[Cite as *State v. Butts*, 2009-Ohio-6430.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO	C. A. No. 24517
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
CHRISTOPHER E. BUTTS	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. CR 08 01 0191

DECISION AND JOURNAL ENTRY

Dated: December 9, 2009

BELFANCE, Judge.

{¶1} Defendant/Appellant Christopher Butts appeals from judgment of the Summit County Court of Common Pleas. For reasons set forth below, we affirm in part and reverse in part.

I.

{¶2} Between September 2007 and February 2008, four women were assaulted in Akron, Ohio. Concerning these incidents, a jury found Butts guilty of twenty of the twenty-two offenses he was charged with, including sexual motivation specifications attendant to some of the charges. The trial court found Butts guilty of the violent predator specifications attendant to some of the charges. The trial court determined that some of the crimes Butts was convicted of were allied offenses of similar import and merged those offenses for purposes of sentencing. Butts was sentenced to a total prison term of ninety-four years to life. All of Butts' sentences

were to run consecutively. Butts has appealed raising two assignments of error for our review, which will be addressed out of sequence to aid our review.

II.

ASSIGNMENT OF ERROR II.

> "APPELLANT'S CONVICTION FOR AGGRAVATED ROBBERY UNDER COUNT NINETEEN OF THE INDICTMENT WAS BASED UPON INSUFFICIENT EVIDENCE AS A MATTER OF LAW AND/OR WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶3} Butts argues that his conviction for aggravated robbery concerning the November 4, 2007 assault of S.S. was based on insufficient evidence as a matter of law. He further alleges that there was no evidence presented to satisfy any of the elements of the crime.

{¶4} When assessing the sufficiency of the evidence, this Court examines the evidence "'to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt.'" *State v. Flynn*, 9th Dist. No. 06CA0096-M, 2007-Ohio-6210, at ¶8, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. In reviewing challenges to sufficiency, we must view the evidence in a light most favorable to the prosecution. *State v. Cepec*, 9th Dist. No. 04CA0075-M, 2005-Ohio-2395, at ¶5, citing *Jenks*, 61 Ohio St.3d at 279.

{¶5} Butts was convicted of aggravated robbery in violation of R.C. 2911.01(A)(3), which provides that "[n]o person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall * * * [i]nflict, or attempt to inflict, serious physical harm on another." The indictment specified that Butts took $60 and in the process of committing the offense or fleeing after the offense inflicted or attempted to inflict serious physical harm on S.S. Serious physical harm is defined as:

> "(a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;
>
> "(b) Any physical harm that carries a substantial risk of death;
>
> "(c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;
>
> "(d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement;
>
> "(e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain." R.C. 2901.01(A)(5).

The mens rea for aggravated robbery committed in violation of R.C. 2911.01(A)(3) is recklessness. See *State v. Hardges*, 9th Dist. No. 24175, 2008-Ohio-5567, at ¶10.

> "A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist." R.C. 2901.22(C).

{¶6} S.S.'s testimony detailed the following concerning the events of November 4, 2007. S.S., a University of Akron student, was living in a house in Akron with four other roommates. On the evening of November 3, 2007, S.S. and her roommates had a group of approximately ten to fifteen friends and acquaintances over. Between midnight and 1:00 a.m. after the guests had left, S.S. went to bed. S.S.'s bedroom was located on the first floor. S.S. awoke sometime around 4:30 or 5:00 a.m. on November 4th to find an African American man dressed in a hoodie and pants in her room standing by her computer. DNA evidence would later implicate Butts as the intruder. S.S. believes that the intruder said his name was "Mike" and that he then began walking towards her bed and touched her. S.S. began screaming and Butts kept telling her to shut up. Butts held a pillow over her face, making it difficult for S.S. to breathe, and began grabbing S.S.'s breasts. S.S. was able to convince Butts to remove the pillow;

however, he kept his hand around her neck and would push on it when she would scream. As Butts began to pull down S.S.'s sweatpants, S.S. told him that she was pregnant, even though she was not, in hopes of getting him to stop. Butts then forced S.S. into a seated position and kept pushing S.S.'s face towards his penis, demanding that she "suck it" or he would kill her. In the process of forcing S.S. to perform fellatio, Butts ejaculated on S.S.'s face, in her mouth, and on her hair. Upon finishing, Butts exited through the window.

