisted of grabbing the victim by the throat and directing her to and from the bedroom. At one point she was nearly rendered unconscious by this physical manipulation. Her only physical symptoms diagnosed at the hospital where she was immediately taken following the ordeal revealed redness and swelling to her throat and a raspy voice.

According to the State's theory at trial, the Kidnapping charge was based upon the control of the victim exerted by Appellant by the means of holding her neck with one or both of his hands. As stated by the prosecuting attorney in the State's opening statement:

"We believe that the Defendant also engaged in Kidnapping for sexual purposes, when he has her by the throat, and he's dragging her from the couch into the bedroom and back and forth."

...

"... [H]e's had his hands on her throat throughout these three hours."

(TR Tr. at 8; 7)

And from the State's closing argument:

"... [H]e choked her into compliance."

(TR Tr. at 349)

The question of merger of these offenses did not arise until the re-sentencing hearing on December 3, 2010, three weeks prior to this Court's decision in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-63314, 942 N.E.2d 1061, wherein this Court of Ohio finally interred *State v.*

Rance, (1999), 85 Ohio St.3d 632, 1999-Ohio-291, 710 N.E.2d 699. The Court below correctly applied the *Johnson* decision in the appeal from the sentencing court's denial of the motion for merger:

{¶32} "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 [**11] 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.'

{¶33} "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).'

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

{¶35} "Conversely, if the court determines that the commission of one offense will never result in the commission of the other, or if the [**12] 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.'

State v. Carver, supra.

Applying the correct analysis, the court below arrived at the conclusion that:

"{¶38} We agree with Defendant that, under the rule *State v. Logan* (1979), 60 Ohio St.2d 126, his kidnapping and felonious assault charges were committed with the same animus, to the extent that they are limited to engaging in that particular conduct, because the restraint was merely incidental to the act of choking B. However, that was not the only act of restraint B's [sic] conduct involved.

“{¶39) Over the entire three-hour episode, Defendant restrained B multiple times, all for the purpose of engaging in sexual activity with her. Those kidnapping by restraint offenses, though committed for the same purpose as the later kidnapping and felonious assault, had a significance independent of the felonious assault. Logan. Furthermore, they were committed separately from the restraint that later kidnapping involved. The jury could find Defendant guilty of kidnapping in violation of R.C. 2905.01(A)(4) on the basis of evidence it heard concerning anyone of the those prior, separate restraints. Being committed separately, those kidnapping offenses do not merge with the later felonious assault.”

Id.

The analysis of the court below would be sound if Appellant had been found guilty by the jury of any of the sex offenses charged against him. Likewise, the analysis would be sound if there had been multiple counts of Kidnapping associated with the court's opinion that there had been “multiple restraints” aside from the restraint associated with the choking. But since the jury that heard the evidence relied upon by the court below rejected almost all of the State's evidence in relation to the four counts of Rape which resulted in acquittals and no verdicts finding guilt of any charged sex offenses, it seems quite fanciful to presume that this jury would or should have entered convictions in relation to kidnapping charges relating to restraint for the purpose of committing those offenses.

On the basis of this record, the court below erred in presuming guilt of uncharged restraints for the purpose of committing sex offenses which were charged but rejected or not found by the jury. In applying *State v. Logan* to determine whether there was sufficient basis to conclude that other restraints as presented in the State's case were “separate” or whether there was independent significance from restraint associated with the Felonious Assault, the court below cannot ignore, as it did, the rejection of that evidence by the trier of fact.

On the basis of this record, the court's proper focus in applying *State v. Logan* should have

been limited to the restraint that the jury surely did convict upon, which was the restraint associated with the choking that provided the factual basis of the Felonious Assault charge. This was the State's theory of the case as actually presented and argued to the jury.

As to whether the restraint associated with the offense conduct which constituted the Felonious Assault were "allied offenses," the court below seems to accept Appellant's argument to that effect, but never really explicitly expressed that holding. As to whether Kidnapping and Felonious Assault can be allied offenses, the answer seems to be "maybe." Or so answered visiting Judge Alba Whiteside in his oft-quoted opinion in *State v. Blankenship*, supra: "[u]nder these circumstances, the two offenses [Felonious Assault and Kidnapping] were committed separately and defendant could be convicted of both offense under R.C. §2941.25 *even though the two offenses may be allied offense of similar import under different circumstances.*" Id. (Emphasis supplied).

