[Cite as *State v. Taylor*, 2009-Ohio-3334.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	CASE NO. 07 MA 115
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	O P I N I O N
	)	
DONALD TAYLOR,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court, Case No. 05CR241.

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

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JUDGES:

Hon. Joseph J. Vukovich
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: June 26, 2009

VUKOVICH, P.J.

¶{1} Defendant-appellant Donald Taylor appeals from his convictions entered in the Mahoning County Common Pleas Court after a bench trial. Appellant argues that the rape and kidnapping charges were allied offenses of similar import committed with separate animus and that his counsel was ineffective by failing to seek merger at sentencing. We conclude that, under the circumstances existing herein, the offenses were committed with separate animus. As such, sentencing properly proceeded on both rape and kidnapping.

¶{2} Appellant also claims that his rape conviction was not supported by sufficient evidence and was contrary to the manifest weight of the evidence. This argument is without merit. For the following reasons, the judgment of the trial court is affirmed.

STATEMENT OF THE CASE

¶{3} On February 18, 2005, a six-year-old female reported that appellant raped her. On March 17, 2005, appellant was indicted on three counts plus a violent sexual predator specification due to prior sexual offenses. Count one charged forcible rape of a child under ten, which is a felony-life offense under R.C. 2907.02(A)(1)(b) and (B). Count two charged kidnapping in violation of R.C. 2905.01(A)(4), which entails using force, threat or deception, or any means where the victim is under thirteen, to remove another from the place where found or to restrain the liberty of another, for the purpose of engaging in sexual activity against the victim's will. A count of gross sexual imposition was included only as a lesser included offense of rape.

¶{4} A bench trial was conducted on June 7, 2007. It was established that on the date of the offense, the child lived in a duplex with her four-year-old brother and her mother on Bryson Avenue in Youngstown, Ohio. Appellant had recently moved into the apartment upstairs with his son and his son's girlfriend. The children often visited the upstairs apartment.

¶{5} The victim testified that she was upstairs with appellant and her brother. When her brother went back downstairs to their apartment, appellant locked the door of his apartment and pulled down his pants. She tried to get away, but he threw her

on the couch (which served as his bed). (Tr. 20). He pulled down her pants. She tried to scream, but he put his hand over her mouth. (Tr. 21).

¶{6} She testified that he "put his pee-pee in my private" and further explained that she was on her back and it was her "front" private that he put his "pee-pee" "inside". (Tr. 19, 22-23). The victim disclosed that her "private" hurt after the incident. (Tr. 22-23). She stated that she ran downstairs, locked their apartment door and told her mother. (Tr. 23).

¶{7} The victim's mother testified that appellant had asked if the children could come upstairs and watch cartoons. (Tr. 123). She stated that after twenty or thirty minutes, the victim ran downstairs crying, slammed and locked the door and reported that appellant "touched her coochie." (Tr. 106-107, 122). The mother checked the child and found that her vaginal area was swollen and bloody. (Tr. 107). The mother pointed out that appellant appeared downstairs right after this and blurted out that the child was lying, although no one had yet confronted him. (Tr. 108).

¶{8} Within minutes, appellant's son's girlfriend came home. She also heard the child's allegation, checked the child and noticed that her vaginal area was red and swollen. (Tr. 108, 209-210). The police were called and arrived shortly after 6:00 p.m. (Tr. 40, 213). The police called an ambulance to transport the child to the emergency room. (Tr. 41).

¶{9} The pediatric emergency physician testified that the child informed him the upstairs neighbor put his "pee-pee" in her private area and complained of soreness in the vaginal area. (Tr. 136, 139). He noticed a one inch round spot of redness on the right side of the outside of the vaginal opening but just inside the labia, which he found indicated a recent trauma. (Tr. 136, 140-141).

¶{10} Although the physician did not notice any bleeding, the vaginal swab from his rape kit tested positive for blood. (Tr. 137, 140, 146). The vaginal swab tested negative for the presence of seminal fluid, but a rectal area swab and an underwear swatch tested positive for seminal fluid. (Tr. 146). The DNA retrieved from the underwear sample was consistent with appellant's DNA, and the DNA in the seminal fluid retrieved from rectal area swab was consistent with a mix of appellant's and the child's DNA. (Tr. 158).

