[Cite as *State v. Hamby*, 2010-Ohio-4040.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23618
v.	:	T.C. NO. 08CR04887
MICHAEL L. HAMBY	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
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O P I N I O N

Rendered on the 27th day of August, 2010.

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DONOVAN, P.J.

{¶ 1} This matter is before the Court on the Notice of Appeal of Michael L. Hamby, filed September 2, 2009. On April 24, 2009, Hamby was indicted on two counts of felonious assault (deadly weapon), in violation of R.C. 2903.11(A)(2), one count of

felonious assault (serious physical harm), in violation of R.C. 2903.11(A)(1), and one count of kidnaping, in violation of R.C. 2905.01(A)(3). At trial, Hamby argued self-defense. The jury found him guilty of all the charges, and the trial court sentenced him to five years for felonious assault (deadly weapon), and three years for felonious assault (deadly weapon), to be served consecutively, and to five years for felonious assault (serious physical harm), and five years for kidnaping, to be served concurrently with each other and with the sentences for felonious assault (deadly weapon), for a total term of eight years.

{¶ 2} The events giving rise to this matter occurred on December 23, 2008, when Linda Deaton, who is Hamby's younger sister, and her two sons, Blake, aged 16, and Zach, aged 27, went to Hamby's residence to retrieve some photographs of Hamby's and Linda's mother, who had recently died. Hamby initially did not respond to Linda and her sons at the door, but he did set a picture of his parents outside on the rear deck for Linda. Through an open window, she asked him for family photo albums to take to the funeral. Linda testified, "I was paying attention to Mike in the window and then it was just like in seconds, air conditioning came flying out the window * * * it looked like it was rotted anyway but it come flying out the window * * * All I see is the back of Zach being pulled in the door by Mike." Linda then observed Hamby beating Zach in the head and arms with a metal pipe through the window, and Hamby "kept saying, 'I'll kill you, you bastard, I'll kill you.'" A portion of the back door was cracked near the bottom, and during the attack, a panel was kicked out of the lower part of the door. Linda "stuck my arms [and head] through there trying to block anything that Mike was doing." Linda testified that Hamby struck her with the pipe on her left cheek, behind her left ear, and on her left arm. Blake then picked a log

up off the ground and threw it through the window to the right of the door, and "it startled Mike just enough that he let go of Zack and Zack came out that hole in the door."

{¶ 3} Linda testified that Zach was " wobbly and * * * had blood going down his face," and she called 911. An ambulance responded and took Linda and Zach to Sycamore Hospital, where they were treated and released. Linda testified that she had injuries to her head and the side of her face, and that she experienced soreness for a period of time after the incident.

{¶ 4} Zach testified that Hamby pulled him through the door and beat him over the head with the pipe. Zach was "on the ground trying to struggle and trying to get up. And at one point in time * * * I got up, and he knocked me back down," and "the only thing I can think of is get out of here." Zach testified that he "kind of [lost] consciousness a couple of times" before he was able to crawl out through the door. Zach stated that Hamby hit him "as hard as somebody could hit somebody." According to Zach, he "had a gash on my arm, and I still have the scar. And I had gashes on my back. I had a goose egg on my head, and that had split open. I had goose eggs all over the back of my head and the side of my head." Zach experienced headaches "at least every other day * * * if not every day," for "quite a few months." Zach stated he never tried to enter the residence without Hamby's permission. Blake's testimony was consistent with Zach's and Linda's.

{¶ 5} Hamby testified that Zach entered his home by kicking in the door panels, and Hamby stated that he "told him he wanted him out of the house." Hamby stated that Zach had "something in his hand," and Hamby "picked up a vacuum cleaner extension tube, the nozzle and I hit him with it." Hamby stated that he hit Zach on the arm and in the head

three or four times. According to Hamby, he "had [Zach] down where I could get him to go back out the door, crawl back out, but Linda was trying to come back in. So, I hit her in the head and she flinched and caught the wood on the side of her head going back out the door. And she jerked back out the door. And I told Zach - - I ordered him out the door. He crawled backwards through the door back outside." Hamby identified the pipe he used to strike his family, which was marked State's Exhibit 26.

