**[Cite as *State v. Walton*, 2010-Ohio-3875.]**

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION
**No. 93659**

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## STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

## LEON WALTON

DEFENDANT-APPELLANT

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**JUDGMENT:**
AFFIRMED

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Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-487606

**BEFORE:** Sweeney, J., Kilbane, P.J., and Celebrezze, J.

**RELEASED AND JOURNALIZED:** August 19, 2010

**ATTORNEY FOR APPELLANT**

Marcus S. Sidoti
Sidoti & Sidoti Co., L.P.A.
1800 Illuminating Building
55 Public Square
Cleveland, Ohio 44113

**ATTORNEYS FOR APPELLEE**

William D. Mason
Cuyahoga County Prosecutor
BY: Brent C. Kirvel
Assistant Prosecuting Attorney
1200 Ontario Street
Cleveland, Ohio 44113

JAMES J. SWEENEY, J.:

**{¶ 1}** Defendant-appellant, Leon Walton ("defendant"), appeals his rape and kidnapping convictions, arguing that they are allied offenses that should have merged for the purpose of sentencing. After reviewing the facts of the case and pertinent law, we affirm.

**{¶ 2}** On April 23, 2007, a jury found defendant guilty of rape in violation of R.C. 2907.02(A)(2), kidnapping in violation of R.C. 2905.01, and intimidation in violation of R.C. 2921.03. The court sentenced defendant to 23 years in prison. On appeal, this Court affirmed defendant's guilty convictions, but vacated his

sentence and remanded the case for a new sentencing hearing. *State v. Walton*, Cuyahoga App. No. 90140, 2008-Ohio-3550.

**{¶ 3}** Upon remand, the court resentenced defendant to 15 years in prison — ten years on the rape charge, four years on the kidnapping charge, and one year on the intimidation charge, all to run consecutive to one another.

**{¶ 4}** Defendant appeals and raises one assignment of error for our review, which states:

**{¶ 5}** "I. Kidnapping, as charged in Count 3 of the indictment, and rape, as charged in Count 2, are allied offenses of similar import committed with a single animus. The court erred by imposing multiple sentences when it should have directed the prosecutor to elect on which offenses conviction would be entered and sentence pronounced."

**{¶ 6}** R.C. 2941.25(A) states that "[w]here 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." R.C. 2941.25(B) states that "[w]here 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."

**{¶ 7}** In *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, at paragraph one of the syllabus, the Ohio Supreme Court held: "In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), courts are required to compare the elements of offenses in the abstract without considering the evidence in the case, but are not required to find an exact alignment of the elements. Instead, if, in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in commission of the other, then the offenses are allied offenses of similar import. (*State v. Rance* (1999), 85 Ohio St.3d 632, 710 N.E.2d 699, clarified.)" The *Cabrales* Court further held that "[i]f the offenses are allied, the court proceeds to the second step and considers whether the offenses were committed separately or with a separate animus." Id. at ¶16.

**{¶ 8}** Kidnapping and rape under R.C. 2907.02(A)(2) are allied offenses pursuant to the first tier of the test. *State v. Mitchell* (1983), 6 Ohio St.3d 416, 418, 453 N.E.2d 593 (holding that "kidnapping may be said to be implicit within every forcible rape").

**{¶ 9}** Under the second tier of the allied offense test, we review the evidence of defendant's conduct to determine whether the kidnapping and the rape were committed separately or with a separate animus. See, e.g., *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117, 526 N.E.2d 816. The Ohio Supreme Court set forth guidelines to establish whether kidnapping and another offense are committed with separate animus under R.C. 2941.25(B):

**{¶ 10}** "(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;

**{¶ 11}** "(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." *State v. Logan* (1979), 60 Ohio St.2d 126, 397 N.E.2d 1345, at syllabus.

**{¶ 12}** In the instant case, the victim testified that she was working as a bartender in the early morning hours of September 30, 2006, when defendant, who had been drinking at the bar all night, repeatedly asked her to have breakfast with him. Eventually, the victim agreed and she got in her car and followed defendant's car to a hotel in downtown Cleveland. The victim and defendant went inside the hotel, and defendant told the victim that he was getting himself a room to "chill out for awhile" before they went to breakfast.