{¶7} The police were called and discovered S.S.'s wallet on the floor in her bedroom. S.S. stated that she left her wallet on her dresser and went to see if anything was taken from it. She discovered that $60 was missing. S.S. testified that her grandmother had given her $100 in $20 increments and that she had spent $40 and so had three $20 bills remaining when she went to bed.

{¶8} That morning, police stopped Butts on S.S.'s street. Officers found marijuana on him, but do not remember finding any cash on him. S.S. was brought outside to see if she could identify Butts as her attacker. She was unable to do so.

{¶9} Here, there is certainly sufficient circumstantial evidence to establish that Butts took the $60. The money was in S.S.'s wallet before she went to bed and was missing after her attack. It is reasonable to infer that Butts took the money at some point while he was in S.S.'s room. Further, there was sufficient evidence that Butts inflicted or attempted to inflict serious physical harm on S.S. by holding a pillow over face with enough force and/or duration to make it difficult for her to breath. Pursuant to the statute, serious physical harm includes "[a]ny physical harm that carries a substantial risk of death." R.C. 2901.01(A)(5)(b)

{¶10} However, we are not convinced that the State established beyond a reasonable doubt that Butts inflicted or attempted to inflict serious physical harm on S.S. while taking the

$60 or while fleeing. There is no evidence indicating when the theft of the $60 took place. It is entirely possible that Butts took the money upon entering S.S's room even before S.S. woke up. This explanation also fits with S.S.'s description of the events as she stated that after the attack, Butts left out the window. She offered no testimony that she saw Butts take the money or even move towards her dresser after the attack. Even viewing the evidence in a light most favorable to the prosecution, we can only conclude that Butts committed the theft offense of stealing $60 and also separately committed the rape offense. However, we cannot conclude that in committing the theft offense, Butts caused or attempted to cause serious physical harm to S.S. Thus, the State failed to establish that Butts committed aggravated robbery in violation of R.C. 2911.01(A)(3) as alleged in count nineteen of the indictment, requiring us to reverse Butts' conviction on this charge. While there was ample evidence to support Butts' other convictions for offenses perpetrated upon S.S., here, we only determine that the State did not present sufficient evidence to prove beyond a reasonable doubt that Butts committed the aggravated robbery offense.

{¶11} In light of our determination that the evidence was insufficient as a matter of law to sustain Butts' conviction pursuant to count nineteen of the indictment, we need not address whether the evidence was against the manifest weight. Butts' second assignment of error is sustained.

III.

ASSIGNMENT OF ERROR I.

> "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR AND/OR PLAIN ERROR IN VIOLATION OF THE DOUBLE JEOPARDY CLAUSE OF THE UNITED STATES CONSTITUTION AND SECTION 10, ARTICLE I, OF THE OHIO CONSTITUTION WHEN IT FAILED TO MERGE THE SENTENCES FOR: A) AGGRAVATED BURGLARY UNDER COUNT TWO WITH RAPE, KIDNAPPING, AND GROSS SEXUAL IMPOSITION * * * UNDER COUNTS

> ONE, THREE, AND TWENTY-TWO; B) GROSS SEXUAL IMPOSITION UNDER COUNT FIVE AND AGGRAVATED BURGLARY UNDER COUNT SIX WITH RAPE UNDER COUNT FOUR; C) AGGRAVATED BURGLARY UNDER COUNT NINE, FELONIOUS ASSAULT UNDER COUNT ELEVEN, AND AGGRAVATED ROBBERY UNDER COUNT TWENTY WITH RAPE, GROSS SEXUAL IMPOSITION AND KIDNAPPING UNDER COUNTS SEVEN, EIGHT, AND TEN; D) KIDNAPPING UNDER COUNT FIFTEEN, FELONIOUS ASSAULT UNDER COUNT SIXTEEN, AGGRAVATED BURGLARY UNDER COUNT FOURTEEN, AND AGGRAVATED ROBBERY UNDER COUNT TWENTY-ONE WITH ATTEMPTED RAPE AND GROSS SEXUAL IMPOSITION UNDER COUNTS TWELVE AND THIRTEEN."

