[Cite as *State v. Himes*, 2010-Ohio-332.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	CASE NO. 08 MA 146
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	OPINION
	)	AND
WILLIAM HIMES,	)	JUDGMENT ENTRY
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Application for Reconsideration.

JUDGMENT: Application for Reconsideration Denied.

APPEARANCES:

For Plaintiff-Appellee:

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For Defendant-Appellant:

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

Dated: January 22, 2010

PER CURIAM:

¶{1} Appellee, State of Ohio, has filed an App.R. 26(A) application to reconsider our decision in *State v. Himes*, 7th Dist. No. 08MA146, 2009-Ohio-6406 wherein we sustained appellant's fourth assignment of error. Therein, we merged appellant's convictions in counts five and six: complicity to vaginal rape and complicity to digital rape. Before doing so, we set forth the statutory merger test that a defendant can only be convicted of both offenses where the offenses are of dissimilar import or where his conduct results in two offenses "of the same or similar kind" committed separately or with a separate animus. R.C. 2941.25(B).

¶{2} We first pointed out that the elements of rape for counts five and six were identical. Id. at ¶48. We then continued to the next step which looks at the defendant's conduct to determine whether the offenses were committed separately or with a separate animus to each. Id. at ¶48-53. In answering this question in the negative, we concluded that there was no indication that appellant's complicity in the principal's vaginal rape of the victim was separate from his complicity for the principal's digital rape of the victim. Id. at ¶53, distinguishing *State v. Moore*, 7th Dist. No. 02CA216, 2005-Ohio-3311, ¶90 (where each act by the defendant was committed separately in order to aid the principal in a different act of rape). See, also, *State v. Bunch*, 7th Dist. No. 02CA196, 2005-Ohio-3309.

¶{3} In its reconsideration application, the state argues that we should not have proceeded to the second step because appellant's conduct was irrelevant where the offenses are not allied offenses of similar import. Specifically, the state urges that vaginal rape and digital rape are not allied offenses of similar import under the first step of the merger analysis because the commission of one will not result in the commission of the other, citing *State v. Nicholas* (1993), 66 Ohio St.3d 431.

¶{4} Generally, an application for reconsideration must call to the attention of the appellate court an obvious error in its decision or point to an issue that had been raised but was inadvertently not considered. *Juhasz v. Costanzo* (Feb. 7, 2002), 7th Dist. No. 99CA294. Reconsideration motions are rarely considered when the movant simply disagrees with the logic used and conclusions reached by an appellate court.

Victory White Metal Co. v. N.P. Motel Syst., 7th Dist. No. 04MA245, 2005-Ohio-3828, ¶2; *Hampton v. Ahmed*, 7th Dist. No. 02BE66, 2005-Ohio-1766, ¶16.

¶{5} Here, the state appears to be merely contesting our analysis and conclusion. However, we will extend some further explanation to explain why our decision is not in opposition to the most recent Supreme Court precedent.

¶{6} In *Barnes*, the Supreme Court held that vaginal rape and oral rape are two offenses of the same or similar kind under the first prong of the merger test. *State v. Barnes* (1981), 68 Ohio St.2d 13, 14 (majority using only "similar kind"), 17 (Celebrezze, J., concurring and garnering majority support as well but using "same or similar kind"). The Court then proceeded to the second prong of the test and concluding that the defendant's acts were committed separately and with a separate animus to each, thus allowing convictions on each offense to stand. Id.

¶{7} As the state points out, the *Nicholas* Court thereafter stated (without reference to *Barnes*) that vaginal rape and oral rape are not allied offenses of similar import because:

¶{8} "the distinct elements of oral and vaginal rape do not 'correspond to such a degree that the commission of one crime will result in the commission of the other.' Commission of oral rape will not constitute commission of vaginal rape. The converse is likewise true. Thus, regarding the two counts of rape, [the defendant] has failed to establish the first step of the test * * *." *State v. Nicholas* (1993), 66 Ohio St.3d 431, 435.

¶{9} However, the Supreme Court thereafter recognized that it has often fluctuated back and forth in its method of applying the first part of the merger test. *State v. Rance* (1999), 85 Ohio St.3d 632, 637-638. The Supreme Court then declared that courts must now contrast the statutory elements of the offenses in the abstract, looking solely to the wording of the statute outlining the offenses. Id. at 636-637. Courts shall no longer consider the particular facts of the case or look to the facts alleged under a particular indictment to determine whether the offenses are "of the same or similar kind." Id.

¶{10} These rules have been reaffirmed recently. See *State v. Harris*, 122 Ohio St.3d 373, 2009-Ohio-3323, ¶12; *State v. Cabrales*, 118 Ohio St.3d 54, 2008-

Ohio-1625, ¶22, 26-27 (also adding that strict textual comparison is not required). In fact, the Court found that the existence of multiple stab wounds *or the use of more than one method of assaulting* will pass the first step of the test (offenses of the same or similar kind) and will allow the court to proceed to the second step of merger test. *Harris*, 122 Ohio St.3d 373, 2009-Ohio-3323, ¶20, 26-26 (noting prior case where Court remanded to determine whether there was same animus for each stab wound, finding same animus for two gunshot wounds to one victim, and remanding where Court could not discern whether there existed separate animus for act of hitting victim with gun and act of shooting that victim).

¶{11} In applying the merger test to the offense of rape, it must be recognized that there are not actually offenses called "vaginal rape" or "digital rape." Rather, these are *factual* terms used to assist the parties and the trier of fact in identifying multiple charges and to differentiate the charges in recounting the factual situation of the case for instance.

¶{12} In count five and count six, appellant was charged with rape in violation of R.C. 2907.02(A)(2). The elements of both offenses are thus as follows:

¶{13} "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." R.C. 2907.02(A)(2).

¶{14} As we have previously stated, the pertinent essential element is sexual conduct, not the exact type of sexual conduct. *Himes*, 7th Dist. No. 08MA146 at ¶30. The factual particulars of entry, i.e. oral, digital, vaginal, or anal, are not elements of the offense of rape. In other words, defendants are charged with rape in violation of R.C. 2907.02, not the definition of sexual conduct provided in R.C. 2907.01(A).

¶{15} The addition of these descriptors, set forth in a separate definitional statute, is an improper consideration of the particular facts of the case. Compared in the abstract without considering the evidence of the case, the statutory elements of the offense of rape align with the statutory elements of the offense of rape.

¶{16} In fact, it has been stated that one need not actually use the term "allied offenses of similar import" (or its comparison of the elements test) when dealing with two counts charging the exact same statutorily enumerated offense. See *Moore*, 7th

Dist. No. 02CA216 at ¶87. This is due to the language of R.C. 2941.25(B), which states offenses of "the *same* or similar kind" and the subsequent cases setting forth the parameters of the first step of the merger test and referencing only questions of whether the offenses are of "*similar* import." That is to say, if a person is charged with multiple counts of the statutorily same (without viewing the particular facts of the case) offense, the first step is automatically satisfied, and the court proceeds directly to the second step to determine if the acts constituting the offenses were committed separately or with separate animus.

¶{17} Either way, the result is the same here: the offense of rape set forth in count five is of the "same or similar kind" as the offense of rape in count six. Thus, this court properly reached the second step regarding whether appellant's conduct constituting the offenses was committed separately or with separate animus. As we are not asked to reconsider our decision on the second step, we stop here.

¶{18} For all of the foregoing reasons, the state's reconsideration motion is denied.

VUKOVICH, P.J., concurs.
DONOFRIO, J., concurs.
DeGENARO, J., concurs.