¶{11} A nurse practitioner, who works with child abuse victims and who examined the victim eleven days after the incident, testified that the victim informed her that when appellant "put his pee-pee in her pee-pee", it hurt, then it was wet and then there was some bleeding. (Tr. 96). The nurse explained that the hymen commonly does not tear in child abuse penetration cases as it is very elastic in children. (Tr. 97-98).

¶{12} Appellant's brother attempted to provide an alibi. He described appellant as mentally "slow". He testified that appellant arrived at his house at noon and was not dropped back off on Bryson until after 7:30 p.m. (Tr. 180-181). He stated that appellant called him around 9:00 p.m. to tell him that the police were there because the children had come up to his apartment. (Tr. 182). He could not explain the time recorded in the hospital's records but argued that the police must be wrong in their time and date because they probably wrote the report days later. He also insisted that this all occurred on Valentine's Day. (Tr. 191-192).

¶{13} Appellant then took the stand. He estimated that he was in his thirties; however, he provided a 1957 date of birth and then agreed that he was nearly fifty. (Tr. 222-223). He reiterated his brother's testimony that he was with his brother from noon until nearly 8:00 p.m. (Tr. 228-229). He testified that he was lying on the couch when the children came upstairs. He said the female child hit him in the head with a bat so he took them downstairs to their mother. (Tr. 231). He denied that he touched the victim. (Tr. 238). He explained the forensic results inside the victim's underwear by claiming that he had sex with his estranged wife on the couch the night before. (Tr. 236). He also testified that the child's mother asked him for $100, got angry when he would not pay her and threatened to call the police regarding this case. (Tr.234-235).

¶{14} The court found appellant guilty of rape and kidnapping, and the lesser included offense of gross sexual imposition was dismissed. The sentencing hearing was held on June 15, 2007. Appellant was sentenced to life without parole for the rape to be served consecutive to a ten-year sentence imposed for the kidnapping. The court also found that appellant was a violent sexual predator under R.C. 2950.09.

¶{15} Appellant filed premature but timely notice of appeal from an entry filed on August 13, 2007. See App. R. 4(C) (a notice of appeal filed after the

announcement of sentence but before entry of the judgment that begins the running of the appeal time period is treated as filed immediately after the entry).

ASSIGNMENT OF ERROR NUMBER ONE

¶{16} Appellant's first assignment of error provides:

¶{17} "THE APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN APPELLANT'S TRIAL COUNSEL FAILED TO ARGUE APPELLANT'S CONVICTIONS FOR RAPE AND KIDNAPPING WERE ALLIED OFFENSES OF SIMILAR IMPORT."

¶{18} Appellant argues that the conviction for the kidnapping offense should merge with the rape offense so that he is only convicted of and sentenced for rape. Because his counsel did not seek merger before the trial court, he raises ineffective assistance of counsel. If his merger argument has merit, then the two-prong test for ineffective assistance of counsel would be satisfied here: objectively deficient performance and prejudice, which is often defined as a reasonable probability that error was outcome determinative. *Strickland v. Washington* (1984), 466 U.S. 668, 686; *State v. Reynolds* (1998), 80 Ohio St.3d 670, 674.

¶{19} However, if the merger argument has no merit, then appellant would not have established ineffective assistance of counsel. We note that merger is a question of law dealing with whether there was sufficient evidence of separate animus, not a question left to the trial court's discretion. See, e.g., *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, ¶93-94.

¶{20} Thus, we proceed to address the question of whether merger would have been legally required had counsel raised it. Ohio's multiple count statute provides:

¶{21} "(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.

¶{22} "(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.

