ORIGINAL

IN THE

SUPREME COURT OF OHIO

STATE OF OHIO	:	**NO. 2013-1441**
Plaintiff-Appellant	:	On Appeal from the Hamilton County Court of Appeals, First Appellate District
vs.	:	
KENNETH RUFF	:	Court of Appeals Case Number C-120533
Defendant-Appellee	:	

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INTRODUCTION

The defendant in this case broke into multiple homes and raped the occupants. After jury trial, he was convicted of aggravated burglary and rape. The First District Court of Appeals, contrary to law, merged these separate convictions. The law requires courts to look at a defendant's conduct to determine whether two or more convictions are allied offenses of similar import. *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061. But the First District's application of this Court's prior rulings is incorrect. The First District went far beyond *Johnson's* analysis in holding that rape and aggravated burglary must merge.

The effect of the First District's decision is profound. Free rape for anyone who also commits a burglary! Free rape because aggravated burglary contains one element that could be construed to be the same thing as rape – physical harm. This absurd result under the First District's analysis has rendered far too many convictions wholly valueless.

Rape is a crime against a person. It is an intimate, sexual violation. Burglary is a property crime; a crime against the dwelling house, and a breach of the sanctity of one's home. It is complete upon entry in the building. The import of these crimes is not the same. And a rape conviction should never be nullified when it is committed during a burglary – aggravated or not.

This Court must clarify *Johnson*'s holding. And, this Court should reiterate its focus on the plain language of the merger statute. Included in R.C. 2941.25 is the instruction that where the defendant's conduct constitutes two or more offenses of dissimilar import, the defendant may be convicted of all of them. R.C. 2941.25(B). This portion of the statute has been wholly ignored by numerous courts within Ohio since *Johnson's* standard was created. And although the statute may be intended to prevent shotgun convictions, it was not intended to invalidate proper convictions. But such is the effect of the First District's decision in this case.

STATEMENT OF THE CASE

The Hamilton County Grand Jury initially charged Kenneth Ruff with two counts of Aggravated Burglary, two counts of Rape, Sexual Battery and Unlawful Sexual Conduct with a Minor. These crimes, under case number B-0907091, involved the rapes of Patricia Fieger, Karen Browning, and the sexual battery of Kayleigh Parsons. Later, the grand jury added charges for two more counts of Rape, two more counts of Aggravated Burglary and one count of Attempted Rape. These crimes were indicted under case number B-1000868 and involved the rapes of Lauren Howard, Sherrie Woods and attempted rape of Kathy Heard. The State dismissed the charges involving Howard when she failed to appear for trial as subpoenaed.

Ruff asked that he be tried separately on each of the charges. The State opposed this motion and asked that both indictments be joined for trial. After briefing from both sides, the trial court ordered all the charges joined for trial.

The case proceeded to a jury trial. After hearing all the evidence and arguments, the jury found Ruff guilty of all the remaining charges.

The trial court sentenced Ruff to an aggregate sentence of 25 years in prison on the first indictment and 15 years for the second. Those sentences were run consecutively.

STATEMENT OF THE FACTS

Rape of Patricia Fieger

Around midnight on September 9, 2009, 75-year-old Patricia Fieger was at home alone in her house at 3034 Temple Avenue in the Westwood area of Cincinnati. (T.p. 593). Ruff broke into her home through the first floor window. *Id.* Ruff found Patricia in her living room and demanded money. (T.p. 574). When Patricia responded that she didn't have any, Ruff raped her. *Id.* Ruff first performed cunnilingus on Patricia and then digitally penetrated her vagina. *Id.* He then climbed on top of Patricia and put his penis inside her vagina. (T.p. 574-575).

When Patricia screamed for help, Ruff put his arm across her neck and choked her. (T.p. 575). He told Patricia, "I killed once already, I won't hesitate to do it again." *Id.* Ruff then instructed Patricia to "Fuck me." *Id.* When she did not respond as he wanted, Ruff beat Patricia about the head with a phone and continued choking her. *Id.*

After the rape, Ruff demanded a cigarette and a can of Coke before he left. *Id.* Patricia immediately called the police and reported that she had been raped. (T.p. 593). When the officers responded, they recovered evidence and took Patricia to University Hospital so she could be examined. (T.p. 595). Sexual Abuse Nurse Examiner ('SANE') Delores Holtman examined Patricia and took her medical history. (T.p. 573). In the exam, Holtman noted the petechia and bruising on Patricia from Ruff's choking and beating. (T.p. 576). Holtman also collected evidence to be placed in a rape kit. (State's Exhibit #18). One of the collected items was Patricia's panties. (State's Exhibit #6). Those panties contained Ruff's semen. (T.p. 663).

The Hamilton County Corner's lab produced a DNA profile from Ruff's semen. (State's Exhibit #23). But not having a known suspect sample to compare it to, the case stalled.

Rape of Karen Browning

On January 9, 2009, Karen Browning was living in a group home at 2624 Harrison Avenue in Westwood. (T.p. 283). She lived there with two other women because she suffered from a mental illness. *Id.* That night, Karen took her sleep medication, which made her kind of "foggy." (T.p. 284-285). She awoke in the middle night to find Ruff raping her. (T.p. 287). Karen's first waking memory was being nude from the waist down and Ruff being on top of her with his penis in her vagina. (T.p. 288-289). Karen started screaming for help. (T.p. 289).

Ruff responded by telling Karen to "shut up or I will kill you." *Id.* Ruff then took off running out the door. (T.p. 290). Lisa Powers, another resident of the group home, heard the

commotion and came to see what was going on. (T.p. 396). Together, she and Karen called the group home manager and then 911. (T.p. 298-299).

Police officers responded and found a gas grill pushed up to a bedroom window. (T.p. 411). There was a footprint in the snow on top of the grill. (State's Exhibit #2-G).

The officers also took Karen to University Hospital for treatment. (T.p. 300). There, SANE Christina Hinkle collected evidence, including semen Ruff left on Karen. (State's Exhibit #14). Again, the Hamilton County Coroner's Lab produced a DNA profile from Ruff's semen. (State's Exhibit #'s 22-A & 22-B). But they still did not have a known suspect for DNA comparison.

Sexual Battery of Kayleigh Parsons

Ruff's sexual abuse of Kayleigh Parsons was somewhat different. In 2002, Kayleigh was a 14-year-old runaway. (T.p. 335). On the night of February 12, Kayleigh and her friend, Amanda Smelling, were walking through Carthage on their way to see Amanda's boyfriend. (T.p. 337). But at the Carthage UDF Smelling ran into Edmond Parsons. *Id.* Amanda knew Parsons, and he offered the pair a ride. *Id.* Amanda and Kayleigh accepted. *Id.*

That ride took them into Kentucky where Parsons bought Amanda and Kayleigh a bottle of liquor. (T.p. 340). And Kayleigh drank enough of it that she was "absolutely obliterated." (T.p. 341).

During this ride, Parsons also picked up Ruff. (T.p. 339). Parsons, Ruff, Amanda and Kayleigh then drove to a house in Cincinnati. (T.p. 341). There, Kayleigh remembers being so drunk that she urinated and vomited all over her clothes. *Id.* Amanda removed her clothes and left Kayleigh lying on a mattress in the bedroom. (T.p. 345). Edmond Parsons and Amanda then left the house. *Id.*

Ruff decided to take advantage of Kayleigh's condition and had sex with her. *Id.* Kayleigh remembers Ruff holding her down by the throat and telling her he was raping her. *Id.* When Kayleigh woke the next morning, she felt pain in her vaginal area and she was bleeding; Ruff had taken her virginity. (T.p. 345-346).

Later that morning, a third man dropped Kayleigh off near her home in Lockland. (T.p. 347). Kayleigh went to the nearest house she could find and asked them to call the police because she had been raped. *Id.*

The responding officers took Kayleigh to Children's Hospital where SANE Dina Verdin examined her and collected evidence for the rape kit. (T.p. 474). One of the samples she collected was Ruff's semen from Kayleigh's genital area. (State's Exhibit #10). DNA testing produced a profile of Kayleigh's attacker. (State's Exhibit #20-A & 20-B). But since she did not know the name of her assailant, no charges were filed.

Rape of Sherrie Woods

In May of 2009, Sherrie Woods, a diabetic woman, lived alone in her Westwood apartment. (T.p. 256). Sherrie moved around with the use of a walker and wheelchair because her disease required doctors to amputate parts of her feet. *Id.* This, along with high blood pressure and other ailments, required Sherrie to be on an oxygen tube and CPAP machine at night. (T.p. 257). She also wore protective underwear for incontinence. (T.p. 269).

