

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
HIGHLAND COUNTY

STATE OF OHIO,	:	
	:	Case No. 23CA6
Plaintiff-Appellee,	:	
	:	
v.	:	<u>DECISION AND JUDGMENT</u>
	:	<u>ENTRY</u>
ROBERT G. JACKSON,	:	
	:	RELEASED: 11/15/2024
Defendant-Appellant.	:	

APPEARANCES:

Dennis Kirk, Kirk Law Office, LLC, Hillsboro, Ohio, for appellant.

Anneka P. Collins, Highland County Prosecuting Attorney, and Adam J. King, Assistant Highland County Prosecuting Attorney, Hillsboro, Ohio, for appellee.

Wilkin, J.

{¶1} This is an appeal from a Highland County Court of Common Pleas judgment of conviction in which appellant, Robert G. Jackson, pleaded guilty to felonious assault and abduction. The trial court imposed separate prison terms and ordered the sentences to be served consecutively. Jackson, in his sole assignment of error, challenges the trial court’s denial of his motion to merge the convictions as being allied offenses of similar import.

{¶2} We agree with Jackson that the trial court erred in denying his motion to merge his felonious assault and abduction offenses. Our de novo review of the indictment, bill of particulars, and the victim’s and prosecution’s statements at sentencing do not establish Jackson committed separate offenses. Jackson’s assertion that his assault of the victim was one continuous conduct committed

with a single animus to physically harm the victim is supported by the record of the case. Accordingly, we reverse the trial court's decision and remand the matter for resentencing.

FACTS AND PROCEDURAL BACKGROUND

{¶3} Barbara Elkins and Jackson lived together and on the afternoon of February 28, 2023, Jackson was drinking when Barbara returned home. Within minutes of Barbara arriving at the house, the two began to argue. The argument escalated when Barbara poured out the remaining alcohol. Jackson physically attacked Barbara by breaking the kitchen chairs on her body, using the broken pieces to stab Barbara in her arm and head, and breaking her arm in two places. Jackson's assault on Barbara stopped because Deputy Steven Alexander responded to Barbara's 9-1-1 call within 2 minutes. Once Jackson heard the sirens, he ran to the back of the house. Jackson surrendered peacefully and was arrested by Deputy Alexander.

{¶4} Based on Jackson's assault on Barbara, he was indicted in April 2023, of committing three felony offenses: felonious assault as a second-degree felony, domestic violence, a third-degree felony, and abduction, a third-degree felony. In exchange for dismissing the second count of the indictment, Jackson agreed to plead guilty to felonious assault and abduction as charged.

{¶5} At sentencing, Jackson's counsel argued that the offenses of felonious assault and abduction should merge as they are allied offenses of similar import. This is because Jackson's intent was to seriously harm Barbara

and the assault was continuous. Thus, according to his counsel, Jackson's conduct could not be separated in two offenses.

{¶6} The State disagreed. The State argued that Jackson's abduction was based on either when Barbara was in her vehicle and he threatened to harm her dog if she did not return inside or his conduct of blocking Barbara from leaving the kitchen area. The State continued that Jackson committed felonious assault when he hit Barbara with the chairs, thus, his assault was separate from the conduct of restraining her movement.

{¶7} The trial court agreed with the State in that Jackson committed the offenses separately, concluding:

Although legally there doesn't have to be any actual harm to constitute the offense of Abduction. It has to be threat of harm or conduct that places the victim in fear of harm or a risk of physical harm. Whereas the Felonious Assault is the actual causing of physical harm. From what has been described here to me, it appears that this conduct had different stages. Initially an assault inside, she got outside, they came back in in part because of the fear that he was going to harm her animals and then from that point she was prevented from going out any further and there was subsequent assault. And so even though this was over a course of a conduct that started and continued until law enforcement got there and thankfully prevented the matter from going any further, it does appear to the Court that the Abduction would be a separate offense and would be subject to separate punishment and does not merge with the facts of this case with the Felonious Assault sentence.

