[Cite as *State v. Himes*, 2009-Ohio-6406.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	CASE NO. 08 MA 146
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	O P I N I O N
	)	
WILLIAM HIMES,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Common Pleas Court, Case No. 07CR332.
JUDGMENT:	Conviction and Sentence Modified.
APPEARANCES:	
For Plaintiff-Appellee:	Attorney Paul Gains Prosecuting Attorney Attorney Gabriel Wildman Assistant Prosecuting Attorney 21 West Boardman Street, 6th Floor Youngstown, Ohio 44503
For Defendant-Appellant:	Attorney Wesley Johnston 111 Broad Street, Suite 207 Wadsworth, Ohio 44281
JUDGES: Hon. Joseph J. Vukovich Hon. Gene Donofrio Hon. Mary DeGenaro	
	Dated: December 4, 2009

VUKOVICH, P.J.

¶{1} Defendant-appellant William Himes appeals from his complicity to rape convictions entered after a jury trial in the Mahoning County Common Pleas Court. Appellant complains that the indictment failed to charge complicity and failed to state the method of the rape. He then argues that the jury was required to specifically make a finding that a rape actually occurred, and he contends there was no evidence that the principal digitally penetrated the victim. Appellant also urges that the two counts of complicity to rape should have merged so that he was only convicted and sentenced for one offense. Because counsel did not object to any of the alleged errors, appellant additionally raises ineffective assistance of counsel.

¶{2} For the following reasons, appellant's merger argument has merit as the two complicity to rape counts were allied offenses of similar import that were not committed separately or with a separate animus to each. As such, the two rape counts must be merged. Thus, appellant's record of conviction and sentence is modified to show one conviction for complicity to rape with one five-year sentence.

STATEMENT OF THE CASE

¶{3} On March 15, 2007, appellant was indicted for kidnapping and five counts of forcible rape. The case was tried to a jury on June 12, 2008. The victim testified that on June 26, 2006, after drinking beer at home, she decided to walk to a nearby bar on the corner of Belle Vista Avenue in Youngstown. (Tr. 246-248). She estimated that she arrived between 10:00 and 11:00 p.m. and that she consumed six to eight beers at the bar for a total of eight to ten beers. (Tr. 248, 253).

¶{4} The victim sat near a man, later identified as appellant, whom she believed she saw one other time and whom she believed lived across the street. (Tr. 266, 272, 274). She conversed with appellant, and they began talking to a man named Tony, who sat further down the bar. (Tr. 249). The victim disclosed that the three of them left together in Tony's car at1:00 a.m. in order to look for marijuana. (Tr. 250).

¶{5} She testified that at the first stop, appellant moved to the front seat while Tony was in a house. Appellant unsuccessfully asked her for oral sex. (Tr. 252-253). At the second stop, appellant again moved to the front seat after Tony exited the vehicle. She testified that appellant tried to force her head down, but she said no and turned her head. (Tr. 254-255). She variously testified that she did perform oral sex, that she did not perform oral sex, and that he managed to get his penis in her mouth at one point. (Tr. 255, 315, 322, 347).

¶{6} When Tony appeared, she asked to go home, and he responded that there was one more stop in the search for marijuana. (Tr. 256). However, Tony then pulled the vehicle into some woods. She testified that they made her take her clothes off even though she was saying no and crying. (Tr. 257, 327). She stated that Tony made her perform oral sex on him. (Tr. 268, 330).

¶{7} At this point, she made a run for the road, but Tony tackled her before she could escape. (Tr. 258). He spread her legs so far, they felt like they would break, which is exactly what he threatened to do, stating that he was Mafia. (Tr. 258). Appellant voiced that they should leave her there, but Tony dragged the victim back through briars and put her in the back seat. (Tr. 259).

¶{8} When she continued to fight, Tony pointed a gun at her and threatened her life and the lives of her husband and son. (Tr. 260). She testified that appellant placed his finger in her vagina and helped guide Tony's penis. (Tr. 261, 319-320, 336). She could not remember if Tony digitally penetrated her. She testified that Tony then raped her vaginally, while appellant held her shoulders and masturbated himself. (Tr. 261). When it was over, Tony dropped her off by the bar. (Tr. 265).