On the night of May 26, Sherrie was at home alone when Ruff knocked on her door. (T.p. 259). Ruff apparently knew Sherrie's estranged husband and was looking for him. *Id.* Sherrie explained that her husband did not live there anymore, but she told Ruff where he could probably find him. *Id.* Ruff then left. *Id.* Sherrie went to bed around midnight. (T.p. 260).

Sometime in the night, Sherrie awoke to find Ruff walking toward her. (T.p. 270). He had broken in her apartment through a bay window. (T.p. 276). When Sherrie screamed for him to get out, Ruff promised that he was not going to hurt her. (T.p. 270). He came around to her side of the bed and pushed her down. (T.p. 271). Ruff tore off Sherrie's protective underwear and raped her. *Id.*

Sherrie resisted the rape by screaming and attempting to use the phone to call for help. (T.p. 271-272). In response Ruff choked her and said, "If you don't stop fighting, I'm going to hurt you." (T.p. 272). When he finished, Ruff calmly put his clothes back on and walked out as if nothing happened. *Id.* He even addressed Sherrie by name saying, "I'm sorry, Sherrie. I didn't mean to do it." *Id.*

When Ruff left, Sherrie immediately called the police. *Id.* Officers collected evidence and took Sherrie to University Hospital where she was examined by SANE Christa Hinkle. (T.p. 523). Hinkle collected a sample of semen that Ruff left in Sherrie's genital area. (State's Exhibit #14). But Sherrie only knew Ruff by his knick-name "Kenny-Ken." (T.p. 601). So when the DNA profile was developed from that semen, officers still had no known sample to which they could compare this profile.

Attempted Rape of Kathy Heard

Ruff's attempt at raping Kathy Heard was a slight departure from his normal routine of breaking into a home and raping a stranger. Kathy knew Ruff. (T.p. 314). He was a friend of her sister. *Id.* And in July of 2008, Ruff was over at Kathy's apartment visiting Kathy's sister. (T.p. 316). When Kathy's sister left for a short time, Ruff came in to talk to Kathy. *Id.*

Kathy was watching television in her bedroom when Ruff came in. (T.p. 317). After engaging in small talk for a while, Kathy asked Ruff if he could massage her back. (T.p. 319).

Kathy testified that this request involved only a backrub rather than anything of a sexual nature. *Id.* But apparently Ruff did not understand that part of the request, because during the backrub, Ruff took out his penis and Kathy felt it touch her buttocks. (T.p. 321). Kathy was lying on her stomach at this point and made clear to Ruff that she was not interested in sex. (T.p. 321-322).

Ruff did not take the rejection well. He tried to force himself on Kathy and tried to pull down her underwear. (T.p. 322). But Kathy fought back. *Id.* The two tussled around the bedroom with Kathy fighting Ruff, and screaming for help. (T.p. 324). Eventually, Ruff was able to pull Kathy's panties down and touch her vaginal area with his penis, but before he could penetrate her, he ejaculated on her leg. (T.p. 324-325).

After that, Ruff got off of Kathy and ran out of the apartment building. (T.p. 325). Kathy called the police. *Id.* Those officers took Kathy to University Hospital where SANE Michele Wilcox examined her and collected evidence. (T.p. 500). One of those samples was the semen Ruff left on Kathy's leg. (State's Exhibit #12). A DNA profile developed from that sample showed that it matched Ruff's DNA. (State's Exhibit #21).

Investigation by Detective Deron Hall

Cincinnati Personal Crimes Detective Deron Hall was tasked with investigating the rape of Patricia Fieger. (T.p. 592). The coroner's lab informed him of a DNA match in the Fieger, Parsons, and Browning cases. (T.p. 600-601). That provided the break Hall needed. Karen Browning knew her rapist as "Kenny Ken." (T.p. 601). When Hall began canvassing the Westwood neighborhood using the first name Kenny and giving a physical description of Fieger's rapist, he developed Ruff as his suspect. (T.p. 601-602). Hall asked Ruff for a DNA sample. (T.p. 604). Ruff consented. (State's Exhibit #19). That known sample linked Ruff to the rapes of all five women.

Ruff testified at trial. (T.p. 703-753). His version of the events was markedly different from that of the State's witnesses. He claimed the sex with four of the women was consensual, and that each had a reason to falsely report a rape. But even Ruff could not explain away the presence of his semen on 75-year-old Patricia Fieger. (T.p. 727). He instead insisted he tried to rob her of money on the night of the rape and that the DNA in her underwear must have come from that encounter. (T.p. 718-719).

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: The import of rape and aggravated burglary are inherently different and these crimes should not merge under R.C. 2941.25.

Johnson's Impact

In *State v. Johnson*, this Court examined whether child endangering and felony murder are subject to merger under R.C. 2941.25. *State v. Johnson,* 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061. That determination was rather simple, as child endangering was the predicate offense for felony murder – essentially, it was a lesser included offense. But, instead of merely applying the merger statute, the Court overruled *State v. Rance,* 85 Ohio St.3d 632, 710 N.E.2d 699 (1999). The Court thus altered the course of allied offenses analysis, which in practice has led to results that are contrary to law.

Johnson requires courts to look solely at the defendant's conduct to determine whether two or more convictions are allied offenses of similar import. *State v. Johnson,* 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, syllabus. Courts must determine, prior to sentencing, whether the offenses were committed by the same conduct. *Id.* at ¶47. If a defendant has separate animus for each offense then the offenses will not merge. *Id.* at ¶51.

Examining a defendant's conduct is an inherently subjective determination. *Id.* at ¶52. And, because the trial court does not consider a defendant's merger argument until after the trier of fact has determined that the defendant is guilty of multiple offenses, the trial court's consideration of whether convictions should merge is aided by a review of the evidence introduced at trial. *Id.* at ¶69. *Johnson* implies that appellate courts should defer to the rulings of trial courts on allied offenses analysis, and they should.

Allied offenses analysis has only recently changed to require the detailed examination of facts required by *Johnson.* In examining the facts, many appellate courts have focused solely on

animus, and ignored the rest of the merger statute. But examination of a defendant's animus is not the only thing an appellate court must do when performing an allied offenses analysis. *State v. Miranda*, ___ Ohio St.3d ___, 2014-Ohio-451, ___ N.E.3d ___, ¶25 (Lanzinger, J., concurring); *State v. Baer*, 67 Ohio St.2d 220, 227, 423 N.E.2d 432, 436-437, (1981). And in order to clarify *Johnson's* analysis, this court must review the language of the statute.

R.C. 2941.25(A) states that "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. But R.C. 2941.25(B) states that "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." This second half of the statute has largely been ignored by Ohio courts. Dissimilar import was not discussed in *Johnson*, and thus, its effect on offenses of dissimilar import is unclear.

Johnson failed to clearly define the terms of art it used. The Legislative Service Commission comments to R.C. 2941.25 state that animus is "ill will." *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, FN2., citing 1937 Legislative Service Commission comments to 1972 Am.Sub.H.B. No. 511. The comments further illustrate what import is, by explaining that "the basic thrust of the section is to prevent 'shotgun' convictions." A crime's import is its essence. And "offenses are dissimilar if they are not alike in their significance and their resulting harm." *Miranda, supra,* at ¶25 (Lanzinger, J., concurring). But no opinion from this Court has ever clearly defined import, and the appellate courts have been confused as a result.

If preventing shotgun convictions is the actual purpose of the merger statute, then this Court must significantly alter the course of Ohio jurisprudence. The Legislative Service Commission comments explicitly describe how theft and receiving stolen property are shotgun convictions, because a thief obviously receives stolen property at some point in time. But the comments differentiate the crimes of robbery and murder because they are dissimilar offenses. *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, FN2., citing 1937 Legislative Service Commission comments to 1972 Am.Sub.H.B. No. 511. The First District Court of Appeals has strayed so far from these basic principles and examples of the application of the merger statute that there is no finality upon conviction.

Under *Johnson*, and with the recent allied offenses decisions from this Court and appellate courts, half of the merger statute has been annihilated. R.C. 2941.25(B) states that "[w]here the defendant's conduct constitutes two or more offenses of dissimilar import . . .the defendant may be convicted of all of them." If rape and aggravated burglary are not two offenses of dissimilar import, then no crimes are. Only when "in substance and effect but one offense has been committed," should the defendant be convicted of only one offense. *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, ¶43.

The Current State of Affairs

In this case, the First District actually recognized that rape and aggravated burglary have dissimilar import, because it ruled that Ruff could have been convicted of simple burglary and rape. *State v. Ruff*, 1st Dist. No. C-120533, 2013-Ohio-3234, ¶34. But the First District found that because one element of aggravated burglary – the physical harm enhancement – *could* have been proven with the same facts that proved rape, Ruff could not be convicted of both crimes. The First District completely ignored the import of these very different offenses.

