

CASE NO. _____

**IN THE SUPREME COURT OF OHIO
COLUMBUS, OHIO**

12-1638

STATE OF OHIO,

Plaintiff-Appellant,

vs.

CHARLES ROSS PORE,

Defendant-Appellee.

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SUPREME COURT OF OHIO

**ON MOTION FOR LEAVE TO APPEAL FROM
THE OHIO COURT OF APPEALS FOR STARK COUNTY,
FIFTH APPELLATE DISTRICT,
CASE NO. 2011-CA-00190**

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF PLAINTIFF-APPELLANT, STATE OF OHIO**

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WHY THE CASE SHOULD BE ACCEPTED FOR REVIEW

This case presents this Court with an opportunity to address the confusion that its decision *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 161, has created throughout the states's trial and appellate courts with regard to what constitutes allied offenses of similar import under R.C. 2941.25. As a result of that confusion, the court of appeal in the instant case misapplied *Johnson* and this Court's earlier decision of *State v. Logan*, 60 Ohio St.2d 126, 14 O.O.3d 373, 397 N.E.2d 1345 (1979), finding that the crimes of rape and kidnapping in this case were not committed with a separate animus, and thus qualified as allied offenses of similar import. Recognizing that there were three different standards offered in the fractious *Johnson* decision, the appellate court settled on the one offered by Justice O'Donnell, and then applied this test in such a manner that rape could never be a separately committed offense from kidnapping except possibly in the most extreme cases, and thereby altering significantly the *Logan* criteria. Judge Patricia A. Delaney dissented from the appellate court's decision, correctly concluding that *Johnson* did not impact the separate-animus analysis set forth in *Logan*, and noted the following:

I would find the following factors set forth in *Logan* exist in this case: Pore held the victim at knife point and moved the victim from one room to another, to wit: from the kitchen to the bedroom, from the bedroom to the front door to lock it and impede anyone from leaving or entering, and then back to the bedroom. This evidence sufficiently demonstrates substantial movement which has significance beyond the underlying offense (to prevent escape and detection) and was independent from the rape. Moreover, the record also shows Pore, while in the bedroom initially, ordered the victim to disrobe and then proceed to cut off her bra with the knife, therefore causing the victim a substantial increase in risk of harm separate and apart from that involved in the underlying rape.

Thus, I would find under the circumstances of this case, there was substantial evidence that Pore committed the offenses of rape and kidnapping with a separate animus. Therefore, the crimes were not allied offenses and the trial court's finding should be affirmed.

State v. Pore, Stark App. No. 2011-CA-00190, 2012-Ohio-3660, 2012 WL 3292937, at ¶¶ 43-44 (Delaney, J., dissenting).

In addition to erroneously concluding that *Johnson* altered significantly *Logan*, the appellate

court also ignored the procedural context of this case. Pore pleaded guilty to the charged offenses, and did not object or raise any issues related to whether the offenses were allied offenses of similar import at the sentencing hearing. Out of an abundance of caution, the trial court *sua sponte* addressed the issue and concluded that they were not allied offenses of similar import, explained why it reached this conclusion, and then proceeded with sentencing. At no time did Pore object to the trial court's findings or conclusions. Instead, he raised the issue for the first time on appeal. Under these circumstances, the appellate court should have found that Pore waived his right to raise the claim on appeal, i.e., he knowingly waived the issue. The court of appeals, however, erroneously proceeded as if Pore had preserved the claim for appellate review. Under this paradigm, therefore, criminal defendants can remain mute at the trial court proceedings, sandbagging the prosecution and the trial court into avoiding the issue altogether, and then raise the claim on appeal with an imperfect, if non-existent, record.

The Court should therefore accept this case for review to address the confusion that the several decisions in *Johnson* have created, to address the impact that *Johnson* has on *Logan*, and to address the procedural posture of defendants raising an allied offenses of similar import claim for the first time on appeal.

STATEMENT OF THE CASE AND FACTS

In 2011, Charles Ross Pore was charged by indictment with one count each of statutory rape, kidnapping, aggravated burglary, and notice of change of address. These charges included a combination of specifications. Instead of standing trial, however, Pore opted to plead guilty to these charges and specifications. After accepting his guilty plea and convicting him, the Stark County Court of Common Pleas sentenced Pore to an aggregate indeterminate prison term of 57 years to life. The trial court also classified Pore as a Tier III sex offender.

Pore appealed his convictions and sentences to the Court of Appeals for Stark County, Fifth

Appellate District, raising four assignments of error. The court of appeals, however, only addressed the first assignment of error, i.e., that the separate convictions and consecutive sentences for the charges of aggravated burglary, rape, and kidnapping were invalid since the offenses were allied offenses of similar import. The court, in a split decision, found that while the aggravated burglary charge did not qualify, the rape and kidnapping convictions did. The court thus vacated the sentence on those offenses and remanded the case to the trial court for further proceedings.¹

Pore's Confession to Police

Pore was questioned by police about the sexual assault, and waived his constitutional rights and gave the police a confession of his crimes.² He told Detective Victor George of the Canton Police Department that he had stalked his victim. Without being employed or having money, Pore approached his victim, Erin Thompson, at her residence, which was for sale. Pore had ascertained that Thompson lived there with a roommate, Amy Bosworth. Pore inquired about the house, and Thompson told him to talk with Bosworth since she was the true owner of the house. When Pore called Bosworth, she told him to go through the realtor, who was Deb McCracken. Pore called McCracken and gave her a fake name (Mike Davis), and feigned interest in buying the house.

On February 27, 2011, Pore came to the house in mid-afternoon and found Thompson home alone. Pore told Thompson that he wanted to leave some contact information, so Thompson let him into the house and led him to the kitchen, where Pore could write on a table. Pore then asked Thompson for a tissue as he had a runny nose, so Thompson turned to get a tissue. Pore took advantage of this move to pull his steak knife, which he took from his girlfriend's kitchen, and ordered Thompson to do what he told her to do and she wouldn't get hurt.

¹*State v. Pore*, Stark App. No. 2011-CA-00190, 2012-Ohio-3660, 2012 WL 3292937.

²A copy of the transcript of this taped interview is attached to Pore's merit brief as Appendix E.