{¶8} With regard to what sentence to impose, both Jackson and his counsel addressed the trial court with counsel informing the court that Jackson regrets his conduct and has taken responsibility for his actions. Counsel, therefore, requested a lenient sentence. Jackson stated that he will not harm Barbara again and will stay away from her and requested leniency from the

judge. The State and Barbara both requested a maximum sentence as Jackson's conduct was one of the "worst" and but for the deputy's close proximity, Jackson was going to kill Barbara.

{¶9} The trial court sentenced Jackson to a minimum of 7 years and a maximum of 10.5 years in prison for the felonious assault conviction. The trial court ordered this sentence to be served consecutively to the 24-month prison term for the abduction offense. It is from this judgment of conviction entry that Jackson appeals.

ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED BY FAILING TO MERGE DEFENDANT'S SENTENCES FOR FELONIOUS ASSAULT AND ABDUCTION.

{¶10} Jackson argues that his abduction and felonious assault offenses should merge. The reason is because Jackson's conduct was singular and continuous, thus, he solely committed one offense. Jackson's intent was to assault Barbara and that is what occurred. Once Jackson began hitting Barbara, the assault did not stop until the deputy arrived. The incident moved locations within the home but it was continuous of Jackson assaulting Barbara. The abduction was incidental to the assault. Further, there is no identifiable harm between the abduction and assault in this case. Therefore, even if you consider the indictment, the bill of particulars, and the discovery provided by the State, the offenses should merge.

{¶11} The State disagrees and contends that Jackson committed two separate offenses. The felonious assault offense was committed when he

seriously caused physical harm to Barbara, in which he initially assaulted her in the porch area of the house and continued the assault in the kitchen. The abduction was committed separately in which Jackson prevented Barbara from leaving the house when Jackson “physically blocked the doorway and prevented the victim from escaping the residence after she re-entered the home in an effort to protect the dog.” Thus, regardless that the assault continued after the victim returned home, Jackson’s “conduct of preventing the victim from leaving the home after she re-entered constitutes a separate identifiable incident with a separate identifiable harm.”

I. Law

{¶12} “The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution affords protections against the imposition of multiple criminal punishments for the same offense.” *State v. Rogers*, 2015-Ohio-2459, ¶ 16, citing *Hudson v. United States*, 522 U.S. 93, 99 (1997). The prohibition against multiple punishments is codified in R.C. 2941.25, which provides:

(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.

{¶13} The Supreme Court of Ohio elaborated that

when determining whether offenses are allied offenses of similar import within the meaning of R.C. 2941.25, courts must ask three

questions when the defendant's conduct supports multiple offenses: (1) Were the offenses dissimilar in import or significance? (2) Were they committed separately? and (3) Were they committed with separate animus or motivation? An affirmative answer to any of the above will permit separate convictions. The conduct, the animus, and the import must all be considered.

State v. Ruff, 2015-Ohio-995, ¶ 31.

{¶14} “Two or more offenses of dissimilar import exist within the meaning of R.C. 2941.25(B) when the defendant's conduct constitutes offenses involving separate victims or if the harm that results from each offense is separate and identifiable.” *Id. at paragraph two of the syllabus*. “Offenses are committed separately within the meaning of R.C. 2941.25(B) if one offense is completed before the other offense occurs.” *State v. Fisher*, 2023-Ohio-2088, ¶ 21 (6th Dist.), citing *State v. Turner*, 2011-Ohio-6714, ¶ 24 (2d Dist.).

“Animus” is defined for purposes of R.C. 2941.25(B) as “‘purpose’ or ‘more properly, immediate motive.’” “If the defendant acted with the same purpose, intent, or motive in both instances, the animus is identical for both offenses.” Animus is often difficult to prove directly, but must be inferred from the surrounding circumstances. (Citations omitted.)

State v. Fisher, 2014-Ohio-4257, ¶ 17 (4th Dist.).