This is in conflict with decisions from other appellate courts. The Eighth District has properly noted that "[a]lthough the seriousness of a burglary offense is related to the relative risk to persons, the burglary offenses punish trespasses *into structures.* [I]t is the defendant's single entry into the dwelling with the requisite intent that constitutes the crime." *State v. Adkins*, 8th Dist. No. 95279, 2011-Ohio-5149, ¶39, citing *State v. Gardner,* 118 Ohio St.3d 420, 2008-Ohio-2787, 889 N.E.2d 995. And, to find otherwise would "transform burglary from an offense against the sanctity of the dwelling house into an offense against the person." *Id.* at ¶41.

Recently, the Eighth District specifically addressed the effect of *Johnson* on the merger analysis regarding the crimes of aggravated burglary and rape, and found it has none. In *State v. Jack*, the court said the defendant "engaged in two separate, distinct acts, regardless of whether his only purpose was to compel the victim to submit to sexual conduct with him." *State v. Jack,* 8th Dist. No. 99499, 2014-Ohio-380, ¶36. The court found that the offenses were not allied, and ended its inquiry there. The court also noted that "before *Johnson*, it was widely acknowledged that aggravated burglary defined in R.C. 2911.11(A)(1) is not allied with an offense of violence, such as rape, that occurs after the defendant has entered the premises." *Id.* at ¶35.

Likewise, in *State v. Lamberson,* the Twelfth District found that aggravated burglary and rape are not allied offenses of similar import. *State v. Lamberson*, 12th Dist. No. CA2000-04-012, 2001 WL 273806 (Mar. 19, 2001). In *State v. Moss*, the Tenth District came to the same conclusion. *State v. Moss*, 10th Dist. No. 99AP-30, 1999 WL 1256580 (Dec.28, 1999). The First District recognized these cases, but understood *Johnson* to have abrogated these decisions, as under *Johnson*, no comparison of the elements of two crimes occurs in the merger analysis. Essentially, because *Johnson* overruled *Rance*, every case that relied on *Rance*'s method of applying R.C. 2941.25 has been overruled as well. *Ruff, supra*, at ¶30.

Although the Eighth District has limited *Johnson*'s application, this Court has not. Recently, this Court revisited the allied offenses analysis in *State v. Washington*, 137 Ohio St.3d 427, 2013-Ohio-4982, 999 N.E.2d 661. The Court laid out some of the significant decisions regarding the merger analysis, noting that 'offenses do not merge if they were "committed separately,"' if they "have a dissimilar import," or if they were 'committed "with a separate animus as to each."' *Id.* at 431, *citing State v. Bickerstaff*, 10 Ohio St.3d 62, 66, 461 N.E.2d 892 (1984). The Court went on to acknowledge that in *Johnson*, it overruled *Rance*, abandoning the abstract evaluation of the elements of the offenses to determine whether the imports of the crimes are similar or dissimilar. *Id.* at 432. But the Court did more than this, because as it stands, the merger statute has been abrogated by *Johnson*.

Johnson espouses the rule that the intent of the General Assembly is controlling in determining whether two offenses should merge. *Johnson*, at ¶46. But *Johnson* does not acknowledge the plain language of the statute, which only required merger of allied offenses. The General Assembly's intent in passing R.C. 2941.25 was to prevent shotgun convictions, it was not to limit a defendant's conduct to one criminal conviction at a time.

<u>The Merger Statute</u>

R.C. 2941.25(A) states that "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." But R.C. 2941.25(B) states that "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."

This Court has found that "R.C. 2941.25 is a clear indication of the General Assembly's intent to permit cumulative sentencing for the commission of certain offenses." *State v. Bickerstaff*, 10 Ohio St.3d 62, 461 N.E.2d 892 (1984), fn.1.

Offenses that are merged into other crimes are not convictions. R.C. 2941.25; *State v. Botta*, 27 Ohio St.2d 196, 271 N.E.2d 776 (1971). This is because the protection afforded a defendant by the law of merger is one against double jeopardy. *See Bickerstaff, supra*; *State v. Washington,* 137 Ohio St.3d 427, 2013-Ohio-4982, 999 N.E.2d 661. The current jurisprudence surrounding allied offenses is not only a break from the common law and a plain reading of the statute, but also from the history behind it.

Under the plain language of R.C. 2941.25, there is a multi-step inquiry a court must engage in before merging convictions. First, the court must determine if the offenses are allied – that is, are they so related that they are of the same family of offenses. *See State v. Baer*, 67 Ohio St.2d 220, 227, 423 N.E.2d 432, 437 (1981). Thus, things like robbery and theft are allied offenses – theft is subsumed as part of the robbery. This is the classic shotgun conviction the statute is meant to avoid, as theft is incidental to robbery. *Bickerstaff, supra*, at 66. The elements of the multiple offenses must be considered here, as the elements will show whether one offense is a lesser included crime of the other offense. But, comparison of the elements need not be exact. Convictions need only have "a recognized similarity." *State v. Rice*, 69 Ohio St.2d 422, 424, 433 N.E.2d 175, 178 (1982).

Much of the pre-*Johnson* confusion regarding allied offenses analysis has surrounded only certain types of offenses. Courts had difficulty deciding whether crimes like kidnapping would be allied with other offenses, when their elements did not clearly align. Courts also grappled with whether crimes like felonious assault, which can be committed in different ways,

would merge with other counts of felonious assault. And receiving stolen property was not the same as theft, but seemed like the same thing. Obviously, even if the elements of these crimes are not identical, they are allied. Common sense dictates that judges can and should be able to determine whether crimes are allied in these situations without a formalistic rule.

Insomuch as *Rance* glorified form over function, it was rightly overruled – the common law and merger statute do not require a strict comparison of elements. But, determining whether crimes are in the same family of offenses is still a necessary step in the allied offense analysis. And the *Johnson* Court ignored this plain language of the statute. The facts in any particular case do not affect the determination of whether offenses are allied at all. And the above rule would allow merger arguments to be easily disposed of at this stage in the analysis.

Next, the court must determine whether the allied offenses are of similar or dissimilar import. This will depend upon an examination of the type of offense that occurs. *See State v. Rice*, 69 Ohio St.2d 422, 433 N.E.2d 175 (1982). The word import means importance, consequence, and signification. *State v. Cleland*, 9th Dist. No. 12CA0018-M, 2012-Ohio-5016, ¶11, *citing State v. Baer*, 67 Ohio St.2d 220, 226 (1981). A crime's import is its essence. Justice O'Connor, in her concurring opinion in *Johnson*, explained that 'offenses are of "similar import" when the underlying conduct involves similar criminal wrongs and similar resulting harm. *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, ¶67 (O'Connor, J., concurring). The effect a crime has on the victim, and the societal interest to be protected, are the aspects of the case to consider at this juncture. *Compare Rice*, at 427.

For example, theft may be allied with robbery, but if it is a theft of a motor vehicle, the import of the offense would be different from that of a plain robbery. A victim who has been robbed of his vehicle suffers different, and greater, harm than one who merely loses

inconsequential property. A motor vehicle is a method of transportation, nearly a necessity for many people. The import of such a theft is different than the import of a theft of one's money, jewelry, or other property that may typically be obtained during a robbery. And it is significant enough that the legislature intended auto theft to be a felony in its own right. Thus, the import of robbery and theft of a motor vehicle are different. This dissimilar import alone disallows merger of these two crimes. R.C. 2941.25(B).

Even if robbery and theft were allied offenses of similar import, the court would still need to determine whether they were committed separately or with a separate animus. A fact-specific inquiry is appropriate in this portion of the merger analysis. Here is the only place where *Johnson* is applicable to R.C. 2941.25. *Johnson* need not be overruled, as long as it is limited to determining only whether crimes are committed with separate animus.

Application in Ruff's Case

The legislature has already shown its intent to punish both rape and aggravated burglary. *See State v. Miranda*, ___ Ohio St.3d ___, 2014-Ohio-451, ___ N.E.3d ___, ¶10. Rape and aggravated burglary are not allied offenses; they do not belong to the same family of crimes.

The relevant portion of the aggravated burglary statute, R.C. 2911.11, states that "no person, by force, stealth or deception, shall trespass in an occupied structure, when another person is present, with purpose to commit in the structure any criminal offense, and inflicts, attempts, or threatens to inflict physical harm on another." The aggravated burglary statute is explicit that an offense of assault or menacing, beyond the burglary, will occur. Based on the elements of the offenses, no one could argue that these misdemeanors would not merge with aggravated burglary.

But nothing about the statute requires every subsequent offense to merge as being merely a portion of the burglary. The rape statute, R.C. 2907.02(A)(2), states that "no person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force." Rape does not merely cause a general kind of physical harm described in the aggravated burglary statute. Rape causes a specific type of personal, sexual, specifically violent harm. A rape conviction should never be nullified when it is committed during a burglary – aggravated or otherwise. Rape is not merely incidental in any respect.