Pore next marched the scared Thompson into a bedroom and ordered her to take off her clothes and get naked. Once she complied, Pore marched her to the front door of the residence and had her lock the front door. Pore then led her back to the bedroom armed with his knife. Pore then had Thompson get on the bed doggie-style first, and then on her back, as he attempted to penetrate her vaginally with his penis. Before trying to enter her, Pore used his finger to stimulate Thompson's vagina in order to make entry easier. According to Pore, however he was still unable to enter her, in part because Thompson allegedly would not keep still. Thompson also kept asking Pore why he was doing this, and asking him to leave. Pore claimed that he reassured the frightened woman by telling her that he wasn't going to hurt her. After some 30 minutes, Pore finished and left the home. He later threw away all of his clothing and the knife in a dumpster in the neighborhood.

Pore admitted to Detective George that he had been convicted of an attempted rape in 1996. Pore also began that sexual assault by using his finger to try to stimulate his victim's vagina, but was nonetheless unable to penetrate his victim.

Victim's Written Statement to Medical Personnel

In addition to Pore's confession to police, the discovery in this case included hospital records pertaining to the treatment of Thompson at Aultman Hospital after this sexual attack.³ These records included a written statement by Thompson about the attack. This statement recited the following:

"I was laying down I heard a knock [at] the door. He had inquired about the house [and] did not show up on the 23rd for appt. [with] realtor. Said he want to leave his information. He use the table to write the note. He ask for a Kleenex. When I came back, he had a knife [and] said I was going to do what he said. He kept telling me not to try anything and then that was in the hallway. He held the knife I was walking backwards [and] he forced me into my [roommate's] room and he

³Pore has included a copy of these records as Appendix F to his merit brief. The quoting of this written statement herein is made with a minimum of grammatical changes.

made me get on the bed [and] take my clothes off so I did. I guess I wasn't moving fast enough so he cut my bra off and then I made me go out [and] lock the front door then took me back to the bedroom [and] made me get on the bed. At that point I think he had me on my stomach [and] touched my vaginal area. I not sure when he took his pants off. He still had the knife to my neck. Then he kept telling me not to scream [and] put the knife near my fact. He had me turn over [and] tried to penetrate but I not sure if he actually penetrated, but he was still using his hands. I'm not sure it didn't last a long time. He gave up. He got up [and] put his pants on and said, "I don't know what I'm doing." He opened up the door [and] told me to get dressed [and] get cleaned up. He wasn't forcing me to go to the bathroom. He said don't call the police or he would leave out the side door [and] stayed in Amy's room until my roommate [and] fiancée got home. I gave her the note and called the police [and] they told me to come here."

Prosecutor's Recitation of Facts

At the guilty plea hearing, the trial court asked the prosecutor to give a recitation of facts the State would prove if the case had gone to trial.

"The facts as outlined in the state's Bill of Particulars are that, ah, it would show that the defendant did, ah, engage in deceptive acts in order to enter the victim's home, ah, in which she was alone at the time, ah, that he produced a knife and that he did then force her into a room where he engaged in sexual conduct with her.

"Ah, the facts would also show that, ah, the defendant, given his previous criminal history had a duty to register as a sex offender, that he had, ah, not changed his address with the Stark County Sheriff's Office, ah, because the evidence would show that he had been residing, ah, at a, an address that was not listed with the sheriff's office. And forgive me. I don't have this at my disposal, but I can find it, the address where he was residing.

"It would also show that given his history, his criminal history, with regard to the

specifications, the evidence would show that pursuant to the statute that he is a person who chronically commits offenses with a sexual motivation. And that would be based upon available information, ah, and evidence suggesting that, as that applies to the specifications. Um, it also, ah, would show that he does qualify as a repeat violent offender, again, given his convictions for the felonious assault, the abduction, and then the prior case of abduction and attempt to commit rape.”⁴

The trial court addressed Pore after this recitation, asking him if the recitation was true. Pore responded that it was. T.(I) 56.

Trial Court's Recitation of Facts

At the subsequent sentencing hearing,⁵ the trial court, before imposing sentence, provided a recitation of facts based upon the record in this case, which included the discovery filed in the case. This recitation outlined the facts of Pore's crimes in this case. The trial court specifically stated:

“This was a particularly heinous group of crimes. The Defendant stalked and targeted his victim for a two-week period. He used deception to gain entry into the house. He employed a deadly weapon. He cut off some of the clothing with that knife. He threatened to use the knife on the victim if she screamed or called the police.

“This was an ordeal that lasted some time, between 30 minutes and 40 minutes, committed by an individual who is, based upon his record, very violent. He has convictions for felonious assault and abduction in 2004 and convictions for abduction and attempted rape in 1996.

“There wasn't much time between those two crimes before that felonious assault and abduction were committed in 2004, and remarkably and sadly the Defendant was out only 69 days, according to my calculations, from the time he was released from that '04 case on December 20,

⁴T.(I) 55-56.

⁵The transcript of proceedings of this sentencing hearing, conducted on August 3, 2011, will be referred in this brief as “T.(II).”

2010, to when this offense - - offenses were committed on February 27, 2011.

“The victim suffered serious psychological harm here, and this crime definitely affects the community. It makes individuals not feel safe in their homes. Also duped was the roommate and the realtor, and I am sure that they are - - will be forever cautious in showing homes and what they do in that regard.”⁶

Based upon these facts, the trial court made a specific finding that these crimes – rape, kidnapping, and aggravated burglary – were all committed with a separate animus.

In this case I believe that you did commit the worst form of the offenses of rape, kidnapping and aggravated burglary. It was a separate animus for each of those crimes. You can commit a burglary without committing a rape and a kidnapping. You can commit a kidnapping without a rape or an aggravated burglary, and you can commit a rape without the other, the other two crimes.

There was a separate animus as to each of these, and that animus was reflected by the way you set this crime up; the phone calls to the realtor and to Amy, the stalking and targeting for a period of two weeks, the deception to gain entry.

All of these indicate strongly to this Court that you had the specific intent to commit all three of these crimes, and I believe that anything further on any of these crimes would result in a different crime. So I believe that you committed the worst form of the offenses of all three of these crimes.

T.(II) 17-18.