{¶15} “The defendant bears the burden of establishing his entitlement to the protection, provided by R.C. 2941.25, against multiple punishments for a single criminal act.” *State v. Mughni*, 33 Ohio St.3d 65, 67 (1987).

{¶16} We review de novo the trial court's merger determination of allied offenses. *State v. Williams*, 2012-Ohio-5699, ¶ 1. Thus, as an appellate court, we “‘independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard.’” *Id. at ¶ 26*,

quoting *State v. Burnside*, 2003-Ohio-5372, ¶ 8. “[W]hen deciding whether to merge multiple offenses at sentencing pursuant to R.C. 2941.25, a court must review the entire record, including arguments and information presented at the sentencing hearing, to determine whether the offenses were committed separately or with a separate animus.” *State v. Washington*, 2013-Ohio-4982, ¶ 24.

{¶17} In the matter at bar, Jackson was convicted of felonious assault in violation of R.C. 2903.11(A)(1), which provides: “(A) No person shall knowingly do either of the following: (1) Cause serious physical harm to another or to another’s unborn[.]”

{¶18} Jackson was also convicted of abduction in violation of R.C. 2905.02(A)(2), which states: “(A) No person, without privilege to do so, shall knowingly do any of the following[] . . . (2) By force or threat, restrain the liberty of another person under circumstances that create a risk of physical harm to the victim or place the other person in fear[.]”

{¶19} Jackson’s conduct is the “pivotal consideration” in determining whether his felonious assault and abduction should merge. See *State v. Jeffrey*, 2023-Ohio-817, ¶ 33 (8th Dist.), citing *Ruff*, 2015-Ohio-995, at ¶ 26. We, therefore, in the next section provide a detailed narrative of the facts in the record of the case that are relevant to the issue of merger.

II. Jackson’s actions

{¶20} Jackson’s criminal proceedings began with the filing of a complaint by Deputy Alexander in municipal court. In his complaint, the deputy stated:

Upon arrival at this address, I exited my vehicle and could hear the female screaming for help from inside. I observed the driver's side door of a vehicle in the driveway open as I approached the residence.

Once back in the residence, I observed a laceration to Barbara's scalp, on the back left side of her head, she was bleeding from the upper right arm that had a puncture wound. Barbara had large knots on her arms and head. She stated that Robert had broken kitchen chairs over her and then beat her with the pieces of the chairs as well. All of this started as an argument and progressed when she poured out his alcohol.

In speaking with Barbara after being treated at HDH for the injuries, she stated that it is confirmed that her left arm is broken, she received 9 stitches to close the puncture wound which she stated had nicked a blood carrying vessel, and 10 staples in her scalp while receiving a concussion. In following up with Barbara, she stated that she had attempted to leave at one point, but that Robert threatened to kill her animals which caused her to return to inside the residence, after being beaten more, she attempted to leave again, but Robert blocked the doorway to keep her inside. A short time later Barbara stated is when I arrived on scene.

{¶21} Jackson was indicted on April 4, 2023, with the following:

Count One:

On or about February 28, 2023 and in Highland County, Ohio Robert G. Jackson did knowingly cause serious physical harm to Barbara Elkins in violation of §2903.11(A)(1) O.R.C. and against the peace and dignity of the State of Ohio.

Count Three:

On or about February 28, 2023 and in Highland County, Ohio Robert G. Jackson did, without privilege to do so, by force or threat, retrain the liberty of Barbara Elkins, under circumstances which create a risk of physical harm to the said Barbara Elkins, or placing her in fear in violation of §2905.02(A)(2) O.R.C. and against the peace and dignity of the State of Ohio. (Emphasis deleted.)