But, if this Court agrees with the First District that the enhancement factor for aggravated burglary could be satisfied with a rape charge (and therefore is akin to a lesser included offense), this does not end the inquiry – it only means the crimes would be allied. Even then, the convictions should not merge, as the import of each crime is distinct.

The essence of aggravated burglary, like any burglary, is a defendant's entry into the victim's home. The dissent in this case highlighted that "[i]f the average person were asked what Ruff did, he or she would respond that Ruff broke into the victims' homes and raped them – two offenses." *State v. Ruff*, 1st Dist. No. C-120533, 2013-Ohio-3234, ¶45 (Dinkelacker, J. dissenting). Rape is a crime against a person. It is an intimate, sexual violation. Burglary is a property crime; a crime against the dwelling house, and a breach of the sanctity of one's home. It is complete upon entry in the building. The import of these crimes is not the same. And to find otherwise "would transform burglary from an offense against the sanctity of the dwelling house into an offense against the person." *State v. Adkins*, 8th Dist. No. 95279, 2011-Ohio-5149, ¶41.

The cases in which R.C. 2941.25 has actually been applied have come to the same conclusion. In *State v. Frazier*, the Court found that burglary and robbery did not merge under

the statute. *State v. Frazier*, 58 Ohio St.2d 253, 389 N.E.2d 1118 (1979). The Court said that "[w]hen the defendant forced the victims' door open with intent to assault [the victim] and take [her] property . . .the burglary was completed. When an intended felony was committed is irrelevant to the burglary charge." *Frazier,* at 256. The court went on to add that "where the intended felony is actually committed, a new crime arises for which the defendant may be convicted." *Id.*

Aggravated burglary is not a sexually oriented offense. R.C. 2950.011. Thus, a defendant who is convicted of aggravated burglary alone may not be registered as a sex offender. In this case, when the First District merged Ruff's rape convictions into his aggravated burglary convictions, the court removed the possibility of registering him as a sex offender. This result is wholly inconsistent with the jury's rendition of Ruff's guilt. And because the legislature does not consider aggravated burglary to be a sexually oriented offense for purposes of sex offender registration, it seems clear that the legislature also does not consider aggravated burglary to have the same import as other sex offenses.

The history of the merger statute is significant to the debate here. The statute codifies the judicial doctrine of merger. *State v. Logan*, 60 Ohio St.2d 126, 131, 397 N.E.2d 1345, 1349 (1979). One of the seminal cases before the passage of R.C. 2941.25, *State v. Botta*, outlines the necessity for merger of certain types of offenses. *State v. Botta*, 27 Ohio St.2d 196, 271 N.E.2d 776 (1971). There, the Court discussed the considerations behind theft and receiving stolen property. The Court found that, although neither of these crimes is a lesser included offense of the other, they must be merged at sentencing. *Botta*, at 201. The judicial doctrine of merger is based on the "penal philosophy that a major crime often includes as inherent therein the

component elements of other crimes and that these component elements, in legal effect, are merged in the major crime." *Id.*

The *Botta* Court went on to note that "it is well established law in Ohio that one act may constitute several offenses and that an individual may at the same time and in the same transaction commit several separate and distinct crimes and that separate sentences may be imposed for each offense. Where, however, in substance and effect but one offense has been committed, a verdict of guilty by the jury under more than one count . . .requires that the court not impose more than one sentence." *Id.*

The Court must reverse the First District's holding in this case. Rape is not incidental to aggravated burglary, and therefore these crimes are not allied offenses. Moreover, as any rape or burglary victim will tell, the import of these crimes is very different. Reason and common sense must return to the law of merger.

Johnson Does Not Require Merger in this Case

Even applying *Johnson*'s analysis to this case, the First District erred. The court found that 'the physical harm that constituted the "aggravating" factor in each aggravated burglary was the rape.' *State v. Ruff*, 1st Dist. No. C-120533, 2013-Ohio-3234, at ¶36. But this conclusion was not necessary under the facts of the case. In each instance of rape and aggravated burglary, Ruff caused his victims harm in multiple ways. And as the Eighth District noted in *State v. Adkins*, *Johnson* requires courts not only to determine if "multiple offenses *can* be committed by the same conduct," but whether they "*were* committed by the same conduct." *State v. Adkins,* 8th Dist. No. 95279, 2011-Ohio-5149, ¶32.

Ruff's Animus

In the case of Patricia Fieger, Ruff broke into her home and tried to rob her. (T.p. 574). Only when she said she had no money did Ruff rape her. Ruff's motive in committing this burglary, beyond that of mere trespass, was theft. *Compare State v. Rojas*, 64 Ohio St.3d 131, 139, 592 N.E.2d 1376, 1384 (1992). Even after raping Patricia, Ruff demanded a cigarette and a can of Coke. (T.p. 575). Simply because the State did not charge Ruff with robbery does not render these facts meaningless. Ruff's conduct shows that he did not commit burglary with the same animus as he committed rape. As such, these offenses should not merge.

This Court must clarify that a defendant's animus is his *immediate* motive, not his ultimate purpose. *State v. Logan*, 60 Ohio St.2d 126, 131, 397 N.E.2d 1345, 1349 (1979). Obviously, as a serial rapist, Ruff committed every burglary in order to rape women. But his immediate motive was to trespass in the victims' homes, secretively. Ruff did not commit aggravated burglary and "a priori" commit rape. *Id.* His animus in committing each crime was different, and as such, his convictions should not merge.

Ruff's Conduct Caused More Physical Harm

Moreover, Ruff's conduct in each case shows that he committed the crimes of rape and aggravated burglary separately.

Ruff raped Patricia Fieger in three different ways – digitally, orally, and with his penis. (T.p. 574-575). Each one of these rapes could have been charged separately. But the First District failed to consider that Ruff committed multiple rapes in this one incident – even if one were to merge as the "physical harm" committed during the aggravated burglary, all three should not. The facts of the case should not be ignored. *See State v. Washington*, 137 Ohio St.3d 427, 2013-Ohio-4982, 999 N.E.2d 661.

Ruff's conduct caused Patricia Fieger multiple physical harms. Any one would have sufficed the charge of aggravated burglary without ever committing a rape. While Ruff was raping Patricia, he choked her and beat her on her head. (T.p. 575). Patricia suffered visible injuries as a result. (T.p. 576). Even Ruff's threat to kill, without more, would have satisfied the elements of aggravated burglary, in that a defendant, while committing a burglary "threatens to inflict physical harm on another." R.C. 2911.11. Ruff's rape and aggravated burglary in the case of Patricia Fieger need not merge.

And Ruff picked a particularly vulnerable victim in Karen Browning. It was easy for him to rape a sleeping, medicated, and mentally impaired woman. (T.p. 283-285). He barely needed to force her at all, because she did not know he had stripped her clothes off and climbed on top of her. (T.p. 287-289). Only when Karen awoke did Ruff threaten to kill her. But he had already committed rape. That he was not charged with rape under R.C. 2907.02(A)(1)(c) does not negate this fact. Climbing on top of Karen, removing her clothing, and raping her while asleep was still forceful. And once Ruff threatened to kill Karen, his conduct was sufficient to separately satisfy his aggravated burglary conviction. Based on the facts, Ruff's aggravated burglary and rape of Karen Browning need not merge.

In the case of Sherrie Woods, Ruff really outdid himself. Sherrie was diabetic, suffered amputation of her feet, and could not walk. (T.p. 256). She also slept with an oxygen tube, CPAP machine, and protective underwear. (T.p. 257, 269). The amount of force Ruff needed to use when raping Sherrie was minimal. Still, he pushed her down and tore off her underwear before raping her. (T.p. 271). These facts were enough to satisfy Ruff's conviction for rape by force.

But Ruff caused Sherrie more harm than that. He choked her and threatened to hurt her when she tried to fight him. (T.p. 271-272). These facts sufficed the aggravated burglary statute elements of committing harm or a threat to commit harm independently from Sherrie's rape. Again, Ruff's rape and aggravated burglary convictions need not merge.

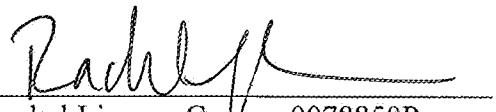
The facts in each of these incidents show that Ruff's conduct was so egregious, by committing so many harms and threatening each victim, that the aggravating factor of the burglary was satisfied exclusive of rape. All facts of each case must be considered when deciding whether a defendant's convictions require merger, and in this case, the First District failed to take the entire record into consideration. Even under *Johnson*, Ruff's convictions for rape and aggravated burglary are not allied offenses of similar import. They are committed separately, with separate animus. The First District's decision must be reversed.