The trial court further noted that Pore committed these crimes while on post-release control, only 69 days after his release from prison for the felonious assault and abduction sentences. T.(II)

19. Pore therefore posed the highest risk of recidivism, according to the trial court. T.(II) 18-19.

ARGUMENT

PROPOSITION OF LAW NO. I

THE SEPARATE ANIMUS TEST SET FORTH IN *STATE v. LOGAN*, 60 OHIO ST.2d 126, 14 O.O.3d 373, 397 N.E.2d 1345 (1979), WAS NOT ALTERED BY THE STANDARD SET

⁶T.(II) 15-17.

FORTH IN *STATE* v. *JOHNSON*, 128 OHIO ST.3d 153, 2010-OHIO-6314, 942 N.E.2d 1061, AND THUS A PROLONGED SEXUAL ASSAULT ON A VICTIM THAT INCLUDED CAREFUL PLANNING, ISOLATION OF THE VICTIM, RENDERING THE VICTIM HELPLESS AND VULNERABLE THROUGHOUT THE PROLONGED ATTACK ARE SUFFICIENT FACTS FOR A TRIAL COURT TO FIND A SEPARATE ANIMUS FOR THE CRIMES OF RAPE AND KIDNAPPING.

The court of appeals found that entering separate convictions and separate consecutive sentences for the charged offenses of rape and kidnapping were invalid in this case because the offenses, under the facts and circumstances of the case, constituted allied offenses of similar import. Pore asserted that these charged offenses constituted allied offenses of similar import per R.C. 2941.25, as interpreted by the Ohio Supreme Court most recently in *Johnson*.⁷ The trial court *sua sponte* found that these offenses were committed with a separate animus. The trial court's finding of separate animus was not challenged by Pore at any time before the trial court. Instead, he raised the issue for the first time on direct appeal. Despite his failure to raise the claim or raise an objection before the trial – which would have put the trial court and the prosecution on notice that this issue was in play – Pore remained mute, and the appellate court found that he had not forfeited the issue. These rulings were erroneous.

Pore's challenge to his separate convictions and sentences is made pursuant to double jeopardy principles under the federal and state constitutions. R.C. 2941.25 is Ohio's statutory device to implement these double jeopardy principles in criminal sentencing, and serves as a prophylactic rule to protect a defendant's double jeopardy rights.⁸ The statute provides in toto:

⁷*State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061.

⁸*See, e.g., State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, at ¶ 45 (“R.C. 2941.25 is a prophylactic statute that protects a criminal defendant's rights under the Double Jeopardy Clauses of the United States and Ohio Constitutions.”); *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, at ¶ 23 (“R.C. 2941.25 codifies the protections of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution, which prohibits multiple

(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 as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

R.C. 2941.25.

Thus, the statute sets forth a two-part standard for determining if any two offenses constitute allied offenses of similar import precluding separate convictions and sentences.

The first prong of this test, as codified in R.C. 2941.25(A), focuses on the statutes to determine whether particular offenses are allied offenses of similar import with each other. The second prong of the test, as codified in R.C. 2941.25(B), focuses on the conduct of the defendant in committing the offenses to determine whether the offenses were committed with a separate animus. Both of these prongs must be satisfied, i.e., that the offenses are allied offenses of similar import as defined by R.C. 2941.215(A) and were committed with the same animus per R.C. 2941.25(B), in order for a defendant to prevail on a claim that the convictions and sentences should be merged.

Pore focused on both prongs in his assignment of error. His focus on the first prong of the test relies upon the Ohio Supreme Court's most recent formulation of the allied-offenses-of-similar-import standard. In *Johnson*, the supreme court abandoned the "in-a-vacuum" standard of *Rance* for a modified standard that considers the conduct of the offender.⁹ If a defendant can meet this standard

punishments for the same offense."); *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, at ¶ 7 ("At the outset of our analysis, we recognize that [R.C. 2941.25] incorporates the constitutional protections against double jeopardy. These protections generally forbid successive prosecutions and multiple punishments for the same offense."); *State v. Rance*, 85 Ohio St.3d 632, 639, 1999-Ohio-291, 710 N.E.2d 699, 705.

⁹The supreme court specifically 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. *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, syllabus (overruling *State v. Rance*, 85 Ohio St.3d 632, 710 N.E.2d 699 (1999)).

that show that the offenses qualify as allied offenses of similar import under R.C. 2941.25(A), he must then meet the second prong of the standard and demonstrate that the offenses were committed with a separate animus under R.C. 2941.25(B). Therefore, even if the first prong is met, a defendant may nonetheless receive separate convictions and sentences if the second prong is not. As the supreme court reiterated in *Johnson*:

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.

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).

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

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.

State v. Johnson, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, at ¶¶ 48-51.

When assessing whether two or more offenses have been committed with a separate animus, the reviewing court must look to a number of factors pertaining to the defendant’s conduct and mental state. This analysis is particularly germane when one of the offenses is kidnapping. Restraining the freedom of movement of a victim is often necessary in order to complete other crimes against this victim. The Ohio Supreme Court set forth these factors when one of the offenses is kidnapping:

In establishing whether kidnapping and another offense of the same or similar kind are committed with a separate animus as to each pursuant to R.C. 2941.25(B), this court adopts the following guidelines:

(a) Where the restraint or movement of the victim is merely incidental to a separate underlying crime, there exists no separate animus sufficient to sustain separate convictions; however, where the restraint is prolonged, the confinement is secretive, or the movement is substantial so as to demonstrate a significance independent of the other offense, there exists a separate animus as to each offense sufficient to support separate convictions;

(b) Where the asportation or restraint of the victim subjects the victim to a substantial increase in risk of harm separate and apart from that involved in the underlying crime, there exists a separate animus as to each offense sufficient to support separate convictions.

State v. Logan, 60 Ohio St.2d 126, 14 O.O.3d 373, 397 N.E.2d 1345, syllabus.

Thus, the factual question is whether the evidence shows a prolonged restraint, significant asportation, or secret confinement of the victim or victims, or whether the restraint was merely incidental to the underlying crime.

In deciding this prong, the court of appeals focused on Justice O'Donnell's separate opinion in *Johnson*. The court specifically focused on the analysis of the animus issue for the crimes of rape and kidnapping in this separate opinion.