{¶12} Butts argues that several of his convictions should have merged with various other convictions pursuant to R.C. 2941.25. R.C. 2941.25 provides that :

> "(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 has determined that a court's analysis pursuant to R.C. 2941.25 requires two steps. *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, at ¶14.

> "'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.'" Id., quoting *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117.
>
> "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." *Cabrales* at paragraph one of the syllabus.

{¶14} "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." (Emphasis sic.) Id. at ¶14, quoting *Blankenship*, 38 Ohio St.3d at 117.

{¶15} Initially we note that Butts did not preserve most of these arguments for review. In Butts' response to the State's merger brief filed in the trial court, Butts only argued that all of the gross sexual imposition charges should merge with the rape and attempted rape charges and that all the kidnapping charges should merge with the rape and attempted rape charges. Thus, any other arguments with respect to merger raised on appeal will be addressed under the plain error standard, see *State v. Elmore*, 111 Ohio St.3d 515, 2006-Ohio-6207, at ¶52, which Butts in his brief has asked us to employ. However, any failure by the trial court in this case to merge allied offenses would amount to plain error. See *State v. Yarbrough*, 104 Ohio St.3d 1, 2004-Ohio-6087, at ¶102 ("Thus, convicting and sentencing Yarbrough both for receiving the stolen Blazer and for theft of the Blazer violated R.C. 2941.25(A). There was plain error affecting Yarbrough's 'substantial rights,' since he was sentenced to 18 months in prison for each offense."). Thus, we will examine each of the four incidents and determine whether Butts is correct in his arguments.

H.V.

{¶16} H.V., a sophomore at the University of Akron, lived in the honors dorm on campus. On the evening of September 20, 2007, H.V. went to her friends' apartment for a cheerleading party attended by approximately sixteen people. H.V. had several alcoholic beverages and ended up sleeping on the couch at her friends' apartment. She awoke to find an

African American man dressed in dark, baggy clothes on top of her. The evidence would later indicate that Butts was the attacker. H.V. began to yell and Butts put his hand over her mouth. He told her to "shut up" and began touching himself. Butts pulled down H.V.'s pants and underwear and raped her and then left.

{¶17} Concerning this incident, Butts was charged with rape (count one), aggravated burglary (count two), kidnapping (count three), gross sexual imposition (count twenty-two) and two counts of aggravated robbery (counts seventeen and eighteen). A sexual motivation specification accompanied the kidnapping charge and violent predator specifications accompanied the rape and kidnapping charges. Butts was found guilty of rape, aggravated burglary, kidnapping, gross sexual imposition, the attendant specifications and not guilty of the two counts of aggravated robbery. The trial court did not sentence Butts on the kidnapping charge or the gross sexual imposition charge, finding both to merge with the rape conviction.

{¶18} Butts now argues that his conviction for aggravated burglary should have merged with his conviction for rape. Although he alleges that the aggravated burglary charge should have merged with the rape, kidnapping, and gross sexual imposition convictions, Butts only presents an argument in his brief with respect to merger of the aggravated burglary with rape. Further, as Butts was not sentenced for either kidnapping or gross sexual imposition, it is unclear to this Court how aggravated burglary would merge with offenses which were merged into another offense.

{¶19} Aggravated burglary and rape are not allied offenses. Butts was convicted of aggravated burglary pursuant to R.C. 2911.11(A)(1) which states that

> "[n]o person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or

> separately occupied portion of the structure any criminal offense, if * * * [t]he offender inflicts, or attempts or threatens to inflict physical harm on another[.]"