CONCLUSION

The crimes of rape and aggravated burglary should never merge, as they are not allied offenses, and they have dissimilar import. R.C. 2941.25 plainly requires these factors to be considered when deciding whether double jeopardy requires merger of two convictions. But even if rape and aggravated burglary could merge, in this case they should not. Ruff committed each aggravated burglary with a separate animus from rape, and he committed each crime separately, based on different conduct. The facts of the case support separate convictions, and the First District's decision below must be reversed.

Respectfully,

Joseph T. Deters, 0012084P
Prosecuting Attorney



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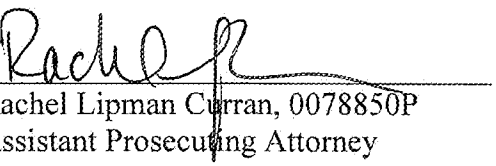
PROOF OF SERVICE

I hereby certify that I have sent a copy of the foregoing Memorandum in Response, by United States mail, addressed to Michaela M. Stagnaro, The Farrish Law Firm, 810 Sycamore Street, Cincinnati, Ohio 45202, counsel of record, this 3rd day of April, 2014.



Rachel Lipman Curran, 0078850P
Assistant Prosecuting Attorney

APPENDIX

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

ENTERED
JUL 25 2013

STATE OF OHIO,	:	APPEAL NOS. C-120533 C-120534
Plaintiff-Appellee,	:	TRIAL NOS. B-1000868 B-0907091
vs.	:	
KENNETH RUFF,	:	*JUDGMENT ENTRY.*
Defendant-Appellant.	:	

This cause was heard upon the appeal, the record, the briefs, and arguments.

The judgment of the trial court is affirmed in part, sentences vacated in part, and cause remanded for the reasons set forth in the Opinion filed this date.

Further, the court holds that there were reasonable grounds for this appeal, allows no penalty and orders that costs are taxed under App. R. 24.

The Court further orders that 1) a copy of this Judgment with a copy of the Opinion attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App. R. 27.

To the clerk:

Enter upon the journal of the court on July 26, 2013 per order of the court.

By: _____
Presiding Judge

D102940541

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NOS. C-120533 C-120534
Plaintiff-Appellee,	:	TRIAL NOS. B-1000868 B-0907091
vs.	:	
KENNETH RUFF,	:	*OPINION.*
Defendant-Appellant.	:	

PRESENTED TO THE CLERK
OF COURTS FOR FILING

JUL 26 2013

COURT OF APPEALS

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed in Part, Sentences Vacated in Part, and Cause Remanded

Date of Judgment Entry on Appeal: July 26, 2013

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *James Michael Keeling*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Michaela Stagnaro, for Defendant-Appellant.

Please note: this case has been removed from the accelerated calendar.

DEWINE, Judge.

{¶1} Kenneth Ruff was convicted of the rape and aggravated burglary of three women, of the attempted rape of a fourth women, and of the sexual battery of a minor. He raises a number of arguments on appeal, most of which we do not find to be meritorious. We do not believe that the verdicts were against the weight or sufficiency of the evidence; nor do we believe that the trial court erred by refusing to require separate trials for each victim, by allowing the admission of a statement made to a nurse by one of the victims who died before trial, or by refusing to allow prior inconsistent statements to be proven by extrinsic evidence. We do agree with Mr. Ruff, however, that the trial court should have merged the convictions for aggravated burglary with the rape convictions because the state relied upon the same conduct to prove both offenses.

Background

{¶2} Mr. Ruff was convicted of the sexual battery of K.P. In 2002, K.P. was a 14-year old, who had run away from home and was walking with a friend in the Carthage neighborhood of Cincinnati. The two girls accepted a ride from a male acquaintance, and picked up Mr. Ruff somewhere along the way. The men bought the girls a bottle of liquor, and K.P. became so drunk that she urinated and vomited on herself in the backseat of the car. The group eventually ended up at an apartment, where someone removed K.P.'s soiled pants and left her lying on a mattress in the bedroom. K.P. testified that she awoke to find Mr. Ruff holding her down by the throat and telling her that he was raping her.

{¶3} Next for Mr. Ruff was the attempted rape of K.H. In July 2008, Mr. Ruff stopped by K.H.'s apartment to visit K.H.'s sister. When the sister left, Mr. Ruff came in to talk to K.H., who was watching television in her bedroom. After engaging in small talk for a while, K.H. asked Mr. Ruff if he could massage her back. Mr. Ruff

took the massage as an opportunity to attempt to force himself upon K.H. K.H. fought back, however, and ultimately Mr. Ruff fled the apartment after ejaculating on her leg.

{¶4} Mr. Ruff was convicted of the aggravated burglary and rape of three different women in the Westwood neighborhood in incidents that spanned a nine-month period in 2009. The first victim, K.B., was suffering from mental illness and living in a group home with two other women. On the night in question, she took sleep medication, which made her kind of "foggy." She awoke in the middle of the night to find Mr. Ruff raping her. When K.B. started crying and screaming for help, Mr. Ruff told her "to shut up or I will kill you." When K.B. continued screaming, Mr. Ruff took off running out the door.

{¶5} Mr. Ruff's next victim, S.W., suffered from a variety of health issues: her toes had been amputated as a result of diabetes, causing her to move around with the assistance of a walker and wheelchair; high blood pressure and other ailments necessitated an oxygen tube and CPAP machine at night; and she wore protective underwear for incontinence issues. S.W. was home alone when Mr. Ruff knocked on her door, looking for S.W.'s estranged husband. S.W. explained that her husband did not live there anymore, and Mr. Ruff left. Later that night, S.W. awoke to find Mr. Ruff in her bedroom. She tried to pull a bed sheet over herself, but Mr. Ruff pushed her down, tore off her protective underwear and raped her. When S.W. attempted to resist, he choked her and said, "If you don't stop fighting, I'm going to hurt you." When he had finished raping S.W., Mr. Ruff put his clothes back on and walked out as if nothing had happened. He told S.W. that he was sorry and that he "didn't mean to do it."

{¶6} Mr. Ruff's final victim, P.F., was 75 years old. Mr. Ruff broke into her home through a first floor window, found P.F. in her living room and demanded money. When P.F. said she didn't have any, Mr. Ruff raped her. P.F. tried to scream for help but Mr. Ruff put his arm across her neck, choking her, and warned "I killed once already." He beat her on the head with his cell phone to keep her still. After Mr. Ruff raped P.F., he demanded a cigarette and a can of Diet Pepsi before he left.

{¶7} Detective Deron Hall investigated the rape of P.F. A DNA test in P.F.'s case was matched to DNA in the K.P. and K.B. cases. Detective Hall learned further that K.B. had referred to her rapist as "Kenny-Ken." Armed with this information, the detective began canvassing Westwood using the first name Kenny and the physical description P.F. had given of her rapist. Detective Hall developed Mr. Ruff as a suspect, and asked him to consent to a DNA test. When Mr. Ruff's DNA sample matched the evidence that police had obtained in their investigation of the sexual assaults of P.F., K.B., and K.P., Detective Hall arrested Mr. Ruff.

{¶8} Mr. Ruff testified at trial and provided the jury with a different version of events. He claimed that he had consensual sex with four of the women and that each had a reason to falsely report a rape. With respect to the other victim, 75-year-old P.F., Mr. Ruff testified that he had tried to rob her of money on the night of the rape and that the DNA in her underwear must have somehow come from that encounter. He also presented testimony from Detective Stephanie Fassnacht, who had investigated K.P.'s sexual assault. Detective Fassnacht testified that K.P. and her friend had initially told her that they had been abducted at knife point and at gunpoint, but during her investigation she discovered that that they had voluntarily accepted a ride with some adult men.

{¶9} The crimes involving the five women were charged in two separate indictments. The trial court denied Mr. Ruff's motion to sever the charges relating to each victim, and all the charges were tried together. A jury found Mr. Ruff guilty on all counts, and the trial court sentenced Mr. Ruff to an aggregate term of 40 years in prison.

Joinder of the Offenses

{¶10} In his first assignment of error, Mr. Ruff argues that the trial court committed reversible error by refusing to sever the counts relating to each victim. He contends that the jury could not have evaluated the evidence relating to each of the crimes separately, and that he was prejudiced as a result of the joinder of the charges against him.