{¶ 6} Officer Scott Marsh, of the City of Miamisburg Police Department, responded to the scene. Marsh recovered the pipe used to strike Zach and Linda, from the attic of the residence. It was metal, approximately 15 or 16 inches in length, and it weighed about a pound.

{¶ 7} Hamby asserts two assignments of error. His first assignment of error is as follows:

{¶ 8} "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN FAILING TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSES OF ASSAULT AND UNLAWFUL RESTRAINT, CONTRARY TO LAW AND IN DENIAL OF DUE PROCESS OF LAW."

{¶ 9} "An offense may be a lesser included offense of another only if (i) the offense is a crime of lesser degree than the other, (ii) the offense of the greater degree cannot, as statutorily defined, ever be committed without the offense of the lesser degree, as statutorily defined, also being committed, and (iii) some element of the greater offense is not required to prove the commission of the lesser offense. (R.C. 2945.74, construed)." (Citations omitted). *State v.Kidder* (1987), 32 Ohio St.3d 279, syllabus, ¶ 1.

{¶ 10} "If the evidence adduced on behalf of the defense is such that if accepted by the trier of fact it would constitute a complete defense to all substantive elements of the crime charged, the trier of fact will not be permitted to consider a lesser included offense unless the trier could reasonably find against the state and for the accused upon one or more of the elements of the crime charged, and for the state and against the accused on the remaining elements, which, by themselves, would sustain a conviction upon a lesser included offense.

{¶ 11} "The persuasiveness of the evidence regarding the lesser included offense is irrelevant. If under any reasonable view of the evidence it is possible for the trier of fact to find the defendant not guilty of the greater offense and guilty of the lesser offense, the instruction on the lesser included offense must be given. The evidence must be considered in the light most favorable to defendant." *State v. Wilkins* (1980), 64 Ohio St.2d 382, 389.

{¶ 12} "Under Ohio law, self-defense is an affirmative defense for which the defendant bears the burden of proof. In order for a defendant to establish self-defense involving the use of nondeadly force, he must prove by a preponderance of the evidence (1) that the defendant was not at fault in creating the situation giving rise to the altercation and (2) that he had reasonable grounds to believe and honest belief, even though mistaken, that he was in imminent danger of bodily harm and his only means to protect himself from such danger was by the use of force not likely to cause death or great bodily harm." *State v. Fritz,* Montgomery App. No. 20796, 2005-Ohio-4736, ¶ 20.

{¶ 13} "On appeal, a party may not assign as error the giving or the failure to give any instructions unless the party objects before the jury retires to consider its verdict, stating

specifically the matter objected to and the grounds of the objection." Crim. R. 30(A). "A party does not waive his objections to the court's charge by failing to formally object thereto (1) where the record affirmatively shows that a trial court has been fully apprised of the correct law governing a material issue in dispute, and (2) the requesting party has been unsuccessful in obtaining the inclusion of that law in the trial court's charge to the jury. (Crim.R. 30(A), construed.)" *State v. Wolons* (July 5,1989), 44 Ohio St.3d 64, syllabus 1. When reviewing a trial court's jury instructions, the proper standard of review for an appellate court is whether the trial court's refusal to give a requested jury instruction constituted an abuse of discretion. Id., at 68.

{¶ 14} "'Abuse of discretion' has been defined as an attitude that is unreasonable, arbitrary or unconscionable. (Internal citation omitted). It is to be expected that most instances of abuse of discretion will result in decisions that are simply unreasonable, rather than decisions that are unconscionable or arbitrary.

{¶ 15} "A decision is unreasonable if there is no sound reasoning process that would support that decision. It is not enough that the reviewing court, were it deciding the issue *de novo*, would not have found that reasoning process to be persuasive, perhaps in view of countervailing reasoning processes that would support a contrary result." *AAAA Enterprises, Inc. v. River Place Community Redevelopment* (1990), 50 Ohio St.3d 157, 161.