¶{23} This statute encompasses two steps. The first step involves a comparison of the elements in the abstract without regard to the facts of the case. *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, ¶14. The court must determine if the elements of one crime correspond to such a degree with the elements of the other crime that the commission of one will necessarily result in commission of the other. Id. at ¶14-15, 22, citing *State v. Rance* (1999), 85 Ohio St.3d 632, 636. This test does not require exact alignment of elements or a strict textual comparison. Id. at ¶23-27. See, also, *State v. Winn*, 121 Ohio Stg.3d 413, 2009-Ohio-1059, ¶12.

¶{24} If the elements do not sufficiently coincide, then the inquiry ends and the defendant can be convicted of (i.e. found guilty and punished for) both crimes as the offenses are of dissimilar import. *Rance*, 85 Ohio St.3d at 636. If the elements of one offense do correspond to the required degree with the elements of another offense, then the offenses are allied offenses of similar import and the court proceeds to the second stage. Id. at ¶14, 30-31.

¶{25} The state makes no argument regarding the first step but moves right to the second step and thus concedes that the elements of kidnapping correspond to such a degree with forcible rape that the rape could not be committed without committing kidnapping. This is likely because the Supreme Court has stated that implicit in every forcible rape is a kidnapping and that such offenses are allied offenses of similar import. See *State v. Powell* (1990), 49 Ohio St.3d 255, 262. See, also, *State v. Parker*, 7th Dist. No. 03MA190, 2005-Ohio-4888, ¶24, citing *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845. Thus, we move to the second step. Id.

¶{26} Even if the offenses are found to be allied offenses of similar import, the defendant can still be convicted of both offenses if they were committed separately or with separate animus to each. Id. at ¶14, 31. Animus here has been defined as purpose or immediate motive. *State v. Logan* (1979), 60 Ohio St.2d 126, 130. The defendant's conduct must be reviewed in order to evaluate separate animus. *State v. Jones* (1997), 78 Ohio St.3d 12, 14.

¶{27} When a kidnapping is committed during another crime, there exists no separate animus where the restraint or movement of the victim is merely incidental to the underlying crime. *State v. Fears* (1999), 86 Ohio St.3d 329, 344, citing *Logan*, 60 Ohio St.2d 126. The kidnapping must have a significance independent from the rape. *State v. Craig*, 110 Ohio St.3d 306, 2006-Ohio-4571, ¶117. "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." Id. Moreover, where the restraint was prolonged, the confinement was secretive, or the movement was substantial, a separate animus exists. *Fears*, 86 Ohio St.3d at 344, citing *Logan*, 60 Ohio St.2d at syllabus.

¶{28} "[W]here an individual's immediate motive is to engage in sexual intercourse, and a so-called 'standstill' rape is committed, the perpetrator may be convicted of either rape or kidnapping, but not both. In contradistinction, an individual who restrains his intended rape victim for several days prior to perpetrating the rape, or who transports her out of the state or across the state while intermittently raping her, may well be considered to have a separate animus as to each of the offenses of kidnapping and rape, and convictions on multiple counts could reasonably be sustained." *Logan*, 60 Ohio St.2d at 132 (describing the two extremes).

¶{29} In *Logan*, the Court found no separate animus for kidnapping even where the defendant forced a victim into an alley and down a flight of stairs before raping her. *Logan*, 60 Ohio St.2d at 132. The Court found this movement to have no significance except for in facilitating the offense of rape and determined that it did not present a substantial increase in harm above that presented by the rape itself. Id. at 135. See, also, *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, ¶93 (no evidence of separate animus for kidnapping where the victim was not moved from her bedroom in which the defendant found her or restrained in any way other than what was necessary to rape and kill her). However, *Logan* involved an adult victim, and there was no evidence as to what actually occurred in *Adams* since the victim was killed. Moreover, the environment where the victim was originally encountered was not significantly changed in *Logan* and not changed at all in *Adams*. See id.