¶{9} The victim arrived at the emergency room at 6:25 a.m. (Tr. 460). She was very upset and had to be sedated. (Tr. 461). Her clothes were wet and dirty. (Tr. 462). She was also very dirty and disheveled and had scratches, abrasions, and bruises all over her body. (Tr. 475-476). She had pain in her legs, hips, groin, back, and vaginal area. (Tr. 469, 482-483). Besides being red and tender with abrasions, her vaginal area contained debris, which appeared to include briars. (Tr. 482-483). Multiple photographs were presented of the victim's condition.

¶{10} The victim reported to a sexual assault nurse examiner that she had been sexually assaulted by two males, whom she referred to as Tony and "the guy across the street." The victim specified that Tony penetrated her vagina with his penis, both men penetrated her vagina with their fingers, and she performed oral sex on both men. (Tr. 467-468).

¶{11} The victim provided police with the following description of the unnamed man: white male, short gray hair, 5'4'' to 5'5'', medium build, mid-forties, wears tie-dyed T-shirts, and was wearing long cargo shorts, sandals and a fisherman's hat. (Tr. 452, 468). After speaking to the bartender and bar owner, the investigating officer believed that the unnamed assailant was named Bill. (Tr. 426, 443). The officer started running searches of all people named Tony, Anthony, William, or Bill that lived in the neighborhood and matched the descriptions provided. (Tr. 425). When she found appellant's name, his features matched the victim's description. (Tr. 425). Thus, she compiled a photographic line-up for the victim's viewing. The victim identified appellant through his photograph, and later from the witness stand. (Tr. 266, 426).

¶{12} The investigator made an appointment for appellant to be interviewed. He gave a statement that the victim was initially compliant with Tony's advances but soon asked Tony to stop. When Tony refused to stop, appellant stated that he left the vehicle because he felt uncomfortable with the situation. He denied that there was any sexual activity between himself and the victim. The DNA he provided excluded him as being the source of the semen found on the victim's vaginal and rectal swabs. (Tr. 360, 383-384). However, his DNA was consistent with the semen found inside the victim's jeans; the victim's DNA and another male's DNA were discovered in the jeans as well. (Tr. 361-363, 383).

¶{13} Through instructions and the verdict forms, the jury was presented with the following counts: (1) kidnapping; (2) rape (oral); (3) rape (digital); (4) complicity to rape (oral); (5) complicity to rape (digital); and, (6) complicity to rape (vaginal). The jury found appellant guilty of complicity to digital rape and complicity to vaginal rape. The jury acquitted appellant of the first four counts, thus finding that appellant did not kidnap the victim, he did not orally rape her, he did not digitally rape her, and he did not aid and abet Tony in orally raping her.

¶{14} At the sentencing hearing, the state recommended two ten-year consecutive sentences. The court sentenced appellant to two five-year consecutive sentences. Appellant filed a timely appeal from the June 23, 2008 sentencing entry.

ASSIGNMENT OF ERROR NUMBER ONE

¶{15} Appellant sets forth four assignments of error, the first of which provides:

¶{16} "THE APPELLANT'S SIXTH AMENDMENT RIGHT TO EFFECTIVE TRIAL COUNSEL WAS VIOLATED WHEN SAID TRIAL COUNSEL FAILED TO OBJECT TO [THE ISSUES RAISED IN THE NEXT THREE ASSIGNMENTS OF ERROR]."

¶{17} Appellant sets forth no analysis under this assignment of error. Rather, he directs us to each of the next three assignments of error to demonstrate that counsel was ineffective. Thus, we shall similarly set forth the general law on ineffective assistance of counsel and then analyze the principle within each assignment of error.

¶{18} To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that such deficient performance prejudiced the defense. *Strickland v. Washington* (1984), 466 U.S. 668, 687. Deficient performance is demonstrated by showing counsel's errors were so serious that he or she failed to function as the counsel guaranteed by the Sixth Amendment. *State v. Hamblin* (1988), 37 Ohio St.3d 153, 156.

¶{19} When reviewing whether counsel's performance was deficient, courts must refrain from second-guessing strategic decisions of trial counsel. *State v. Sallie* (1998), 81 Ohio St.3d 673, 674. In addition, there is a strong presumption that trial counsel's decisions fell within the wide range of reasonable professional assistance. Id. at 674-675.

