[Cite as *State v. Mitchell*, 2009-Ohio-5251.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	
CHARLES A. MITCHELL	:	Case No. CT2006-0090
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. CR2006-0187
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	September 30, 2009

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
ROBERT L. SMITH 27 North Fifth Street Zanesville, OH 43701	DAVID A. SAMS P.O. Box 40 West Jefferson, OH 43162

Farmer, P.J.

{¶1} On July 7, 2006, the Muskingum County Grand Jury indicted appellant, Charles Mitchell, on count of aggravated burglary in violation of R.C. 2911.12(A)(2), one count of kidnapping with a sexual motivation specification and a sexually violent predator specification in violation of R.C. 2905.01(A)(4), and four counts of rape in violation of R.C. 2907.02(A)(2). Said charges arose from an incident involving appellant and his ex-wife, Denise Mitchell.

{¶2} A jury trial commenced on October 31, 2006. The jury found appellant guilty of the aggravated burglary and kidnapping counts, and not guilty of the specifications and the rape counts. By judgment entry filed December 11, 2006, the trial court sentenced appellant to an aggregate term of 20 years in prison.

{¶3} Appellant filed an appeal assigning seven errors. This court overruled the assignments and affirmed appellant's conviction and sentence. See, *State v. Mitchell,* Muskingum App. No. CT2006-0090, 2007-Ohio-5519.

{¶4} On March 9, 2009, appellant filed a motion to reopen his appeal pursuant to App.R. 26(B). By judgment entry filed March 23, 2009, this court granted the motion and reopened appellant's appeal. This matter is now before this court for consideration. Assignments of error are as follows:

I

{¶5} "THE DEFENDANT-APPELLANT WAS DENIED DUE PROCESS AND A FAIR TRIAL UNDER ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY STRUCTURAL CONSTITIONAL (SIC) ERROR WHICH

OCCURRED WHEN HE WAS CONVICTED OF AGGRAVATED BURGLARY AND KIDNAPPING BASED UPON AN INSUFFICIENT INDICTMENT WHICH DID NOT INCLUDE THE DEFAULT ELEMENT OF RECKLESSNESS WITH RESPECT TO EACH COUNT."

II

{¶6} "THE DEFENDANT-APPELLANT WAS DENIED DUE PROCESS AND WAS TWICE PLACED IN JEOPARDY IN VIOLATION OF ARTICLE 1, SECTION 10 OF THE OHIO CONSTITUTION AND THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY STRUCTURAL CONSTITUTIONAL ERROR WHICH OCCURRED WHEN HE WAS CONVICTED OF AGGRAVATED BURGLARY AND OF A PREDICATE KIDNAPPING UNDER R.C. 2905.01(A)(4) AFTER THE JURY ACQUITTED HIM OF BOTH RAPE AND OF A SEXUAL MOTIVATION SPECIFICATION AS TO THE KIDNAPPING COUNT WHICH AROSE OUT OF THE SAME OFFENSE."

III

{¶7} "THE DEFENDANT-APPELLANT WAS DENIED DUE PROCESS AND A FAIR TRIAL IN VIOLATION OF ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION AND THE FIFTH, SIXTH AND FOURTEENTH AMENEMENTS (SIC) TO THE UNITED STATES CONSTITUTION BY STRUCTURAL CONSTITUTIONAL ERROR WHICH OCCURRED WHEN HE WAS CONVICTED OF AGGRAVATED BURGLARY AND KIDNAPPING IN THE ABSENCE OF SUFFICIENT EVIDENCE AND WHERE THE VERDICTS WERE OTHERWISE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

IV

{¶8} "THE DEFENDANT-APPELLANT WAS DENIED DUE PROCESS AND A FAIR TRIAL IN VIOLATION OF ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION AND THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY STRUCTURAL CONSTITUTIONAL ERROR WHICH OCCURRED WHEN HE WAS TWICE PLACED IN JEOPARDY AND GIVEN CONSECUTIVE SENTENCES FOR THE SAME ALLIED OFFENSES OF AGGRAVATED BURGLARY AND KIDNAPPING WHICH INVOLVED NEITHER SEPARATE INCIDENTS NOR SEPARATE ANIMI."