¶{30} In a case more similar to the case at bar, the Court held that there was a separate animus when the defendant lured a six-year-old neighbor into his apartment, watched television with her and then raped and killed her. *State v. Lynch*, 98 Ohio St.3d 514, 2003-Ohio-2284. The *Lynch* Court found the existence of the following factors: substantial movement where the defendant lured her into his apartment and then moved her into his bedroom; secretive restraint as it took place in his apartment; and prolonged restraint as they ate popcorn and watched television prior to the rape. Id. at ¶135. In yet another case, the Court found a separate animus for the kidnapping where the defendant moved the victim from an outside stairway into his apartment and then to his bedroom. *State v. Rogers* (1985), 17 Ohio St.3d 174, 181-182.

¶{31} The state concludes that locking the apartment door, throwing the child on the couch and covering her mouth are sufficient to prove a separate animus for kidnapping. The state cites two appellate cases. One is too different for comparison. See *State v. Myers*, 5th Dist. No. 03CA61, 2004-Ohio-3052, ¶146 (defendant threatened the victims' lives, accelerated when a victim tried to exit the car causing the door to hit her leg, locked the doors and drove through stop signs). In the other, the court noted that kidnapping would not merge with rape because the defendant took the victim into a sequestered room and locked the door. *State v. Sharp*, 8th Dist. No. 84346, 2005-Ohio-390, ¶37.

¶{32} First, we recognize that the act of pushing a victim onto a couch (used as his bed) and holding her in place during a rape may constitute the offense of kidnapping, but the acts are not performed with a separate animus from rape. See *Rogers*, 17 Ohio St.3d at 181-182. However, covering a victim's mouth to avoid yelling is a step further than holding one in place in order to consummate the act of rape. It is done to avoid detection, as opposed to being done in order to facilitate the physical act. It also increases the risk of harm to a child of tender years as it presents the risk of suffocation that would not have existed without this form of restraint.

¶{33} The act of locking the door after the victim's four-year-old brother left and before the rape also made the restraint more secretive. (Tr. 20-21). This is even more significant in the case of a six-year-old than in the case of an adult. That is, along with the function of keeping others from interrupting, the lock could be seen as keeping a

young child from escaping quickly or at all. It is more restraint than merely holding the victim down during the rape.

¶{34} As for asportation, the last movement of the victim may have been minimal distance-wise, from standing near the couch to laying on the couch. Nevertheless, the child was essentially lured to appellant's apartment as in the Supreme Court's *Lynch* case. She was originally located in her own apartment when appellant came down and asked her mother if he could bring her upstairs to watch cartoons. The *Lynch* defendant also watched television with his young neighbor, which time period was counted toward the restraint.

¶{35} Finally, the time between the locking of the door and the throwing of the child onto the couch and the rape were minimal, and the time period during which the rape occurred does not appear to have been lengthy. (Tr. 34). Yet, the child was in the apartment for a more substantial period of time prior to the rape, twenty to thirty minutes. (Tr. 122). Considering the following analysis, the factor of prolonged restraint or removal exists as the time involved in the kidnapping was much longer than that necessary to commit the rape, which lasted mere minutes

¶{36} Notably, kidnapping is committed by restraint *or removal*, and this removal need not be by force or threat *but can also be by deception* and, *where the victim is under thirteen, by any means* at all where the restraint or removal is for the purpose of engaging in any sexual activity with the victim against her will. R.C. 2905.01(A)(4). Here, there was sufficient evidence that, hoping to engage in sexual activity with the child, appellant removed the victim from the safety of her apartment by deceiving her and her mother (and regardless he removed her "by any means").

¶{37} Appellant was a repeat sexual offender of very young girls. He had recently been released from a twenty-year prison sentence for the last time he molested a child and was in violation of his release terms by approaching these children. Appellant actively sought a way to get the six-year-old victim to come to his apartment in order to engage in sexual activity against her will. (Tr. 224-226, 237, 243-245). Asportation by deception has a significance independent from asportation incidental to the rape itself. *State v. Ware* (1980), 63 Ohio St.2d 84, 87. The fact that the mother (who was found neglectful both before and after the incident) knew the

location of the child does not erase appellant's animus. Likewise, the fact that the four-year-old brother was involved in the television-watching at first does not negate appellant's separate luring, preparatory and predatory animus toward the six-year-old victim. As soon as the young brother left, appellant acted on his intent.