{¶ 16} We initially note that, on July 28, 2009, Hamby filed a written request for jury instructions, asking the court to instruct the jury regarding assault as a lesser included offense of felonious assault and unlawful restraint as a lesser included offense of kidnaping. On July 28, 2009, the following exchange occurred

after the trial court overruled Hamby's motion for an acquittal:

{¶ 17} "MR. MILES: I do want to discuss with the Court with the jury instructions [sic]. * * *

{¶ 18} "THE COURT: I as well.

{¶ 19} "MR. MILES: * * * I have some additional ones that I have not brought to your attention - -

{¶ 20} "THE COURT: Great.

{¶ 21} "MR. MILES: - - well, before right now.

{¶ 22} "THE COURT: * * * We'll go off the record and we'll go back into chambers and let's talk about those, okay?"

{¶ 23} The proceedings were then adjourned.

{¶ 24} On July 29, 2009, after the court instructed the jury without an oral objection, the following exchange occurred at sidebar:

{¶ 25} "THE COURT: And there are a couple of things. I know. But (indiscernable) who has your objections, I think. Yesterday we talked about it. I want to make sure they're in here. Those are included in - -

{¶ 26} "MR. MILES: Yeah.

{¶ 27} "THE COURT: You filed that though?

{¶ 28} "MR. MILES: I did file that.

{¶ 29} "* * *

{¶ 30} "MR. MILES: And for the record, you overruled them.

{¶ 31} "THE COURT: I overruled them, right, so okay. I just want to make sure we've got that part."

{¶ 32} We note, nothing was filed other than the proposed instructions, and it appears that the trial court referred to the proposed written instructions as "objections."

{¶ 33} R.C. 2903.11(A)(2), pursuant to which Hamby was charged in two counts, provides, "No person shall knowingly * * * [c]ause or attempt to cause physical harm to another * * * by means of a deadly weapon * * * ." "'Deadly weapon' means any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon." R.C. 2903.11(E)(1); R.C. 2923.11(A). R.C. 2903.13(A) defines assault and provides, "No person shall knowingly cause or attempt to cause physical harm to another * * *."

{¶ 34} In *State v. Brown*, Montgomery App. No. 19113, 2002-Ohio-6370, ¶ 48, the defendant beat the victim in the left cheek with a metal pipe, leaving a large bruise, and we determined that the evidence was "legally sufficient to demonstrate that Defendant knowingly caused physical harm to [the victim] by means of a deadly weapon, in violation of R.C. 2903.11(A)(2)." We note the State's version of the facts was that Hamby beat Zach with the pipe. Also, Linda claimed she heard Hamby tell Zach that he intended to kill him. This evidence, if believed, would have established that Hamby knowingly harmed Zach and Linda by means of a deadly weapon, namely the pipe. Significantly, Hamby admitted using the pipe. His defense was a claim of self-defense. Viewing the evidence adduced at trial in a light most favorable to Hamby, however, the jury could not reasonably find Hamby not guilty of the greater offense of felonious assault but convict him on the lesser

offense of assault. See *State v. Deem* (1988), 40 Ohio St.3d 205 (holding that evidence was insufficient to establish serious provocation element of aggravated assault to warrant aggravated assault instruction as offense of inferior degree to felonious assault, where the defendant stabbed the victim several times after their cars bumped on the highway).

{¶ 35} Hamby was also charged with a violation of R.C. 2903.11(A)(1) as to Zach, which provides, "No person shall knowingly * * * (1) Cause serious physical harm to another * * * ." "'Serious physical harm to persons' means [in relevant part] * * * (c) Any physical harm 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). Felonious assault under R.C. 2903.11(A)(1) results in serious physical harm, whereas assault under R.C. 2903.13(A) does not.