{¶22} In response to Jackson's request for a bill of particulars, the State provided the same narrative for each of his offenses:

On the above date, Deputy Alexander responded to the above address after being advised of an active domestic dispute by dispatch. Dispatch advised Deputy Alexander that there was an

open line 911 call and a female could be heard screaming for help while stating that she was bleeding and her arm was broken. The male subject could be heard on the open line stating "I'll rip your head off bitch". Upon arriving at the residence, Deputy Alexander immediately exited his patrol vehicle and upon doing so heard a male subject yelling from inside the residence and a female screaming for help. As Deputy Alexander approached the residence he could hear what sounded like heavy footsteps moving through the residence away from the front door. Deputy Alexander could also hear the female continuing to scream for help. Upon entering the front porch area of the residence, Deputy Alexander observed the front door to the residence standing open and also observed B.E. standing in the kitchen holding what appeared to be a blood-soaked towel to the side of her head. B.E. was crying and continued to yell for help. Deputy Alexander advised dispatch to send a life squad to the location. Deputy Alexander entered the kitchen and asked B.E. where the male subject went. B.E. pointed toward the back hallway of the residence. Deputy Alexander observed broken glass and kitchen furniture in pieces on the floor. Deputy Alexander approached the entrance to the rear hallway and with his gun drawn shouting commands for Robert Jackson to come out where he could be seen and to show his hands. Jackson yelled from down the hallway and then stepped out where he could be seen. Jackson complied with Deputy Alexander's commands and was placed in handcuffs. Deputy Alexander then escorted Jackson out of the residence and Jackson was placed in Deputy Alexander's patrol vehicle. Deputy Alexander then returned to the residence and observed that B.E. was bleeding profusely from her head. B.E. then had a seat in the living room while waiting for the squad to arrive. *B.E. advised Deputy Alexander that Jackson and herself had been arguing and Jackson then became violent toward the dog. B.E. advised that Jackson had been consuming alcohol and that she jumped on his back in an effort to stop Jackson from hitting the dog. B.E. advised that Jackson then began hitting her and slammed her head into a door. B.E. advised that Jackson then began using the kitchen chairs to strike her. B.E. continued to state that Jackson had broken both of her arms. B.E. also stated that Jackson caused a puncture wound to her upper right arm while beating her with a chair. B.E. indicated that she managed to get her phone and call 911 while Jackson was calling her names and striking her with items. B.E. stated that Jackson stopped once he saw Deputy Alexander pull in the driveway. (Emphasis added.)*

{¶23} At the sentencing hearing, the victim addressed the trial court and stated as follows:

Mr. Jackson first attack me on the front porch where he drug me, threaten to kill my dog. I tried to go back in the house to get my dog and my keys and he cornered me in the kitchen. He beat me with two antique chairs, busted them, really busted them over me. He took the pieces and kept beating me with them no matter how much I begged him to stop. Bleeding, my arm was broke, I had my head bleeding, my arm was bleeding out because of the artery in it was nicked and he wouldn't stop. I begged him, I've taken over a hundred beatings from him in the past five years. And if Officer Alexander did not show up when he did I would have been dead. I would not be here, I would be dead.

{¶24} The State also commented at sentencing and elaborated on the facts of the case:

this is one of the worst cases of felonious assault that I've seen. Um, to say that he beat her mercilessly is really and truly an understatement. I just want to tell the Court very briefly about the 911 call and I know that Ms. Elkins wants to speak as well. I first want to say Mr. Jackson is extremely respectful in court and almost acts like a model, a model defendant, but this is an absolute façade. He drinks and he's mean and that's the end of it. Um, the 911 call, Mr. King and I listened to the 911 call in this case and literally were on the edge of our seats, we knew how it ended but you can not help listening to that and think "oh my gosh he is going to kill her" what happens is, he is beating her mercilessly. *She manages to dial 911, at first she tries, she leaves the house, goes out and gets in her car, he tells her he is going to kill her dog and she goes back in to rescue the dog. Then he will not let her leave the house. He physically keeps her from exiting the house again.* She manages to dial 911 and drops the phone into, like it falls onto the ground or something, and for the next seven minutes it's an open phone call. An open line where dispatcher named Taylor is trying to get her location and then up pinging the phone and figuring out where she is at. Obviously, law enforcement was familiar with the Defendant. The Court can review his prior criminal history on the first, on the Discovery. *But they get there and um he had beaten her throughout this phone call, she's begging him not to kill her and it is awful, it is truly awful to listen to. He says at one point, "I'm going to rip your fucking head off" "I'm going to kill you" and he's breaking a, he's broken all of the chairs in the kitchen or in the dining room.* And he is beating her with the spindles off of the chairs. He broke her arm in two places and she had to have surgery on that arm. He stabbed her in the arm with the spindle off the chair and she had to have either staples or stitches put in the hole in her arm to seal that up. He beat her over the head