¶{38} The Supreme Court has stated that even one factor is sufficient to find separate animus. As discussed above, we have the existence of one factor, restraint longer than needed to commit the rape, and we have evidence tending toward other factors. The Supreme Court has also placed special emphasis on the luring of young children in determining animus. Under the particular circumstances here, we conclude that appellant possessed a separate animus for the kidnapping. In answering this question of law in favor of the state, there can be no prejudice in counsel's failure to raise merger to the trial court. This assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER TWO

¶{39} Appellant's second assignment of error contends:

¶{40} "THE TRIAL COURT DENIED APPELLANT DUE PROCESS UNDER THE FOURTEENTH AMENDMENT DUE TO THE FACT HIS CONVICTION FOR RAPE [IS] AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND THE TRIAL COURT'S VERDICT WAS INCONSISTENT WITH THE EVIDENCE AND TESTIMONY PRESENTED AT TRIAL."

¶{41} This assignment of error deals only with the rape conviction. Appellant argues there is no evidence of penetration and then points out perceived inconsistencies in certain testimony. Appellant speaks mostly of weight of the evidence. However, he quotes a passage from *Jenks* that the same test applies to weight and sufficiency, and he makes some statements regarding sufficiency of the evidence.

¶{42} As we have stated multiple times, *State v. Thompkins* (1997), 78 Ohio St.3d 380 clearly established that sufficiency of the evidence and weight of the evidence are distinct concepts with different definitions and different tests. See, e.g., *State v. Alicea*, 7th Dist. No. 99CA36, 2002-Ohio-6907, ¶26; *State v. Griffin*, 7th Dist. No. 01CA151, 2002-Ohio-6900, ¶18. Contrary to appellant's brief, the *Jenks* holding that weight and sufficiency use the same test is no longer of precedential value. *State*

v. Cuthbertson, 7th Dist. No. 01CA212, 2003-Ohio-1217, ¶7 (specifying how this portion of *State v. Jenks* (1991), 61 Ohio St.3d 259 is no longer good law).

¶{43} Sufficiency of the evidence is a question of law that deals with adequacy rather than the more discretionary concept of weight of the evidence. *Thompkins*, 78 Ohio St.3d at 386. In viewing a sufficiency of the evidence argument, a conviction will not be reversed unless the reviewing court determines that no rational fact-finder could have found that the elements of the offense were proven beyond a reasonable doubt. *State v. Goff* (1998), 82 Ohio St.3d 123, 138. In conducting this review, we evaluate the evidence in the light most favorable to the prosecution. Id.

¶{44} Rape involves sexual conduct, which is specifically defined as including insertion, however slight, of any part of the body or any object into the vaginal or anal opening of another. R.C. 2907.02(A). The statute reiterates that penetration, however slight, is sufficient to complete vaginal or anal intercourse. Id.

¶{45} The child was six years old at the time of the incident. Appellant was the child's upstairs neighbor. She had been to his apartment before, and he admits that she was there on February 18, 2005. The child testified that appellant locked the door, pulled down his and then her pants, threw her on the couch when she tried to get away, and put his hand over her mouth when she tried to scream. She then said that he "put his pee-pee in my private", and she complained that her "private" hurt thereafter. (Tr. 19, 22-23). Upon further questioning, she confirmed that he put his "pee-pee" "inside" her private. (Tr. 23). There was no indication that she meant on or around the outside, and insertion is penetration, however slight. That the red, swollen spot visible to the physician was outside the vaginal opening does not mean that appellant's penis did not achieve penetration. In fact, the location on the inside of the labia right outside the opening could lead one to reasonably infer that an object made this mark on its way into and out of the opening.

¶{46} As the nurse disclosed, an uninjured hymen after penetration of a child occurs more often than an injured hymen. Moreover, blood was found on the victim's vaginal swab, and seminal fluid was found on her rectal area and in her underwear. Appellant's DNA was found to be consistent with this seminal fluid. There is other evidence against appellant that will be discussed in evaluating the weight of the

evidence, but we stop here to say that this is more than sufficient evidence to uphold a conviction of forcible rape of a child under ten. In other words, some reasonable trier of fact could find beyond a reasonable doubt that he forcibly penetrated this child's vaginal opening.