On the other hand, R.C. 2907.02(A)(2), the statute prohibiting rape, provides that "[n]o person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force." A quick examination of the elements of the two crimes reveals that each crime requires the completion of an element that the other crime does not. Rape does not require a trespass into an occupied structure by force, stealth, or deception and aggravated burglary does not require any sexual conduct by force or threat of force. Thus, one does not necessarily commit aggravated burglary by committing a rape, nor does one necessarily commit a rape by committing an aggravated burglary. As such, aggravated burglary and rape are not allied offenses. Accord *State v. Taylor*, 12th Dist. No. CA2007-12-037, 2009-Ohio-924, at ¶63; *State v. Bell*, 7th Dist. No. 06-MA-189, 2008-Ohio-3959, at ¶175 (concluding aggravated burglary and attempted rape are not allied offenses); *State v. Grider*, 8th Dist. No. 80617, 2002-Ohio-3792, at ¶22; *State v. Lamberson* (Mar. 19, 2001), 12th Dist. No. CA2000-04-012, at *16.

S.S.

{¶20} As noted above, S.S. was living in a house in Akron with four other roommates. On the evening of November 3, 2007, S.S. and her roommates had a group of approximately ten to fifteen friends and acquaintances over. Between midnight and 1:00 a.m. after the guests had left, S.S. went to bed. S.S. awoke sometime around 4:30 or 5:00 a.m. on November 4th to find Butts standing by her computer. S.S. began screaming and Butts kept telling her to shut up. Butts held a pillow over her face, making it difficult for S.S. to breathe, and began grabbing S.S.'s breasts. S.S. was able to convince Butts to remove the pillow; however, he kept his hand around her neck and would push on it when she would scream. As Butts began to pull down

S.S.'s sweatpants, S.S. told him that she was pregnant, even though she was not, in hopes of getting him to stop. Butts then forced S.S. into a seated position and kept pushing S.S.'s face towards his penis, demanding that she "suck it" or he would kill her. In the process of forcing S.S. to perform fellatio, Butts ejaculated on S.S.'s face, in her mouth, and on her hair. Upon finishing, Butts exited through the window.

{¶21} The police were called and discovered S.S.'s wallet on the floor in her bedroom. S.S. stated that she left her wallet on her dresser and went to see if anything was taken from it. She discovered that $60 was missing. That morning, police stopped Butts on S.S.'s street. Officers found marijuana on him, but do not remember finding any cash on him. S.S. was brought outside to see if she could identify Butts as her attacker. She was unable to do so.

{¶22} Concerning this incident, Butts was charged with rape (count four), an accompanying violent predator specification, gross sexual imposition (count five), aggravated burglary (count six), and aggravated robbery (count nineteen). Butts was found guilty of all charges. The trial court did not merge any of the charges.

{¶23} Butts argues that aggravated burglary and gross sexual imposition should have merged with the rape conviction.

{¶24} As noted above, aggravated burglary and rape are not allied offenses and thus this portion of Butts' argument is without merit.

{¶25} Gross sexual imposition and rape are allied offenses pursuant to R.C. 2941.25(A). See *State v. Evans*, 122 Ohio St.3d 381, 2009-Ohio-2974, at ¶30, quoting *State v. Hooper,* 7th Dist. No. 03 CO 30, 2005-Ohio-7084, at ¶16 ("[T]he Seventh District Court of Appeals stated, 'Appellant is correct that gross sexual imposition (R.C. § 2907.05) is both a lesser included offense and an allied offense of similar import of rape (R.C. § 2907.02).'"); *State v. Foust*, 105

Ohio St.3d 137, 2004-Ohio-7006, at ¶¶139, 143-145 (In examining the allied offense statute, the Court concluded that "[g]ross sexual imposition is a lesser included offense of rape. Consequently, a defendant may not be convicted of both gross sexual imposition and rape when the counts arise out of the same conduct." (Internal citation omitted.) Id. at ¶143); *State v. Boerio*, 6th Dist. No. L-08-1182, 2009-Ohio-5181, at ¶67. However, if we conclude "'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.'" *Cabrales* at ¶14, quoting *Blakenship*, 38 Ohio St.3d at 117. "Animus refers to the defendant's immediate criminal motive, intent or state of mind." *Hooper* at ¶15, citing *Blankenship*, 38 Ohio St.3d at 119.