Consider the crimes of rape and kidnapping, for example. The elements of each are different. Rape, as defined in R.C. 2907.02(A)(2), is committed when a defendant engages in sexual conduct with another and the defendant purposefully compels the other person to submit by force or threat of force. Kidnapping, as defined in R.C. 2905.01(A)(4), is committed when by force, threat, or deception, or, in the case of a victim under the age of 13 or mentally incompetent, by any means, a defendant removes another from the place where the other person is found or restrains the liberty of the other with the purpose to engage in sexual activity with the victim against the victim's will.

Inevitably, every rapist necessarily kidnaps the victim, because the conduct of engaging in sexual conduct by force results in a restraint of the victim's liberty. Thus, in those circumstances, the conduct of the defendant can be construed to constitute two offenses—rape and kidnapping—and an indictment may contain counts for each, but the defendant may be convicted of only one.

In a different factual situation, however, if the state presented evidence that a defendant lured a victim to his home by deception, for example, and then raped that victim, an indictment may contain separate counts for the rape and for the

kidnapping. In this hypothetical, different conduct—the luring of the victim by deception and the separate act of rape—results in two offenses being committed separately; therefore, the indictments may contain counts for both offenses and the defendant may be convicted of both. *See, e.g., State v. Ware* (1980), 63 Ohio St.2d 84, 17 O.O.3d 51, 406 N.E.2d 1112 (the defendant could be convicted of both kidnapping and rape because he lured the victim to his home by deception before raping her).

State v. Johnson, 128 Ohio St.3d 153, 2010–Ohio–6314, 942 N.E.2d 1061, ¶ 81–81 (O'Donnell concurring in judgment and syllabus) (footnotes omitted).¹⁰

In the instant case, the trial court specifically found that the offenses in this case were committed with a separate animus. In its original sentencing entry, as well as in its nunc pro tunc sentencing entry, the trial court specifically found, “The court finds . . . that there was a separate animus for each said underlying offense.” Pore does not specifically challenge this finding as not being supported by the record in this case. These findings reflect the facts that were recited for the record by both the prosecution and the trial court. Pore had targeted and stalked his victim for two weeks, and then deceptively gained entry into her home when she was alone. Pore then produced a knife and forced his victim into a room, where he raped her. During the assault, Pore used his knife to cut off some of her clothing. Finally, he threatened to use the knife on her if she screamed or called for the police. As the trial court noted, this attack lasted some 30 to 40 minutes.

All of these offenses – forcible rape, kidnapping, and aggravated burglary – were committed with a separate animus. Had Pore left after deceptively gaining entry into his victim’s home armed with a knife in order to sexually assault his victim, he would have committed the crime of aggravated burglary.¹¹ Instead of leaving, however, Pore used his knife to force his victim from the kitchen to

¹⁰*See Pore*, Stark App. No. 2011-CA-00190, 2012-Ohio-3660, 2012 WL 3292937, at ¶ 27.

¹¹The charged portion of the aggravated burglary statute provides: “No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if any of the following apply: . . . (2) The offender has a deadly weapon or dangerous ordnance on or about

a bedroom, where he had her strip naked, then marched her with knife in hand to the front door of the residence where he had her lock that door, and then marched her back to the bedroom, threatening to use the knife on her if she screamed. He even used the knife to remove her bra before marching her to the front door. Had Pore left the house without sexually assaulting Thompson, he would have already committed the crime of kidnapping. This kidnapping, therefore, was committed with a separate animus since the restraint of the victim was not merely incidental to the sexual conduct.¹² Thus, the kidnapping was committed once Pore produced his knife and marched his victim from the entrance to another room with the purpose of engaging in sexual activity with her, regardless of whether he followed through with that purpose. In addition, the kidnapping would have also been committed had Pore engaged only in sexual contact with his victim, such as using his finger to stimulate her clitoris, while avoiding any penetration or other sexual conduct. Pore, however, did not stop at either points in time, but instead proceeded with the rape of his victim. The total time of this entry into the house and sexual assault was between 30 and 40 minutes.

Under the *Logan* test for separate animus for offenses, and especially for rape and kidnapping, the trial court's R.C. 2941.25(B) ruling was supported by the record in this case. Pore's commission of the crime of aggravated burglary was not incidental to the other crimes of kidnapping and rape. Furthermore, his commission of the crime of kidnapping was not incidental to the crimes of aggravated burglary or rape. And finally, his act of raping Thompson was not incidental to the crimes of aggravated burglary or kidnapping. The trial court therefore did not err in finding a

the offender's person or under the offender's control." R.C. 2911.11(A)(2).

¹²The charged section of the kidnapping statute prohibited: "(A) 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: . . . (4) To engage in sexual activity, as defined in section 2907.01 of the Revised Code, with the victim against the victim's will." R.C. 2905.01(A)(4). "Sexual activity" is statutorily defined as "sexual conduct or sexual contact, or both." R.C. 2907.01(C).

separate animus for these offenses, and thereby convicting Pore of these offenses and imposing separate and consecutive sentences.

PROPOSITION OF LAW NO. II

A CRIMINAL DEFENDANT WAIVES HIS CHALLENGE TO HIS CONVICTIONS AND SENTENCES THAT THE OFFENSES CONSTITUTED ALLIED OFFENSES OF SIMILAR IMPORT UNDER R.C. 2945.21 AFTER PLEADING GUILTY AND NOT RAISING THE ISSUE BEFORE THE TRIAL COURT, OR RAISING AN OBJECTION BEFORE THE TRIAL COURT, RAISING INSTEAD FOR THE FIRST TIME ON APPEAL.

In this case, Pore never raised the issue that any or all of the charged offenses constituted allied offenses of similar import under R.C. 2954.21. Instead, he raised the issue for the first time on direct appeal. Furthermore, the trial court *sua sponte* raised the issue, made findings on the record, and reach the legal conclusion that none of the offenses constituted allied offenses of similar import. The court of appeals ignored the procedural posture of this case, and nonetheless proceeded to review and rule on Pore's challenge. The challenge, however, was waived under these circumstances.