¶{20} Even if the defendant shows deficient performance, there can be no reversal without prejudice. To establish prejudice, a defendant must show there is a reasonable possibility that, but for counsel's errors, the result of the proceeding would have been different. *State v. Bradley* (1989), 42 Ohio St.3d 136, 142. We consider the totality of the circumstances in determining prejudice. Id. at 142-143. A reasonable probability is a probability sufficient to undermine confidence in the

outcome. Id. However, it is not enough for the defendant to show that the error had some conceivable effect on the outcome. Id. at 142, fn.1.

¶{21} As aforementioned, we shall apply this test where ineffective assistance of counsel is specifically raised under each of the following assignments of error.

ASSIGNMENT OF ERROR NUMBER TWO

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

¶{23} "THE APPELLANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS WAS VIOLATED BY THE APPELLEE'S FAILURE TO PROPERLY NOTIFY HIM THAT HE WOULD BE FACING COMPLICITY CHARGES REGARDING THE CRIMINAL OFFENSES OF RAPE. BECAUSE NO OBJECTION WAS MADE BY TRIAL COUNSEL TO THE LACK OF NOTICE ISSUE IN THE MATTER AT HAND, THE DOCTRINES OF INEFFECTIVE ASSISTANCE OF COUNSEL AND PLAIN ERROR APPLY."

¶{24} Appellant initially argues that the indictment failed to charge him with complicity. He believes that recent Supreme Court cases, noting the importance of an indictment in providing notice, have changed the prior holdings that complicity can be tried even where the indictment sounds in terms of the principal offense. See *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624. This argument is without merit.

¶{25} "A charge of complicity may be stated in terms of [the complicity statute] or in terms of the principal offense." R.C. 2923.03(F). This statute provides adequate notice that the jury may be instructed on complicity even where the indictment is phrased as if the defendant were the principal offender. *State v. Herring* (2002), 94 Ohio St.3d 246, 251. Thus, a defendant charged with an offense may be convicted of that offense upon proof that he was complicit in its commission, even though the indictment is stated in terms of the principal offense and does not mention complicity. Id., citing *State v. Keenan* (1998), 81 Ohio St.3d 133, 151. In fact, there is adequate statutory notice of the potential for a complicity conviction even where a bill of particulars did not mention complicity either. *State v. Hand*, 107 Ohio St.3d 378, 2006-Ohio-18, ¶181. Here, there was no request for a bill of particulars.

¶{26} Because the statute provides that the offense is the same no matter what theory (principal or complicitor) is used to convict, a complicity instruction is not the

equivalent of amending an indictment to change the name of the offense. Contrary to appellant's other suggestion, it also does not change the identity of the crime, as it neither alters the penalty nor the degree of the offense. See *State v. Davis*, 121 Ohio St.3d 239, 2008-Ohio-4527, ¶13.

¶{27} Appellant is also incorrect in suggesting that the *Herring* precedent was changed by *Colon*'s holding that an indictment is defective where it does not provide the mental state for an essential element. In fact, that particular holding was nothing new. See, e.g., *State v. O'Brien* (1987), 30 Ohio St.3d 122, 125 (child endangering indictment that omitted recklessness mental state was defective). In any event, *Colon* did not address complicity.

¶{28} Here, defense counsel received discovery, which included the police report and the victim's statements to the nurse. Multiple pretrials were conducted. The victim testified to various instances of appellant assisting the principal in his attempt to rape the victim. Defense counsel did not object to the jury instructions or verdict forms on complicity. Rather, he presented arguments that if Tony raped the victim, appellant did not participate or assist Tony. There is no indication that counsel was not prepared to defend against the complicity allegations. Rather, counsel is presumed to have been aware of the well-established doctrine that complicity instructions are permissible regardless of the indictment as R.C. 2923.03(F) provides notice of how the doctrine works.

¶{29} Due to the existence of R.C. 2923.03(F), *Herring* and *Hand*, defense counsel did not provide ineffective assistance of counsel by accepting that the complicity instructions were permissible notwithstanding the failure to indict on complicity. Complicity need not be indicted upon in order to properly notify the defendant that he faced such allegations. See, e.g., *State v. Spires*, 7th Dist. No. 04NO317, 2005-Ohio-4471, ¶49-50 (it is well-established that complicity need not be contained in the indictment in order to provide the defendant notice that he can be convicted as an aider and abettor).