{¶11} The law favors the joinder of multiple offenses in a single trial. *State v. Torres*, 66 Ohio St.2d 340, 343, 421 N.E.2d 1288 (1981); *see* Crim.R. 8; Crim.R. 13. Nevertheless, a trial court may grant severance under Crim.R. 14 if a defendant demonstrates that he will be prejudiced by the joinder. *State v. Roberts*, 62 Ohio St.2d 170, 175, 405 N.E.2d 247 (1980). The state can negate claims of prejudice by showing either "(1) that the evidence for each count will be admissible in a trial of the other counts under Evid.R. 404(B), or (2) that the evidence for each count is sufficiently separate and distinct so as not to lead the jury into treating it as evidence of another." *State v. Bennie*, 1st Dist. Hamilton No. C-020497, 2004-Ohio-1264, ¶ 20.

{¶12} We find no prejudice from the trial court's refusal to sever the charges relating to each victim. The offenses in each indictment involved five different victims and were analytically and logically separate. The state's presentation of the evidence with respect to each of the charges was direct and

uncomplicated, thus enabling the jury to segregate the proof for each offense. The trial court, furthermore, instructed the jury to consider each count separately. Because the trial court's refusal to sever the counts did not prejudice Mr. Ruff, we overrule his first assignment of error.

Hearsay and Confrontation Clause Issues

{¶13} Mr. Ruff next argues the trial court erred as a matter of law by allowing hearsay to be admitted into evidence, which violated his rights under the Confrontation and Due Process Clauses of the United States and Ohio Constitutions. Specifically, Mr. Ruff argues that it was improper to allow Delores Holtmann, a Sexual Abuse Nurse Examiner ("SANE") who examined P.F. after the rape, to read a statement that P.F. had made to her at the hospital. P.F. had died prior to trial and was thus unavailable to testify.

{¶14} P.F. was interviewed by Detective Hall the night of her rape. Detective Hall testified that he noticed visible bruising and had her transported to the hospital for treatment. Nurse Holtmann interviewed P.F. at the hospital. The primary purpose of the interview, according to Nurse Holtmann, was for medical treatment and diagnosis. P.F. recounted that she had been sitting on the couch when her assailant came in and demanded money from her. She then described in detail her rape and other physical abuse that Mr. Ruff inflicted in the process, including choking her and hitting her with a cell phone. After he finished raping her, she explained further, he demanded a cigarette, took a can of Diet Pepsi, and walked out the door.

{¶15} Mr. Ruff objects to Nurse Holtmann's verbatim recitation of P.F.'s statement claiming that his constitutional right to confront the witnesses against him was violated because P.F. did not testify at trial and he did not have a prior opportunity to cross-examine her. The United States Supreme Court has held that out-of-court

statements that are testimonial in nature are barred by the Confrontation Clause unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness, regardless of whether the statements are deemed reliable by the trial court. *Crawford v. Washington*, 541 U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Therefore, we must determine whether P.F.'s statements in the medical records were testimonial. *State v. Jones*, 135 Ohio St.3d 10, 2012-Ohio-5677, 984 N.E.2d 948, ¶ 143.

{¶16} The Ohio Supreme Court has held that statements made by an adult victim of sexual assault to a nurse working in a specialized medical facility for sexual-assault victims were nontestimonial. *State v. Stahl*, 111 Ohio St.3d 186, 2006-Ohio-5482, 855 N.E.2d 834, ¶ 2 and 47. "A testimonial statement," explained the court, "includes one made 'under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.' " *Id.* at paragraph one of the syllabus, quoting *Crawford* at 52. "In determining whether a statement is testimonial for Confrontation Clause purposes, courts should focus on the expectation of the declarant at the time of making the statement; the intent of a questioner is relevant only if it could affect a reasonable declarant's expectations." *Id.* at paragraph two of the syllabus. The court noted that even though the specialized facility partly served a prosecutorial function, its "primary" function was the care of patients. *Id.* at ¶ 39. Thus because the "victim could reasonably have believed that * * * [her] statement would be used primarily for health-care purposes," the statement was nontestimonial. *Id.* at ¶ 39-40.

{¶17} A year later, the Ohio Supreme Court held that where hearsay statements by a child declarant to a police officer were at issue, the appropriate standard to determine if such statements were testimonial was not the objective-

witness test set forth in *Stahl*, but a test under which the court determines the "primary purpose" of such statements. *State v. Siler*, 116 Ohio St.3d 39, 2007-Ohio-5637, 876 N.E.2d 534, paragraph one of the syllabus.

{¶18} In *State v. Arnold*, 126 Ohio St.3d 290, 2010-Ohio-2742, 933 N.E.2d 775, the court applied this "primary purpose" test to statements made to a social worker at a child-advocacy center. Because child-advocacy centers have a "dual purpose" of gathering forensic information and gathering medical information for diagnosis and treatment, the court held that the trial court was required to examine each statement and determine if it was testimonial or nontestimonial. *Id.* at ¶ 34-41. Statements made primarily for a forensic or investigative purpose are testimonial and thus inadmissible under the confrontation clause where the declarant is unavailable; but statements made for diagnosis and treatment are nontestimonial and thus admissible without offending the confrontation clause. *Id.* at paragraphs one and two of the syllabus. The court found that statements about sexual acts performed by the perpetrator and other physical details about the abuse inflicted on the victim were necessary for the proper medical diagnosis and treatment of the victim in that case and, therefore, were nontestimonial. *Id.* at ¶ 37.

{¶19} It is not clear that the Ohio Supreme Court would apply *Arnold* beyond the context of a child victim and a child-advocacy center. In reaching its decision, the court noted the "unique" nature of such centers with their dual forensic and medical purpose. *Id.* at ¶ 33. Further, there is nothing in *Arnold* which disavows the court's holding in *Stahl*. Nevertheless, even if we were to apply *Arnold* beyond the context of a child-advocacy center, we still find no merit to the assignment of error.

{¶20} In this case, the vast majority of P.F.'s statements dealt with the abuse Mr. Ruff inflicted upon her. Such statements were made for the purpose of medical diagnosis and treatment and would have been understood to be so by an objective observer. Under either the "objective observer" or "primary purpose" test such statements were nontestimonial and properly admitted into evidence. Arguably, if we parse her statements in the manner suggested by the *Arnold* decision, some of the peripheral details provided by P.F.—that Mr. Ruff demanded money before raping her and had a cigarette and Diet Pepsi afterwards—were testimonial. Any error in admitting such statements was harmless, however, because of the other evidence of Mr. Ruff's guilt and the fact that Mr. Ruff himself testified to some of those facts at trial. *See State v. Hood*, 135 Ohio St.3d 137, 2012-Ohio-6208, 984 N.E.2d 1057, ¶ 43-50.

{¶21} Similarly, P.F.'s statements do not constitute inadmissible hearsay. Evid.R. 803(4) provides that hearsay statements are admissible if they are "made for purposes of medical diagnosis or treatment and describ[e] medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." *See State v. Muttart*, 116 Ohio St.3d 5, 2007-Ohio-5267, 875 N.E.2d 944, syllabus. Here, the purpose of P.F.'s statements was for medical diagnosis and treatment, and even if we were to conclude that a few of the details extend beyond what P.F. needed to say for purposes of obtaining treatment, any error in the admission of such statements was harmless for the reasons explained above. We, therefore, overrule the second assignment of error.

K.P.'s Prior Inconsistent Statement

{¶22} Mr. Ruff argues the trial court erred by preventing him from impeaching K.P. by admitting extrinsic evidence of a prior inconsistent statement. Defense counsel

argued that a prior statement that K.P. made to police officers was inconsistent with her trial testimony in three respects: (1) she testified at trial that she had never had sex before the incident but told the police officers that she had engaged in previous sexual activity; (2) she testified at trial that she awoke to find Mr. Ruff with his hands on her throat but did not say anything about being choked to the police officers; and (3) she told the police initially that she had been abducted, but admitted at trial that she had voluntarily gotten into the car. The trial court permitted defense counsel to question K.P. about those matters at length, but denied counsel's request to "publish" K.P.'s prior statement to the jury.

{¶23} We believe the trial court acted well within its discretion. Evid.R. 613(B) provides:

> Extrinsic evidence of a prior inconsistent statement by a witness is admissible if both of the following apply:
>
> (1) If the statement is offered solely for the purpose of impeaching the witness, the witness is afforded a prior opportunity to explain or deny the statement and the opposite party is afforded an opportunity to interrogate the witness on the statement or the interests of justice otherwise require;
>
> (2) The subject matter of the statement is one of the following:
>
> (a) A fact that is of consequence to the determination of the action other than the credibility of a witness;
>
> (b) A fact that may be shown by extrinsic evidence under Evid.R. 608(A), 609, 616(A), 616(B) or 706;
>
> (c) A fact that may be shown by extrinsic evidence under the common law of impeachment if not in conflict with the rules of evidence.

Thus under the rule, collateral matters may not be proven by extrinsic evidence.