This Court has noted the difference between forfeiture of a claim and waiver of such claim.¹³ In this case, Pore remained mute throughout his guilty plea hearing, and throughout the sentencing hearing. The trial court in fact put Pore on notice to the issue by its *sua sponte* addressing of the issue. Pore nonetheless chose to remain silent, precluding the prosecution or the trial court to flesh out more of the facts of this case that would relate to the *Logan* factors. To allow Pore to nonetheless raise the issue is to permit all criminal defendants to take out an insurance policy by not raising the issue or objecting to the sentence, and instead address it for the first time on appeal with an imperfect, if not silent, record on the issue. Requiring defendants to raise or waive the issue

¹³See, e.g., *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306.

would be a sound rule that would prevent the wasteful use of judicial resources.

For those reasons, the motion for leave to appeal should be granted.

**JOHN D. FERRERO, #0018590
PROSECUTING ATTORNEY,
STARK COUNTY, OHIO**

By: *Ronald Mark Caldwell*

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A copy of the foregoing Memorandum in Support of Jurisdiction was sent by ordinary U.S.

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COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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CLERK OF COURT OF APPEALS
STARK COUNTY, OHIO

STATE OF OHIO

Plaintiff-Appellee

-vs-

CHARLES ROSS PORE

Defendant-Appellant

JUDGES:

Hon. Patricia A. Delaney, P.J.
Hon. W. Scott Gwin, J.
Hon. William B. Hoffman, J.

Case No. 2011-CA-00190

OPINION

CHARACTER OF PROCEEDING:

Criminal appeal from the Stark County
Court of Common Pleas, Case No. 2011-
CR-0354

JUDGMENT:

Affirmed in part; reversed in part; **(F)**
Remanded

DATE OF JUDGMENT ENTRY:

APPEARANCES:

For Plaintiff-Appellee

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6

Gwin, J.,

{¶1} Defendant-appellant Charles R. Pore ["Pore"] appeals from his convictions and sentences in the Stark County Court of Common Pleas on one count of Rape with a sexually violent predator specification and repeat violent offender specification, one count of Kidnapping with a sexually violent predator specification, a sexual motivation specification and repeat violent offender specification, one count of Aggravated Burglary, with a repeat violent offender specification and one count of Notice of Change of Address; Registration of New Address. Plaintiff-appellee is the State of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶2} Without being employed or having money, Pore approached his victim, E.T. at her residence, which was for sale. Pore had ascertained that E.T. lived there with a roommate, A. B. Pore inquired about the house, and E.T. told him to talk with A.B. since she was the true owner of the house. When Pore called A.B., she told him to go through the realtor, who was Deb McCracken. Pore called McCracken and gave her a fake name (Mike Davis), and feigned interest in buying the house.

{¶3} On February 27, 2011, Pore came to the house in mid-afternoon and found E.T. home alone. Pore told her that he wanted to leave some contact information, so she let him into the house and led him to the kitchen, where Pore could write on a table. Pore then asked her for a tissue as he had a runny nose, so she turned to get a tissue. Pore then pull a steak knife, which he took from his girlfriend's kitchen, and ordered E.T. to do what he told her to do and she would not get hurt.

{¶4} Pore next marched E.T. into a bedroom and ordered her to take off her clothes and get naked. Once she complied, Pore marched her to the front door of the

residence and had her lock the front door. Pore then led her back to the bedroom armed with his knife. Pore then had E.T. get on the bed doggie-style first, and then on her back, as he attempted to penetrate her vaginally with his penis. Before trying to enter her, Pore used his finger to stimulate E.T.'s vagina in order to make entry easier. According to Pore, however he was still unable to enter her, in part because E.T. allegedly would not keep still. E.T. also kept asking Pore why he was doing this, and asking him to leave. Pore claimed that he reassured the frightened woman by telling her that he was not going to hurt her. After some 30 minutes, Pore finished and left the home. He later threw away all of his clothing and the knife in a dumpster in the neighborhood.

{15} According to the lab report prepared by a forensic scientist of the Canton-Stark County Crime Laboratory, a semen sample was obtained from the rape kit performed at Aultman Hospital. The results of a comparison analysis revealed:

DNA typing was performed on the DNA samples prepared from the semen stained vaginal swabs and the dried blood standard of [E.T.]. The results were compared to the DNA profile of [E.T.].

A mixture of DNA profiles from [E.T.] and a male individual was obtained from the vaginal swabs. The male DNA profile (semen source) could be distinguished at fifteen (15) STR loci. The probability of selecting an unrelated individual at random having the same fifteen (15) locus DNA profile as the male individual is approximately 1 in 82,000,000,000,000,000.

To a reasonable degree of certainty (excluding identical twins),

Charles R. Pore is the source of the semen on the vaginal swabs.

{¶16} Pore was indicted on April 11, 2011. He was charged with one count of Rape with a sexually violent predator specification and a repeat violent offender specification; one count of Kidnapping with a sexual motivation specification, a sexually violent predator specification and a repeat violent offender specification; one count of Aggravated Burglary with a repeat violent offender specification; and one count of Notice of Change of Address; Registration of New Address. Pore pled guilty as charged on July 21, 2011 and was sentenced on August 3, 2011 as follows:

{¶17} Rape 10 years, sexually violent predator specification 15 years to life, consecutive to Rape; repeat violent offender specification 8 years consecutive to Rape;

{¶18} Kidnapping 10 years, consecutive to Rape; sexual motivation specification 15 years to life-merged with the sexually violent predator specification (Rape); repeat violent offender specification 8 years, consecutive to the Kidnapping and merged with the repeat violent offender specification (Rape);

{¶19} Aggravated Burglary 10 years consecutive (Rape and Kidnapping); repeat violent offender specification 8 years, consecutive to the Aggravated Burglary and merged with the repeat violent offender specification (Rape);

{¶10} Notice of Change of Address, 2 years consecutive to Rape, Kidnapping and Aggravated Burglary.

{¶11} The Court further imposed a sanction of 2 years for the violation of post-release control to be served consecutive to all other counts.

{¶12} Thus, the aggregate sentenced imposed is a total period of incarceration of fifty-seven (57) years to life imprisonment. Pore was further designated as a Tier III offender pursuant to R.C. 2950.01(G). Finally, Pore was ordered to serve mandatory periods of post release control.