with this and she had to have staples put in her head from that beating. It is, had Deputy Alexander not been close, I have no doubt that we would be here for a much different charge today. Deputy Alexander was I think two minutes away and you could hear him come into the house. He tells, when Mr. Jackson saw the lights come into the driveway he runs and hides in the back of the house. . . . Barb, or Ms. Elkins rather is in the kitchen, she is profusely bleeding, it looks like an animal has been sacrificed in the kitchen or dining room of that house. There is blood everywhere.

. . .
My first response is that it's not the same nucleus or same set of events. Even when she's telling you about it or when you read the Bill of Particulars, when you read the Bill of Particulars there are separate crimes listed in the Bill of Particulars. So, here's the situation, she leaves to go to her car, it literally, he damages the car, they are outside. He go...she goes back in the house to save an animal, he then will not let her out. Then he breaks the chair over her head and over her arm. So, those are two separate, those are two separate events. (Emphasis added.)

III. Analysis

{¶25} “[T]he central question is whether appellant harbored a separate animus for the two offenses.” *State v. Kuntz*, 2022-Ohio-3376, ¶ 35 (4th Dist.)

To reiterate:

“Animus” means “ ‘purpose, or more properly, immediate motive’ and ‘requires us to examine the defendant’s mental state in determining whether two or more offenses may be chiseled from the same criminal conduct.’ ” *Bailey*, 1st Dist. Hamilton No. C-140129, 2015-Ohio-2997, at ¶ 86, quoting *State v. Logan*, 60 Ohio St.2d 131, 397 N.E.2d 1345 (1979). To determine animus, or a defendant’s motive or purpose, a court must dissect the facts and circumstances in evidence, including the means used to commit the offense. *Id.*

Id.

{¶26} As the above summary of the relevant facts demonstrate, Jackson’s assertion that his offenses should merge has merit. The evidence demonstrates that Jackson’s conduct was committed with a single animus, i.e., to physically harm Barbara that day. Any restraint to her liberty was incidental and we are

unable to discern that Jackson completed the offense of abduction separately from committing felonious assault.

{¶27} In his complaint, Deputy Alexander stated that Barbara returned to the residence after getting to her car because Jackson threatened to harm her animals. By the plain language of the applicable abduction statutory provision, R.C. 2905.02(A)(2), the threat or use of force must be against Barbara, not her animals. And in the deputy's statement, there is no evidence that Barbara was assaulted prior to returning to the house.

{¶28} Moreover, the deputy's statement that "after being beaten more, [Barbara] attempted to leave again, but Robert blocked the doorway to keep her inside[.]" does not include a threat or use of force that is separate from Jackson's continuous physical assault and single intention to kill her. This is because we cannot ascertain when Jackson's conduct of blocking the doorway occurred. That is, whether it was before he began breaking the kitchen chairs on Barbara, during the breaking of the chairs, or after stabbing her with the pieces of the chairs. Moreover, Barbara's next statement was that "[a] short time later" Deputy Alexander arrived. Deputy Alexander arrived 2 minutes after Barbara called 9-1-1.

{¶28} The indictment alleges that Jackson is the perpetrator of the crimes against Barbara. Further, the indictment provides the elements of felonious assault in count one and abduction in count three but fails to provide any facts supporting the offenses.

{¶29} The bill of particulars does not include any facts that demonstrate that Barbara left the house and returned or was blocked in any way by Jackson. Thus, there are no facts demonstrating Jackson committed the offense of abduction separate and apart from the felonious assault. Rather, the evidence as stated in the bill of particulars demonstrates a continuous assault by Jackson causing Barbara serious physical injuries. Any restraint was incidental to the physical assault.