¶{47} After a reviewing court determines that a trial court's judgment is supported by sufficient evidence, the court then reviews the weight of the evidence. *Thompkins*, 78 Ohio St.3d at 387. Weight of the evidence concerns "the inclination of the greater amount of credible evidence" and involves the evidence's effect in inducing belief after reviewing the entire record and weighing evidence. Id. The discretionary power to grant a new trial by disagreeing with the fact-finder's resolution of conflicting testimony should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. Id. Thus, where there are two reasonable versions of events or views of the evidence, we do not override the trial court's decision on which version or view is more credible. Unless the fact-finder clearly lost its way and created a manifest miscarriage of justice, we do not reverse based upon weight of the evidence. Id.

¶{48} Contrary to a statement in appellant's brief, his son's girlfriend did not testify that the offense took place earlier in the day or that the mother waited hours before calling the police. The mother testified that she checked her daughter immediately, that appellant's son's girlfriend came in several minutes later and also checked the victim, and that she called the police within fifteen to twenty minutes. (Tr. 108-109). Appellant's son's girlfriend confirmed the victim's statement and the fact that the victim's vaginal area was red and swollen. She also noted that the mother was crying, that the incident had just happened and that the police arrived while she was there. (Tr. 209, 213).

¶{49} Contrary to another argument presented by appellant, there was more than just the mother's claim that blood was present. (Tr. 107). *The vaginal swab came back positive for blood*. (Tr. 145-146). Regarding the seminal fluid around the child's rectum and in her underwear, the fact that he may have withdrawn prior to ejaculation does not mean that he did not previously achieve at least slight penetration. The trial court rationally discarded appellant's suggestion that the victim

picked up his seminal fluid on the inside of her underwear from jumping on the couch, where he had allegedly had intercourse with his estranged wife the prior night. (Tr. 236).

¶{50} In weighing the evidence and all rational inferences, we cannot say that the trial court clearly lost its way. The trial court could have rationally found that appellant was not credible. For instance, he claimed that he was not present at the apartment on February 18, 2005 until nearly 8:00 p.m. However, the police officer testified that he was dispatched at 6:08 p.m. and that he spoke with appellant at the scene. (Tr. 40-41). The officer called for an ambulance to take the victim to the hospital, and the emergency room physician confirmed that he treated the child sometime near 6:00 p.m. (Tr. 135).

¶{51} The trial court occupied the best position to evaluate appellant's credibility as it heard his voice inflection and observed his demeanor, eye movements and gestures. See *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80. The court could rationally disbelieve appellant's claim that he did not touch the child. (Tr. 238). Notably, if he did not touch her at all as he claimed, then this would mean the child was lying. The court could reasonably choose to believe the child's claim that he put his penis inside her private and could then choose to draw a rational inference from her testimony and from other evidence that at least slight penetration occurred. This assignment of error is overruled.

¶{52} For the foregoing reasons, the judgment of the trial court is hereby affirmed.

Donofrio, J., concurs.
DeGenaro, J., concurs in part, dissents in part; see concurring in part, dissenting in part opinion.

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

¶{53} I must respectfully dissent in part from the majority, because it is reasonably probable that the outcome of Taylor's trial would have been different had trial counsel properly raised the issue of merger. The evidence does not support the majority's conclusion that Taylor committed the offenses of rape and kidnapping with a

separate animus. I would therefore sustain Taylor's first assignment of error. I would otherwise affirm the judgment of the trial court.

¶{54} It is well settled in Ohio law that rape and kidnapping are generally allied offenses of similar import when compared in the abstract. *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, 817 N.E.2d 29, at ¶94. See also *State v. Winn*, 121 Ohio St.3d 413, 2009-Ohio-1059, 905 N.E.2d 154, at ¶23, citing *State v. Logan*, 60 Ohio St.2d 130, 14 O.O.3d 373, 397 N.E.2d 1345. This fact alone indicates that counsel was patently deficient for not raising the issue of merger.