{¶26} Here, Butts committed gross sexual imposition when he grabbed S.S.'s breasts while forcibly holding a pillow over her face. Pursuant to R.C. 2907.05(A)(1), a person commits gross sexual imposition when he or she by force or threat of force, compels the victim to "to have sexual contact with the offender." Sexual contact is defined by the Ohio Revised Code as "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). Butts did not commit rape until later in the incident when he forced S.S. into a seated position and forced his penis into her mouth. The sexual contact which constituted gross sexual imposition occurred separately from the conduct that constituted rape. Further, the conduct that constituted gross sexual imposition could not constitute rape. As such, it was not improper for the trial court to sentence Butts for both offenses. See, also, *State v. Cheren* (July 21, 1993), 9th Dist. No. 15752, at *3 ("The jury could have found that Cheren committed gross sexual imposition when he fondled Davis' breasts and that he committed attempted rape when he grabbed her head and forced it into his lap and told

her to perform oral sex. Thus, the trial court did not err in sentencing Cheren as to both the attempted rape and the gross sexual imposition.").

L.M.

Kidnapping

{¶27} On the morning of October 17, 2007, L.M. fell asleep on the couch after her daughter left for school. She awoke to find an African American man with beaded hair dressed in baggy clothes standing in her doorway asking her "Do you recognize me from the bus stop?" and asking if L.M. was alone. L.M. asked the man to leave several times. When Butts refused to leave, L.M. went to the kitchen and grabbed a knife. She went to her front door, put the knife in his face, and told him several times to get out. Butts pushed L.M. on to the uncarpeted stairs. He climbed on her and choked her. Butts yelled at her to drop the knife or he would kill her. While she struggled to get free from Butts, L.M. dropped the knife. Butts picked it up and he put the knife to her throat. L.M. tried to get the knife away from him and she was cut in the process. L.M. tried to scream "rape." Butts repeatedly ordered her to remain quiet. L.M. became confused at this point and began to wonder why he was attacking her and why he was there. L.M. and Butts continued to struggle for the knife; both were cut in the process. After Butts was cut, he got up off of L.M. He asked her to get a band-aid for him. L.M. did not comply.

Attempted Rape

{¶28} After L.M. refused to give Butts a band-aid, he unleashed a new attack. He choked her and tried to sexually assault her. Butts tried four or five times to pull down L.M's pants and also tore her shirt, ripping off several of the buttons. He put his mouth on her breasts. He undid his pants. The struggle continued and the two ended up on the floor. Butts quickly got up and locked the door. L.M. recovered the knife and tried unsuccessfully to stab Butts. He

"finger[ed]" L.M. through her clothes and asked, "Is this the way you wanted it?" As Butts held L.M.'s shoulder down, he suddenly asked L.M. if she had any money. L.M. responded that she did and asked if he would leave if she gave him money.

{¶29} Butts stood up. L.M. removed her purse from a nearby closet and threw it at him. She escaped through the back door, ending the 20 to 25 minute attack. Butts' attack caused L.M. to suffer a fractured vertebra.

{¶30} Butts was charged with attempted rape (count twelve) with a violent predator specification, gross sexual imposition (count thirteen), aggravated burglary (count fourteen), kidnapping (count fifteen) with sexual motivation and violent predator specifications, felonious assault (count sixteen) with sexual motivation and violent predator specifications, and aggravated robbery (count twenty-one). Butts was found guilty of all charges and attendant specifications. The trial court merged Butts' conviction for gross sexual imposition with his conviction for attempted rape.

{¶31} Butts contends that his convictions for kidnapping and felonious assault should have merged with his convictions for gross sexual imposition and attempted rape, that his conviction for aggravated robbery should have merged with his kidnapping conviction, and that his aggravated burglary conviction should have merged with "all other counts stemming from this incident." We note that with respect to the portion of Butts' assignment of error related to this incident, Butts contends that the kidnapping, felonious assault, aggravated burglary, and aggravated robbery convictions should have merged with his convictions for gross sexual imposition and attempted rape. However, as it is the appellant's duty to present an argument related to his assignment of error, see App.R. 16(A)(7), we will only address those issues actually argued within Butts' brief.