¶{30} Under this assignment of error, appellant also complains that the verdict forms contained the words "digital" for count five or "vaginal" for count six but the indictment did not. This argument is without merit. The indictment tracked the

language of R.C. 2907.02(A)(2), the applicable statute, as permitted by R.C. 2941.05. The indictment need not specify the method of rape. See, *State v. Shaw*, 2d Dist. No. 21880, 2008-Ohio-1317, ¶19-20; *State v. Wilson*, 2d Dist. No. 21738, 2007-Ohio-4885, ¶26; *State v. Plymale* (Nov. 2, 2001), 11th Dist. No. 99-P-12; *State v. Lee* (Aug. 11, 1983), 8th Dist. No. 45802. See, also, *State v. Alexander*, 7th Dist. No. 03CA789, 2004-Ohio-5525, ¶112. The pertinent essential element is sexual conduct, not the exact type of sexual conduct. See id. Finally, there is no indication that defense counsel was unaware of the various penetrations alleged by the victim.

¶{31} As for labeling the verdict forms, this is merely a rational way to identify which verdict is for which rape. See, e.g., *Shaw*, 2d Dist. No. 21880 at ¶22. Verdict captioning not an improper practice. See *State v. Amos*, 7th Dist. No. 07BE22, 2008-Ohio-7138, ¶47 (where court used location of alleged offense in verdict form and labeled other offense "threesome"). This process avoids problems such as double jeopardy issues in cases of a hung jury on some offenses but not others. It is not deficient performance to fail to object to these labels merely because the indictment did not specify the type of sexual conduct.

¶{32} Notably, appellant was acquitted on three counts of rape and is able to properly focus his arguments on appeal due to the labeled verdict forms. There is no indication of prejudice from the utilization of such clarifying labels. In fact, it is the state that is potentially prejudiced in this case because, as will be discussed infra, the need for merger of convictions is only apparent based upon the labeled verdict forms.

ASSIGNMENT OF ERROR NUMBER THREE

¶{33} Appellant's third assignment of error alleges:

¶{34} "THE APPELLANT'S CONVICTION AND SENTENCE FOR THE OFFENSES OF COMPLICITY TO RAPE ARE IMPROPER BECAUSE THE JURY DID NOT MAKE THE NECESSARY FINDING THAT THE OFFENSE – RAPE - HAD ACTUALLY BEEN COMMITTED AS REQUIRED BY R.C. 2923.03. THEREFORE, THE APPELLANT'S CONVICTION IS NOT ONLY VOID, BUT IS VOID AB INITIO. FURTHERMORE, THERE WAS INSUFFICIENT EVIDENCE PRESENTED BY THE APPELLEE TO PROVE THAT THE APPELLANT WAS GUILTY OF COMPLICITY TO RAPE – 'DIGITALLY' AS STATED ON THE VERDICT FORM."

¶{35} Pursuant to R.C. 2923.03(C), "No person shall be convicted of complicity under this section unless an offense is actually committed, but a person may be convicted of complicity in an attempt to commit an offense in violation of section 2923.02 of the Revised Code." Appellant suggests that this requires the jury to make a specific written finding in a verdict form that an offense was actually committed. However, this argument is without merit, and thus, counsel was not ineffective in failing to seek a verdict form that contained a special finding.

¶{36} Just as the verdict form need not state each of the essential elements, the verdict need not state the complicity principle that an offense was actually committed. See, e.g., *State v. Martin*, 2d Dist. No. 22744, 2009-Ohio-5303, ¶8 (verdict can merely state that jury finds defendant guilty of a named offense without stating all elements, which is said to invite confusion), citing 2 Ohio Jury Instructions (2007), Criminal Section 425.33; *State v. Lampkin* (1996), 116 Ohio App.3d 771, 774 (6th Dist). Cf. R.C. 2945.75(A)(2) (where offense has different degrees, verdict must state either the degree charged or provide elements necessary for higher degree); R.C. 2907.02(B) (all rapes are first degree felonies).