¶{55} In its discussion of the merger of the rape and kidnapping subsections identical to the ones in this case, the Ohio Supreme Court provided the following explanation: "A comparison of R.C. 2907.02(A)(1) and 2905.01(A)(4) clearly indicates similarity between the two offenses. Both offenses, by their very nature, are committed for the same purpose. The kidnapping precedes the actual rape, but can be committed whether the conduct of the offender ultimately results in rape." *State v. Donald* (1979), 57 Ohio St.2d 73, 75, 11 O.O.3d 242, 386 N.E.2d 1341.

¶{56} The Ohio Supreme court noted that the *Donald* decision was limited to an analysis of the elements of rape and kidnapping in the abstract, pursuant to R.C. 2941.25(A). However, the Supreme Court supplemented its *Donald* decision and added the "separate animus" analysis of R.C. 2941.25(B) in *State v. Logan* (1979), 60 Ohio St.2d 126, 14 O.O.3d 272, 397 N.E.2d 1345. This second step of the R.C. 2941.25 merger analysis looks at whether an appellant committed the rape and kidnapping separately or with separate animus. The term "animus" refers to a person's "purpose or, more properly, immediate motive." *Logan* at 131.

¶{57} The Ohio Supreme Court provided the following specific guidance in order to determine whether incidents of rape and kidnapping were perpetrated with separate animus:

¶{58} "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:

¶{59} "(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;

¶{60} "(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." *Logan* at syllabus.

¶{61} The primary issue to be considered, according to *Logan*, "is whether the restraint or movement of the victim is merely incidental to a separate underlying crime or, instead, whether it has a significance independent of the other offense." Id. at 135. The facts of this case indicate that the movement and restraint of the victim was incidental to the underlying rape: the state did not provide proof of prolonged restraint, secretive confinement, substantial movement, or an act independent of the rape that substantially increased the risk of harm to the victim.

¶{62} The majority determines that covering the victim's mouth and locking the door made the confinement of the victim more secretive. The majority also determines that the act of covering the victim's mouth put her at risk of suffocation, creating a substantial increase in the risk of harm separate and apart from the underlying rape, and constituting an act in excess of the force necessary to consummate the rape. It is true, perhaps, that these two actions were not a necessary and automatic part of the consummation of the act of rape itself. However the focus is on whether those actions were conducted with the same animus in order to effectuate the rape, i.e. to bring it about, not just to consummate it.

¶{63} In *Logan*, the defendant both threatened the victim by pressing a knife to her throat, and moved the victim into an alleyway. *Logan* at 127. Under the majority's reasoning, pressing a knife to a victim's throat would put her at risk of getting injured or killed, which would increase her risk of harm separately from the underlying rape and would be beyond the force necessary to complete the actual act of rape. Further, under the majority's reasoning, forcing a victim down the stairs and into an alleyway to avoid detection would seem to make the action more secretive. However, the Ohio

Supreme Court noted that such actions "had no significance apart from facilitating the rape." *Logan* at 135. The Court noted that detention and asportation may be incidental to the crime of rape. *Logan* at 135-136. Thus, not all acts of detention and asportation (i.e. which are additional to the physical restraint required to complete the physical act of rape) have a significance apart from facilitating a rape. Here, the defendant covered the victim's mouth and locked the door in order to both restrain the victim and avoid detection for the purpose of facilitating the act of rape, and released the victim immediately afterwards.