{¶32} Butts first argues that his convictions for kidnapping and felonious assault should merge with his convictions for attempted rape and gross sexual imposition because the kidnapping and felonious assault charges contained sexual motivation specifications, essentially indicating that Butts committed the crimes with a single animus. As the trial court merged Butts' conviction for gross sexual imposition with his conviction for attempted rape, any argument alleging that other convictions should have merged with the gross sexual imposition conviction will not be addressed.

{¶33} We will begin by analyzing Butts' convictions for kidnapping and attempted rape. Butts was charged with kidnapping in violation of R.C. 2905.01(A)(3)/(A)(4) and attempted rape in violation of R.C. 2923.02 and 2907.02(A)(2). The pertinent subsections of R.C. 2905.01(A) provide that:

> "No person, by force, threat, or deception * * * 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:
>
> "(3) To terrorize, or to inflict serious physical harm on the victim or another[,] [or]
>
> "(4) To engage in sexual activity, as defined in section 2907.01 of the Revised Code, with the victim against the victim's will[.]"

The Supreme Court of Ohio has held that "'[i]It is clear from the plain language of the statute that no movement is required to constitute the offense of kidnapping; restraint of the victim by force, threat, or deception is sufficient. Thus, implicit within every forcible rape (R.C. 2907.02[A][1]) is a kidnapping.'" *State v. Winn*, 121 Ohio St.3d 413, 2009-Ohio-1059, at ¶23, quoting *State v. Logan* (1979), 60 Ohio St.2d 126, 130. Likewise, it is clear that attempted rape and kidnapping are also allied offenses for purposes of R.C. 2941.25(A). See, e.g. *State v. Saleh*, 10th Dist. No. 07AP-431, 2009-Ohio-1542, at ¶125; *State v. Bell*, 7th Dist. No. 06-MA-189, 2008-Ohio-3959, at ¶158; *State v. Miner*, 8th Dist. No. 85746, 2005-Ohio-5445, at ¶¶14,18.

Thus, we turn our attention to examine whether the crimes were committed with a separate animus.

> "The test to determine whether kidnapping was committed with a separate animus is 'whether the restraint or movement of the victim is merely incidental to a separate underlying crime or, instead, whether it has a significance independent of the other offense.' *State v. Logan*, 60 Ohio St.2d at 135. In *Logan* and subsequent cases, prolonged restraint, secretive confinement, and substantial movement apart from that involved in the other crime were factors necessary to establish a 'separate animus as to each offense sufficient to support separate convictions.' Id. at subparagraph (a) of the syllabus; *State v. Jenkins* (1984), 15 Ohio St.3d 164, 198." *State v. Lynch*, 98 Ohio St.3d 514, 2003-Ohio-2284, at ¶134.

Further, "where the asportation or restraint 'subjects the victim to a substantial increase in risk of harm separate and apart from * * * the underlying crime, there exists a separate animus.'" *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, at ¶90, quoting *Logan*, 60 Ohio St.2d at 126.

{¶34} Here, we conclude that the restraint Butts used subjected L.M. to a "substantial increase in risk of harm separate and apart" from the attempted rape. *Adams* at ¶90, quoting *Logan*, 60 Ohio St.2d at 126. Butts completed a kidnapping offense prior to, and separately from, the attempted rape. Prior to attempting to engage in any sexual conduct, Butts pushed L.M. onto uncarpeted stairs, choked her, held a knife to her throat, and threatened her. L.M. was not even sure at this point what Butts' motives were for attacking her. He did not begin to sexually assault L.M. until after he became cut during the initial struggle, at which point he got up off of L.M. and asked for a band-aid. When L.M. refused to comply, he resumed attacking her and only then did he begin to sexually assault her. The force involved in the incident caused L.M. to suffer a fractured vertebra. The above combination of factually unique circumstances occurred prior to, and separately from, the underlying attempted rape. Further, Butts' conduct during the kidnapping substantially increased the risk of harm to L.M,, and thus we do not believe the trial court erred in not merging Butts' convictions as a separate animus existed for the