¶{37} Rather, this is the function of jury instructions. Statutorily, the court is to *instruct* the jury on all matters of law necessary to render a verdict. R.C. 2945.11. Here, *the jury was instructed four different times that appellant could not be convicted for complicity unless a rape was actually committed*. (Tr. 562, 563, 565, 573). By finding him guilty on two counts of complicity, the jury necessarily found that a rape was actually committed.

¶{38} Appellant similarly argues under this assignment of error that there was insufficient evidence to support his conviction of complicity to digital rape because no digital rape was committed by the principal. Sufficiency of the evidence deals with legal adequacy rather than the weight or persuasiveness of the evidence. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. In viewing a sufficiency of the evidence argument, we evaluate the evidence in the light most favorable to the prosecution. *State v. Goff* (1998), 82 Ohio St.3d 123, 138. A conviction cannot be reversed on grounds of sufficiency unless the reviewing court determines that no rational juror

could have found that the elements of the offense were proven beyond a reasonable doubt. Id.

¶{39} At the trial, two years after the rape, the victim testified that she could not remember if Tony digitally penetrated her. (Tr. 261). Notably, although the victim testified that appellant digitally penetrated her, the jury acquitted appellant of rape by digital penetration among other offenses. (Tr. 261). Thus, the jury rendered a verdict establishing that appellant did not digitally penetrate victim himself (nor did they believe that he kidnapped the victim, that he forced his penis into the victim's mouth, or that he was complicit to the principal forcing his penis into the victim's mouth).

¶{40} Thus, appellant concludes that there was no evidence of digital rape by the principal. However, *the jury heard testimony from the nurse that the victim reported that both perpetrators penetrated her vagina with their fingers*. (Tr. 467). See Evid.R. 803(4) (statements made for purposes of medical diagnosis or treatment and describing 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 are not excluded by the hearsay rule); *State v. Menton*, 7th Dist. No.07MA70, 2009-Ohio-4640, ¶59 (nurse examiner can testify that victim reported multiple acts of penetration). See, also, *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶80, citing *Lockhart v. Nelson* (1988), 488 U.S. 40-42 (sufficiency is not affected by evidentiary issues in any event).

¶{41} As such, the jury was presented with some evidence that Tony digitally penetrated the victim, which is the only element raised as lacking sufficiency here. Viewed in the light most favorable to the state, a rational juror could conclude beyond a reasonable doubt that Tony raped the victim in this manner.

¶{42} However, a finding of sufficiency does not permit a final conviction to be entered where merger, the topic discussed next, is required. Due to our analysis below, appellant is not truly prejudiced by our overruling of this assignment or error.

ASSIGNMENT OF ERROR NUMBER FOUR

¶{43} Appellant's fourth and final assignment provides:

¶{44} "THE APPELLANT'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO BE FREE FROM DOUBLE JEOPARDY WERE VIOLATED WHEN HE

WAS CONVICTED OF TWO COUNTS OF COMPLICITY TO RAPE WHICH ALLEGEDLY RESULTED FROM ONE SINGLE ACT. FURTHERMORE, TO BE SENTENCED TO SERVE TWO PRISON TERMS, CONSECUTIVELY, FOR THE COMPLICITY TO RAPE, FURTHER VIOLATES THE APPELLANT'S RIGHT TO BE FREE FROM DOUBLE JEOPARDY. FINALLY, BECAUSE DEFENSE COUNSEL FAILED TO OBJECT TO THE AFOREMENTIONED CONSTITUTIONAL VIOLATIONS, THE APPELLANT WAS NOT AFFORDED THE SIXTH AMENDMENT RIGHT TO BE REPRESENTED BY EFFECTIVE COUNSEL."

¶{45} Under Ohio's multiple count statute, a defendant can be convicted of two offenses where his conduct constituted two offenses of dissimilar import or where his conduct resulted in two offenses of the same or similar kind committed separately or with a separate animus to each. R.C. 2941.25. See, also, *State v. Rance* (1999), 85 Ohio St.3d 632, 635-636, 639 (where such statute exists, the analysis does not involve double jeopardy analysis). The first step is thus to determine whether the two crimes are allied offenses of similar import by comparing 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.