{¶30} Similarly, Barbara's statement at sentencing does not demonstrate the completion of the offense of abduction separate from felonious assault. Barbara indicated that the initial assault began on the front porch. She states Jackson "drug me." We cannot ascertain from that statement that an abduction was committed as Barbara fails to indicate her liberty was restrained and moreover, fails to demonstrate that Jackson's conduct at this point created a risk of physical harm or that she was in fear. This is because in the next sentence she states: "I tried to go back in the house to get my dog and my keys[.]" Furthermore, Barbara continues by stating that when she went back inside the house to retrieve her keys, Jackson "cornered me in the kitchen. He beat me with two antique chairs, busted them, really busted them over me. He took the pieces and kept beating me with them no matter how much I begged him to stop." Thus, when Jackson cornered Barbara in the kitchen it was for the purpose of causing her serious physical harm.

{¶31} The State's recitation of the facts was more detailed than Barbara's statements, but even these facts, fail to demonstrate a completed offense of

abduction separate from felonious assault that resulted in separate harm. The State mentions that Barbara returned to the house after Jackson threatened to harm her dog, not a threat against Barbara. Once she returns to the house Jackson “will not let her leave the house. He physically keeps her from exiting the house again.” First, the State uses the word “again” but there is nothing in the record to support the factual conclusion that Barbara entered the house twice and/or that she was blocked from leaving the home two times. Second, the State fails to indicate whether the restraint was due to threat or use of force that is separate from Jackson’s felonious assault actions of beating Barbara mercilessly. Third, there is no mention of a harm caused to Barbara that is separate from the serious injuries she suffered from Jackson’s assault in the same location, the kitchen.

{¶32} Barbara managed to dial 9-1-1 as she was being physically assaulted. The call was for seven minutes and within two minutes of Barbara’s phone call, Deputy Alexander arrived. During the phone call, Jackson is heard threatening to kill Barbara and was continuously assaulting her until the deputy arrived. And when Deputy Alexander arrived within 2 minutes of the 9-1-1 call, Barbara was in the kitchen seriously injured.

{¶33} As previously stated, “[o]ffenses are committed separately when ‘one offense was complete before the other offense occurred, * * * notwithstanding their proximity in time and that one [offense] was committed in order to commit the other.’ (Cleaned up.) *Jeffrey*, 2023-Ohio-817, at ¶ 38 (8th Dist.). In *State v. Herzner*, 2021-Ohio-4244 (12th Dist.), the Twelfth District Court

of Appeals affirmed the separate convictions of domestic violence and abduction and overruled the argument that the abduction was incidental. In reaching this conclusion, the court identified the facts supporting each offense:

When Herzner grabbed Vollmer as she tried to leave, threw her back in the room, threatened her with a knife, and shut her into the room with no escape, the abduction offense was complete. In restraining her liberty in this manner, particularly after having just choked her with a rope, Herzner created a risk of physical harm to Vollmer or placed her in fear. Further, Herzner's second attack on Vollmer, separated as it was by thirty minutes from the initial incident, constitutes a wholly separate offense. Even if Herzner's choking Vollmer with rope is viewed as incidental to the abduction, his punching and choking her with his hands was completely separate in time from the acts which constituted the abduction.

Id.

{¶34} Similarly, in *Kuntz*, we upheld the separate conviction of kidnapping¹ and rape in which the victim and other witnesses testified at trial and detailed Kuntz' criminal conduct. 2022-Ohio-3376 (4th Dist.). Based on their testimony, we held:

appellant grabbed the victim, removed her from a car in a parking lot and forced her some distance to a rampway in an alley behind a building. Once again, as the AmVets witness stated about that location, "if you're down in the bottom of it [the ramp way] nobody can see ya." Like *Zanders*, in the case at bar appellant moved the victim from a public place to a secluded location, then confined and assaulted her. We believe that, under these facts, the victim, like the victim in *Zanders*, suffered harm separate and apart from the