V

{¶9} "THE DEFENDANT-APPELLANT WAS DENIED DUE PROCESS, A FAIR TRIAL, A FAIR APPEAL AND THE EFFECTIVE ASSISTANCE OF BOTH TRIAL AND APPELLATE COUNSEL BY STRUCTURAL CONSTITUTIONAL ERROR IN THE ABSENCE OF WHICH HE WOULD HAVE BEEN ACQUITTED AND OTHERWISE GIVEN ONLY A SINGLE PRISON TERM."

VI

{¶10} "THE DEFENDANT-APPELLANT WAS DENIED DUE PROCESS UNDER ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION AND THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY STRUCTURAL CONSTITUTIONAL ERROR WHICH OCCURRED WHEN HE WAS GIVEN MAXIMUM CONSECUTIVE PRISON TERMS IN THE ABSENCE OF SUFFICIENT FINDINGS REQUIRED BY LAW."

VII

{¶11} "THE DEFENDANT-APPELLANT WAS DENIED DUE PROCESS AND A FAIR TRIAL BY CUMULATIVE STRUCUTAL (SIC) CONSTITUTIONAL ERROR."

I

{¶12} Appellant claims constitutional structural error because the indictment did not include the default element of recklessness. We disagree.

{¶13} In support of his arguments, appellant relies on the case of *State v. Colon,* 118 Ohio St.3d 26, 2008-Ohio-1624 (*Colon I*), wherein the Supreme Court of Ohio held the following at syllabus: "When an indictment fails to charge a mens rea element of a crime and the defendant fails to raise that defect in the trial court, the defendant has not waived the defect in the indictment." However, in *State v. Colon,* 119 Ohio St.3d 204, 2008-Ohio-3749 (*Colon II*), ¶3, the Supreme Court of Ohio reconsidered *Colon I* and specifically stated "*Colon I* is prospective in nature and applies only to those cases pending on the date *Colon I* was announced."

{¶14} Because appellant's case was neither after *Colon I* nor pending on appeal at the time of *Colon I,* the case does not apply retroactively and hence, does not apply sub judice.

{¶15} Assignment of Error I is denied.

II

{¶16} Appellant claims structural constitutional error because he was convicted of aggravated burglary and the predicate offense of kidnapping, but was acquitted of the specifications and the rape counts. Appellant claims he was twice placed in jeopardy. We disagree.

{¶17} It is appellant's position that the kidnapping offense was based solely on the alleged sexual activity [R.C. 2905.01(A)(4)] and the sexual motivation specification (R.C. 2941.147). The indictment filed July 7, 2006 stated the following in pertinent part:

{¶18} "SECOND COUNT

{¶19} "THE JURORS OF THE GRAND JURY of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that on or about 06/29/2006, in Muskingum County, Ohio, **Charles A. Mitchell**, did, by force, threat or deception, restrain the liberty of another to-wit, D.L.M, to facilitate the commission of a felony, to-wit, Rape, or flight thereafter; in violation of Ohio Revised Code, Title 29, Section 2905.01(A)(4), and against the peace and dignity of the State of Ohio.

{¶20} "FIRST SPECIFICATION TO SECOND COUNT: THE JURORS OF THE GRAND JURY of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, further say that the said Charles A. Mitchell committed the offense of Kidnapping, a violation of Ohio Revised Code Section 2905.01(A)(4) with a sexual motivation; in violation of the Ohio Revised Code, Title 29, Section 2941.147, and against the peace and dignity of the State of Ohio."

{¶21} The jury found appellant guilty of kidnapping (Count 2), but not guilty of the first specification to Count 2 and the three counts of rape.