¶{46} If the elements correspond to such a degree that commission of one offense will necessarily result in commission of the other offenses, then the offenses are allied offenses of similar import and the court proceeds to the second stage. Id. at ¶14-15, 22-27, citing *Rance*, 85 Ohio St.3d at 636. See, also, *State v. Harris*, 122 Ohio St.3d 373, 2009-Ohio-3323, ¶13-14, 16 (applying *Cabrales*). If the elements do not so correspond, then conviction and sentencing can proceed on both. Id. at ¶14, 30-31.

¶{47} If the offenses are allied, then the second stage asks whether the offenses were committed separately or with separate animus. Id. at ¶14, 31. Animus here has been defined as purpose or motive. *State v. Logan* (1979), 60 Ohio St.2d 126, 130. Unlike the first stage, the defendant's conduct must be reviewed in order to evaluate this stage. See *State v. Jones* (1997), 78 Ohio St.3d 12, 14.

¶{48} On counts five and six, appellant was indicted for rape. The elements of both offenses were the same pursuant to the indictment. The state's theory on these

two counts was complicity, the jury was instructed as such, and the verdict forms were labeled so that count five represented complicity to digital rape and count six represented complicity to vaginal rape.

¶{49} Appellant does not contest that digital and vaginal rape counts do not merge when the principal is being convicted and sentenced, as each method of rape is a separate act and/or is committed with a separate animus. See, e.g., *State v. Barnes* (1981), 68 Ohio St.2d 13, 14 (oral and vaginal rapes were two offenses of similar kind committed with separate animus). Rather, he contends that his conduct alleged to constitute complicity was a single act with a single animus. He urges that the failure to seek merger of his convictions constituted ineffective assistance of counsel and plain error. The state merely responds that the fact that a defendant is convicted of complicity does not change the rule that rape by different methods allows multiple convictions.

¶{50} However, the blanket rule posited by the state is incorrect under the precedent of this court. This court has held that convictions on multiple counts of complicity to rape can be sustained where the defendant committed different acts to assist the principal committing various types of rapes. *State v. Moore*, 7th Dist. No. 02CA216, 2005-Ohio-3311, ¶90; *State v. Bunch*, 7th Dist. No. 02CA196, 2005-Ohio-3309. In one case, the defendant held the victim's head while the principal made her perform fellatio, held her against a car while the principal anally raped her, and pointed a gun at her while the principal vaginally raped her. *Moore*, 7th Dist. No. 02CA216 at ¶90. In concluding that the three counts of complicity to rape did not merge, this court relied on the fact that *each act by the defendant was committed separately in order to aid the principal in a different act of rape*. Id.

¶{51} Thus, where the principal penetrates the victim in various ways, we suggested that it depends upon the facts of each case and the actions by the defendant as to each type of rape to determine whether multiple complicity to rape convictions can be entered in a given case. See id. Although any type of rape the principal commits can be attributable to the accomplice for purposes of trial and sufficiency of the evidence, this concept is distinct from the merger principles after trial.

Notably, we are evaluating the separateness of the defendant's actions or animus (as found by the jury), not the separateness of the principal's actions.

¶{52} We begin by reiterating the importance of the fact that appellant was acquitted of kidnapping, oral rape, digital rape, and complicity to oral rape. The acts said to have constituted these allegations thus cannot be utilized in evaluating the facts surrounding the separateness of his actions or animus for complicity to digital rape and complicity to vaginal rape. Excluding the acts of which appellant was acquitted, it was alleged that appellant helped guide the principal's penis into the victim's vagina and held the victim's shoulders down to facilitate the vaginal intercourse.

¶{53} Although there was testimony (from the nurse) that the principal digitally penetrated the victim's vagina, there was no indication that appellant's complicity for this offense was separate from the complicity involved in the vaginal rape. That is, no act was performed by appellant in facilitation of the principal's digital rape of the victim different and apart from the acts performed to facilitate the vaginal rape. Thus, the totality of the facts and circumstances here are distinguishable from the *Moore* and *Bundy* cases as appellant was not alleged to have engaged in separate and distinct acts to facilitate the principal's vaginal rape as opposed to the principal's digital rape.

¶{54} Accordingly, the jury's verdict must be merged into a single conviction for complicity to rape. Thus, appellant's record of conviction and sentence is modified to show one conviction for complicity to rape with one five-year sentence.

Donofrio, J., concurs.
DeGenaro, J., concurs.