{¶ 36} Zach testified that he lost consciousness during the attack, that he is scarred therefrom, and that he experienced headaches for months after being beaten. The State adduced evidence which established that Zach suffered serious physical harm, and no version of the facts tends to establish mere "physical harm." Thus, an instruction on assault was not warranted on the evidence, as the jury could not reasonably acquit on the greater crime charged but convict on the lesser included offense.

{¶ 37} Finally, Hamby was charged with kidnaping. R.C. 2905.01(A)(3)

provides, “No person, by force, threat or deception * * *shall remove another person 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.” R.C. 2905.03 defines unlawful restraint and provides: “No person, without privilege to do so, shall knowingly restrain another of the other person’s liberty.”

{¶ 38} According to the State, Linda observed Hamby pull Zach inside the house. Zach testified that Hamby pulled him through the door, and that as he struggled to get out, Hamby knocked him down again. Hamby, however, testified that he was fighting with an armed intruder, i.e. a burglar. As with the above offenses, the evidence herein does not support an acquittal on the offense of kidnaping but conviction on the offense of unlawful restraint.

{¶ 39} There being no abuse of discretion, Hamby’s first assignment of error is overruled.

{¶ 40} Hamby’s second assigned error is as follows:

{¶ 41} “THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN SENTENCING MR. HAMBY ON ALLIED OFFENSES OF SIMILAR IMPORT THAT SHOULD HAVE MERGED PRIOR TO SENTENCING, WHICH IS CONTRARY TO LAW AND IN VIOLATION OF DOUBLE JEOPARDY.”

{¶ 42} The State concedes that the trial court erred in failing to merge the two felonious assault counts involving Zach.

{¶ 43} We note that at the sentencing hearing, the trial court imposed sentence as follows: “ * * * I am going to sentence you on Count I to a period of five

years in Corrections Reception Center. On Count 3, I will sentence you to five years to run concurrently with Count I. Those two actually do merge. I agree with that.

{¶ 44} "Count 4, I will sentence you to a period also of five years to run concurrent with Counts I and 3, although I would - - I'm not doing that cause they merge. I'm doing that because that's the sentencing scheme I decided on. The kidnaping, I think was a separate action altogether [from] the felonious assault. The act of pulling the victim in the door was the initial connecting effort, and that's totally different than the beating that the young man took.

{¶ 45} "On Count Number 2, I'm going to sentence you to a period of three years to run consecutive to Counts 1, 3, and 4, for a total of eight years."

{¶ 46} "As we recently noted in *State v. Reid*, Montgomery App.No. 23409, 2010-Ohio-1686, * * * the Supreme Court of Ohio determined, 'our analysis of allied offenses originates in the prohibition against cumulative punishments embodied in the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, and Section 10, Article I of the Ohio Constitution. *United States v. Halper* (1989), 490 U.S. 435, 440, 109 S.Ct. 1892, 104 L.Ed.2d 487, citing *North Carolina v. Pearce* (1969), 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656. However, both this court and the Supreme Court of the United States have recognized that the Double Jeopardy Clause does not entirely prevent sentencing courts from imposing multiple punishments for the same offense but rather "prevent[s] the sentencing court from prescribing greater punishment than the legislature intended." *State v.*

Rance (1999), 85 Ohio St.3d 632, 635, * * * quoting *Missouri v. Hunter* (1983), 459 U.S. 359, 366, 103 S.Ct. 673, 74 L.Ed.2d 535, and citing *State v. Moss* (1982), 69 Ohio St.2d 515, 518, 23 O.O.3d 447, * * * . Thus, in determining whether offenses are allied offenses of similar import, a sentencing court determines whether the legislature intended to permit the imposition of multiple punishments for conduct that constitutes multiple criminal offenses. *State v. Williams,* 124 Ohio St.3d 381, 2010-Ohio-147, at ¶ 12.' *Reid*, ¶ 28." *State v. Scandrick*, Montgomery App. No. 23406, 2010-Ohio-2270, ¶ 43.