¶{64} The majority further determines that the movement of the victim from her mother's apartment upstairs to the defendant's apartment, along with approximately twenty or thirty minutes of TV watching with her brother and the defendant, indicates that the victim's removal was significant enough in distance and duration to indicate a separate animus. To support this finding, the majority relies on *State v. Lynch*, 98 Ohio St.3d 514, 2003-Ohio-2284, 787 N.E.2d 1185. Although the facts in this case are very similar to *Lynch*, there are still important distinctions that should lead to an opposite result. In *Lynch*, the defendant was able to create a situation where the victim was alone, only with the defendant, for approximately one hour's time. *Lynch* at ¶7-8, 135. Lynch was able to isolate the victim so that friends and family were completely unaware of the victim's whereabouts. Id. In the case at hand, the victim was not so isolated with the defendant. Both the victim and her brother were in the defendant's apartment watching TV. The presence of the brother does not indicate that the victim would somehow be protected by the brother, but it does indicate that there was no isolation and no secrecy. Additionally, the mother of the victim was immediately downstairs and had knowledge of the victim's exact whereabouts, since the defendant had asked the mother if the children could watch TV with him. This is not the kind of secrecy explained in *Lynch*, and certainly not the kind of secret detention envisioned by *Logan*. See *Logan* at 135 (describing secret confinement as occurring in situations "such as in an abandoned building or nontrafficked area").

¶{65} This case is more analogous to the facts described in *State v. Price* (1979), 60 Ohio St.2d 136, 14 O.O.3d 379, 398 N.E.2d 772. In *Price*, the 23 year old defendant transported the 13 year old victim from a public area to a trailer to drink

beer. Both the defendant and the victim were accompanied by additional friends. After the victim had rejected the defendant's sexual advances and returned to the car, the defendant pulled the victim from the car, took her behind nearby bushes, and forcibly raped her. *Price* at 137. The Ohio Supreme Court found that there was no separate animus in the commission of rape and kidnapping, and that "there was no act of asportation distinct from the rape either in time or in function." *Price* at 143. The Supreme Court has factually distinguished *Price* from other cases, where the defendant used deception to remove the victim from a more public area, where the victim was alone with the defendant and no one was aware of the victim's whereabouts. *State v. Ware* (1980), 63 Ohio St.2d 84, 86-87, 17 O.O.3d 51, 406 N.E.2d 1112.

¶{66} In *Ware*, the Court relied on *Price* to find that the forcible movement of the victim into a more private area of the defendant's house did not constitute a separate animus. However, the defendant in *Ware* additionally used deception to lure the victim away from her friends so that she would walk and hitchhike with the defendant to his house. *Ware* at 87. Again, this is the kind of isolation and secrecy found in the facts of *Lynch*, and distinguishable from the case at hand.

¶{67} Finally, the majority further justifies its decision that the victim's movement leading up to the rape was sufficiently significant in distance and duration by noting that R.C. 2905.01(A)(4) only requires movement "by any means" for victims under thirteen. It is true that there does not need to be any force or even deception in order to satisfy the elements of kidnapping for a victim under the age of thirteen, and that the proof required is thus different from cases involving adults. However, the R.C. 2941.25(B) analysis at this point is not whether the elements of R.C. 2905.01(A)(4) have been met. Rather, the analysis is focused on whether Taylor's removal of the victim, by any means, was committed with an animus which was significantly independent from, and not incidental to the rape itself. Although the type of proof required to prove the kidnapping of a child may be easier to produce than for the kidnapping of an adult, it does not follow that the considerations in *Logan* are changed or become inapplicable. We must still find prolonged restraint, secretive confinement,

or substantial movement, no matter how little the victim needed to have been moved in order to satisfy the elements of kidnapping.

¶{68} The facts that the victim in this case was in the defendant's apartment with her brother during the twenty or thirty minutes of TV-watching, that the mother knew where the victim was, that the victim was alone with the defendant only during the commission of the rape, and that the victim was released immediately following the rape, indicate that none of the *Logan* considerations of prolonged restraint, secretive confinement, or substantial movement, occurred in this case. The acts of rape and kidnapping for which Taylor was convicted were committed with the same animus, and thus it is reasonably probably that the convictions would have been merged if trial counsel had properly raised the issue.

¶{69} For the foregoing reasons, I must respectfully dissent in part from the majority's decision that the rape and kidnapping in this case were committed with separate animus, and therefore that no prejudice resulted in trial counsel's failure to raise the issue of merger. Appellant's first assignment of error should be sustained, and appellant's kidnapping conviction should be vacated.