crime of kidnapping. See, also, *State v. Stadmire*, 8th Dist. No. 88735, 2007-Ohio-3644, at ¶52 ("We find that the prolonged restraint and substantial movement of the victim from the steps to the kitchen wall and then to the floor constitutes separate conduct apart from the rape. * * * Accordingly, we find that the restraint used to facilitate the kidnapping was independent of, and not merely incidental to, that used to facilitate the rape."); *State v. Campbell* (Aug. 3, 1993), 2nd Dist. No. 13138, at *3 ("[T]he form of restraint used in this case, a choke-hold, demonstrates a substantial increase in the risk of harm separate and distinct from the underlying crime of rape. Choke-holds have in some cases resulted in death, and are regarded as a potentially lethal form of restraint. It did not have dire consequences here, but the test in *Logan* is not the consequence but the risk presented.").

{¶35} Butts next argues that the charges for felonious assault should have merged with his attempted rape conviction. Butts was charged with felonious assault in violation of R.C. 2903.11(A)(2) which provides that "[n]o person shall knowingly * * * [c]ause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance." However, we agree with the other appellate courts that addressed this issue and have concluded that rape and felonious assault are not allied offenses. See, e.g., *State v. McCullen*, 8th Dist. No. 90213, 2008-Ohio-3081, at ¶18; *State v. McClaskey*, 4th Dist. No. 06CA24, 2007-Ohio-5867, at ¶27; *State v. Gallagher*, 5th Dist. No. CA941, 2003-Ohio-3581, at ¶74. The commission of a rape does not necessarily result in serious physical harm and does not necessarily involve a deadly weapon, while the commission of felonious assault does not necessarily result in sexual conduct. See *Gallagher* at ¶74. Therefore we also necessarily conclude that attempted rape and felonious assault are not allied offenses and the trial court did

not err. See *State v. Parker* (May 24, 1990), 10th Dist. No. 89AP-1217, at *3 (concluding attempted rape and felonious assault are not allied offenses).

{¶36} Butts also argues that his conviction for aggravated robbery in violation of R.C. 2911.01(A)(3) should have merged with his conviction for kidnapping in violation of R.C. 2905.01(A)(3)/(4). The aggravated robbery statute provides that "[n]o person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall * * * [i]nflict, or attempt to inflict, serious physical harm on another." R.C. 2911.01(A)(3). Recently, the Supreme Court of Ohio in *State v. Winn*, 121 Ohio St.3d 413, 2009-Ohio-1059, examined subsection (A)(1) of the aggravated robbery statute and subsection (A)(2) of the kidnapping statute and concluded the offenses were allied offenses. Id. at syllabus. The Court noted that "[h]olding that kidnapping and aggravated robbery are allied offenses is also in keeping with 30 years of precedent." Id. at ¶22. Thus, "'implicit within every robbery (and aggravated robbery) is a kidnapping[.]'" Id., quoting *State v. Jenkins* (1984), 15 Ohio St.3d 164, 198, fn. 29.

{¶37} Therefore, Butts is correct in his argument unless the crimes occurred separately or with a separate animus. *Cabrales* at ¶14, quoting *Blankenship*, 38 Ohio St.3d at 117. As discussed above in our analysis of Butts' convictions for kidnapping and attempted rape, we likewise here conclude that Butts subjected L.M. to a "substantial increase in risk of harm separate and apart" from the robbery. *Adams* at ¶90, quoting *Logan*, 60 Ohio St.2d at 126. Further, the activity constituting the "substantial increase in risk of harm[,]" including the choking, threatening of L.M. with a weapon, and pushing her onto the stairs, all occurred prior to the robbery, and prior to the kidnapping inherent in the robbery itself, and therefore we determine the trial court did not err in sentencing Butts for both crimes. Id.