**{¶ 13}** Defendant and the victim went into defendant's hotel room, and the victim asked about breakfast. Defendant replied that he wanted to smoke some marijuana and then the two would go. The victim testified that, at this point, she still trusted defendant, "but I sat in the chair that was there, and he had to have

known that I was waiting to go to breakfast because I wasn't like all relaxing back and chilling out the way he wanted to chill out and do his smoking."

**{¶ 14}** The victim questioned defendant about breakfast a few more times and indicated that she had to get home soon as she was watching her grandchildren the next morning. Defendant approached the victim, wanting a hug, and pulled her out of the chair and onto the bed. The victim pushed defendant away and told him that she was there for breakfast and nothing else was going to happen.

**{¶ 15}** Defendant suddenly erupted, punching the victim in the face and head and pulling her hair out. Defendant then slammed the victim against the wall and threatened to kill her. Defendant dragged the victim into the bathroom, smashed her into the wall, and raped her. He then threw her back onto the bed, held her body down, and raped her again. Defendant told the victim he would kill her if she did not do as he asked.

**{¶ 16}** Eventually, the victim was able to put most of her clothes back on and leave the hotel room. She took the elevator to the lobby; defendant was already there, having gone down the stairs. The two walked out to the parking lot and defendant threatened to kill the victim if she told anyone what happened.

**{¶ 17}** At the resentencing hearing in the instant case, the court found that the rape and kidnapping convictions were not allied offenses of similar import, stating the following:

**{¶ 18}** "The Court's reason for not merging * * * is that the victim talked about wanting to go and being seated on a chair and [defendant] lying on the bed flat refusing to go and at some point grabbing the victim and not permitting her to go.

**{¶ 19}** "When she finally went in the bathroom is when he came in and smashed her head against the mirror and rammed his penis into her vagina and from the rear.

**{¶ 20}** "So my memory is there's something taking place in two rooms at different times, so that the kidnapping, in the Court's memory of the evidence, preceded the rape and was not just an incidental part of the rape. If all there was was [defendant] pinning his victim up against the mirror of the bathroom, then I would agree. If that's all there was to the kidnapping, then the kidnapping and the rape would merge. But I think there was kidnapping material before the rape occurred."

**{¶ 21}** In applying the *Logan* guidelines to the facts at hand, we find that the instant case is similar to *State v. Lynch*, 98 Ohio St.3d 514, 2003-Ohio-2284, 787 N.E.2d 1185, in which the court upheld the defendant's convictions for rape and kidnapping. The *Lynch* court held that "the facts show substantial movement as Lynch lured [the victim] into his apartment and then moved her into his bedroom; [the victim's] restraint was secretive, as it took place inside Lynch's apartment; and there was prolonged restraint, as [the victim] ate popcorn and watched videos inside the apartment before being orally raped. These fact show that

Lynch committed the kidnapping offense with an animus separate from the rape." Id. at 536.

**{¶ 22}** In the instant case, defendant was deceptive about the victim and him going to breakfast, and the victim followed defendant under false pretenses. Once the victim refused defendant's hug, defendant clearly restrained the victim's liberty. We recognize that restraint is often necessary to commit offenses such as rape. For example, defendant held the victim's body down while he forced himself upon her, thus constituting kidnapping; however, this was merely incidental to the rape. On the other hand, slamming the victim against the wall and forcing her into the bathroom, then back onto the bed is more restraint than merely holding her down to facilitate the offense. See *State v. Taylor*, Mahoning App. No. 07MA115, 2009-Ohio-3334 (holding that covering the victim's mouth is restraint to avoid detection increasing "the risk of suffocation that would not have existed without this form of restraint").

**{¶ 23}** Finding that defendant committed the kidnapping with a separate animus than the rape, we hold that the court did not err in sentencing defendant for each conviction.

**{¶ 24}** Defendant's sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

JAMES J. SWEENEY, JUDGE

MARY EILEEN KILBANE, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR