

ORIGINAL

NO. 2011-0619

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IN THE SUPREME COURT OF OHIO

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

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STATE OF OHIO,

Plaintiff-Appellant

-vs-

JASON WILLIAMS,

Defendant-Appellee

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**REPLY BRIEF OF APPELLANT, STATE OF OHIO**

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## STATEMENTS OF THE CASE AND FACTS

Plaintiff-Appellant the State of Ohio relies on its statements of the case and facts as set forth in its merit brief.

### 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.***

The jury found Defendant guilty of multiple offenses including rape, kidnapping and gross sexual imposition. After the jury verdict but prior to Defendant's sentencing, the trial court heard argument and weighed relevant portions of the evidence in making its determination regarding allied offenses. (Tr. 782-791.) Based on its analysis of the evidence, the trial court concluded that Defendant's conduct in the kidnapping was committed separately and with a separate animus such that separate but concurrent sentences for his kidnapping and rape offenses were required. (Tr. 790-791.)

The trial court's ruling that the facts and evidence in this case rendered these kidnapping and rape offenses independent (and not subject to merger) was a sound exercise of discretion. Certainly other criminal cases involving similar charges of kidnapping and rape may be subject to merger, but based on the facts of this case, Defendant was properly sentenced for each of these crimes. As the determination of whether two offenses merge under R.C. § 2941.25 necessarily involves a weighing of evidence and consideration of the defendant's conduct, such rulings must be reviewed on appeal for abuse of discretion.

With regard to allied offense analysis, Defendant alleges that a trial court does nothing more than strictly apply law to a jury's findings of fact. However, pursuant to this Court's decision in *Johnson*, a trial court's assessment of the defendant's conduct is

an essential component of the allied test. *State v. Johnson*, 128 Ohio St.3d 153, 942 N.E.2d 1061, 2010-Ohio-6314, ¶ 48. With regard to rape and kidnapping, trial courts must consider the evidence to decide whether the restraint of the victim was prolonged, whether the victim was moved, and whether the kidnapping subjected the victim to an increased in risk of harm. *State v. Logan* (1979), 60 Ohio St.2d 126, 131, 397 N.E.2d 1345. Consideration of these factors necessitates a weighing of the State's evidence beyond the manner that was undertaken by the jury during the guilt phase of trial.

In this case the trial court properly concluded that Defendant's two rape and one kidnapping offenses were separately punishable. As Defendant concedes in his merit brief to this Court, the facts of Defendant's conduct are not in dispute. Here, the trial court assessed those undisputed facts and found that Defendant committed the kidnapping separately and with a separate animus.

The trial court's finding of separate conduct was factually supported and legally justified based on the victim's testimony. The child was eight when Defendant committed these crimes. She testified that he first pulled down the front of her clothes and put his mouth on her "private." (Tr. 339-340.) Then Defendant forced her to the second location where he picked her up and put her on the ground (Tr. 340-341) and raped her again.

Similarly, the trial court's finding of separate animus was proven by the facts. "Animus" refers to the defendant's immediate motive. *Id.* Animus is inferred from the surrounding circumstances. *Id.* at 131, citing *State v. Robinson* (1975) 48 Ohio App.2d 197, 205, 356 N.E.2d 725, affirmed (1976) 47 Ohio St.3d 103, 114, 351 N.E.2d 88. Defendant had already committed an act of rape upon the victim before he forced her to the second location where he put her on the ground and committed another act of rape.

Since the first offense had already been completed, what was the Defendant's immediate motive in moving the child to the next location?

From the facts of this case, the trial court reasonably inferred that Defendant had a separate additional immediate motive in moving the victim—a motive beyond rape. (Tr. 791.) He had already raped her. He was a grown man and she a child; surely he could have completed any acts against her at the first location in the backyard without forcing the girl to a different location. It is clear that Defendant moved the victim both to prolong his restraint of her and to further secret his acts against her. Perhaps the first location was too visible, or within earshot of the others. Defendant was not finished with the child but he decided to move her before he raped her again. His forcible movement of the victim undeniably increased the risk of harm to her. That decision to move the victim, as demonstrated by the facts and evidence of Defendant's conduct, renders his kidnapping of the victim separately punishable from the rape offenses.

The trial court's finding that Defendant's crimes were committed separately and with a separate animus should only have been reversed upon an abuse of discretion. Appellate courts must not be free to substitute their own judgment for that of the trial judges. *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.

Contrary to Defendant's assertion, an abuse of discretion standard of review would not condone "bad calls" by trial courts. Rather, application of this appellate standard of review would simply give deference to trial court findings in those instances where the trial court has taken the time and effort to hear arguments and assess evidence and make allied offense determinations prior to sentencing.

Allied offense analysis does not always happen first in the trial courts. Many times the issue is first raised upon appeal. *State v. Johnson*, 128 Ohio St.3d 153, 942 N.E.2d 1061, *State v. Johnson*, Hamilton App. No. C-080156, 2009-Ohio-2568, ¶ 47-50; *State v. Winn*, 121 Ohio St.3d 413, 905 N.E.2d 154, 2009-Ohio-1059, *State v. Winn*, 173 Ohio App.3d 202, 877 N.E.2d 1020, 2007-Ohio-4327, at ¶ 26; *State v. Cabrales*, 118 Ohio st.3d 54, 886 N.E.2d 18, 2008-Ohio-1625, ¶ 3; *State v. Rance*, 85 Ohio St.3d 632, 633, 710 N.E.2d 699, 1999-Ohio-291. Thus, it seems that Defendant's concern that "bad calls" will be condoned if an abuse of discretion standard of review is utilized is unfounded.

Consistency and uniformity in allied offense jurisprudence are laudable goals that are shared by trial courts across this State. These goals are undiminished, however, when trial courts simultaneously apply the principle that every criminal matter presents unique defendants and victims, unique facts and evidence, which require individualized assessment of the evidence by trial judges.

When the trial court found that the Defendant's kidnapping and rape offenses were separately committed separately and with a separate animus, that decision should have been reviewed on appeal only for an abuse of discretion. Here, the trial court committed no such abuse when it found the kidnapping to be independently significant, from a penal standpoint, from the rapes of this child.

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.

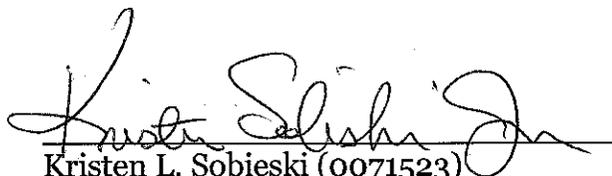
**CONCLUSION**

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,

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CUYAHOGA COUNTY PROSECUTOR

BY:

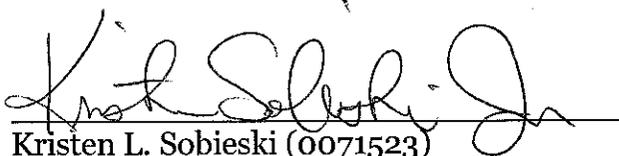


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**CERTIFICATE OF SERVICE**

A true and accurate copy of the foregoing Reply Brief of Plaintiff-Appellant the State of Ohio was sent by regular United States Mail on this 6<sup>th</sup> day of February 2012 to the following:

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