{¶24} Here K.P. admitted on cross-examination that she had initially lied to the police officers about being abducted. As a consequence, her prior testimony on this point was not inconsistent with her trial testimony and there was no need for the admission of extrinsic evidence. *See State v. Young*, 2d Dist. Montgomery No. 23438, 2010-Ohio-5157, ¶ 129. The other matters upon which defense counsel sought to admit extrinsic evidence—whether she had told police initially that Mr. Ruff put his hands on her throat and what she had said about her sexual history—were collateral to issues of the defendant's guilt. Mr. Ruff was charged with unlawful sex with a minor and sexual battery.[1] Defense counsel had admitted in his opening statement that Mr. Ruff had had sex with K.P., a minor. The sexual-battery charge required only a showing that "[t]he offender knows the other person's ability to appraise the nature of or control the other person's own conduct is substantially impaired." R.C. 2907.03(A)(2). The only issue relating to the sexual-battery charge was whether Ruff knew that K.P. was substantially impaired. Issues about whether she had had sex previously or if Mr. Ruff had put his hands on her throat were clearly collateral to the issue of her impairment. Because the "subject matter" of the statements at issue was "not of consequence to the determination of the action other than the credibility of a witness," extrinsic evidence was properly excluded by the trial court. We, therefore, overrule the third assignment of error.

Sufficiency and Weight-of-the-Evidence Claims

{¶25} In his fourth assignment of error, Mr. Ruff challenges the weight and sufficiency of the evidence adduced at trial to support his convictions.

[1] The unlawful-sex-with-a-minor offense was merged into the sexual-battery conviction at sentencing.

{¶26} As to the sufficiency argument, our review of the record reveals that the state adduced substantial, credible evidence from which the jury could have reasonably concluded that the state had proved beyond a reasonable doubt the elements of the offenses for which Mr. Ruff was found guilty. *See State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

{¶27} In regard to the manifest-weight argument, Mr. Ruff's primary argument is that the state's witnesses were not credible. Matters as to the credibility of witnesses, however, were for the jury to determine. *See State v. Waddy*, 63 Ohio St.3d 424, 430, 588 N.E.2d 819 (1992); *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967). Our review of the entire record fails to persuade us that the jury clearly lost its way and created such a manifest miscarriage of justice that we must reverse Mr. Ruff's convictions and order a new trial. *See State v. Thompkins*, 78 Ohio St.3d 380, 386-87, 678 N.E.2d 541 (1997). We, therefore, overrule this assignment of error.

Sentencing Errors

{¶28} Mr. Ruff asserts various sentencing errors in his fifth assignment of error. He argues that the trial court erred by failing to find that his convictions for aggravated burglary and rape with respect to P.F., K.B., and S.W. are allied offenses pursuant to R.C. 2941.25; that the trial court erred in imposing consecutive sentences without making the necessary findings; and that the trial court abused its discretion in imposing a 40-year prison sentence.

{¶29} Because Mr. Ruff's allied-offense argument is dispositive of his fifth assignment of error, we address it first. Mr. Ruff was found guilty of three counts of rape under R.C. 2907.02(A)(2), which provides that: "No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit

by force or threat of force." He was also convicted of three counts of aggravated burglary. The aggravated burglary statute, R.C. 2911.11, provides:

> (A) No person, by force, stealth or deception shall trespass into an occupied structure * * * when another person other than an accomplice of the offender is present, with purpose to commit in the structure * * * any criminal offense, if any of the following apply:
>
> (1) The offender inflicts, or attempts or threatens to inflict physical harm on another;
>
> (2) The offender has a deadly weapon or dangerous ordnance on or about the offender's person or under the offender's control.

Mr. Ruff was convicted under the first subsection, R.C. 2911.11(A)(1). The argument that is advanced is that the physical harm that is at issue in the aggravated burglary is the rape (sexual conduct compelled by force or threat of force), and that, therefore, the offenses are allied.

{¶30} A few years ago—that is, prior to the Ohio Supreme Court's decision in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061—the question presented here would have been a fairly easy one. It was widely understood that aggravated burglary under R.C. 2911.11(A)(1) is not allied with an offense of violence that occurs after the defendant has entered the premises. *See, e.g., State v. Frazier*, 73 Ohio St.3d 323, 343, 652 N.E.2d 1000 (1995) (aggravated murder and aggravated burglary not allied); *Waddy*, 63 Ohio St.3d 424, 448, 588 N.E.2d 819 (aggravated burglary and kidnapping not allied); *State v. Moss*, 10th Dist. Franklin No. 99AP-30, 1999 Ohio App. LEXIS 6497, *8 (Dec. 28, 1999) (aggravated burglary and rape not allied); *State v. Lamberson*, 12th Dist. Madison No. CA2000-04-012,

2001 Ohio App. LEXIS 1255, *47 (Mar. 19, 2001) (aggravated burglary and rape not allied).

{¶31} *Johnson*, however, changes the analysis. In the syllabus of that case, the Ohio Supreme Court held that "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)." All seven justices concurred in the syllabus overruling *Rance*, and they uniformly agreed that the conduct of the accused must be considered. *See Johnson* at ¶ 44, ¶ 68 (O'Connor, J., concurring), and ¶ 78 (O'Donnell, J., concurring). This court has understood *Johnson* to mean that if the evidence adduced at trial reveals that the state relied upon the same conduct to support the two offenses, and that the offenses had been committed neither separately nor with a separate animus as to each, then the defendant is afforded the protection of R.C. 2941.25, and the trial court errs in imposing separate sentences for the offenses. *See State v. Hodges*, 1st Dist. Hamilton No. C-110630, 2013-Ohio-1195, ¶ 6; *State v. Anderson*, 2012-Ohio-3347, 974 N.E.2d 1236, ¶ 20 (1st Dist.).

{¶32} Subsequent to *Johnson*, courts have concluded that aggravated burglary under R.C. 2911.11(A)(1) merges with another felony where the physical-harm element in subpart (A)(1) consists of the same conduct necessary to prove an element of the other felony. Thus, in *State v. Shears*, 1st Dist. Hamilton No. C-120212, 2013-Ohio-1196, ¶ 39-43, we held that an aggravated-burglary charge would merge with an aggravated-robbery charge because the same physical harm provided the "aggravation" necessary for both counts. The Twelfth District has reached a similar result, concluding that aggravated burglary under R.C. 2911.11(A)(1) merges with kidnapping where the conduct involved in the kidnapping was the same conduct used to meet the physical-

harm requirement in the aggravated-burglary statute. *State v. Ozevin*, 12th Dist. Clermont No. CA2012-06-044, 2013-Ohio-1386. "[T]he act of aggravated burglary in violation of 2911.11(A)(1)," the court explained, "is not complete until the offender inflicts, attempts, or threatens physical harm to another." *Id.* at ¶ 13. Similarly, the Eleventh District held that aggravated burglary and aggravated robbery merge where the physical harm at issue is the same physical harm necessary to meet the physical-harm requirement of the aggravated-robbery statute, R.C. 2911.01(A)(3). *State v. Jarvi*, 11th Dist. Ashtabula No. 2011-A-0063, 2012-Ohio-5590, ¶ 24. Likewise, the Fourth District held that aggravated burglary and felonious assault merge where the felonious assault constitutes the physical harm in the aggravated burglary. *State v. Jacobs*, 4th Dist. Highland No. 11CA26, 2013-Ohio-1502, ¶ 49-51.

{¶33} In the present case, each aggravated burglary was not completed until Mr. Ruff raped his victims, and the state necessarily relied upon evidence of the rapes to establish the elements of the aggravated-burglary offenses. The conduct relied upon to establish rape—sex compelled by force—was the same as the conduct relied upon by the state to establish the "physical harm" component in R.C. 2911.11(A)(1). Thus, we are constrained to reverse the convictions.

{¶34} The dissent protests that Mr. Ruff's conduct is best understood as two offenses—breaking into the victims' homes and raping them—and says that he should be separately punishable for both. But of course he is separately punishable for both. He could have been convicted of simple burglary under R.C. 2911.12—which does not require physical harm—and the burglary conviction would not have merged with the rape. *See Shears*, 2013-Ohio-1196, at ¶ 42, 45. The problem in this case, though, is that he was charged with R.C. 2911.11(A)(1) aggravated burglary, which has the additional element of the infliction of physical harm.

{¶35} We also note that the merger might not be required had Mr. Ruff been charged with aggravated burglary of the deadly weapon variety under R.C. 2911.11(A)(2). A defendant may be convicted under R.C. 2911.11(A)(2) without evidence of physical harm and thus such an offense does not necessarily merge with a rape conviction. *See State v. Adams*, 1st Dist. Hamilton No. C-120059, 2013-Ohio-926, ¶ 24-28.

{¶36} In this case, however, the physical harm that constituted the "aggravating" factor in each aggravated burglary was the rape. As a consequence, we must, under *State v. Johnson*, reverse Mr. Ruff's separate convictions for the aggravated burglary and rape of P.F., K.B., and S.W. Our decision today is not—as the dissent suggests—an attempt to compensate for some sort of past jurisprudential sins. We simply apply the law. And unless and until the Supreme Court sees fit to reconsider its holding in *Johnson*, we will not shirk our duty to adhere to its holding.

{¶37} We sustain that part of Mr. Ruff's fifth assignment of error challenging the multiple sentences for these offenses. His remaining arguments, which challenge the trial court's imposition of consecutive sentences and the aggregate term of his incarceration, are moot. *See* App.R.12(A)(1)(c). Thus, we sustain in part, and find moot, in part, Mr. Ruff's fifth assignment of error.

{¶38} We, therefore, vacate the sentences for the aggravated-burglary and rape counts relating to P.F., K.B., and S.W., and remand this cause so that the state may elect which allied offense it will pursue for purposes of sentence and conviction. *See State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, paragraphs one and two of the syllabus. We affirm the trial court's judgment in all other respects.

Judgment accordingly.

CUNNINGHAM, P.J., concurs.
DINKELACKER, J., concurs in part and dissents in part.

DINKELACKER, J., concurring in part and dissenting in part.

{¶39} Because I believe that the aggravated-burglary and rape offenses are not allied offenses of similar import, I must dissent.

{¶40} In a previous decision, I have noted my growing concern with the development of post-*Johnson* jurisprudence in Ohio. *See State v. Anderson*, 1st Dist. Hamilton No. C-110029, 2012-Ohio-3347 (Dinkelacker, J., dissenting). The majority's analysis in this case continues the trend of overcompensating for the sins of the past. There is no interpretation of *Johnson* that requires a finding that "the state relied upon the same conduct to support the two offenses, and that the offenses had been committed neither separately nor with a separate animus as to each * * *."

{¶41} Consider the crime of aggravated burglary. It has been widely held that when an individual commits the crime of aggravated burglary and there are two individuals in the dwelling, the offender can be convicted of only one offense. *See, e.g., State v. Marriott*, 189 Ohio App.3d 98, 2010-Ohio-3115, 937 N.E.2d 614 (2d Dist.). This is because "R.C. 2911.11(A) is not meant to criminalize an offender's conduct toward the occupants of the structure; rather the prosecutor may charge the defendant with an assault offense to satisfy that interest." *Id.* at ¶ 46. As the Second Appellate District noted, "the inclusion of the element that the offender 'inflicts, or attempts or threatens to inflict physical harm on another' * * * does not convert the aggravated burglary statute to a statute that is defined in terms of conduct toward another." *Id.* at ¶ 38.

{¶42} Under R.C. 2941.25, a trial court may, in a single proceeding, sentence a defendant for two or more offenses "having as their genesis the same criminal conduct or transaction," if the offenses (1) are not allied offenses of similar import, (2) were committed separately, or (3) were committed with a separate

animus as to each offense. *See State v. Bickerstaff*, 10 Ohio St.3d 62, 65-66, 461 N.E.2d 892 (1984), quoting *State v. Moss*, 69 Ohio St.2d 515, 519, 433 N.E.2d 181 (1982). "The Ohio Supreme Court interprets the term 'animus' to mean 'purpose or, more properly, immediate motive,' and infers animus from surrounding circumstances." *State v. Shields*, 1st Dist. Hamilton No. C-100362, 2011-Ohio-1912, ¶ 16, citing *State v. Logan*, 60 Ohio St.2d 126, 131, 397 N.E.2d 1345 (1979). The nucleus of the aggravated-burglary conduct, and Ruff's immediate motive, was to trespass. To hold otherwise would all but vitiate the crime of aggravated burglary, as it cannot be committed without concurrently intending to commit some further criminal offense once entry has been achieved.

{¶43} Perhaps the best illustration of the separation of these two offenses is the separate harms they caused the victims. The women in this case no longer feel safe in their homes, and have been physically violated in the most intimate, personal way possible. To characterize what occurred to them as merely the "physical harm" of an aggravated burglary is unthinkable. This court has noted that when the conduct so exceeds the degree required to commit one offense, a separate animus can be demonstrated as to a second offense. *State v. Whipple*, 1st Dist. Hamilton No. C-110184, 2012-Ohio-2938, ¶ 39. The harm suffered by these women so exceeds the level of harm required to support an aggravated-burglary conviction that to hold that they are *not* grossly disproportionate is simply disingenuous.

{¶44} When addressing aggravated burglary, the Eighth Appellate District warned that allowing multiple convictions when there are multiple persons present was contrary to the history of the offense. In so warning, it also presaged the outcome of this case:

> It would transform burglary from an offense against the sanctity of the dwelling house into an offense against the person. Logically, one of the unintended consequences of such a transformation may be that the act of burglary, which is completed as soon as the dwelling is entered with the requisite intent, will be viewed as an allied offense to the crimes the defendant commits therein.

State v. Adkins, 8th Dist. Cuyahoga No. 95279, 2011-Ohio-5149, ¶ 41.

{¶45} If the average person were asked what Ruff did, he or she would respond that Ruff broke into the victims' homes and raped them—two offenses. He or she would easily and logically understand that Ruff could properly be punished for both of them. Ruff violated both the "sanctity of the dwelling house" and the persons of these women. They were two offenses for which he can and should be separately punished.

{¶46} I must note that this court's opinion, which I authored, in *State v. Shears*, 1st Dist. Hamilton No. C-120212, 2013-Ohio-1196, cited by the majority, involved a determination that the crimes of aggravated burglary and aggravated robbery must be merged. The opinion concluded that

> [t]he problem with these two separate convictions is that the conduct that provides the aggravation for both counts is the same: the physical harm that Shears caused to Mr. Batawana in order to rob him. Since this was the same conduct that was committed with the same animus, the two counts must merge.

Id. at ¶ 41.

{¶47} *Shears* is distinguishable from this case. Aggravated burglary and aggravated robbery use identical language to provide for the aggravation aspect of the respective statutes. *Compare* R.C.2911.11 and 2911.01. In the *Shears* case, merger was required as the statutory language covered the same conduct: "the physical harm that Shears caused Mr. Batawana in order to rob him."

{¶48} Such is not the situation in this case. Rape, as defined under R.C. 2907.02 (a completely different part of the code dealing with sexual crimes), is a crime that prohibits one from engaging in sexual conduct by force (as in this case). Nowhere in the rape statute is there an element of the offense that requires the type of conduct that serves as the "aggravation" for the burglary statute.

{¶49} In this case, Ruff separately committed aggravated burglary and rape in each instance. For these reasons, I would hold that Ruff's rape and aggravated-burglary convictions were not subject to merger. In all other aspects, I concur with the opinion of the majority.

Please note:

The court has recorded its own entry this date.

ORIGINAL

IN THE

SUPREME COURT OF OHIO

STATE OF OHIO	:	NO. 13-1441
Plaintiff-Appellant	:	On Appeal from the Hamilton County Court of Appeals, First Appellate District
vs.	:	
KENNETH RUFF	:	Court of Appeals Case Number C-120533, C-120534
Defendant-Appellee	:	

NOTICE OF APPEAL OF PLAINTIFF-APPELLANT, STATE OF OHIO

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IN THE

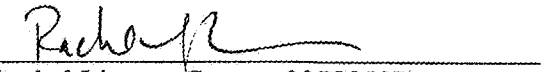
SUPREME COURT OF OHIO

STATE OF OHIO	:	NO.
Plaintiff-Appellant	:	
vs.	:	NOTICE OF APPEAL OF PLAINTIFF-APPELLANT, STATE OF OHIO
KENNETH RUFF	:	
Defendant-Appellee	:	

Plaintiff-Appellant, State of Ohio, hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Hamilton County Court of Appeals, First Appellate District, entered in Court of Appeals case numbers C-120533 and C-120534 rendered on July 26, 2013. This case involves a felony and is of public or great general interest.

Respectfully submitted,

Joseph T. Deters
Prosecuting Attorney



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PROOF OF SERVICE

I hereby certify that I have sent a copy of the foregoing Notice of Appeal of Appellant, State of Ohio, by United States mail, addressed to Michaela Stagnaro, attorney at law, The Farrish Law Firm , 810 Sycamore Street, Cincinnati, Ohio 45202, counsel of record, and to Timothy Young, Ohio Public Defender, 250 E. Broad Street, Suite 1400, Columbus, Ohio 43215-2998, this 6th day of September, 2013.

Rachel Lipman Curran, 0078850P
Assistant Prosecuting Attorney

2941.25 Allied offenses of similar import - multiple counts.

(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.

Effective Date: 01-01-1974

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