{¶22} In his first appeal, appellant argued the jury's verdict was inconsistent as to the counts of the indictment. See, *Mitchell,* supra, at Assignment of Error I. This court overruled the assignment of error, stating the following at ¶22:

{¶23} "Upon review, we find that consistency between verdicts on several counts of an indictment is unnecessary where the defendant is convicted on one or some counts and acquitted on others; the conviction generally will be upheld irrespective of its rational incompatibility with the acquittal. *State v. Adams* (1978), 53 Ohio St.2d 223, 374 N.E.2d 137, vacated in part on other grounds, 439 U.S. 811, 99 S.Ct. 69, 58 L.Ed.2d 103. Each count of a multi-count indictment is deemed distinct and independent of all other counts, and thus inconsistent verdicts on different counts do not justify overturning a verdict of guilt. See *State v. Hicks* (1989), 43 Ohio St.3d 72, 78, 538 N.E.2d 1030; *State v. Brown* (1984), 12 Ohio St.3d 147, 465 N.E.2d 889, paragraph one of the syllabus; *State v. Washington* (1998), 126 Ohio App.3d 264, 276, 710 N.E.2d 307. "[T]he sanctity of the jury verdict should be preserved and could not be upset by speculation or inquiry into such matters (1997), to resolve the inconsistency." *State v. Lovejoy* 79 Ohio St.3d 440, 444, 683 N.E.2d 1112."

{¶24} Appellant now argues the inconsistencies lead to a violation of the prohibition against double jeopardy. Following the United States Supreme Court, the Supreme Court of Ohio has found that the double jeopardy clause does not apply to inconsistent verdicts:

{¶25} "However, the United States Supreme Court has held that double jeopardy does not apply to cases involving inconsistent verdicts and, by implication, hung juries. In *Dunn v. United States* (1932), 284 U.S. 390, 393, 52 S.Ct. 189, 190, 76 L.Ed. 356, 358-359, the United States Supreme Court found that consistency in a verdict was not required and that where offenses were separately charged in counts of a single indictment, even though the evidence was the same in support of each, an acquittal on

one count could not be pleaded as *res judicata* as to the other. The court found that the sanctity of the jury verdict should be preserved and could not be upset by speculation or inquiry into such matters to resolve the inconsistency. The court stated: ' "The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. We interpret the acquittal as no more than their assumption of a power which they had no right to exercise, but to which they were disposed through lenity." ' *Id.,* quoting *Steckler v. United States* (C.A.2, 1925), 7 F.2d 59, 60.

{¶26} "This principle of law was further affirmed in *United States v. Powell* (1984), 469 U.S. 57, 105 S.Ct. 471, 83 L.Ed.2d 461, where a defendant was charged with using the telephone to facilitate crimes of conspiracy and drug possession, crimes that were alleged in the indictment separately from the telephone solicitation charge, a compound indictment. In that case, a jury found the defendant not guilty of possession or conspiracy, but guilty of telephone solicitation to distribute cocaine. Even though possession and conspiracy were predicate felonies, the United States Supreme Court still held that the inconsistent verdicts could not be overturned. The court refused to weaken the *Dunn* rule, finding that 'a criminal defendant already is afforded sufficient protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts.' *Id.* at 67, 105 S.Ct. at 478, 83 L.Ed.2d at 470. The court rejected attempts by the lower courts of appeals to carve out exceptions to the *Dunn* case, and rejected defendant's argument that the principles of *res judicata* or collateral estoppel should apply to verdicts rendered by a single jury

where they jury acquitted the defendant of the predicate felony. The court held: 'We believe that the *Dunn* rule rests on sound rationale that is independent of its theories of res judicata, and that it therefore survives an attack based upon its presently erroneous reliance on such theories.' *Id.* at 64, 105 S.Ct. at 476, 83 L.Ed.2d at 468." *State v. Lovejoy* (1997), 79 Ohio St.3d 440, 444.

{¶27} Appellant further claims that "sexual activity" as defined in R.C. 2907.01(C) necessarily includes sexual motivation (as in the specification to Count 2) and the rape counts. Appellant argues when read in pari materia, they are the same act.

{¶28} Sexual activity is defined as "sexual conduct" [R.C. 2907.01(A)] or "sexual contact" [R.C. 2907.01(B)]. Nothing within these definitions require force or resistance against the will of another as in rape (R.C. 2907.02). R.C. 2971.01(J) defines "sexual motivation" as "a purpose to gratify the sexual needs or desires of the offender." Once again, neither force nor resistance is an element.