ASSIGNMENTS OF ERROR

{¶13} Pore raises four assignments of error,

{¶14} "I. THE TRIAL COURT ERRED WHEN IT SENTENCED MR. PORE TO CONSECUTIVE SENTENCES ON COUNTS 1, 2 AND 3 OF THE INDICTMENT IN VIOLATION OF R.C. 2941.25 - ALLIED OFFENSES OF SIMILAR IMPORT- AND THE DOUBLE JEOPARDY CLAUSES OF THE OHIO AND UNITED STATES CONSTITUTIONS.

{¶15} "II. THE TRIAL COURT ERRED IN SENTENCING MR. PORE TO A SENTENCE OF 57 YEARS TO LIFE IN VIOLATION OF THE EIGHTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES AND SECTION 9, ARTICLE I OF THE OHIO CONSTITUTION, WHICH PROHIBITS CRUEL AND UNUSUAL PUNISHMENT.

{¶16} "III. THE TRIAL COURT ABUSED IT DISCRETION IN SENTENCING MR. PORE TO 57 YEARS TO LIFE IMPRISONMENT IN VIOLATION OF MR. PORE'S RIGHT TO DUE PROCESS UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

{¶17} "IV. THE APPELLANT WAS DENIED THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE CONSTITUTIONS OF THE UNITED STATES AND THE STATE OF OHIO."

I.

{¶18} In Pore's first assignment of error, he argues that his sentences for Rape, Aggravated Burglary and Kidnapping are contrary to law, as the crimes are allied offenses of similar import, pursuant to R.C. 2941.25.

{¶19} R.C. 2941.25, Multiple counts states:

(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 as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

{¶20} In *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, the Ohio Supreme Court revised its allied-offense jurisprudence. The *Johnson* court overruled *State v. Rance*, 85 Ohio St.3d 632, 710 N.E.2d 699(1999), "to the extent that it calls for a comparison of statutory elements solely in the abstract under R.C. 2941.25." The Court was unanimous in its judgment and the syllabus, "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. (*State v. Rance* (1999), 85 Ohio St.3d 632, 710 N.E.2d 699, overruled.)" However, the Court could not

agree on how the courts should apply that syllabus holding. The *Johnson* case lacks a majority opinion, containing instead two plurality opinions, and a separate concurrence in the judgment and syllabus only. *State v. Helms*, 7th Dist. No. 08 MA 199, 2012-Ohio-1147, ¶71 (DeGenaro, J., concurring in part and dissenting in part).

{¶21} Justice Brown's plurality opinion sets forth a new two-part test for determining whether offenses are allied offenses of similar import under R.C. 2941.25. The first inquiry focuses on whether it is possible to commit both offenses with the same conduct. *Id.* at ¶ 48, 710 N.E.2d 699. It is not necessary that the commission of one offense will *always* result in the commission of the other. *Id.* Rather, the question is whether it is *possible* for both offenses to be committed by the same conduct. *Id.*, quoting *State v. Blankenship*, 38 Ohio St.3d 116, 119, 526 N.E.2d 816(1988). Conversely, if the commission of one offense will *never* result in the commission of the other, the offenses will not merge. *Johnson* at ¶ 51.

{¶22} If it is possible to commit both offenses with the same conduct, the court must next determine whether the offenses were in fact committed by a single act, performed with a single state of mind. *Id.* at ¶ 49, quoting *State v. Brown*, 119 Ohio St.3d 447, 895 N.E.2d 149, 2008-Ohio-4569, ¶ 50 (Lanzinger, J., concurring in judgment only). If so, the offenses are allied offenses of similar import and must be merged. *Johnson* at ¶ 50. On the other hand, if the offenses are committed separately or with a separate animus, the offenses will not merge. *Id.* at ¶ 51.

{¶23} Under Justice Brown's plurality opinion in *Johnson*, "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." *Id.* at ¶ 47, 942 N.E. 2d 1061. Rather,

the court simply must ask whether the defendant committed the offenses by the same conduct. *Id.*

{¶24} Justice O'Connor's plurality opinion advocates that the proper inquiry under R.C. 2941.25(A) is not whether the two offenses can be committed with the same conduct, but whether the convictions "arose from the same conduct that involves similar criminal wrongs and similar resulting harm." *Johnson* at ¶ 70 (O'Connor, J., concurring in judgment.) The O'Connor plurality also notes that this determination should be aided by a review of the evidence adduced at trial. *Id.* at ¶ 68–69, 942 N.E.2d 1061. *State v. Helms*, 2012-Ohio-11467, ¶ 79.

{¶25} Justice O'Donnell's separate concurrence, joined by Justice Lundberg Stratton, sets forth a slightly different analysis,

[T]he proper inquiry is not whether the elements align in the abstract as stated in *Rance* but, rather, whether the defendant's conduct, i.e., the actions and behavior of the defendant, results in the commission of two or more offenses of similar or dissimilar import or two or more offenses of the same or similar kind committed separately or with a separate animus as to each. See *Black's Law Dictionary* (9th Ed.2009) 336 ("conduct" defined as "[p]ersonal behavior, whether by action or inaction").

Johnson at ¶ 78 (O'Donnell, J., separately concurring.) *State v. Helms*, 2012-Ohio-11467, ¶ 80-81.

{¶26} As Judge DeGenaro from the Seventh District Court of Appeals has noted,

While all three opinions focus on the conduct of the defendant, there are notable distinctions between them. The Brown plurality is still somewhat hypothetical in nature. The determination of “whether it is possible to commit one offense and commit the other with the same conduct,” still appears to require an abstract comparison. *Johnson* at ¶ 48 (emphasis added). The O'Connor plurality directs the focus of the analysis back to the evidence adduced at trial, while also leaving open the possibility for some comparison of the elements of the offenses: “*Rance*, inasmuch as it requires a comparison of the elements of the offenses solely in the abstract, should be overruled.” *Johnson* at ¶ 68–69, 942 N.E.2d 1061 (emphasis added). Justice O'Connor also returns to the language of the statute, parsing out the meaning of several key terms: “allied offenses” and “of similar import.” *Id.* at ¶ 65–68, 942 N.E.2d 1061. The O'Donnell concurrence emphasizes the importance of removing abstract comparisons from the merger analysis and shifts the focus of the test onto whether the two offenses were committed separately or with a separate animus. *Johnson* at ¶ 78–83, 942 N.E.2d 1061.