That conclusion is fortified by the decision of another appellate another court has recently held that under the facts of the case under review, Kidnapping and Felonious Assault constituted allied offenses of similar import, where the offender may be found guilty of both offenses but sentenced only for one. *State v. Wilson*, 8th District case no. 91971, 2010-Ohio-1196 ¶¶ 94-96, *aff'd on other grounds*, 129 Ohio St.3d 214, 2011-Ohio-2669. In that case the court concluded that the Kidnapping was completely incidental to the Felonious Assault, although the mutual animus in the factual context of that record was causing serious physical harm and/or terrorizing the victim rather than sexual activity.

Since the court below did state its acceptance of Appellant's argument that the offense conduct of the restraint associated with the choking was "incidental," and because the court below did state its agreement that the purpose of both offenses was "for the purpose of engaging in sexual

activity,” Id at ¶ 39, there is sufficient basis in the decision of the court below to conclude that the Kidnapping conviction and Felonious Assault conviction were allied offenses and subject to merger.

PROPOSITION OF LAW II

THE JUDGMENT ENTERED BY THE COURT BELOW DEPRIVED APPELLANT OF HIS RIGHT TO TRIAL BY JURY AND DUE PROCESS OF LAW IN CONTRAVENTION OF HIS RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

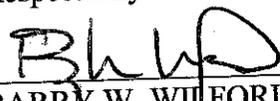
The decision of the court below imposed additional punishment based upon its finding that Appellant could of been convicted of Kidnapping based upon testimony of restraints other than the restraint associated with the choking which was the basis of the Felonious Assault charge. This supposition stands in stark contrast with the fact that there was not multiple charges of Kidnapping associated with those “separate” restraints brought against Appellant, nor did the jury enter any findings of guilt which would support the court’s supposition.

It is submitted that the action of the court below exceeded what the Sixth and Fourteenth amendments guarantee: a right to trial and a jury determination before punishment can be imposed for criminal conduct. *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

CONCLUSION

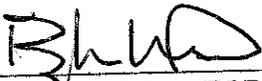
This Court should accept review of this appeal, reverse the judgment of the court below, and remand for proceedings consistent with its judgment and opinion.

Respectfully submitted,


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Counsel for Appellant Kyle Carver

PROOF OF SERVICE

A copy of this Memorandum was forwarded by U.S. Postal Service first class mail to Andrew French, Assistant Montgomery County Prosecuting Attorney, P.O. Box 972, Dayton, OH 45422, this 3rd day of January, 2012.



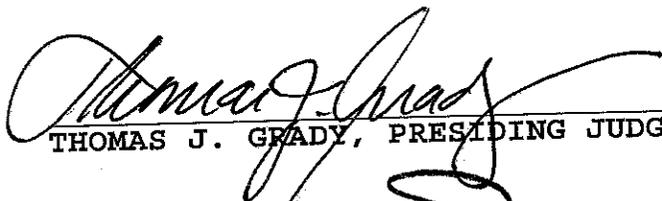
BARRY W. WILFORD

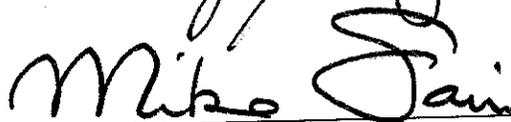
IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO :
Plaintiff-Appellee : C.A. CASE NO. 24400
vs. : T.C. CASE NO. 03CR3323
KYLE CARVER : FINAL ENTRY
Defendant-Appellant :

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Pursuant to the opinion of this court rendered on the
18th day of November, 2011, the judgment of the trial
court is Affirmed. Costs are to be paid as provided in App.R.
24.


THOMAS J. GRADY, PRESIDING JUDGE


MIKE FAIN, JUDGE


MICHAEL T. HALL, JUDGE

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Hon. Barbara P. Gorman

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO :
Plaintiff-Appellee : C.A. CASE NO. 24400
vs. : T.C. CASE NO. 03CR3323
KYLE CARVER : (Criminal Appeal from
Defendant-Appellant : Common Pleas Court)

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O P I N I O N

Rendered on the 18th day of November, 2011.
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Attorney for Defendant-Appellant
.

GRADY, P.J.:

Defendant, Kyle Carver, appeals from a de novo resentencing hearing the trial court conducted pursuant to *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, in order to properly impose post release control.