{¶ 47} R.C. 2941.25 determines the application of the Double Jeopardy Clause to the issue of multiple punishments and provides:

{¶ 48} "(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.

{¶ 49} "(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. "

{¶ 50} " ' "A two-step analysis is required to determine whether two crimes are allied offenses of similar import. E.g. *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117, * * * ; *Rance*, 85 Ohio St.3d at 636, * * * . Recently, in *State v. Cabrales* 118 Ohio St.3d 54, 2008-Ohio-1625, * * * we stated: '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.' Id. at paragraph one of the syllabus. If 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 ¶ 31." *Williams*, at ¶ 16.'

{¶ 51} " 'Courts have sometimes applied R.C. 2941.25 as requiring merging of "convictions." That is conceptually incorrect. When its terms are satisfied, the court must merge multiple offenses of which a defendant is found guilty into a single conviction. That scenario contemplates multiple charged offenses on which the verdicts returned by the trier of fact pursuant to Crim.R. 31(A) contain a finding of guilt. Following the State's election of which allied offenses should survive, *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, the court must merge the offenses concerned into a single judgment of conviction entered pursuant to Crim.R. 32(C), followed by the court's imposition of a sentence on that conviction pursuant to Crim.R. 32(A). * * * ' *Reid*, ¶ 32-33." *Scandrick*, ¶ 47-48.

{¶ 52} We conclude that Hamby's R.C. 2903.11(A)(1) and (A)(2) offenses of felonious assault, arising from his conduct in beating Zach, are allied offenses of similar import, committed with the same animus, and they accordingly must be merged pursuant to R.C. 2941.25. See *Scandrick, ¶ 50.* Simply running the

prison terms concurrently does not constitute merger.

{¶ 53} Although not raised by Hamby, we further conclude that the trial court erred in failing to merge the kidnaping offense. "We may notice plain error or defects affecting substantial rights although they were not brought to our attention. Crim.R. 52(B). Plain error does not exist unless it can be said that but for the error, the outcome of the trial would clearly have been otherwise. *State v. Long* (1978), 53 Ohio St.2d 91 * * * ." *State v. Green*, Montgomery App. Nos. 23326, 23307, 2010-Ohio-3448, ¶ 8.

{¶ 54} Our conclusion is supported by the rationale set forth by the Supreme Court in *State v. Logan* (1979), 60 Ohio St.2d 126. In *Logan*, the victim was forced down an alley, around a corner, and down a flight of stairs at knife point, where she was raped, and the Supreme Court determined that the defendant could not be convicted as charged of both kidnaping and rape. "In establishing whether kidnapping [sic] and another offense of the same or similar kind are committed with a separate animus as to each pursuant to R.C. 2941.25(B), [the Supreme Court adopted] the following guidelines:

{¶ 55} "(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;

{¶ 56} "(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." *Logan*, at syllabus.

{¶ 57} "Secret confinement, such as in an abandoned building or nontrafficked area, without the showing of any substantial asportation, may, in a given instance, also signify a separate animus and support a conviction for kidnapping [sic] apart from the commission of an underlying offense.

{¶ 58} "The primary issue, however, 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." Id., at 135. In *Logan*, "the restraint and movement of the victim had no significance apart from facilitating the rape. The detention was brief, the movement was slight, and the victim was released immediately following the commission of the rape." Id. Similarly, Hamby pulled Zach into the house, and his conduct in doing so appears to have been wholly incidental to the commission of the assault and, as in *Logan*, merger is required.

{¶ 59} Hamby's second assignment of error is sustained, and we reverse and vacate his sentences for felonious assault (deadly weapon), his sentence for felonious assault (serious harm), and his sentence for kidnaping. The case will be remanded to the trial court to first merge the above offenses and, pursuant to the State's election, to resentence Hamby accordingly.

{¶ 60} Judgment affirmed in part and reversed in part consistent with this opinion.

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GRADY, J. and FROELICH, J., concur.

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