{¶38} Finally Butts argues that if we find merit in his other arguments with respect to L.M. then, "[a]s this leaves no discernible separate animus for the charge of Aggravated Burglary under Count Fourteen, this count must also merge for purposes of sentencing with all other counts stemming from this incident." First, as we have concluded Butts' other arguments concerning this incident were meritless, Butts' argument here also must fail. Moreover, the first step in our analysis, to determine if offenses are allied, is to examine the elements of the offenses in the abstract. *Cabrales* at ¶14. Butts has provided no argument in this respect and has not listed the crimes that he believes merge with aggravated burglary. Nonetheless, we do not see how the crime of aggravated burglary under R.C. 2911.11(A)(1), which requires trespass into an occupied structure with the purpose to commit any criminal offense, would merge with any of the other offenses; the commission of an aggravated burglary would not necessarily result in an attempted rape, a kidnapping, a felonious assault, or an aggravated robbery, nor would commission of any of the listed offenses necessarily result in an aggravated burglary. There was no error.

S.U.

{¶39} In the early morning hours of January 7, 2008, S.U., a nursing student at the University of Akron, was awakened by the sound of a bang and saw a man, later determined by the evidence to be Butts, wearing dark baggy clothing coming through her window. S.U. screamed and Butts told her to shut up or he would choke her to death. Butts then asked S.U. for all of her money. She said she did not have any, but Butts asked again. S.U. remembered she had $20 and so gave him her wallet. Butts then asked S.U. to lift up her shirt and S.U. complied and asked Butts to leave. Butts continued to threaten S.U., telling her if she talked or fought he would kill her. He then pushed her towards the bed and put a pillow over her head. S.U.

attempted to fight Butts off and he choked her to the point of passing out. She woke to find him still choking her. She asked him to stop and he said if she screamed he would kill her. Butts pushed S.U. onto the bed, lifted up her shirt, held himself up by her breasts, and proceeded to rape S.U. Something seemed to startle Butts and he left out the window.

{¶40} Butts was charged with rape (count seven) along with a violent predator specification, gross sexual imposition (count eight), aggravated burglary (count nine), kidnapping (count ten) including sexual motivation and violent predator specifications, felonious assault (count eleven) including sexual motivation and violent predator specifications, and aggravated robbery (count twenty). Butts was found guilty of all charges. The trial court merged Butts' convictions for kidnapping and gross sexual imposition with his conviction for rape.

{¶41} Butts argues that his conviction for felonious assault should have merged with his convictions for rape, gross sexual imposition, and kidnapping, that his conviction for aggravated robbery should have merged with his conviction for kidnapping, and that his conviction for aggravated burglary should have merged "with all other counts stemming from this incident." Again we note that the relevant portion of Butts' assignment of error alleges that additional offenses should merge, however, pursuant to App.R. 16(A)(7), we will only address those crimes specifically argued about in the briefs.

{¶42} Initially we note that Butts was not sentenced for gross sexual imposition or kidnapping, as the trial court merged these offenses with Butts' conviction for rape; therefore, we do not address Butts' arguments alleging other offenses should merge into offenses that already merged. Thus, we turn to Butts' argument that felonious assault should have merged with his conviction for rape. We disagree. When we addressed the assault involving L.M., we concluded

rape and attempted rape are not allied offenses with felonious assault. See, also, *McCullen* at ¶18; *State v. McClaskey*, 4th Dist. No. 06CA24, 2007-Ohio-5867, at ¶27; *State v. Gallagher*, 5th Dist. No. CA941, 2003-Ohio-3581, at ¶74. Accordingly, Butts' argument is overruled.

{¶43} Butts next argues that his convictions for aggravated robbery and kidnapping should have merged, however, the trial court merged Butts' conviction for kidnapping with his conviction for rape and so we necessarily see no merit in this argument.

{¶44} Finally Butts argues again, that if we were to sustain Butts' other arguments pertaining to this incident, "[a]s this leaves no discernable separate animus for the charge of Aggravated Burglary under Count Nine, this count also must merge for purposes of sentencing with all other counts stemming from this incident." We disagree for the same reasons detailed under our analysis of the assault involving L.M.

IV.

{¶45} In light of the foregoing, we sustain Butts' second assignment of error and overrule his first assignment of error.

Judgment affirmed in part,
reversed in part,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed equally to both parties.

EVE V. BELFANCE
FOR THE COURT

CARR, J.
DICKINSON, P. J.
CONCUR

APPEARANCES:

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