{¶29} Upon review, we do not find any constitutional violation of the double jeopardy guarantee.

{¶30} Assignment of Error II is denied.

III

{¶31} Appellant claims structural constitutional error because the guilty verdicts were against the sufficiency and manifest weight of the evidence. We disagree.

{¶32} Appellant argues the lack of recklessness charged in the indictment (Assignment of Error 1), and insufficient evidence to satisfy the definition of "sexual

activity" which "means sexual conduct or sexual contact, or both." R.C. 2907.01(C). "Sexual conduct" is defined as follows:

{¶33} " 'Sexual conduct' means vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse." R.C. 2907.01(A).

{¶34} " 'Sexual contact' means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person." R.C. 2907.01(B).

{¶35} Essentially, appellant restates Assignment of Error II.

{¶36} In addition, in his direct appeal, appellant assigned as error the sufficiency and manifest weight of the evidence. See, *Mitchell,* supra, at Assignment of Error V. This court overruled the assignment of error, stating the following at ¶80:

{¶37} "Upon review of the record, we conclude that the jury, in resolving the conflicts in the evidence, did not create a manifest miscarriage of justice so as to require a new trial. Viewing this evidence in a light most favorable to the prosecution, we further conclude that a rational trier of fact could have found beyond a reasonable doubt that Appellant trespassed into his ex-wife's home with a deadly weapon, to-wit: a crow bar, under his control with the purpose of committing a criminal offense. We further

conclude that a rational trier of fact could have found beyond a reasonable doubt that Appellant did by force, threat or deception, restrain the liberty of his ex-wife."

{¶38} Assignment of Error III is denied.

IV

{¶39} Appellant claims structural constitutional error because his convictions of aggravated burglary and kidnapping involved neither separate incidents nor separate animi. Appellant claims he was twice placed in jeopardy and given consecutive sentences in error. We disagree.

{¶40} R.C. 2941.25 governs multiple counts and states the following:

{¶41} "(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.

{¶42} "(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."

{¶43} In *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117, the Supreme Court of Ohio set forth the following two-tiered test:

{¶44} "This court has set forth a two-tiered test to determine whether two crimes with which a defendant is charged are allied offenses of similar import. In the first step, the elements of the two crimes are compared. If the elements of the offenses correspond to such a degree that the commission of one crime will result in the

commission of the other, the crimes are allied offenses of similar import and the court must then proceed to the second step. In the second step, the defendant's conduct is reviewed to determine whether the defendant can be convicted of both offenses. If the court finds either that the crimes were committed separately or that there was a separate animus for each crime, the defendant may be convicted of both offenses.***" (Citations omitted.)

{¶45} Appellant was convicted of aggravated burglary in violation of R.C. 2911.12(A)(2) and kidnapping in violation of R.C. 2905.01(A)(4) which state the following, respectively:

{¶46} "(A) No person, by force, stealth, or deception, shall do any of the following:

{¶47} "Trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure that is a permanent or temporary habitation of any person when any person other than an accomplice of the offender is present or likely to be present, with purpose to commit in the habitation any criminal offense.

{¶48} "(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:

{¶49} "(4) To engage in sexual activity, as defined in section 2907.01 of the Revised Code, with the victim against the victim's will."

{¶50} The victim, appellant's ex-wife, Ms. Mitchell, testified appellant was armed with a tire iron and forced her into her home and ordered her to remove her clothing. T. at 128-131. Appellant ordered her to fondle herself, and chastised her for harassing him. T. at 133-138. Appellant physically moved her around the house and held her, thereby preventing her from escaping. T. at 144. Appellant moved Ms. Mitchell into the bedroom for sexual conduct (putting lotion in her vagina and fingering her buttocks). T. at 149. Ms. Mitchell was able to call 911. Police arrived and knocked on the door. Ms. Mitchell "answered" the knock by breaking out the bedroom window. T. at 152-153.

{¶51} Appellant testified and admitted to having sex with his ex-wife, but claimed it was consensual. T. at 242-243, 343-354.