State v. Helms, 2012-Ohio-11467, ¶ 82 (DeGenaro, J., concurring in part and dissenting in part).

{¶27} We find that in the case at bar, the analysis utilized by the O'Donnell concurrence to be the most appropriate. In fact, the O'Donnell concurrence utilized the following illustration,

Consider the crimes of rape and kidnapping, for example. The elements of each are different. Rape, as defined in R.C. 2907.02(A)(2), is committed when a defendant engages in sexual conduct with another and the defendant purposefully compels the other person to submit by force or threat of force. Kidnapping, as defined in R.C. 2905.01(A)(4), is committed when by force, threat, or deception, or, in the case of a victim under the age of 13 or mentally incompetent, by any means, a defendant removes another from the place where the other person is found or restrains the liberty of the other with the purpose to engage in sexual activity with the victim against the victim's will.

Inevitably, every rapist necessarily kidnaps the victim, because the conduct of engaging in sexual conduct by force results in a restraint of the victim's liberty. Thus, in those circumstances, the conduct of the defendant can be construed to constitute two offenses—rape and kidnapping—and an indictment may contain counts for each, but the defendant may be convicted of only one.

In a different factual situation, however, if the state presented evidence that a defendant lured a victim to his home by deception, for example, and then raped that victim, an indictment may contain separate counts for the rape and for the kidnapping. In this hypothetical, *different* conduct—the luring of the victim by deception and the separate act of rape—results in two offenses being committed separately; therefore, the indictments may contain counts for both offenses and the defendant may

be convicted of both. See, e.g., *State v. Ware* (1980), 63 Ohio St.2d 84, 17 O.O.3d 51, 406 N.E.2d 1112 (the defendant could be convicted of both kidnapping and rape because he lured the victim to his home by deception before raping her).

State v. Johnson, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, ¶81-81(O'Donnell concurring in judgment and syllabus)(Footnotes omitted).

{¶28} In the case at bar, Pore was charged with Rape, as defined in R.C. 2907.02(A)(2), Kidnapping as defined in R.C. 2905.01(A)(4) and Aggravated Burglary as defined in R.C. 2905.01(A)(4). In the case at bar we must determine whether the actions and behavior of Pore results in the commission of two or more offenses of similar or dissimilar import or two or more offenses of the same or similar kind committed separately or with a separate animus as to each.

{¶29} More than three decades ago, the Supreme Court of Ohio ruled that Rape and Kidnapping are allied offenses of similar import. *State v. Donald*, 57 Ohio St. 2d 73, 386 N.E.2d 1391(1979), syllabus; *State v. Henderson*, 10th Dist. No. 06AP-645. The Supreme Court laid out the requirements in order to determine what constitutes a separate animus for Kidnapping and a related offense. Specifically, the Court stated:

In establishing whether kidnapping and another offense of the same or similar kind are committed with a separate animus as to each pursuant to R.C. 2941.25(B), this court adopts the following guidelines:

(a) Where the restraint or movement of the victim is merely incidental to a separate underlying crime, there exists no separate animus sufficient to sustain separate convictions; however, where the restraint is

prolonged, the confinement is secretive, or the movement is substantial so as to demonstrate a significance independent of the other offense, there exists a separate animus as to each offense sufficient to support separate convictions;

(b) Where the asportation or restraint of the victim subjects the victim to a substantial increase in risk of harm separate and apart from that involved in the underlying crime, there exists a separate animus as to each offense sufficient to support separate convictions.

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

{¶30} In the case at bar, Pore armed himself with a knife and deceptively gained entrance to E.T.'s home. Threatening E.T. with the knife, Pore moved E.T. from the kitchen to the bedroom. He then ordered E.T. to remove her clothes. At that point, Pore moved E.T. at knifepoint from the bedroom to the living room in order to lock the front door. Pore then forced E.T. at knifepoint to return to the bedroom where the assault occurred.

{¶31} With respect to the charge of Aggravated Burglary, we find this crime was complete when Pore deceptively gained entrance into the home. This act was separate, distinct from the subsequent Rape and Kidnapping. Accordingly, under the facts of this case Aggravated Burglary is not an allied offense of either Rape or Kidnapping. Thus, Pore can be convicted and sentenced for Aggravated Burglary.

{¶32} In *State v. Logan*, the Supreme Court found no separate animus to sustain separate convictions for rape and kidnapping. 60 Ohio St.2d 126, 397 N.E.2d 1345(1979). In *Logan*, after the victim refused to accept some pills, the "defendant

produced a knife, held it to her throat, and forced her into an alley. Under such duress, she accompanied him down the alley, around a corner, and down a flight of stairs, where he raped her at knifepoint." 60 Ohio St.2d. at 127, 397 N.E.2d 1345.

{¶33} In *State v. Price*, the appellant asked the victim if she wanted to engage in sexual intercourse. 60 Ohio St.2d 136, 398 N.E.2d 772(1979). The victim refused and returned to the car. *Id.* The appellant pulled the victim from the backseat of the vehicle to a nearby area where the appellant raped the victim. *Id.* "The force by which [the] appellant removed [the victim] from the car to behind a nearby bush to engage in sexual conduct, as required under the rape statute, is indistinguishable from the force by which [the] appellant restrained [the victim] of her liberty, as required under the kidnapping statute." *Id.* at 143, 398 N.E.2d 772. The Supreme Court held the restraint and asportation of the victim necessary to substantiate the kidnapping offense were not distinct from the rape, either in time or function. *Price* at 143, 398 N.E.2d 772.