The facts of this case were set forth in our previous opinion, *State v. Carver*, Montgomery App. No. 21328, 2008-Ohio-4631, as follows:

"{¶ 13} In late August 2003, Carver and 'M' were living

together in M's apartment in Dayton. They had met in March or April of 2003 when both were working for a telecommunications company, and they began dating in early August. Carver was approximately forty years old, approximately fourteen years older than M.

"{¶ 14} On August 28, 2003, Carver picked up M from work, and they returned to the apartment. There, M discovered that her television was missing. Carver told her that he had pawned the television to get money. According to M, they argued and she later found a pawn ticket from Don's Pawn Shop in the car. At some point, Carver pulled out a crack pipe, lit it up, and had M watch him smoke it. Around 9:00 p.m., Carver left, saying that he was going to try to make some money to get her television back. Carver later returned with a cousin, J.R., and Carver and M 'had a few more words.' Carver grabbed M's car keys, which were for a Chevrolet Cavalier owned by M's mother, and he left. M stated she thought he had left at approximately 3:00 a.m.

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"{¶ 16} After entering, Carver got a glass of water and sat on the couch in the living room. Carver told B that 'this isn't

really about [M]' and he started to unbutton his shirt. B tried to stand and move away, but Carver grabbed her and pulled her back down to the couch. B testified that Carver put his hand on her throat and threatened to strangle her if she screamed or made noise. Carver continued to undress and told her that 'he was going to give [her] what [she] wanted.' Carver then led B to her bedroom, where he performed oral sex on her and had vaginal intercourse. Afterwards, Carver and B returned to the living room so Carver could smoke a cigarette; B also smoked a cigarette.

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"{¶ 22} Carver did not present any evidence at trial. However, his counsel asserted during opening statements that Carver and B had engaged in consensual intercourse. Defense

counsel's cross-examination also emphasized that B was taking several psychotropic medications at the time of the alleged sexual assault."

In 2005 Defendant was indicted on one count of unauthorized use of a motor vehicle, R.C. 2913.03(B), five counts of rape, R.C. 2907.02(A)(2), one count of gross sexual imposition, R.C. 2907.05(A)(1), one count of kidnapping, R.C. 2905.01(A)(4), and one count of felonious assault, R.C. 2903.11(A)(1). Following a jury trial, Defendant was found not guilty on four of the rape charges, and the jury was unable to agree on a verdict on one of the rape charges and the gross sexual imposition charge, which resulted in the trial court declaring a mistrial on those offenses. Defendant was found guilty of unauthorized use of a motor vehicle, kidnapping, and felonious assault. The trial court sentenced Defendant to consecutive prison terms of twelve months for unauthorized use of a motor vehicle, ten years for kidnapping, and eight years for felonious assault, for a total sentence of nineteen years.

We affirmed Defendant's conviction and sentence on direct appeal. *State v. Carver*, Montgomery App. No. 21328, 2006-Ohio-5798. We subsequently granted Defendant's motion to reopen his appeal, and once again affirmed his conviction and sentence. *State v. Carver*, Montgomery App.No. 21328, 2008-Ohio-4631. At no time in either his initial direct appeal or in his reopened appeal did Defendant ever raise an allied offenses issue regarding his kidnapping and felonious assault convictions.

On May 14, 2010, Defendant filed a motion in accordance with then controlling law, *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, seeking a de novo re-sentencing hearing because the trial court failed to properly impose post release control. The trial court granted Defendant's motion for resentencing. On December 1, 2010, Defendant filed a motion to dismiss the kidnapping charge based upon double jeopardy and the allied offenses statute, R.C. 2941.25. The issue Defendant raised pertained to the relationship between the kidnapping and the rape charges, not the kidnapping and the felonious assault charge. On December 3, 2010, the trial court conducted a de novo resentencing hearing. The court overruled Defendant's motion to dismiss the kidnapping charge, and reimposed the same prison terms originally imposed. The court also imposed the appropriate terms of post release control applicable to each of Defendant's offenses.

Defendant timely appealed to this court from his re-sentencing.

ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED BY FAILING TO FIND THAT THE OFFENSES OF KIDNAPPING AND FELONIOUS ASSAULT WERE ALLIED OFFENSES UNDER R.C. § 2941.25, AND MERGED FOR CONVICTION AND SENTENCING PURPOSES."

