

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. CA2011-01-013
 :
 - vs - : OPINION
 : 12/30/2011
 :
 DAVID WEATHERS, :
 :
 Defendant-Appellant. :

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2010-02-0300

Michael T. Gmoser, Butler County Prosecuting Attorney, Donald R. Caster, Government Services Center, 315 High Street, 11th Floor, Hamilton, Ohio 45011, for plaintiff-appellee

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POWELL, P.J.

{¶1} A defendant convicted of felonious assault, felony domestic violence, and violation of a protection order for punching his victim argues on appeal that those offenses should have been merged for sentencing. We agree and remand this case for a new sentencing hearing after the state selects which allied offense to pursue.

{¶2} David Weathers was charged with three offenses in connection with events that

began when the victim in this case obtained a protection order against Weathers, who is the father of her three children. The order was still in effect when he and the victim encountered each other inside a bar in 2009.

{13} While the testimony at trial differed concerning who was pursuing whom inside the bar, there is no question an altercation took place later in the bar parking lot. The victim said Weathers grabbed her by the throat, pulled her out of the car, and punched her in the face. She said she "maced him" and he ran away.

{14} Weathers testified that he was trying to avoid the victim in the parking lot, but she confronted him about his girlfriend and maced him. He said he may have accidentally scratched her while fending off the mace attack.

{15} A jury found Weathers guilty of felonious assault, felony domestic violence, and violation of the protection order (VPO), which was charged as a felony. The trial court sentenced Weathers to 18 months in prison for the domestic violence offense, five years for the felonious assault, and five years for violating a protection order, all sentences to run concurrently. Weathers filed this delayed appeal, raising a single assignment of error for our review.

{16} Assignment of Error:

{17} "THE TRIAL COURT ERRED WHEN IT IMPOSED SEPARATE SENTENCES FOR OFFENSES THAT AROSE FROM THE SAME CONDUCT, WERE COMMITTED WITH A SINGLE ANIMUS, AND SHOULD HAVE BEEN MERGED FOR SENTENCING PURPOSES UNDER R.C. 2941.25."

{18} Under this assignment of error, Weathers presents two separate issues for review, arguing in both that the offenses for which he was convicted are allied offenses of similar import.

{19} To support his argument, Weathers relies on the Ohio Supreme Court case of

State v. Johnson, 128 Ohio St.3d 153, 2010-Ohio-6314, which was released five months after he was sentenced and one month prior to initiating this delayed appeal. We will discuss *Johnson* more fully below. First, we note that Weathers waived all but plain error by failing to raise any allied offense objection with the trial court; however, the Ohio Supreme Court has said the imposition of multiple sentences for allied offenses of similar import is plain error. *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, ¶31.

{¶10} R.C. 2941.25, the statute providing guidance on the charging of multiple offenses, provides:

{¶11} "(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.

{¶12} "(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."

{¶13} When determining whether two offenses are allied offenses of a similar import subject to merger under R.C. 2941.25, the Ohio Supreme Court held in *Johnson* that the conduct of the accused must be considered. *Id.*, 2010-Ohio-6314 at syllabus, overruling *State v. Rance*, 85 Ohio St.3d 632, 1999-Ohio-291.

{¶14} Under *Johnson*, a court must first decide whether it is possible to commit one offense and commit the other with the same conduct. *Id.* at ¶48 (it's not necessary that both crimes are always committed by the same conduct but, rather, it is sufficient if both offenses can be committed by the same conduct [internal citations omitted]); *State v. McCullough*, Fayette App. Nos. CA2010-04-006, CA2010-04-008, 2011-Ohio-992, ¶14-15.

{¶15} If the multiple offenses can be committed by the same conduct, then the court must determine whether the offenses were indeed committed by the same conduct, i.e, a single act, committed with a single state of mind. *Id.* at ¶49; *McCullough*.

{¶16} Conversely, if the court determines the commission of one offense will never result in the commission of the other, or if the offenses are committed separately, or with a separate animus for each offense, then, the offenses will not merge. *Johnson* at ¶51-52 (this analysis may result in varying results for the same set of offenses in different cases, given that R.C. 2941.25 instructs courts to examine a defendant's conduct—an inherently subjective determination).

{¶17} Within this context, we turn to the first issue presented under this assignment of error. Weathers argues the domestic violence and felonious assault offenses should have been merged because they were both based on the conduct of choking the victim or punching the victim in the eye.

{¶18} As charged in this case, it was alleged that Weathers committed felonious assault by knowingly causing serious physical harm to another. See R.C. 2903.11(A)(1). Further, Weathers was charged with domestic violence by knowingly causing or attempting to cause physical harm to a family or household member when the offender had previously been convicted of domestic violence. See R.C. 2919.25(A). The record indicates both offenses were based upon Weathers pulling the victim from the car and punching her in the eye.

{¶19} The state conceded the two offenses of felonious assault and domestic violence were allied offenses committed with the same animus. After reviewing the record, we agree that both offenses can be committed by the same conduct and the state relied on the same conduct to support the conviction for both offenses.

{¶20} Weathers asserts in his second issue for review that the violation of a

protection order (VPO) should be merged into the felonious assault offense as they were committed by the same conduct with a single animus.

{¶21} Weathers was charged with recklessly violating the terms of a protection order while committing a felony domestic violence offense by "approaching and assaulting" the victim. See R.C. 2919.27(A)(1).

{¶22} The state argues that Weathers committed the VPO with a separate animus or separate state of mind because he violated the protection order over the course of the evening by following the victim around the bar and "[i]t was only when he pulled her from her car and struck her that he committed a felonious assault."

{¶23} After reviewing the record, we reject the state's argument. The VPO offense in the case at bar was charged as a felony; the record indicates the supporting evidence for this offense, as well as the other two offenses, was the conduct outside in the parking lot when Weathers pulled the victim out of the car and punched her. See *State v. Craycraft*, 193 Ohio App.3d 594, 2011-Ohio-413, ¶19 (since this was a pre-*Johnson* case, charges were pursued collectively in contemplation of the now overruled *Rance* analysis, appellate court compelled to view the record as it stands in revisiting the issue); *State v. Sutphin*, Cuyahoga App. No. 96015, 2001-Ohio-5157.

{¶24} Consequently, under the record before us, the felonious assault, domestic violence and violation of a protection order offenses are allied offenses of similar import and must be merged for sentencing because the state relied on the felonious conduct for each offense. The trial court committed plain error by not merging the offenses. Weathers' assignment of error is sustained.

{¶25} The judgment is reversed and this matter remanded to the trial court for resentencing. Upon remand, the state can elect which allied offense to pursue, which the trial court must accept and merge the crimes for sentencing. *State v. Whitfield*, 124 Ohio

St.3d 319, 2010-Ohio-2, ¶20, 24; *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, syllabus (when the cause is remanded to correct an allied-offense sentencing error, the trial court must hold a new sentencing hearing for the offense that remains after the state selects which allied offense to pursue).

{¶26} Reversed and remanded.

RINGLAND and HENDRICKSON, JJ., concur.