{¶34} In *State v. Ware*, the victim was unable to find a telephone to request a ride home from a party. 63 Ohio St.2d 84, 406 N.E.2d 112(1980). The appellant offered the victim to use his telephone at his residence. *Id.* The victim accepted appellant's invitation, and they began walking toward his home. After walking several blocks, they hitchhiked a ride from a passing motorist, who dropped them off within a block of appellant's residence. Shortly after they arrived, appellant laughed and stated that he did not have a telephone, and began making advances toward the victim. When she resisted, appellant picked her up, carried her upstairs to a bedroom and, under threats of death, forced her to submit to vaginal and anal intercourse. Appellant thereafter accompanied the victim back to her girlfriend's residence, a few blocks from where he

was subsequently apprehended by the police. *Id.* The Supreme Court began its analysis by reviewing the decision in *State v. Price*,

Price observes that the defendant's forcible asportation of his victim was to an area within close proximity of the initial confrontation, and was for the purpose of moving her to a place where the rape could be accomplished without detection. In essence, the court found the distance to be spatially insubstantial and the movement purely incidental to the singular purpose of committing a rape.

The victim in the cause at bar was forcibly moved from the lower level of appellant's residence into the upstairs bedroom, and, if these were the only facts before the court, it could be necessary to reverse appellant's kidnapping conviction. However, R.C. 2941.25(B) provides for conviction for both kidnapping and rape where these "same or similar" offenses are committed separately.

Under the facts at bar, we conclude that there was an act of asportation by deception which constituted kidnapping, and which was significantly independent from the asportation incidental to the rape itself.

The two crimes were committed separately.

63 Ohio St.2d 84, 86-87, 406 N.E.2d 112(1980)(Citations omitted).

{¶35} We are constrained to find Pore's commission of the Kidnapping was merely incidental to the Rape. The restraint and movement had no significance apart from facilitating the Rape. No evidence exists in the record of substantial movement, prolonged restraint, or secretive confinement. *Logan*, 60 Ohio St.2d 126, 397 N.E.2d

1345, at syllabus. We find the restraint did not subject the victim to a substantial increase in the risk of harm separate from that involved in the underlying Rape. Accordingly, we find it was plain error not to find the offenses of Rape and Kidnapping to be allied offenses of similar import.

II, III, IV

{¶36} In light of our disposition of Pore's first assignment of error, we find that Pore's second, third and fourth assignments of error are premature.

CONCLUSION

{¶37} In accordance with the Ohio Supreme Court's decision in *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, ¶ 25, we remand this case to the trial court for further proceedings consistent with that opinion. This decision in no way affects the guilty verdicts issued by the court. It only affects the entry of conviction and sentence. All of Pore's convictions are affirmed.

{¶138} The judgment of the Stark County Court of Common Pleas is affirmed in part; reversed in part; and the case is remanded for further proceedings to resentence Pore in accordance with the law and this Opinion.

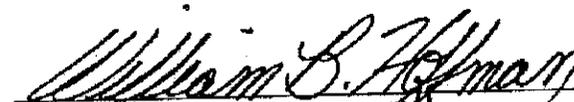
By Gwin, J., and

Hoffman, J., concur;

Delaney, P.J., dissents


HON. W. SCOTT GWIN

HON. PATRICIA A. DELANEY


HON. WILLIAM B. HOFFMAN

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Delaney, J., dissenting

{¶39} I respectfully dissent from the majority opinion.

{¶40} While there is no dispute that rape, in violation of R.C. 2907.02 (A)(2), and kidnapping in violation of R.C. 2905.01(A)(4), may be allied offenses in some cases as defined under the *Johnson* test, the critical issue is whether the crimes were committed separately or with a separate animus for each offense. R.C. 2941.25.

{¶41} At the sentencing hearing, the trial court heard from the state and defense counsel, and reviewed both the victim's and Pore's recorded statements and medical records. The majority opinion sets forth a recitation of those facts. Based upon these facts, the trial court determined the crimes of aggravated burglary, kidnapping and rape were committed with a separate animus.

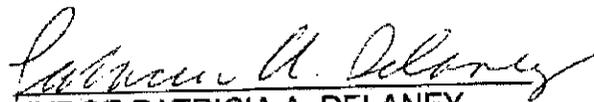
{¶42} Upon appeal, we review de novo the issue of whether Pore's convictions for rape and kidnapping merge as allied offenses of similar import. In *Logan, supra*, the Ohio Supreme Court set forth the following guidelines to establish whether a kidnapping and an offense of the same or similar import are committed with separate animus. I disagree with the majority's conclusion that, in applying the *Logan* guidelines, the kidnapping in this case was merely incidental to the rape.

{¶43} I would find the following factors set forth in *Logan* exist in this case: Pore held the victim at knife point and moved the victim from one room to another, to wit: from the kitchen to the bedroom, from the bedroom to the front door to lock it and impede anyone from leaving or entering, and then back to the bedroom. This evidence sufficiently demonstrates substantial movement which has significance beyond the underlying offense (to prevent escape and detection) and was independent from the rape. Moreover, the

record also shows Pore, while in the bedroom initially, ordered the victim to disrobe and then proceed to cut off her bra with the knife, therefore causing the victim a substantial increase in risk of harm separate and apart from that involved in the underlying rape.

{¶44} Thus, I would find under the circumstances of this case, there was substantial evidence that Pore committed the offenses of rape and kidnapping with a separate animus. Therefore, the crimes were not allied offenses and the trial court's finding should be affirmed.

{¶45} I would overrule the first assignment of error and address the remaining assignments of error set forth by Pore.


JUDGE PATRICIA A. DELANEY

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

CHARLES ROSS PORE

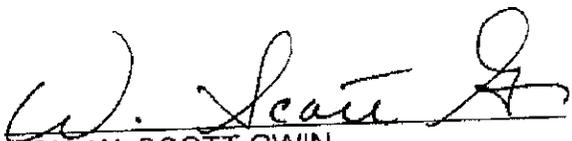
Defendant-Appellant

JUDGMENT ENTRY

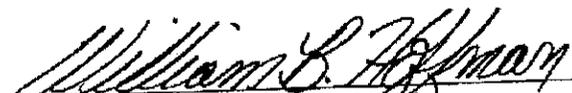
CASE NO. 2011-CA-00190

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STARK COUNTY, OHIO

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Stark County Court of Common Pleas is affirmed in part; reversed in part; and the case is remanded for further proceedings to resentence Pore in accordance with the law and this Opinion. Costs divided equally between the parties.


HON. W. SCOTT GWIN

HON. PATRICIA A. DELANEY


HON. WILLIAM B. HOFFMAN