In his sole assignment of error, Defendant argues that the trial court erred in sentencing him for both kidnapping and felonious assault because those are allied offenses of similar

import that must be merged pursuant to R.C. 2941.25 and the rule of *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314.

Defendant was found guilty of kidnapping in violation of R.C. 2905.01(A)(4), which provides:

"No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall remove another from the place where the other person is found or restrain the liberty of the other person, for any of the following purposes:

"To engage in sexual activity, as defined in section 2907.01 of the Revised Code, with the victim against the victim's will."

Defendant was also found guilty of felonious assault in violation of R.C. 2903.11(A)(1), which provides:

"No person shall knowingly do either of the following:

"Cause serious physical harm to another or to another's unborn[.]"

In discussing allied offense of similar import, we stated in *State v. Freeders*, Montgomery App. No. 23952, 2011-Ohio-4871:

"{¶ 13} The Double Jeopardy Clause of the United States Constitution, which applies to the States through the Fourteenth Amendment prohibits multiple punishments for the same offense. *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, at ¶10. However, the Double Jeopardy Clause only prohibits a sentencing court from prescribing greater punishment than the legislature intended. *Id.*, at ¶11. The two-tiered test set forth in R.C. 2941.25, Ohio's multiple count statute, resolves both the

constitutional and state statutory inquiries regarding the General Assembly's intent to permit cumulative punishments for the same conduct. *Id.*, at ¶12. However, it is not necessary to resort to that test when the legislature's intent to impose multiple punishments is clear from the language of the statute. *Id.*, at ¶37.

"{¶ 14} Ohio's multiple counts statute, R.C. 2941.25, provides:

"{¶ 15} '(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.'

"{¶ 16} '(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.'

"{¶ 17} In *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, the Ohio Supreme Court announced a new test for determining when offenses are allied offenses of similar import that must be merged pursuant to R.C. 2941.25. *Johnson* overruled the previous test announced in *State v. Rance* (1999), 85 Ohio St.3d 632, and held: '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.' *Id.* at syllabus. The

Supreme Court explained its holding at ¶47-51, stating:

"{¶ 18} 'Under R.C. 2941.25, the court must determine prior to sentencing whether the offenses were committed by the same conduct. Thus, the court need not perform any hypothetical or abstract comparison of the offenses at issue in order to conclude that the offenses are subject to merger.'

"{¶ 19} '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.'

"{¶ 20} '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).'

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

"{¶ 22} '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.'

"{¶ 23} Johnson is a welcome relief from the abstractions of Rance and is more consistent with R.C. 2941.25 in that the tests it imposes apply to the conduct in which the defendant actually engaged. If that conduct can be construed to violate two or more sections of the criminal code, the offenses involved are allied offenses of similar import per R.C. 2941.25(A). The offenses must then be merged unless the conduct in which Defendant engaged was committed separately or with a separate animus as to each offense. R.C. 2941.25(B)."

Defendant Carver argues that his offenses of kidnapping and felonious assault are allied offenses of similar import that must be merged pursuant to R.C. 2941.25, because in placing his hands around B's neck and then choking her to the point of unconsciousness, he acted for the same purpose, which was to engage in sexual activity with B. Therefore, he acted with but a single animus, and his acts involved the same conduct.

We agree with Defendant that, under the rule of *State v. Logan* (1979), 60 Ohio St.2d 126, his kidnapping and felonious

assault charges were committed with the same animus, to the extent that they are limited to engaging in that particular conduct, because the restraint was merely incidental to the act of choking B. However, that was not the only act of restraint B's conduct involved.

Over the entire three-hour episode, Defendant restrained B multiple times, all for the purpose of engaging in sexual activity with her. Those kidnapping by restraint offenses, though committed for the same purpose as the later kidnapping and felonious assault, had a significance independent of the felonious assault. Logan. Furthermore, they were committed separately from the restraint that later kidnapping involved. The jury could find Defendant guilty of kidnapping in violation of R.C. 2905.01(A)(4) on the basis of evidence it heard concerning any one of those prior, separate restraints. Being committed separately, those kidnapping offenses do not merge with the later felonious assault.

Defendant's sole assignment of error is overruled. The judgment of the trial court will be affirmed.

FAIN, J., And HALL, J., concur.

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