{¶52} Upon review, we find sufficient evidence of a separate animus for appellant's acts to warrant consecutive sentences.

{¶53} Assignment of Error IV is denied.

V

{¶54} Appellant claims there was a lack of sufficient findings to support non-minimum consecutive sentences. We disagree.

{¶55} Appellant argues *Oregon v. Ice* (2009), 129 S.Ct. 711, has overruled *State v. Foster,* 109 Ohio St.3d 1. In *State v. Jones,* Greene App. No. 08CA0008, 2009-Ohio-694, our brethren from the Second District stated the following at ¶8:

{¶56} "As we pointed out above, *State v. Foster* relieved the court of the statutory duty to make and state the statutory findings on which the court imposes consecutive sentences. *Foster* followed the rules announced in *Apprendi v. New Jersey,* (2000), 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435, and *Blakely v.*

Washington (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403, which held that, per the Sixth Amendment, factual findings may not be made by the court absent a foundational finding of the jury or a defendant's admission. More recently in *Oregon v. Ice* (2009), --- U.S. ----, 129 S.Ct. 711, 172 L.Ed.2d 517, the Supreme Court held that the Sixth Amendment does not inhibit states from assigning to judges, rather than to juries, the finding of facts necessary to the imposition of consecutive, rather than concurrent, sentences for multiple offenses, and therefore that the *Apprendi/Blakely* limitation does not apply to a consecutive sentence order. The question after *Ice* is whether the court abused its discretion when it imposed consecutive sentence."

{¶57} Therefore, we conclude under *Foster,* appellant's maximum consecutive sentences were not unlawful. Furthermore, we note in his direct appeal, appellant assigned as errors the issues of maximum consecutive sentences and this court overruled the assignments and found the sentence to be lawful. See, *Mitchell,* supra, at Assignments of Error VI and VII.

{¶58} Assignment of Error V is denied.

VI

{¶59} Appellant claims he was denied the effective assistance of appellate counsel. In our judgment entry re-opening the case, the scope of the re-opening was limited to this issue.

{¶60} The standard this issue must be measured against is set out in *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraphs two and three of the syllabus, certiorari denied (1990), 497 U.S. 1011. Appellant must establish the following:

{¶61} "2. Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. (*State v. Lytle* [1976], 48 Ohio St.2d 391, 2 O.O.3d 495, 358 N.E.2d 623; *Strickland v. Washington* [1984], 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, followed.)

{¶62} "3. To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different."

{¶63} Appellant argues his first appellate counsel was deficient in failing to argue the errors in Assignments of Error I, II, and III herein. Given our disposition of these assignments, we find these arguments to be moot.

{¶64} Appellant also argues his trial counsel was deficient in questioning him on his previous misdemeanor convictions. We note this court must accord deference to defense counsel's strategic choices made during trial and "requires us to eliminate the distorting effect of hindsight." *State v. Post* (1987), 32 Ohio St.3d 380, 388.

{¶65} Once appellant took the witness stand, his prior consistent actions became ripe for questioning. It is obvious that defense counsel was attempting to forestall any questioning on the issue and make appellant's testimony straightforward and credible. T. at 317.

{¶66} We find such strategy at times to be very successful. We note appellant was acquitted of three counts of rape and the specifications to Count 2.

{¶67} Upon review, we do not find any trial counsel deficiency.

{¶68} Assignment of Error VI is denied.

VII

{¶69} Appellant claims the cumulative errors (Assignments of Errors I through VI) denied him a fair trial. We disagree.

{¶70} Having found no error in the assignments of error above, this assignment of error is denied.

By Farmer, P.J.

Wise, J. and

Delaney, J. concur.

_s/ Sheila G. Farmer_____

_s/ John W. Wise_____

_s/ Patricia A. Delaney_____

JUDGES

SGF/sg 0820

IN THE COURT OF APPEALS FOR MUSKINGUM COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
CHARLES A. MITCHELL	:	
Defendant-Appellant	:	CASE NO. CT2006-0090

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Muskingum County, Ohio is affirmed. Costs to appellant.

s/ Sheila G. Farmer

s/ John W. Wise

s/ Patricia A. Delaney

JUDGES