¹ R.C. 2905.01 defines a violation of kidnapping as:

(A) No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall remove another from the place where the other person is found or restrain the liberty of the other person, for any of the following purposes:

- (1) To hold for ransom, or as a shield or hostage;
- (2) To facilitate the commission of any felony or flight thereafter;
- (3) To terrorize, or to inflict serious physical harm on the victim or another;
- (4) To engage in sexual activity, as defined in section 2907.01 of the Revised Code, with the victim against the victim's will[.]

rape when appellant moved the victim to a secluded location before he committed the rape.

Id. at ¶ 36.

{¶35} The Third District Court of Appeals more recently upheld Smith’s felonious assault and abduction convictions as separate offenses based on the detailed facts demonstrating Smith’s criminal conduct. *State v. Smith*, 2024-Ohio-886 (3d Dist.). In *Smith*, the victim was tied up and threatened physical harm if he tried to leave. *Id.* at ¶ 49. Force was used in restraining the victim in which he had ligature marks on his wrists. *Id.* The victim was also beaten up by Smith resulting in serious physical harm including fractures in the arm, cracked eye socket, and 20 stitches to the shin. *Id.* This serious physical harm was separate from the ligature marks on the wrists. *Id.* Accordingly, the Third District held that the offenses were not allied offenses of similar import. *Id.*

{¶36} In the matter at bar, the facts of Jackson’s conduct are limited as he pleaded guilty to the offenses of felonious assault and abduction. And pursuant to the underdeveloped facts and our thorough review of the record, we find that Jackson met his burden in demonstrating his conduct of causing Barbara serious physical harm was committed with one animus establishing the offense of felonious assault. Any restraint was incidental to the felonious assault. As the Fifth District Court of Appeals in *State v. Gates* held, Gates’ “entry into the bedroom and blocking the doorway was nearly simultaneous with his reaching back for the gun, and the kidnapping in Count Five was incidental to the offense of felonious assault. The testimony does not demonstrate that this count of kidnapping was committed separately or with a separate animus from the first

count of felonious assault[.]” 2015-Ohio-4950, ¶ 47 (5th Dist.). *Compare State v. Chidester*, 2014-Ohio-1597, ¶ 15 (5th Dist.) (affirming the separate sentences for felonious assault and abduction where “abduction and the assault started around 4:00 a.m., stopped when the children woke up, and then continued after the children left for school. Around 9:00 a.m. when appellant went to bed, he made his wife ‘lay in bed with him and wrapped his arms and legs around her so she could not leave.’ Once he awoke at 2:30 p.m., the assault continued.”)

{¶37} Jackson’s assertion that he had one animus of killing Barbara that day is supported by the record of the case in which he was continuously causing her serious physical harm. Any restraint was incidental to Jackson’s motive of causing Barbara serious physical harm. Accordingly, we sustain Jackson’s assignment of error and remand the matter for resentencing.

CONCLUSION

{¶38} Having sustained Jackson’s assignment of error, we remand the matter to the trial court to conduct a resentencing hearing consistent with our holding that the offenses of felonious assault and abduction should merge. We note that the trial court should ensure that Jackson is orally advised of the indefinite prison term notifications pursuant to R.C. 2929.19(B)(2)(c) at the sentencing hearing.

JUDGMENT REVERSED AND CAUSE REMANDED.

Abele, J., Concurring in Judgment Only:

{¶39} Although I do not generally ascribe to the single intent theory as viewed from an offender's perspective, I do agree that in the case sub judice the prosecution's presentation of the relevant facts are somewhat unclear and do not permit us to determine with certainty whether the offenses should merge. Consequently, I concur in only the judgment.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS REVERSED and the CAUSE IS REMANDED. Appellee shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Highland County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Smith, P.J.: Dissent.

Abele, J.: Concur in Judgment Only with Opinion.

For the Court,

BY: _____
Kristy S. Wilkin, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.